

The Relocation of the U.S. Embassy from Tel Aviv to Jerusalem (Palestine v. United States of America): a Commentary on the Merits of the Case, Jurisdiction of the International Court of Justice and Admissibility of Palestine's Application

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ABSTRACT: This paper examines the legal status and historical context of the city of Jerusalem, specifically addressing the prohibition on establishment or maintenance of diplomatic missions within the Holy City. This will be undertaken firstly by exploring Security Council resolution 478 of August 1980, and secondly through a discussion of State practice and *opinio juris*. This paper was inspired by the recent developments regarding the conduct of the United States of America, the Republics of Guatemala and Paraguay in relocating their embassies from Tel Aviv to Jerusalem in May 2018. Unlike the Republic of Paraguay, which subsequently restituted its embassy to Tel Aviv in September 2018, the United States of America and the Republic of Guatemala have hitherto maintained their embassies in Jerusalem. This paper adopts a comparative approach by drawing on the particularities of Southern Rhodesia (Zimbabwe), South West Africa (Namibia) and Kuwait. It gradually examines the crux of the matter regarding the merits of the case initiated by Palestine against the United States of America in September 2018: namely the customary international diplomatic law underpinning the prohibition on establishing embassies in Jerusalem under the Vienna Convention on Diplomatic Relations. It further explores equally important issues relating to questions of jurisdiction of the International Court of Justice and admissibility of the application.

KEYWORDS: *Diplomatic Missions-Jerusalem; Sui Generis; Customary International Diplomatic Law; Monetary Gold Principle; Compulsory Settlement of Disputes*

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1. INTRODUCTION

Owing to its historical and religious uniqueness, Jerusalem has received special treatment known as *Corpus Separatum* to be administered by the United Nations across the whole part of Mandatory Palestine, as envisaged in the partition plan of General Assembly resolution 181 of 1947. General Assembly resolution 181 was substantial in its definition of the boundaries of the city of Jerusalem as it did not only include its traditional municipal borders but was greatly extended to include certain surrounding areas located in the district of Jerusalem. These are: Abu Dis to the east, Bethlehem to the south, Ein Karim to the west, and Shu'fat to the north.¹ Jerusalem's *Corpus Separatum* was not meant to be permanent. To the contrary, it was designed as a temporary measure whereby the status of the city would be determined by its citizens after ten years: "The residents of the City shall be then free to express by means of a referendum their wishes as to possible modifications of the regime of the City".² Neither the United Nations General Assembly special regime on Jerusalem nor the envisaged boundaries of the two Arab and Jewish States have come into fruition. The inhabitants of Jerusalem's *Corpus Separatum* who were supposed to determine the status of the regime of the City after the ten year period of its potential implementation found themselves torn between a division of their city and district in 1948: Eastern and Western sectors.

A succinct historical overview of Jerusalem has to be presented here following the partition plan of 1947 and particularly in the aftermath of the Arab - Israeli war in 1948 in which the western part of city fell under the control of the Israeli troops while Jordanian forces controlled

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¹ See B. Boundaries of the City, G.A. Res. 181(II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947). See also G.A. Res. 181(II), U.N. Doc. A/RES/181(II), map No. 104(b) (Nov. 29, 1947).

² D. Duration of the Special Regime, G.A. Res. 181(II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

the eastern part of the city, which encompassed the historical and magnificent old town. On the 30th of November 1948, the Israeli and Jordanian parties reached a cease-fire Agreement and on the 3rd of April 1949 both parties concluded an Armistice Agreement. Several small and narrow strips of territories in two distinct areas in the Latrun and Jerusalem regions known as “no man’s land” were located between the Israeli and Jordanian front lines and were neither controlled by the Jordanian nor the Israeli forces until the latter’s occupation in June 1967. The third paragraph of Article IV of the Jordan-Israel General Armistice Agreement of 1949 provides that “Rules and regulations of the armed forces of the Parties, which prohibit civilians from crossing the fighting lines or entering the area between the lines, shall remain in effect after the signing of this Agreement with application to the Armistice Demarcation Lines”.³ Accordingly, the West Bank of the Jordan River (including East Jerusalem as well as the narrow strips of territories known as the “no man’s land” in the Latrun and Jerusalem regions) were among the territories which fell under the occupation of Israel.

Through its occupation in 1967 of the West Bank (including East Jerusalem as well as the narrow strips of territories known as the “no man’s land” in the Latrun and Jerusalem regions), Israel has marked its boundaries under customary international law to exclude the territories located beyond the Armistice Line of 1949 (hereinafter Green Line).⁴ The Israeli occupation of 1967 has met with strong opposition by the international community as a whole, as reflected in - amongst others - the Security Council and General Assembly resolutions, which resulted in the emergence of customary international law on the status of the occupied territory of Palestine. The suggestion of the *Corpus Separatum* by the General Assembly has gradually become ineffective and not

³ General Armistice Agreement, HKJ-Isr., art. IV (3), Apr. 3, 1949. See Annex I: Map Delineating Armistice Demarcation Lines Palestine (North & South sheets), Jerusalem, Latrun. Document Sources: Hashemite Jordan Kingdom - Israel: General Armistice Agreement.

⁴ This without prejudice to the other parts of the territory of Palestine which Israel occupied in 1967 i.e. Gaza Strip.

feasible. Accordingly, it acquired no legal validity, as the West Bank – which includes East Jerusalem – became an integral part of the occupied territory of Palestine.

In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, the International Court of Justice (hereinafter I.C.J.) affirmed that “The territories situated between the Green Line . . . and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power”.⁵ The interim Peace Agreements between Israel and the Palestine Liberation Organization (representing the State of Palestine) which started in 1993 – best known as the “Oslo Accords” – neither changed the status of the occupied territory of Palestine, nor Israel’s status as the occupying power.⁶ This has been affirmed in the I.C.J. advisory opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by declaring that “Subsequent events in these territories have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying power.”⁷

Not only does Jerusalem have a unique cultural importance, but its centrality also possesses a geographical significance. Jerusalem geographical centrality was not only pivotal to the whole territory of Mandatory Palestine but also to the geographical territory of what became to be known as the West Bank. In regards to the geography of the West Bank, Jerusalem is the connecting hub of the southern West Bank cities (such as Bethlehem and Hebron) to the central and Northern cities (such

⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 167, ¶ 78 (July 9).

⁶ For more information on the peace process, see generally AlZoughbi, Basheer “The Operation of the Oslo Treaties and the Pacific Mechanisms of Conflict Resolution under Public International Law”. *Peace Research* 45, no. 2 (2013): pp. 35-40.

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 167, ¶ 78 (July 9).

as Jericho, Nablus and Ramallah) and vice versa. The ordinary route from the southern West Bank cities to the central and Northern Palestinian cities and vice versa passes through Jerusalem city. Throughout its occupation, annexation and other measures such as the establishment of military checkpoints, Israel has cut-off East Jerusalem from the rest parts of the West Bank. Palestinian nationals (who do not have Israeli identity cards) wishing to enter the Holy City are required to obtain a pre-approval visa “permit” issued by the Israeli Civil Administration. The Israeli Civil Administration has the discretion to approve or reject the permit application requests made by the Palestinian nationals. The United Nations Economic and Social Council asserted in several of its resolutions that it “[s]tresses the need to preserve the territorial integrity of all of the occupied Palestinian territory and to guarantee the freedom of movement of persons and goods in the territory, including the removal of restrictions on going into and from East Jerusalem”.⁸

East Jerusalem is a term of convenience adopted by the international community and the United Nations which is understood to be that part of the occupied territory which Israel annexed (this means the old city of Jerusalem, the “no man’s areas” of Jerusalem, various villages and towns from the governorate of Jerusalem and other areas administratively located within the boundaries of other governorates of the West Bank e.g. Bethlehem). If for example, Israel implements the so-called E-1 plan by annexing Ma’ale Adumim settlement and its neighboring settlements (Qedar, Mishor Adumim and its industrial area, Kfar Adumim and Almon), it would then constitute an integral part of the occupied and annexed East Jerusalem. The locution “East Jerusalem and its expanded municipal boundaries” could be a better explanatory term to

⁸ ECOSOC Res. 2007/22, Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and the Arab population in the occupied Syrian Golan, ¶ 1, U.N. Doc. E/RES/2001/19 (Jul. 25, 2001). See also ECOSOC Res. 2002/31, ¶ 1, U.N. Doc E/RES/2002/31 (Jul. 25, 2002) & ECOSOC Res. 2012/23, ¶ 2, U.N. Doc E/RES/2012/23 (Jul. 26, 2012). See also for example, G.A. Res. 56/62, ¶ 5, U.N. GAOR, 56th sess., U.N. Doc. E/RES/56/62 (Dec. 10, 2001).

convey a meaning to that part of territory which was occupied in 1967 and was subsequently annexed and unilaterally declared by Israel to be within the boundaries of Jerusalem city.

2. ISRAEL'S MEASURES POST-JUNE 1967

Since June 1967 the legislative and executive organs of the State of Israel have been racing against time to change the geographical, demographical, administrative and economic character of the city of Jerusalem through a series of practices and laws which aim to annex parts of the occupied territory. The 1971 Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories affirmed that Eastern Jerusalem is an example of the policy of annexation.⁹ During World War II, Nazi Germany annexed several occupied territories. For example, the United States Military Tribunal noted in the *Justice Case (The United States of America v. Josef Altstoetter, et al.)* that on 27 October 1939, the Polish Ambassador at Washington, D.C. informed the U.S. Secretary of State that the German Reich had decreed the annexation of part of the territory of the Polish republic.¹⁰ The United States Military Tribunal further asserted that “the purported annexation of territory in the East . . . was invalid and that in point of law such territory never became a part of the Reich, but merely remained in German military control under belligerent occupancy”.¹¹ Article 47 of the Fourth Geneva Convention affirms that a change introduced as a result of the occupying power’s annexation of the whole

⁹ U.N. Special Committee, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, ¶ 34, 44, U.N. Doc. A/8389 (Oct. 5, 1971).

¹⁰ *The Justice Case (The United States of America v. Josef Altstoetter, et al.)*, Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10. October 1946-April 1949, Volume III, United States Government Printing Office: Washington, 1951, p. 1027.

¹¹ *Id.*

or part of the occupied territory does not deprive protected persons in an occupied territory of the benefits conferred by the present Convention.¹² The Commentary on Article 47 of the Fourth Geneva Convention provides that “the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty. The preliminary work on the subject confirms this”.¹³

Since its occupation in 1967, Israeli measures were directed at Jerusalem in particular and the other cities, villages and localities in the occupied territories in general. For example, Israel dissolved the duly elected Arab Municipality Council in Jerusalem and dismissed the Mayor Rawhi Al- Khatib (who was subsequently deported to Jordan in 1968) and further abolished the Jordanian Dinar, which was the legal tender in the West Bank before the six-day war.¹⁴ Similar to the German Reich which had decreed the annexation of parts of the territory of Poland, Israel decreed laws to annex parts of the occupied territory of Palestine, including East Jerusalem. On 27 June 1967, the Israeli legislative organ known in Hebrew as the “*Knesset*” adopted amendments to two existing laws based upon a proposal of the Israeli government, which aimed at annexing Jerusalem and expanding its boundaries. Under the Law and Administration Ordinance, 5708-1948 (Isr.), a new provision was introduced which extends the law, jurisdiction and administration of the Israeli State to any area which the Israeli Government considers to be part of the State of Israel.¹⁵ The Municipalities Ordinance Law, 5727-1967 (as amended with amendment n. 6) (Isr.), gave the Israeli Minister of Interior the power to issue a proclamation to enlarge the area of a certain

¹² Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 47, Aug. 12, 1949, 75 U.N.T.S. 287.

¹³ OSCAR M. UHLER ET AL., INT’L COMM. OF THE RED CROSS, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 276 (Jean S. Pictet ed., 1958).

¹⁴ See U.N. S.C., Rep. of the Security Council, Sept. 12, 1967, ¶ 1, 8 annex I, U.N. Doc. S/8146 (Sept. 12, 1967), relating to U.N. G.A., note by Secretary-General, Sept. 12, 1967, U.N. Doc. S/8153 (Sept. 12, 1967). See also U.N. Rep. of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, ¶ 77, U.N. Doc. A/RES/2727 (Dec. 1, 1970).

¹⁵ Law and Administration Ordinance, 5727-1967, art. 11(b) (as amended with amendment n. 11).

municipality by the inclusion of a designated area under the new amended provision of the Law 5708-1948.¹⁶

On 28 June 1967, the Israeli Minister of Interior issued a proclamation under the Municipalities Ordinance Law, 5727-1967, Article 8(a), extending the boundaries of the municipality of Jerusalem so as to include the entire Arab sector of Jerusalem and several neighboring villages.¹⁷ Israel expanded the geographical boundaries of the city of Jerusalem municipality into the surrounding villages of Jerusalem governorate itself and other areas administratively located in other West Bank governorates i.e. Bethlehem while it gradually excluded other villages or neighborhoods located within Jerusalem governorate such as Bethany (AlEizariya) and Abu Deis. By expanding its traditional municipal boundaries, the occupying power sought to alter the geographical character of Jerusalem in order to increase the Jewish settler population and exclude as much as possible the Arab Palestinian population from the unilaterally declared municipal boundaries.

The 1973 Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories provided that “the Government of Israel is continuing with its policy of the unilateral annexation of the occupied part of Jerusalem and the enlargement of the municipal boundaries of the city by the incorporation of considerable areas of land forming part of the occupied West Bank”.¹⁸ The tipping point came when the legislative organ of the Israeli State enacted a Basic Law on the 30th of July 1980 entitled “Jerusalem, Capital of Israel”. The 1980 Law provides that “Jerusalem, complete and united, is the capital of Israel. Jerusalem is the seat of the

¹⁶ Municipalities Ordinance Law, 5727-1967, art. 8(a), (as amended with amendment n. 6).

¹⁷ See B. Reply received from the Government of Jordan, U.N. Special Committee, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, U.N. Doc. A/8089 (Oct. 5, 1970).

¹⁸ U.N. Special Committee, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, ¶ 43, U.N. Doc. A/9148 (Oct. 25, 1973).

President of the State, the *Knesset*, the Government and the Supreme Court”.¹⁹

Simultaneously, Israel has extensively transferred parts of its civilian population on the one hand, to the annexed East Jerusalem, and on the other, to the rest of the West Bank areas, which belongs to the *de jure* State of Palestine, so as to introduce demographical changes. Estimates of the Israeli settler population of the West Bank in 2012 vary between 500,000 and 650,000 settlers, including nearly 200,000 Israeli settlers living in settlements located in East Jerusalem.²⁰ Around 320,000 Palestinians currently reside in East Jerusalem.²¹ Not only has Israel systematically and extensively seized immovable property, it has also systematically and extensively destroyed Palestinian property without military necessity in the occupied territory of Palestine including East Jerusalem. By way of example, the International Committee of the Red Cross (hereinafter I.C.R.C.) provided in its annual report of 1971 that: “[I]n view of the continued destruction of houses in the occupied territories, the President of the ICRC made a renewed appeal to the Israeli Prime Minister at the end of April that her Government should abandon a method to counter subversive activities”.²² The United Nations Office for the Coordination of Humanitarian Affairs (hereinafter O.C.H.A.) provided that during 2016, Israel demolished or seized 1089 Palestinian-owned structures in the West Bank including East Jerusalem.²³

The construction of the wall and its associated regime in the occupied territory of Palestine since 2002 has amplified the extensive

¹⁹ Para 1 & 2, Basic Law: Jerusalem, Capital of Israel (30th July, 1980).

²⁰ U.N. Secretary-General, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Rep. of the Secretary-General, ¶ 7, U.N. Doc. A/67/375 (Sept. 18, 2012).

²¹ UNITED NATIONS O.C.H.A. OCCUPIED PALESTINIAN TERRITORY, WEST BANK | EAST JERUSALEM: KEY HUMANITARIAN CONCERNS, (DEC. 21, 2017).

²² I.C.R.C. Annual Report 1971, (Geneva, 1972), pp. 49-50. Quoted in U.N. Rep. of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, ¶ 47, U.N. Doc. A/8828 (Oct. 9, 1972).

²³ See RECORD NUMBER OF DEMOLITIONS IN 2016; CASUALTY TOLL DECLINES, THE UNITED NATIONS O.C.H.A. (Dec. 29, 2016).

appropriation and destruction of property which is not demanded by military necessity. The construction of the wall and its associated regime is directly linked to the annexation of East Jerusalem as well as annexation of several settlements located near the Green line (to the East of the Green line). The I.C.J. provided that “[t]he route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements”.²⁴ The I.C.J. further provided that “it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.”²⁵ The I.C.J. ruled that: “Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated”.²⁶ The I.C.J. did not shy away from affirming that the Israeli settlements in the Occupied Palestinian Territory including East Jerusalem are in breach of international law while further asserting on the applicability of the Fourth Geneva Convention.²⁷

3. THE PROHIBITION ON ESTABLISHING OR MAINTAINING DIPLOMATIC MISSIONS IN JERUSALEM

The prohibition on establishing or maintaining embassies in Jerusalem was based on the Security Council in its resolution 478 of 20 August 1980 where it called upon “Those States that have established diplomatic

²⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. , ¶ 184 (Dec. 8).

²⁵ *Id.* para 132, p. 189.

²⁶ *Id.* para 163, 3(B), p. 201.

²⁷ See Para 120 and para 101, *Id.* pp. 184 & 177.

missions at Jerusalem to withdraw such missions from the Holy City.”²⁸ Security Council resolution 478 was issued as a result of the Israeli Knesset enactment of the 1980 Basic Law entitled “Jerusalem, Capital of Israel”. In relation to the Sending States’ diplomatic missions to Israel, four legal obligations, stemming explicitly or implicitly from the Security Council resolution 478, are imposed on States. Firstly, States which are diplomatically represented in Israel and which have already established diplomatic missions in Jerusalem are under the legal obligation to withdraw their embassies from Jerusalem and as a corollary withdraw their diplomatic agents. Secondly, States which are diplomatically represented in Israel and which have already established their embassies in Tel Aviv are under the legal obligation not to relocate their embassies to Jerusalem. Thirdly, States which are about to establish diplomatic representations with Israel, must not locate their embassies in Jerusalem. Fourthly, the establishment of diplomatic missions in Tel Aviv should neither be interpreted as a recognition of Israel’s sovereignty over Jerusalem nor recognize its null and void actions and practices.²⁹

In addition to its call upon those States which have established diplomatic missions in Jerusalem to withdraw them, Security Council resolution 478 of 20 August 1980 affirmed that the enactment of the Israeli “Basic Law” of 1980 is a violation of international law and does not affect the continuity of application of the Four Geneva Conventions in the 1967 occupied Palestinian territory including East Jerusalem.³⁰ Furthermore, Security Council resolution 478 determined that all legislative and administrative measures and actions taken by Israel are null and void³¹ and “Decided not to recognize the “Basic Law” and such other actions by Israel that, as a result of this law, seek to alter the

²⁸ S.C. Res. 478, para 5(b), U.N. Doc. S/RES/478 (Aug. 20, 1980).

²⁹ See BASHEER AL ZOUGHBI, *Trump’s Plan to Move the US Embassy to Jerusalem: A discussion of International Humanitarian Law and International Diplomatic Law*, AL JAZEERA CENTRE FOR STUDIES (Mar. 30, 2017), <http://studies.aljazeera.net/en/reports/2017/03/trumps-plan-move-embassy-jerusalem-discussion-international-humanitarian-law-interna-170330092849045.html>.

³⁰ See S.C. Res. 478, *supra* note 28, para 2.

³¹ See *id.* para 3.

character and status of Jerusalem”³² Much like the usage of the legislative organ of Nazi Germany for the purpose of enhancing its occupation and/or annexation, the legislative organ of the Israeli State enhanced the occupation and annexation of East Jerusalem and the expanded boundaries of the city of the occupied territory of Palestine. In the *Case of the S.S. Lotus (France v. Turkey) of 1927*, the Permanent Court of International Justice (hereinafter P.C.I.J.) provided that “the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law”.³³

In the deliberations of the Security Council on the 20th of August 1980, the Representative of the Palestine Liberation Organization expressed his gratitude to the Governments of Venezuela, Ecuador, Colombia and Uruguay for having decided not to locate their diplomatic missions in Jerusalem.³⁴ Before the adoption of Security Council resolution 478 (1980), Chile, Ecuador and Venezuela had announced their decisions to withdraw their diplomatic missions from Jerusalem.³⁵ At the time of the adoption of resolution 478 (1980), there were only ten States which maintained diplomatic missions in Jerusalem.³⁶ In the course of August-September 1980, ten Governments (El Salvador, Costa Rica, Panama, Colombia, Haiti, Bolivia, the Netherlands, Guatemala, Dominican Republic and Uruguay) informed the Secretary-General that they had decided to withdraw their diplomatic missions from the Holy City.³⁷

Yet Costa Rica and El Salvador, whom were among the States, which had withdrawn their embassies in 1980, moved their embassies back to Jerusalem respectively in 1982 and 1984. The letter dated 17 May

³² *Id.* para 5.

³³ *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. ¶ 51, (ser. A) No. 10 (Sept. 7).

³⁴ Security Council Official Records - Thirty-fifth Year, 2245th Meeting: Held in New York on Wednesday, 20 August 1980, at 4 p.m., SIPV.2245, p.19.

³⁵ See REPORT OF THE SECRETARY-GENERAL UNDER SECURITY COUNCIL RESOLUTION 478 (1980), DISTR. GENERAL S/14248, 11 NOVEMBER 1980, ORIGINAL: ENGLISH, (NOV. 11, 1980).

³⁶ *See Id.*

³⁷ *See Id.*

1982 from the *charge d'affaires* A.I. of Costa Rica to the United Nations addressed to the Secretary-General informed of the Costa Rican Government decision of 9 May 1982 to establish its diplomatic mission in the Western Sector of Jerusalem.³⁸ The Letter dated 19 April 1984 from the Acting Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People to the Secretary-General referred to a news item in the New York Times of 14 April 1984 in which it was reported that the Government of El Salvador has officially relocated its embassy in Israel from Tel Aviv to Jerusalem.³⁹

It was only in August 2006 when El Salvador and Costa Rica decided to reconstitute their embassies from Jerusalem to Tel Aviv. The then President of the Republic of Costa Rica Oscar Arias decided on the 16th of August 2006 to move the Costa Rican embassy from Jerusalem to Tel Aviv.⁴⁰ On 25 August 2006 the Deputy Permanent Representative of El Salvador to the United Nations transmitted a copy of the letter from the Minister for Foreign Affairs of the Republic of El Salvador addressed to the Secretary-General entailing information on that the Government of the Republic of El Salvador has decided to transfer the embassy of El Salvador in Israel from Jerusalem to the Tel Aviv.⁴¹ This decision of El Salvador Government was pursuant to the various resolutions on the status of Jerusalem, in particular Security Council resolution 478.⁴²

Between September 1980 (upon the withdrawal of all States which had their diplomatic missions in Jerusalem) through to 1982, Jerusalem remained a city with no diplomatic missions. It was only in 1982 and 1984

³⁸ DISTR. GENERAL S/15109, 24 MAY 1982, ENGLISH, ORIGINAL: SPANISH, LETTER DATED 17 MAY 1982 FROM THE CHARGES D'AFFAIRES A.I. OF COSTA RICA TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, (MAY 24, 1982).

³⁹ GENERAL ASSEMBLY, THIRTY-NINTH SESSION, ITEM 33 OF THE PRELIMINARY LIST(A/39/50)-QUESTION OF PALESTINE, LETTER DATED 19 APRIL 1984 FROM THE ACTING CHAIRMAN OF THE COMMITTEE ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE TO THE SECRETARY-GENERAL, (APR. 19, 1984).

⁴⁰ Memoria Institucional del Ministerio de Relaciones Exteriores y Culto [Institutional Memory of the Ministry of Foreign Affairs and Worship] 2009-2010, San José, (May 8, 2010), 320.

⁴¹ ANNEX TO THE LETTER DATED 25 AUGUST 2006 FROM THE DEPUTY PERMANENT REPRESENTATIVE OF EL SALVADOR TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, (AUG. 25, 2006).

⁴² *Id.*

when two Central American States i.e. Costa Rica and El Salvador relocated their diplomatic missions again to Jerusalem up until their decisions in August 2006 to reconstitute their acts. From 2006 (upon the withdrawal of Costa Rica and El Salvador Embassies) to April 2018, Jerusalem remained with no embassies until the United States of America, Guatemala and Paraguay relocated their embassies to Jerusalem in May 2018. Paraguay has, however, reconstituted its act and moved its embassy back to Tel Aviv within a short period of time in the same year i.e. September 2018.

The prohibition on establishing or maintaining embassies in Jerusalem established by Security Council resolution 478 must also be read in conjunction with other Security Council resolutions relevant to the issue of Jerusalem, both former and subsequent to resolution 478. For example, Security Council resolution 252 of 1968 “Consider[ed] that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status”;⁴³ Security Council resolution 465 of 1 March 1980 “[d]etermined that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity”.⁴⁴ Security Council resolution 476 of 30 June 1980 “[r]econfirm[ed] that all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity and constitute a flagrant violation of the Geneva Convention.”⁴⁵

Security Council resolution 2334 of December 2016 “[u]nderlines that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through

⁴³ S.C. Res. 252, ¶ 2, U.N. Doc. S/RES/252 (May 21, 1968).

⁴⁴ S.C. Res. 465, ¶ 5, U.N. Doc. S/RES/465 (Mar. 1, 1980).

⁴⁵ S.C. Res. 476, ¶ 3, U.N. Doc. S/RES/476 (Jun. 30, 1980).

negotiations”;⁴⁶ it further “[c]all[ed] upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”;⁴⁷ Paragraph 1 of Security Council resolution 2334 reaffirmed the illegality of the Israeli settlements under international law in the Palestinian territory occupied since 1967, including East Jerusalem.⁴⁸ By locating their embassies in Jerusalem in the unilaterally declared boundaries of Jerusalem, the United States of America and Guatemala are not differentiating in their treatment of the territory of the State of Israel and the territories occupied since 1967. The United States of America and Guatemala are affirming the annexation of East Jerusalem and treating the boundaries of the municipality of Jerusalem as defined by Israel as single entity.

It is also worth pointing out that several States opted to cut off their diplomatic relations with Israel particularly in 1973, which explains the relatively small number of embassies in Jerusalem or Tel Aviv by 1980. The 4th Summit Conference of Heads of State or Government of the Non-Aligned Movement adopted a resolution on 9 September 1973 where it provided that it “welcomes the decision of certain member countries to break off relations with Israel, and requests the other member countries to take steps to boycott Israel diplomatically, economically, militarily and culturally”.⁴⁹ Between 21 September and 14 October 1973, seven African States cut off diplomatic ties with Israel (Togo, Zaire, Benin, Rwanda, Upper Volta “in 1984 renamed Burkina Faso”, Cameroon, Equatorial Guinea).⁵⁰ Twenty-seven African States decided to sever diplomatic ties with Israel in less than one year and twenty-one of them during a period of forty days.⁵¹ The African States which have resumed or otherwise

⁴⁶ S.C. Res. 2334, ¶ 3, U.N. Doc. S/RES/2334 (Dec. 23, 2016).

⁴⁷ *Id.* para 5.

⁴⁸ *Id.* para 1.

⁴⁹ NAM (Government of the Non-Aligned Movement), *Resolution on the Middle-East situation and the Palestine Issue* (Sept. 5–9, 1973).

⁵⁰ See Zach Levey, *Israel's Exit from Africa, 1973: The Road to Diplomatic Isolation*, 35 BRIT. J. MIDDLE E. STUD. 205, 217–8 (2008).

⁵¹ See *Id.* p. 224.

established diplomatic relations with Israel refrained from locating their embassies in Jerusalem.

3.1. STATE PRACTICE AND THE ELEMENT OF OPINIO JURIS

The obligation on all States, which are diplomatically represented in Israel not to relocate their embassies to Jerusalem, or otherwise establish embassies in Jerusalem, is not a courtesy or a comity but a binding custom that is not in paucity of the element of *opinio juris sive necessitatis*.⁵² The I.C.J. stated in the *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* that:

The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.⁵³

The notion of the *opinio juris sive necessitatis* is what distinguishes a binding custom on all States from a mere courtesy, comity, convenience or tradition. In the *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, the I.C.J. held that:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.⁵⁴

⁵² See Al Zoughbi, *supra* note 29.

⁵³ *North Sea Continental Shelf Case (Ger/Den; Ger/Neth.)*, Judgment, 1969 I.C.J. 44, ¶ 77 (Feb. 20).

⁵⁴ *Id.*

There has been a widespread and consistent practice of sovereign States represented in Israel in not locating their embassies in Jerusalem, the declared de facto capital of Israel. States felt legally obliged not to locate or maintain their embassies in Jerusalem for several reasons: Israel's de facto declaration of Jerusalem as its capital and enactment of a law in 1980 as such, and its illegal annexation of an occupied territory acquired by the use of force.⁵⁵ Other Israeli measures that were directed at changing the status of Jerusalem included extensive transfer of Israeli civilians thereto and systematic and extensive appropriation and destruction of property without military necessity. In *Fisheries (United Kingdom v. Norway)*, the I.C.J. found that the method of straight lines which was established in the Norwegian system "had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law".⁵⁶ Similarly, the prohibition on establishing or maintaining embassies in Jerusalem is consolidated by a constant and sufficiently long practice.

If a State decided to relocate its embassy to West Jerusalem, (which was not seized in 1967, and which international law does not consider as an occupied territory), it would still be considered to have committed a breach of customary international law.⁵⁷ By its annexation of the occupied section of Jerusalem, Israel aimed at the de facto unification of the whole city and thus moving an embassy to any part of the city would explicitly and/or implicitly approve or recognize the de facto illegal unification, annexation and other measures taken by Israel which have been described by the Security Council and General Assembly as null and void.⁵⁸

A Security Council draft resolution (S/2017/1060) of 18 December 2017 has not been adopted, owing to a negative vote of a permanent

⁵⁵ See Al Zoughbi, *supra* note 29.

⁵⁶ *Fisheries Case (UK v. Nor.)*, Judgment, 1951 I.C.J. 139 (Dec. 18).

⁵⁷ See Al Zoughbi, *supra* note 29.

⁵⁸ See *Id.*

member (the United States of America) while the fourteen other votes were in favour of the draft resolution (Bolivia, China, Egypt, Ethiopia, France, Italy, Japan, Kazakhstan, Russian Federation, Senegal, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, and Uruguay).⁵⁹ The draft resolution calls upon all States not to establish diplomatic missions in the Holy City of Jerusalem, in compliance with resolution 478 (1980) and “affirms that decisions and actions which purport to have altered, the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded”.⁶⁰ The fact that the draft Security Council resolution (S/2017/1060) has been vetoed by the United States of America and as a result was not adopted does not undermine the provisions of customary international law as enshrined in this draft resolution.

In its explanation of the veto, the United States of America stated that its exercise was in defense of American sovereignty.⁶¹ The United States of America further invoked the statement of then Secretary of State Ed Muskie on resolution 478, and specifically on the provision on diplomatic missions in Jerusalem, where he considered as nonbinding and without force.⁶² Had the United States of America considered Security Council resolution 478 as non-binding, why it has refrained in all these past years from locating its embassy to Jerusalem? The United States of America claim that Security Council resolution 478 is not binding, thus subverting the Security Council, General Assembly resolutions and the existence of customary international diplomatic law relevant to the issue of the prohibition of establishing diplomatic missions in Jerusalem. In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion asserted:

⁵⁹ 8139th meeting Monday, 18 December 2017, 12.25 p.m, New York S/PV.8139, The situation in the Middle East, including the Palestinian question, p. 3, (Dec. 18, 2017) http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.8139.

⁶⁰ S.C. Res. 1060, ¶ 1, U.N. Doc. S/RES/1060 (Dec. 18, 2017).

⁶¹ See S.C. Prov. 8139, ¶ 4, U.N. Doc. S/PV.8139 (Dec. 18, 2017).

⁶² See S.C. Prov. 2245, ¶ 111, U.N. Doc. S/PV.2245 (Dec. 18, 2017).

Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.⁶³

In 1976, the U.S. Ambassador Scranton reiterated the U.S. position on Jerusalem quoting Ambassador Yost's words of 1969 in relation to Jerusalem: "The part of Jerusalem that came under the control of Israel in the June 1967 war, like other areas occupied by Israel, is occupied territory and hence subject to the provisions of international law governing the rights and obligations of an occupying Power".⁶⁴ Ambassador Scranton further quoted Ambassador Goldberg statement of 1968 that "The United States does not accept or recognize unilateral actions by any States in the area as altering the status of Jerusalem."⁶⁵ In its statement following the voting (S/2017/1060), Sweden agreed with the call on all States to refrain from the establishment of diplomatic missions in Jerusalem, in line with resolution 478 (1980) and stated clearly that the vote (S/2017/1060) does not impact the former resolutions adopted by the Security Council.⁶⁶ Sweden affirmed that the status of Jerusalem remains unchanged under international law.⁶⁷

In its statement following the voting, the United Kingdom regarded East Jerusalem as part of the occupied Palestinian territories and disagreed with the United States decision to unilaterally recognize Jerusalem as the capital of Israel and the move of its embassy thereto.⁶⁸

⁶³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory opinion, 1971 I.C.J 57, ¶ 116 (21 June).

⁶⁴ Para 97, 1483rd meeting. Quoted in para 66, PROVISIONAL AGENDA (S/AGENDA/1896), S/PV.1896 23 MARCH 1976, (MAR. 23, 1976).

⁶⁵ S.C. Prov. 1424, ¶ 45, U.N. Doc. S/PV.1424 (May 9, 1968).

⁶⁶ See S.C. Prov. 8139, ¶ 10, U.N. Doc. S/PV.8139 (Dec. 18, 2017).

⁶⁷ See *Id.* p. 10.

⁶⁸ See *Id.* p. 5.

France's statement affirmed that it neither recognized the annexation of East Jerusalem, which is part of the occupied territories under international law, nor Israel's unilateral acts concerning Jerusalem both before and after Israel's Basic Law of 1980.⁶⁹ China affirmed that it supports the establishment of a fully sovereign and independent State of Palestine based on its 1967 borders with East Jerusalem as its capital and further urged the international community to respect the relevant Security Council resolutions.⁷⁰ The Russian Federation affirmed that it is committed to an independent State of Palestine, with East Jerusalem as its capital.⁷¹ Italy reaffirmed the well-established principles that are already enshrined in several relevant resolutions.⁷² Ukraine affirmed that the issue of Jerusalem should be resolved in strict compliance with the relevant Security Council resolutions, including resolutions 476 (1980), 478 (1980) and 2334 (2016).⁷³ Ukraine further affirmed that the draft resolution (S/2017/1060) also reaffirms the inadmissibility of the acquisition of territory by force.⁷⁴

In her statement on violence in Gaza and the latest developments as of 14 May 2018, the High Representative of the Union for Foreign Affairs and Security Policy/ Vice-President of the Commission, Federica Mogherini affirmed that “[t]he European Union has a clear, consolidated position on Jerusalem, which was reaffirmed in numerous Foreign Affairs Council conclusions. The EU will continue to respect the international consensus on Jerusalem embodied in, inter alia, U.N. Security Council Resolution 478, including on the location of diplomatic representations”.⁷⁵

⁶⁹ See *Id.* p. 6.

⁷⁰ See *Id.* p. 11.

⁷¹ See *Id.* p. 9.

⁷² See *Id.* p. 10.

⁷³ See *Id.*

⁷⁴ See *Id.*

⁷⁵ Strategic Communications Division, *Gaza: EU calls for restraint on both sides following deaths of dozens of Palestinian protesters*, EUROPEAN UNION EXTERNAL ACTION (May 14, 2018, 06:20 PM), https://eeas.europa.eu/diplomatic-network/middle-east-peace-process/44527/gaza-eu-calls-restraint-both-sides-following-deaths-dozens-palestinian-protesters_en.

3.2. THE RELOCATION OF THE U.S., GUATEMALA AND PARAGUAY EMBASSIES TO JERUSALEM

Security Council draft resolution (S/2017/1060) of 18 December 2017 was drafted following Donald J. Trump Presidential Proclamation of the 6th of December 2017 where he recognized Jerusalem as the Capital of Israel and instructed the relocation of the United States embassy to Israel from Tel Aviv to Jerusalem in pursuance of Jerusalem Embassy Act enacted by the U.S. Congress in October 1995. The Jerusalem Embassy Act, 1995, recognizes Jerusalem as the capital of Israel and dictates that the U.S. embassy should be established in Jerusalem no later than 31 May 1999.⁷⁶ In *Case concerning certain German interests in Polish Upper Silesia (The Merits)*, the P.C.I.J. provided that “[t]he Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention”.⁷⁷ The Jerusalem Embassy Act contained a waiver provision, which empowered the U.S. President to suspend it every six months if deemed necessary to protect the national security interests of the United States.⁷⁸ Presidents Bill Clinton, George W. Bush and Barack Obama had invoked this waiver clause repeatedly, whereas even Donald J. Trump himself did so – when he signed a six-month waiver in June 2017. Yet, In May 2018, the United States of America relocated its embassy from Tel Aviv to Jerusalem in pursuance to the 6th of December 2017 proclamation. The United States of America relocated its embassy to an interim building, which houses consular operations of its Consulate General of Jerusalem.⁷⁹

⁷⁶ Jerusalem Embassy Act, Public Law 104-45, 1995, § 2 and 3, www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf.

⁷⁷ *German Interests in Polish Upper Silesia (Germ. v. Pol.)*, Judgment, 1926 P.C.I.J. (ser. A) No. 7, ¶ 52 (May 25).

⁷⁸ Jerusalem Embassy Act, Public Law 104-45, 1995, § 1(a) and (2).

⁷⁹ Press Statement, Heather Nauert, Dep’t Spokesperson, Opening of U.S. Embassy Jerusalem, U.S. DEPARTMENT OF STATE (Feb. 23, 2018), <https://www.state.gov/r/pa/prs/ps/2018/02/278825.htm>.

Following the United States of America footsteps, Guatemala and Paraguay relocated their embassies from Tel Aviv to Jerusalem in the same month. However, in September 2018 Paraguay decided to revoke its decision and reconstitute its act by moving its embassy back to Tel Aviv. The Paraguayan Ministry for External Relations Statement on the relocation of Paraguay's embassy to the State of Israel on the 5th of September 2018 elucidated that in line with Article 143 of the Paraguayan Constitution in which it adheres to international law in its foreign policy, the Government of the Republic of Paraguay considers it appropriate to re-establish the embassy to the State of Israel to the location previous to the statement dated in May 9, 2018.⁸⁰ The act of Paraguay to relocate its embassy back to Tel Aviv is considered an act of restitution in line with one of the forms of the principle of reparation for the internationally wrongful act of the Republic of Paraguay.

The Sending States, which are diplomatically represented in Israel, cannot rely on their own domestic or foreign policies to justify their conduct of transferring their embassies to Jerusalem as they are violating their obligations under international law. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the I.C.J. held that “[a] State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems”.⁸¹

3.3. GENERAL ASSEMBLY RESOLUTIONS

The General Assembly issued several resolutions in several instances when States have violated Security Council resolution 478 by locating

⁸⁰ *Comunicado sobre la ubicación de la Embajada de la República del Paraguay ante el Estado de Israel* [Statement on the location of the Embassy of the Republic of Paraguay to the State of Israel], MINISTERIO DE RELACIONES EXTERIORES [MINISTRY OF FOREIGN AFFAIRS] (Sept. 9, 2018), <http://www2.mre.gov.py/index.php/noticias/comunicado-sobre-la-ubicacion-de-la-embajada-de-la-republica-del-paraguay-ante-el-estado-de-israel>.

⁸¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 131, ¶ 258 (June 27).

their embassies in Jerusalem or otherwise when deciding to relocate their embassies to Jerusalem. It accordingly deplored States' conduct of establishing or maintaining their embassies in Jerusalem or otherwise called upon States to refrain from such conduct. For example, General Assembly resolution 37/123 of 1982 "[d]eplore[d] the transfer by some States of their diplomatic missions to Jerusalem in violation of Security Council resolution 478 (1980)";⁸² General Assembly resolution 40/168 of 1985 "[d]eplore[d] the transfer by some States of their diplomatic missions to Jerusalem in violation of Security Council resolution 478 (1980) and their refusal to comply with the provisions of that resolution".⁸³ This act of deploring was at a time when El Salvador and Costa Rica had already relocated their embassies to Jerusalem. By way of another example, as a result of the United States of America decision on the 6th of December 2017 to relocate its embassy to Tel Aviv, General Assembly resolution A/ES-10/L.22 of 19 December 2017 called upon all States to refrain from establishing diplomatic missions in Jerusalem in line with Security Council resolution 478 (1980).⁸⁴

In its numerous resolutions, the General Assembly have taken the same position as the Security Council which also enhance the existence of a rule and the emergence of an *opinio juris* that States diplomatically represented in Israel must refrain from locating their embassies in Jerusalem as established by Security Council resolution 478 of 20 August 1980. For example, General Assembly resolution 36/120 of 1981 reaffirmed its decision not to recognize the Israeli Basic Law of 1980 and called upon all States to comply with the present resolution and other

⁸² G.A. Res. 37/123, ¶1, U.N. Doc. A/RES/37/123 (Dec. 16, 1982).

⁸³ G.A. Res. 40/168 (C), ¶2, U.N. Doc. A/RES/40/168 (Dec. 16, 1985). For the matter of deploring the transfer by some States of their diplomatic missions to Jerusalem see e.g. other General Assembly resolutions: G.A. Res. 38/180, ¶2, U.N. Doc. A/RES/38/180 (Dec. 19, 1983), G.A. Res. 48/59 (A), ¶2, U.N. Doc. A/RES/48/59 (Dec. 14, 1993), G.A. Res. 50/22 (A), ¶2, U.N. Doc. A/RES/50/22 (Dec. 4, 1995), G.A. Res. 54/37, ¶2, U.N. Doc. A/RES/54/37 (Dec. 1, 1999), G.A. Res. 56/31, ¶2, U.N. Doc. A/RES/56/31 (Dec. 18, 2001), G.A. Res. 57/111, ¶2, U.N. Doc. A/RES/57/111 (Dec. 3, 2002), G.A. Res. 59/32, ¶2, U.N. Doc. A/RES/59/32 (Dec. 1, 2004), G.A. Res. 60/41, ¶2, U.N. Doc. A/RES/60/41 (Dec. 1, 2005).

⁸⁴ G.A. Res. 10/L.22, ¶1, U.N. Doc. (A/ES-10/L.22 (Dec. 19, 2017)).

relevant resolutions.⁸⁵ General Assembly Resolution 36/120 further demanded Israel to comply with United Nations resolutions relevant to Jerusalem particularly Security Council resolutions 476 and 478 of 1980.⁸⁶ General Assembly resolution A/73/L.29 of November 2018 recalled among others Security Council resolution 478 and affirmed that the imposition of the occupying power of its laws, jurisdiction and administration on the Holy City of Jerusalem are illegal.⁸⁷

In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the I.C.J. provided that it must “be satisfied that there exists in customary international law an *opinio juris* This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625”.⁸⁸ The customary international diplomatic law underpinning the prohibition on establishing embassies in Jerusalem was also fundamental - as in the absence of it, Ambassadors of the sending States which are diplomatically represented in Israel are (or would be) accredited under these circumstances to the president of Israel.⁸⁹ In its advisory opinion on *the Legality of the Threat or Use of Nuclear Weapons*, the I.C.J. pointed out that:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of

⁸⁵ G.A. Res. 36/120 (E), ¶ 3, U.N. Doc. A/RES/36/120 (Dec. 10, 1981).

⁸⁶ *Id.*, para 4.

⁸⁷ G.A. Res. 73/22, Preamble and ¶ 1, U.N. Doc. A/RES/73/22 (Nov. 30, 2018).

⁸⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 131, ¶ 188 (June 27).

⁸⁹ *See generally* for accreditation of ambassadors, envoys and *charges d'affaires* Vienna Convention on Diplomatic Relations art. 14, Apr. 18, 1961, 500 U.N.T.S. 95.

resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.⁹⁰

3.4. THE PRINCIPLE OF INADMISSIBILITY OF ACQUISITION OF TERRITORY BY FORCE

By not establishing embassies in Jerusalem, States are also affirming the principle of the illegality and inadmissibility of acquisition of territory by force. The Security Council and General Assembly have affirmed in several instances this principle. For example, the preamble of Security Council resolution 242 affirmed on the inadmissibility of the acquisition of territory by war.⁹¹ General Assembly resolution 2799 of 1971 “[r]eaffirm[ed] that the acquisition of territories by force is inadmissible and that, consequently, territories thus occupied must be restored”⁹². The illegality and inadmissibility of acquisition of territory was affirmed by several governments and intergovernmental organizations. For example, the Declaration of the nine Foreign Ministers of the European Economic Community of 6 November 1973 in Brussels, on the Situation in the Middle East provided that the nine member States consider that a peace agreement should be based on, among others, “the inadmissibility of the acquisition of territory by force; the need for Israel to end the territorial occupation which it has maintained since the conflict of 1967”.⁹³ On the Jerusalem issue the Irish Minister for Foreign Affairs made it clear in 1979 that the then nine Member States of the European Economic Community did not support any unilateral moves concerning this city.⁹⁴ The European Council Venice Declaration of June 13, 1980

⁹⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 254 ¶ 70 (Jul. 8).

⁹¹ S.C. Res. 242, Preamble, U.N. Doc. S/RES/242 (Nov. 22, 1967). See also for example, S.C. Res. 298, U.N. Doc. S/RES/298 (Sept. 25, 1971).

⁹² G.A. Res. A/RES/2799 (XXVI), ¶ 1, U.N. Doc. (Nov. 30, 2018). See also for example, G.A. Res. A/RES/36/120 (D) and (E), Preamble, U.N. Doc. (Dec. 10, 1981).

⁹³ para 3 (I) and (II), Declaration of the Nine Foreign Ministers of 6 November 1973, in Brussels, on the Situation in the Middle East, https://www.cvce.eu/content/publication/1999/1/1/a08b36bc-6d29-475c-aadb-of71c59dbc3e/publishable_en.pdf.

⁹⁴ Michael O’Kennedy, Irish Foreign Minister, Speech at the 34th Session of the U.N. General Assembly in New York (Sept. 25, 1979), (A/34/PV.8).

affirmed on that “[t]he nine stress that they will not accept any unilateral initiative designed to change the status of Jerusalem The nine stress the need for Israel to put an end to the territorial occupation which it has maintained since the conflict of 1967 the Israeli settlements are illegal under international law.”⁹⁵

3.5. THE PROHIBITION ON AID OR ASSISTANCE TO ISRAEL’S INTERNATIONALLY WRONGFUL ACTS

By relocating their embassies from Tel Aviv to Jerusalem, the United States of America and Guatemala are also aiding and assisting the internationally wrongful acts of transferring Israeli civilians into Israeli settlements in the occupied territory of Palestine, including its occupied section of Jerusalem, as well as Israel’s annexation and colonization policies. For example, Security Council resolution 465 of 1980 “calls upon all States not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories”.⁹⁶ General Assembly resolution 31/106 of 1976

[r]eiterates its call upon all States, international organizations and specialized agencies not to recognize any changes carried out by Israel in the occupied territories and to avoid actions, including those in the field of aid, which might be used by Israel in its pursuit of the policies of annexation and colonization.⁹⁷

⁹⁵ European Community (1980) “Venice Declaration”. European Union, http://eeas.europa.eu/mepp/docs/venice_declaration_1980_en.pdf, retrieved 29/01/1980.

⁹⁶ S.C. Res. 465, *supra* note 44, ¶ 7. See also S.C. Res. 471, ¶ 5, U.N. Doc. S/RES/471 (Jun. 5, 1980).

⁹⁷ G.A. Res. 31/106, ¶ 8, U.N. Doc. A/RES/31/106 (Dec. 16, 1976). See also G.A. Res. 3092 (XXVIII) (B), ¶ 8, U.N. Doc. A/RES/3092 (XXVIII) (Dec. 7, 1973); G.A. Res. 3240 (XXIX) (A), ¶ 8, U.N. Doc. A/RES/3240 (XXIX) (Nov. 29, 1974); G.A. Res. 3525 (XXX) (A), ¶ 10, U.N. Doc. A/RES/3525 (XXX) (Dec. 15, 1975); G.A. Res. 32/91 (C), ¶ 8, U.N. Doc. A/RES/32/91 (Dec. 13, 1977); G.A. Res. 33/113 (A), ¶ 8, U.N. Doc. A/RES/33/113 (A) (Dec. 18, 1978); G.A. Res. 34/90 (A), ¶ 8, U.N. Doc. A/RES/34/90 (A) (Dec. 12, 1979); G.A. Res. 35/122 (C), ¶ 8, U.N. Doc. A/RES/35/122 (C) (Dec. 11, 1980); G.A. Res. 36/147 (C), ¶ 11, U.N. Doc. A/RES/36/147 (C) (Dec. 16, 1981); G.A. Res. 37/88 (C), ¶ 11, U.N. Doc. A/RES/37/88 (C) (Dec. 9, 1982); G.A. Res. 38/79 (D), ¶ 13, U.N. Doc. A/RES/38/79 (D) (Dec. 15, 1983); G.A. Res. 39/95 (D), ¶ 13, U.N. Doc. A/RES/39/95 (D) (Dec. 14, 1984); G.A. Res. 40/161 (D), ¶ 15, U.N. Doc.

General Assembly resolution ES-7/4 of 1982 urged Governments “[to] renounce the policy of providing Israel with military, economic and political assistance, thus discouraging Israel from continuing its aggression, occupation”.⁹⁸

By recognizing Jerusalem as the capital of Israel and/or locating embassies in Jerusalem, States are violating Security Council resolution 2334 which required them to distinguish in their dealings between the territory of the State of Israel and the occupied territories of 1967. In addition, the conduct of any State that relocated its embassy to Jerusalem or otherwise maintained its embassy in Jerusalem after the initiation of the construction of the wall and its associated regime (which is also built in and around Jerusalem) is aiding or assisting this specific internationally wrongful act. The I.C.J. ruled in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion of 2004:

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁹⁹

The Security Council and the General Assembly have in other situations issued several resolutions in which they called upon all States to refrain

A/RES/40/161 (D) (Dec. 16, 1985); G.A. Res. 41/63 (D), ¶ 16, U.N. Doc. A/RES/41/63 (D) (Dec. 3, 1986); G.A. Res. 42/160 (D), ¶ 16, U.N. Doc. A/RES/42/160 (D) (Dec. 8, 1987); G.A. Res. 43/58 (A), ¶ 18, U.N. Doc. A/RES/43/58 (A) (Dec. 6, 1988); G.A. Res. 44/48 (A), ¶ 19, U.N. Doc. A/RES/44/48 (A) (Dec. 8, 1989); G.A. Res. 45/74 (A), ¶ 19, U.N. Doc. A/RES/45/74 (A) (Dec. 11, 1990); G.A. Res. 46/47 (A), ¶ 19, U.N. Doc. A/RES/46/47 (A) (Dec. 9, 1991); G.A. Res. 47/70 (A), ¶ 15, U.N. Doc. A/RES/47/70 (A) (Dec. 14, 1992).

⁹⁸ G.A. Res. ES-7/4, ¶ 9 (b), U.N. Doc. A/RES/ES-7/4 (Apr 28, 1982).

⁹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131 ¶ 163 (3) (July, 9).

from providing any assistance to the colonial powers, occupying powers and/or racist illegal regimes. Security Council resolution 218 of 1965 “[r]equests all States to refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the people of the Territories under its administration”.¹⁰⁰ General Assembly resolution 2507(XXIV) of 1969 “urges all States . . . to withhold or desist from giving further military and other assistance to Portugal which enables it to pursue the colonial war in the Territories under its domination.”¹⁰¹ Security Council resolution 216 of 12 November 1965 called upon all States not to render aid or assistance to the racist minority regime in Southern Rhodesia.¹⁰² Security Council resolution 277 of 1970 noted that “[t]he Governments of the Republic of South Africa and Portugal have continued to give assistance to the illegal regime of Southern Rhodesia, thus diminishing the effects of the measures decided upon by the Security Council.”¹⁰³

In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion, the I.C.J. ruled “that States Members of the United Nations are under obligation . . . to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration”;¹⁰⁴ Security Council resolution 301 of 1971 agreed with the I.C.J. as expressed in paragraph 133 of its advisory opinion and called upon Member States not to lend support or assistance to the illegal presence and administration of South Africa in Namibia.¹⁰⁵

¹⁰⁰ S.C. Res. 218, ¶ 6, U.N. Doc. S/RES/218 (Nov. 23, 1965).

¹⁰¹ G.A. Res. 2507 (XXIV), ¶ 13, U.N. Doc. A/RES/2507 (XXIV) (Nov. 21, 1969).

¹⁰² S.C. Res. 216, ¶ 2, U.N. Doc. S/RES/216 (Nov. 12, 1965).

¹⁰³ S.C. Res. 277, Preamble, U.N. Doc. S/RES/277 (Mar. 18, 1970).

¹⁰⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution (1970)*, Advisory Opinion, 1971 I.C.J. 58 ¶ 133 (2) (Jun. 21).

¹⁰⁵ S.C. Res. 301, ¶ 6 and ¶ 7, U.N. Doc. S/RES/301 (Oct. 20, 1971).

3.6. THE OBLIGATION TO RENDER AID OR ASSISTANCE TO THE PALESTINIAN PEOPLE IN REALIZATION OF SELF-DETERMINATION

With the prohibition on rendering aid or assistance to Israel's policies of annexation and colonization in mind, the General Assembly issued several resolutions calling for provision of assistance and/or support for the Palestinian people in realization of their right to self-determination. For example, General Assembly resolution 2649 of 1970 provides that it "[r]ecognizes the right of peoples under colonial and alien domination in the legitimate exercise of their right to self-determination to seek and receive all kinds of moral and material assistance, in accordance with the resolutions of the United Nations and the spirit of the Charter of the United Nations";¹⁰⁶ General Assembly resolution 2649 further "[c]ondemns those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine"¹⁰⁷; General Assembly resolution 3236 (XXIX) of 1974 "[r]eaffirm[ed] the inalienable rights of the Palestinian people in Palestine, including: (a) The right to self-determination without external interference; (b) The right to national independence and sovereignty";¹⁰⁸ General Assembly resolution 72/160 of 2017 "[u]rge[d] all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination".¹⁰⁹

The relocation of the United States of America and the Republic of Guatemala of their embassies from Tel Aviv to Jerusalem are internationally wrongful acts in breach of their legal interests and obligations to protect the erga omnes right of self-determination of the Palestinian people. One of the purposes of the United Nations as

¹⁰⁶ G.A. Res. 2649, ¶ 2, U.N. Doc. A/RES/2649 (Nov. 30, 1970).

¹⁰⁷ *Id.* para 5.

¹⁰⁸ G.A. Res. 3236, ¶ 1, U.N. Doc. A/RES/3236 (Nov. 22, 1974).

¹⁰⁹ G.A. Res. 72/160, ¶ 2, U.N. Doc. A/RES/72/160 (Dec. 19, 2017).

prescribed in its Charter of 1945 is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”;¹¹⁰ in *East Timor (Portugal v. Australia)*, the I.C.J. provided that “[i]n the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable”.¹¹¹ In *Barcelona Traction, Light and Power Company, Limited*, the I.C.J. provided that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.¹¹²

The transfer of Israeli civilians into the occupied territory of Palestine, the annexation of parts of the occupied territory of Palestine and the construction of the wall and its associated regime are but few measures which impede the Palestinian exercise to their right to self-determination and sovereignty over their occupied State. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, the I.C.J. provided “[t]hat construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.”¹¹³

3.7. RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

The execution of the Jerusalem Embassy Act by the U.S. President proclamation in December 2017 combined with his conduct of relocating the U.S. embassy from Tel Aviv to Jerusalem in May 2018 entails the responsibility of the United States of America for its internationally

¹¹⁰ U.N. Charter, art. 1, para 2, Jun. 26, 1945.

¹¹¹ *East Timor (Port. v. Austl.)*, 1995 I.C.J. ¶ 29 (June 27).

¹¹² *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. ¶ 33 (Feb. 5).

¹¹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 184 ¶ 122 (Jul. 9).

wrongful act under the customary international law on State responsibility. Similarly, the decision of Jimmy Morales, President of Guatemala to relocate the Guatemalan embassy from Tel Aviv to Jerusalem in March 2018 combined with the implementation of his decision in May 2018, incurs the responsibility of the Republic of Guatemala for the internationally wrongful act under the customary international law on State responsibility. Article 2 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts mentions the elements of an internationally wrongful act of a State: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation”.¹¹⁴ Article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that

[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.¹¹⁵

The conduct of the USA and Guatemala in relocating their embassies from Tel Aviv to Jerusalem in May 2018 (which have hitherto maintained their embassies in Jerusalem) is a violation of their obligations under international diplomatic law. This is also true of other States who have formerly done so, i.e., Costa Rica in 1982 and El Salvador and 1984 and Paraguay in May 2018. The infraction of the rule of customary international diplomatic law which prohibits States which are

¹¹⁴ Report of the International Law Commission to the General Assembly, 53rd Sess., 2001, art. 2, U.N. Doc. A/56/10. reprinted in [2007] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

¹¹⁵ *Id.* article 4.

diplomatically represented in Israel, from establishing or maintaining their embassies in Jerusalem incurs State responsibility under the customary international law of State responsibility. In *the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the I.C.J. “deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule”.¹¹⁶

The United States of America and Guatemala are also under a legal obligation to make adequate reparation in the forms of restitution i.e, reestablishing their embassies to Tel Aviv and give satisfaction to the State of Palestine. This without prejudice to Israel’s obligation to provide full reparation for its internationally wrongful acts under international law. The P.C.I.J. furnished in the *Case Concerning the Factory at Chorzów (Merits)* that: “[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation”.¹¹⁷

By relocating their embassies to Jerusalem, the United States of America and the Republic of Guatemala are internationally responsible for rendering aid or assistance to Israel’s policies of annexation and colonization under the customary international law on State responsibility.¹¹⁸ In *the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the I.C.J. ruled that “the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under

¹¹⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 131, ¶ 186 (June 27).

¹¹⁷ *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, ¶ 73 (Sept. 13).

¹¹⁸ On aid or assistance see for example, Report of the International Law Commission to the General Assembly, 53rd Sess., 2001, *supra* note 114, art. 16 and art. 41 at 65-67, 113-116.

customary international law”.¹¹⁹ In addition, the act of the relocation of the United States of America and the Republic of Guatemala’s embassies to Jerusalem is a breach of their obligation to protect the Palestinian people erga omnes right to self-determination and incurs responsibility of both States for their internationally wrongful acts. Both States have also violated their obligations under international law in that they have not rendered assistance to the Palestinian people so as to realize their right to self-determination.

3.8. THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

The United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO) adopted several resolutions where it affirmed the occupying power illegal measures in the Holy City of Jerusalem including its archaeological excavations. For example, the 1968 UNESCO’s General Conference resolution 15C/3.343 called upon Israel “(a) to preserve scrupulously all the sites, buildings, and other cultural properties, especially in the old city of Jerusalem; (b) to desist from any archaeological excavations, transfer of such properties and changing of their features on their cultural and historical character”.¹²⁰ The 1974 UNESCO’s General Conference resolution 3.427 condemned Israel for its persistent conduct of altering the historical features of Jerusalem and its excavations following its illegal occupation which are regarded contrary to the aims of the UNESCO.¹²¹ The 1978 UNESCO’s General Conference resolution 4/7.6/13 condemned the Israeli occupying authorities infringement of both UNESCO and United Nations resolutions and its

¹¹⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 131, ¶ 292(3) (June 27).

¹²⁰ UNESCO General Conference Fifteenth Session Paris, Fr., October 15–November 20, 1968, Sciences, Human Sciences and Culture, Preservation and Presentation of the Cultural Heritage, ¶ 1, U.N. Doc., 15C/RES/3.343 (Nov. 20, 1968).

¹²¹ UNESCO General Conference Eighteenth Session Paris, Fr., October 17–November 23, 1974, Social Sciences, Humanities and Culture, Cultural Heritage, Implementation of the Resolutions of the General Conference and Decisions of the Executive Board Concerning the Protection of Cultural Property in Jerusalem, ¶ 2, U.N. Doc., Res. 3.427 (Nov. 21, 1974).

measures to change and Judaize the historic and cultural configuration of Jerusalem.¹²² By affirming the illegality of the Israeli occupation per se, as well as its illegal measures in Jerusalem, the UNESCO as one of the specialized agencies of the United Nations, is complying with its obligations under international law of not rendering aid or assistance to Israel's colonization and annexation policies. By its resolutions on Jerusalem, the UNESCO is also affirming applicable principles of international law on the illegality of the Israeli occupation and its illegal measures. It is worth pointing out that the Old City of Jerusalem and its Walls has been on the UNESCO's In-Danger List since 1982.¹²³

3.9. STATUS OF CONSULATES IN JERUSALEM

Few States have their consulates established in Jerusalem such as the French consulate-general, the Turkish consulate-general, the British consulate-general and Belgium consulate-general. These States' consulates in Jerusalem maintain their embassies in Tel Aviv. The consuls in Jerusalem do not receive accreditation from the President of Israel.¹²⁴ Consuls, who were already resident in the city during Mandatory Palestine, did not recognize Israeli or Jordanian rule of the city.¹²⁵ The existence of consulates in Jerusalem does not appear to be inconsistent with customary consular international law, as long as the heads of the consular posts exequaturs are not granted by Israel, the occupying power, and as long as the heads of the consular posts do not explicitly or implicitly recognize Israel's occupation, annexation and other illegal measures in Jerusalem including the 1980 Basic law. If/when any

¹²² UNESCO General Conference Twentieth Session January 1, 1978, Jerusalem/Cultural Heritage, ¶ 3, U.N. Doc., Res. 4/7.6/13 (Jan. 1, 1978).

¹²³ ICOMOS World Heritage in Danger, Compendium II- A compendium of key decisions on the conservation of cultural heritage properties on the UNESCO List of World Heritage in Danger, 5 (April 2009), <https://whc.unesco.org/document/106357>.

¹²⁴ United Nations, Prepared for, and under the guidance of, the Committee of the Exercise of the Inalienable Rights of the Palestinian People, *The Status of Jerusalem* (New York: United Nations, 1997), p. 9.

¹²⁵ Meron Benvenisti, *Jerusalem the Torn City* (Minneapolis USA: the University of Minnesota Press, 1976), p.15.

consul-general in Jerusalem exequatur is granted by Israel, it would be a violation of State practice and the element of *opinio juris*. It would then constitute a violation of customary international consular law as codified in the preambular paragraph six of the Vienna Convention on Consular Relations of 1963. Previously the United States of America consulate had its premises in Jerusalem and the embassy in Tel Aviv. However, on 18 October 2018, in the aftermath of the relocation of the U.S. embassy from Tel Aviv to Jerusalem, the U.S. Secretary of State announced the merging of both the U.S. embassy in Jerusalem and U.S. consulate-general in Jerusalem into a single diplomatic mission and requested the U.S. Ambassador to guide the merger.¹²⁶ That's one less consulate in Jerusalem on the 4th of March 2019.

4. COMPARATIVE ANALYSIS OF SOUTHERN RHODESIA (ZIMBABWE), SOUTH WEST AFRICA (NAMIBIA) AND KUWAIT

The legal obligation on States to withdraw existing diplomatic and/or consular missions, or otherwise not to establish diplomatic and/or consular missions in certain territories, has a precedent in Southern Rhodesia (Zimbabwe) and South West Africa (Namibia). The following section will explore Southern Rhodesia (Zimbabwe) and South West Africa (Namibia) case studies and further discuss the status of diplomatic and/or consular missions in Kuwait in the aftermath of the First Gulf War that resulted in the Iraqi occupation and annexation of the territory of Kuwait. The aim of the inclusion of the above-mentioned three specific case studies is to analyze the particularity of each situation and assist in determining the merits of the pending case (*Palestine v. United States of America*).

¹²⁶ Press Statement, Michael R. Pompeo, Sec'y of State of Washington, D.C., On the Merging of U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem, U.S. DEPARTMENT OF STATE (Oct. 18, 2018), <https://www.state.gov/secretary/remarks/2018/10/286731.htm>.

4.1. SOUTHERN RHODESIA (ZIMBABWE)

As a result of the white minority regime's proclamation of the independence of Southern Rhodesia on the 11th of November 1965, Security Council issued resolution 216 on the 12th of November 1965 in which it condemned the unilateral declaration of independence and further called upon all States not to recognize this racist minority regime.¹²⁷ Security Council resolution 217 of 20 November 1965 called upon all States not to entertain diplomatic or other relations with the authorities of this illegal regime.¹²⁸ Security Council resolution 253 of 29 May 1968 laid an emphasis on States' obligations to withdraw all consular and trade representation in Southern Rhodesia in addition to the obligation provided under Paragraph 6 of Security Council resolution 217 on not entertaining diplomatic or other relations.¹²⁹ Security Council resolution 253 further established a committee to, among other things, examine reports on the implementation of this resolution.¹³⁰

Prior to the illegal declaration of independence by the minority regime, about twenty States maintained some form of consular relations with Southern Rhodesia: while some closed their consulates, others did not.¹³¹ In compliance with the Committee's request contained in paragraph 9 of its first report (S/8954), a note verbale dated on 7 January 1969 was sent by the United Nations Secretary-General to the Governments of Belgium, Denmark, Federal Republic of Germany, France, Greece, Italy, the Netherlands, Norway, Portugal, South Africa, Switzerland and the United States of America as they have maintained a consulate or accredited diplomatic representative in Southern Rhodesia.¹³² The Secretary-General drew attention to operative

¹²⁷ S.C. Res. 216, *supra* note 102, ¶ 1 and ¶ 2, .

¹²⁸ S.C. Res. 217, paras 1, 2, U.N. Doc. S/RES/217 (Nov. 12, 1965).

¹²⁹ S.C. Res. 253, para 6, U.N. Doc. S/RES/253 (May 29, 1968).

¹³⁰ *Id.* para 20.

¹³¹ C. Rep. No. 4, para 71, Established in Pursuance of S/RES/253 (May 29, 1968), Twenty-Sixth Year Special Supplement No. 2, S/10229 and Add. 1 and 2, United Nations New York, p. 17.

¹³² C. Rep. No. 2, Established in Pursuance of S/RES/253 (May 29, 1968): Annex VIII, Consular and Trade Representation in Southern Rhodesia, S/9252/Add.1 (13 June, 1969), p.1.

paragraph 10 of resolution 253 (1968) and operative paragraph 6 of resolution 217 (1965) where he sought the comments of these Governments in light of the provision under resolution 253 (1968).¹³³ As of 6 June 1969, all States except South Africa had given responses on this matter.¹³⁴

An analysis of the 11 notes verbales that were sent to the Secretary-General in response to his note verbale reveals that all States demonstrated that the presence of their consular posts was essential to render assistance to their respective nationals residing in the territory of Southern Rhodesia.¹³⁵ All the notes verbales of the States affirmed either explicitly or implicitly that they had no intention to close their consulates in Southern Rhodesia.¹³⁶ In addition, States either explicitly or implicitly claimed that the wording of paragraph 10 of resolution 253 (1968) is seen as a form of recommendation and not binding in nature.¹³⁷ The overwhelming majority of the responses of the States affirmed that the presence of their consulates should in no way be interpreted as recognizing the illegal minority regime of Southern Rhodesia.¹³⁸ The overwhelming majority of the responses further affirmed that the consuls-general exequaturs were granted by the British sovereign and were not granted by the minority regime.¹³⁹

By way of example, in its note verbale of 1969, Norway stated that it maintained an honorary consulate in Salisbury (in 1982 renamed Harare) where the honorary consul exequatur was granted by the British Sovereign and further stated that since the unilateral declaration of independence in 1965, the honorary consul refrained from any relations or contacts with the illegal regime in Southern Rhodesia.¹⁴⁰ In its note

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ The texts of the Note verbale are found under Annex VIII, *supra* note 132, Second Report of the Committee Established in Pursuance of S.C. Res. 253 (1968), pp. 2-9.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Note verbale from the Permanent Representative of Norway (26 March, 1969), Annex VIII, *supra* note 132, p.5.

verbale of 1969, Switzerland invoked its neutrality to evade subscribing to the compulsory United Nations sanctions and affirmed that a Swiss Consulate was maintained at Salisbury.¹⁴¹ In its note verbale of 1969, the United States of America decided not to remove its consular staff in Salisbury and affirmed that all staff exequaturs were granted by the British Crown and had no official connexion with the minority regime.¹⁴² Portugal's response was severe as it stated clearly in its note verbale that it did not recognize the invoked United Nations Security Council resolutions as valid where it also complained that it had not received any replies concerning its several requests for clarifications on the invoked Security Council resolutions.¹⁴³ Portugal affirmed that it maintains a consulate-general in Salisbury headed by a consul-general.¹⁴⁴ In addition to the diplomatic representation of South Africa, Portugal drew attention to the other existing and functioning consular representations in Southern Rhodesia (which the Secretary-General has already referred to in his note verbale) and further indicated that there exists a German consulate in Bulawayo, Austrian consulate in Salisbury and an official representation of the United Kingdom in Salisbury.¹⁴⁵

The turning point in Southern Rhodesia was on the 2nd of March 1970 when the minority illegal regime granted it a republican status. The Security Council condemned the proclamation of republican status in its resolution 277 of 18 March 1970,¹⁴⁶ and further decided in accordance with Article 41 of the United Nations Charter that Member States shall “[i]mmediately sever all diplomatic, consular, trade, military and other relations that they may have with the illegal régime in Southern Rhodesia, and terminate any representation that they may maintain in the Territory”.¹⁴⁷ In its Fourth Report of 1971, the Committee Established in

¹⁴¹ Note verbale from the Permanent Observer of Switzerland (21 January, 1969), p.7

¹⁴² Note verbale from the Representative of the United States of America (Feb. 14, 1969), p. 8.

¹⁴³ Letter from the Minister for Foreign Affairs of Portugal (Feb. 18, 1969) (S/9026), *Id.* p.6.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* pp. 6 & 7.

¹⁴⁶ S.C. Res. 277, *supra* note 103, para 3, U.N. Doc., S/RES/277 (18 March, 1970).

¹⁴⁷ *Id.* ¶ 9(a).

Pursuance of Security Council Resolution 253 (1968) provided that all States with the exception of South Africa and Portugal have closed their consular offices in Southern Rhodesia.¹⁴⁸ On 10 March 1970, the Minister for Foreign Affairs of South Africa announced that the South African representation would not be withdrawn and that the representative of South Africa was accredited to the Rhodesian Minister for Foreign Affairs and not to the Head of State.¹⁴⁹

On 30 April 1970, Portugal announced that its consul-general in Salisbury would be withdrawn: he in fact departed on 9 May 1970, however the Portuguese consulate was operating with an acting consul-general who was assuming consular functions.¹⁵⁰ The fact that Portugal withdrew its consul-general but kept its consulate operating with an acting consul was a violation of the relevant Security Council resolutions, State practice and *opinio juris*, which prohibits maintaining or otherwise establishing diplomatic missions or consulates in Southern Rhodesia. In its eighth report of 1976, the committee noted that it received information that in August 1975, the Portuguese consulates in Umtali and Bulawayo had been closed.¹⁵¹ The Committee has received no further information indicating that any other country than South Africa maintains consular offices in Southern Rhodesia.¹⁵²

After Portugal's closure of its consulates, South Africa remained the only diplomatically represented State in Southern Rhodesia. South Africa among other countries rendered aid and assistance to the illegal and racist regime of Southern Rhodesia including in the diplomatic field. The fall of the Southern Rhodesia regime with which South Africa shared

¹⁴⁸ Fourth Report of the Committee Established in Pursuance of S.C. Res. 253 (1968), ¶ 72, Twenty-Sixth Year Special Supplement No. 1, S/10229 and Add.1 and 2, United Nations: New York (1971), p.17.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ¶ 73.

¹⁵¹ Eighth Report of the Committee Established in Pursuance of S.C. Res. 253 (1968), ¶ 75, Thirty-First Year Supplement No. 2, S/11927/Rev.1 (Vol. II), United Nations: New York (1976), p.18.

¹⁵² Tenth Report of the Committee Established in Pursuance of S.C. Res. 253 (1968), ¶114, Thirty-Third Year Special Supplement No. 2, Volume I, S/12529/Rev.1, United Nations: New York (1987), p. 36.

strategic interests and similar practices, would have threatened its own regime, as well as apartheid practices in both South Africa and South West Africa. The fall of the Southern Rhodesia regime led by Ian Smith in 1979 meant that sooner or later there would be a subsequent falling of the South African regime and its occupation of South West Africa (Namibia). The prohibition on establishing or maintaining diplomatic or consular missions in Southern Rhodesia (Zimbabwe) was one of the measures which the Security Council established as a result of the white minority regime's taking of power and its conduct of racial discrimination and segregation against the African people who constituted the majority and whom were for years deprived of their right to self-determination.

4.2. SOUTH WEST AFRICA (NAMIBIA)

After the termination of South Africa Mandate over South West Africa (Namibia) by the General Assembly in its resolution 2145 (XXI) on the 27th of October 1966,¹⁵³ South Africa did not withdraw its forces from the territory of South West Africa (Namibia). On the contrary, South Africa kept its military and police presence in South West Africa and practiced apartheid on its territory. The General Assembly and Security Council issued several resolutions addressing the South African occupation of South West Africa. For example, General Assembly resolution 2325 (XXII) declared that the continued presence of South African Authorities in South West Africa is a violation of its territorial integrity and called upon the former to withdraw from the latter's territory unconditionally and without delay.¹⁵⁴ General Assembly 2325 (XXII) further called upon all Member States to take effective economic and other measures to ensure withdrawal of the South African administration from South West Africa.¹⁵⁵

¹⁵³ Gen. Ass. Res. No. 2145 (XXI), ¶ 4 (27 October, 1966).

¹⁵⁴ Gen. Ass. Res. No. 2325 (XXII), ¶ 4 and 5, 1635th Plenary Meeting (16 December, 1967).

¹⁵⁵ *Id.* 6.

Paragraph 2 of Security Council resolution 276 of 1970 “declare[d] that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts Mandate are illegal and invalid”.¹⁵⁶ Security Council resolution 276 further “[c]all[ed] upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution”.¹⁵⁷ With resolution 284 adopted on 29 July 1970, the Security Council requested an advisory opinion from the I.C.J. on the following question: “What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?”¹⁵⁸ In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion of 1971, the I.C.J. provided that

Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.¹⁵⁹

The aforementioned paragraph adduces three obligations: firstly, abstaining from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia. Secondly, abstaining from sending consular agents to Namibia and withdrawing

¹⁵⁶ S.C. Res. 276, ¶ 2, U.N. Doc., S/RES/273 (Jan. 30, 1970).

¹⁵⁷ *Id.* 5.

¹⁵⁸ S.C. Res. 284, ¶ 1, U.N. Doc, S/RES/284 (July 29, 1970).

¹⁵⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding S.C. Res. (1970)*, Advisory Opinion, 1971 I.C.J. ¶ 123.

any such agents already present there. Thirdly, the affirmation that any maintenance of diplomatic or consular relations with South Africa excludes any recognition of the latter's authority over Namibia.

4.3. KUWAIT

On the 2nd of August 1990, Iraqi military forces occupied Kuwait and annexed it on the 8th of August 1990. The Emir of Kuwait and members of his cabinet fled to neighboring Saudi Arabia where they acted as a Government in exile. Security Council Resolution 660 of 2 August 1990 condemned the Iraqi invasion and demanded Iraq to withdraw its troops unconditionally and immediately¹⁶⁰ while Security Council resolution 662 of 9 August 1990 decided that the annexation of Kuwait has no legal validity and is null and void.¹⁶¹ Security Council resolution 662 further “[c]alls upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation”.¹⁶² On 9 August Iraq ordered the diplomatic and consular missions in Kuwait to close down by 24th August 1990.¹⁶³ Security Council resolution 664 of 18 August 1990 “demand[ed] that the Government of Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel”.¹⁶⁴

The Security Council did not call upon States to withdraw their diplomatic and consular missions from Kuwait in the aftermath of the Iraqi occupation and annexation. On the contrary, it was Iraq, whose acts of intimidation against diplomatic agents and the heads of consular posts as well as its forcible measures against the premises of the diplomatic and

¹⁶⁰ S.C. Res. 660, ¶ 1, 2, U.N. Doc. S/RES/660 (Aug. 2, 1990).

¹⁶¹ S.C. Res. 662, ¶ 1, U.N. Doc., S/RES/662 (Aug. 9, 1990).

¹⁶² *Id.* 2.

¹⁶³ Interim Report to the Secretary-General by the United Nations Mission Led by Mr. Aedulrahim a. Farah, Former Under-Secretary-General, Assessing the Losses of Life Incurred During the Iraqi Occupation of Kuwait, as well as Iraqi Practices Against the Civilian Population in Kuwait, 40, S/22536 (April 29, 1991).

¹⁶⁴ S.C. Res. 664, ¶ 3, U.N. Doc., S/RES/664 (Aug. 18, 1990).

consular missions that made States withdraw their diplomatic agents and heads of consular posts. The expulsion of the diplomatic agents and heads of consular posts who were associated with the Kuwaiti Government purported to cease the legal personality of the State of Kuwait. Security Council resolution 667 of 16 September 1990 demanded Iraq to comply with its obligations under relevant Security Council resolutions, the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963 and international law.¹⁶⁵

Iraq, the occupying power, acted in contravention of the long-standing rules of inviolability and immunity as enshrined under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations of 24 April 1963 and customary international law. Security Council resolution 674 of 29 October of 1990 demanded Iraq to ensure access to food, water and basic services to, among others, the personnel of diplomatic and consular missions in Kuwait.¹⁶⁶ In addition, Iraq, neither acquired any legal authorization to cut-off diplomatic relations with States diplomatically represented in Kuwait nor acquired any legal authorization to declare diplomatic agents or heads of consular posts as *persona non grata*. By its forcible measures against the diplomatic agents, heads of consular posts and their premises (which included restrictions on access of food, water and basic services), Iraq succeeded in expelling diplomatic and consular agents which led to the forcible closure of these premises.

Unlike Kuwait which had an institutionalized Government but fled to neighboring Saudi Arabia, the situations in South West Africa and Southern Rhodesia were examples of liberation movements resisting racist regimes and/or occupying powers. Palestine has been an example of liberation movement represented by the Palestine Liberation Organization. However, the Palestine Liberation Organization has

¹⁶⁵ S.C. Res. 667, ¶ 3, U.N. Doc., S/RES/667 (Sept. 16, 1990).

¹⁶⁶ S.C. Res. 674, ¶ 5, U.N. Doc., S/RES/674 (Oct. 29, 1990).

gradually revived the international legal personality of its de jure statehood even though it still does not have sovereignty over its territory, borders, territorial waters, internal waters or aquifer water, or airspace due to the Israeli colonial occupation.¹⁶⁷ In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the I.C.J. provided that “[t]he basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2. Paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory”.¹⁶⁸

5. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS-THE MERITS

Preambular paragraph five of the Vienna Convention on Diplomatic Relations affirmed on the applicability of the rules of customary international law on questions not expressly regulated by the present convention: “Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention”.¹⁶⁹ The Drafting history of this paragraph illustrates that Switzerland proposed its inclusion in the preamble.¹⁷⁰ Preambular paragraph six of the Vienna Convention on Consular Relations of 1963 is identical to preambular paragraph five of the Vienna Convention on Diplomatic Relations which asserts the applicability of the rules of customary international law on questions not

¹⁶⁷ In 2005, Israel had withdrawn its military forces along with its withdrawal and/or relocation of its civilian settlers population from the Gaza Strip. Although Israel does not hold control over the Rafah crossing between Gaza Strip and Egypt in the aftermath of its withdrawal, the Israeli army of occupation (through its Air Force) has still the effective control over its airspace.

¹⁶⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, ¶ 212 Merits, Judgment, 1986 I.C.J. 111 (June 27).

¹⁶⁹ Vienna Convention on Diplomatic Relations, *supra* note 89, Preamble.

¹⁷⁰ U.N Conference on Diplomatic Intercourse and Immunities, Consideration and Voting Upon the Draft Articles and the Amendments and Proposals Relating Thereto (italic), ¶ 22, U.N Doc. A/CONF.20/L.2 (Vol. II) (Apr. 21, 1961).

explicitly regulated by the present convention.¹⁷¹ The second paragraph of Article 31 of the Vienna Convention on the Law of Treaties provides that the context for the purpose of the interpretation of a treaty includes the text, including its preamble and annexes.¹⁷² The fourth paragraph of Article 31 of the Vienna Convention on the Law of Treaties mentions that “[a] special meaning shall be given to a term if it is established that the parties so intended”.¹⁷³ Article 32 of the Vienna Convention on the Law of Treaties provides that

supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.¹⁷⁴

In the *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, the I.C.J. provided that the principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are a codification of existing customary international law.¹⁷⁵ In the *Polish Postal Service in Danzig* Advisory Opinion, the P.C.I.J. provided in 1925 that “[i]t is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd”.¹⁷⁶ In the *Competence of the General Assembly for the Admission of a State to the United Nations* advisory opinion of 1950, the I.C.J. provided on interpretation and application of the provisions of a treaty that “[i]f . . . the words in their natural and ordinary meaning are ambiguous or lead to

¹⁷¹ Vienna Convention on Consular Relations, Preamble, Apr. 22, 1963, 596 U.N.T.S. 261.

¹⁷² Vienna Convention on the Law of Treaties, Art.1, ¶ 2, May 23, 1969, 1155 U.N.T.S. 331.

¹⁷³ *Id.* Art. 31(4).

¹⁷⁴ *Id.* Art. 32.

¹⁷⁵ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Seneg.)*, Judgment, 1991 I.C.J. 70, ¶ 48 (November 12).

¹⁷⁶ *Polish Postal Service in Danzig (Poland v. Free City of Danzig)*, Advisory Opinion, 1925 P.C.I.J. ¶ 113 (ser. B) No. 11 (May 16).

an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words”.¹⁷⁷

The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations regulate the diplomatic and consular relations between the sending State and the receiving State. Article 2 of the Vienna Convention on Diplomatic Relations provides that “The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent”.¹⁷⁸ The Draft Articles on Diplomatic Intercourse and Immunities with commentaries 1958 provides that

[t]he most efficient way of maintaining diplomatic relations between two States is for each to establish a permanent diplomatic mission (i.e., an embassy or a legation) in the territory of the other; but there is nothing to prevent two States from agreeing on other methods of conducting their diplomatic relations, for example, through their missions in a third State.¹⁷⁹

The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations do not explicitly regulate situations such as the conduct of the sending States in an occupied and/or in sui generis territories. If they are present, should the sending States withdraw or not withdraw their diplomatic missions and/or consular posts? This will be governed by the rules of customary international diplomatic or consular law (if existing), which the preambles of both conventions have asserted on and must be examined on a case-by-case basis. In the occupied territory of Kuwait, there was no rule of customary international law that dictated the sending States to withdraw from

¹⁷⁷ Competence of Assembly regarding Admission to the United Nations, Advisory Opinion, 1950 I.C.J. 8 (March 3).

¹⁷⁸ Vienna Convention on Diplomatic Relations, *supra* note 89, Art. 2.

¹⁷⁹ Draft Articles on Diplomatic Intercourse and Immunities with commentaries, 1958 Yearbook of the International Law Commission, vol. II 90.

Kuwait during its occupation. In the absence of customary international law and/or Security Council resolutions and/or General Assembly resolutions (that function as customary law), the sending States have the discretion to voluntarily withdraw or not withdraw their diplomatic or consular missions. It was Iraq in its capacity as the occupying power that violated the sending States' discretion where it forcibly made them withdraw their diplomatic and/or consular missions from an occupied territory. One can also draw attention to diplomatic missions or consular missions of the sending States which were already located in a territory before its occupation or were established in the aftermath.

The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations are examples of a treaty law that are reflecting customary international law. In the *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), the I.C.J. pronounced on the customary international law nature of the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations “[o]n these points, the Vienna Convention on Diplomatic Relations reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations”.¹⁸⁰ In addition, this treaty law is also governed by customary international law in areas that are not explicitly regulated by these conventions.

In the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the I.C.J. provided that the New York Convention on Special Missions of 8 December 1969 and the Vienna Convention on Diplomatic Relations of 18 April 1961 “provide useful guidance on certain aspects of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that

¹⁸⁰ *Arrest Warrant of 11 April (Dem. Rep. of Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, ¶ 52 (Feb. 14).

the Court must decide the questions relating to the immunities”¹⁸¹. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the I.C.J. provided that Croatia

must show that its dispute with Serbia regarding these events is a dispute relating to the interpretation, application or fulfilment of the Genocide Convention. It is not enough that these events may have involved violations of the customary international law regarding genocide; the dispute must concern obligations under the Convention itself.¹⁸²

Similarly, the Palestine dispute with the United States of America involves violations of customary international diplomatic law (the legal obligation imposed on the Sending State represented in Israel not to establish an embassy in Jerusalem), which relates to the interpretation and application of the Vienna Convention on Diplomatic Relations. The I.C.J. will determine breaches of the Vienna Convention on Diplomatic Relations based on customary international diplomatic law, the Vienna Convention on Diplomatic Relations, customary international law on State responsibility for the internationally wrongful acts and the customary provisions of the Vienna Convention on the Law of Treaties. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the I.C.J. provided that

[i]n order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international

¹⁸¹ *Id.*

¹⁸² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (H.R. v. R.S.)*, Judgment, 2015 I.C.J. 48, ¶ 89 (Feb. 3).

law on treaty interpretation and on responsibility of States for internationally wrongful acts.¹⁸³

If there exists State practice evidenced by the element of *opinio juris sive necessitatis* and/or Security Council resolutions and/or General Assembly resolutions that functions as evidence for establishing the existence of a rule or the emergence of an *opinio juris* that dictates States to withdraw embassies from or otherwise not to establish embassies in a certain territory (occupied and/or *sui generis*), the sending States become restricted in their diplomatic action in this fundamental branch of public international law as seen in the examples of Palestine, Southern Rhodesia and South West Africa. Jerusalem is a situation of *sui generis* territory as the city as it is now, has been unilaterally declared as the capital of Israel which consists of East Jerusalem which international law considers it an occupied and annexed territory, and West Jerusalem which international law does not consider it as an occupied territory. Customary international diplomatic law puts the unilaterally declared boundaries of Jerusalem within the range of prohibition on establishing diplomatic missions by the sending States which are diplomatically represented in Israel.

Article 21 of the Vienna Convention on Diplomatic Relations provides that “[t]he receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way”.¹⁸⁴ The 1958 commentary on the Draft Articles on Diplomatic Intercourse and Immunities (Draft Article 19) provides that

[t]he laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary to it. For that reason the Commission has inserted in the draft an article which makes it obligatory for the receiving State to

¹⁸³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb & Montenegro), Judgment, 2007 I.C.J. 105, ¶ 149.

¹⁸⁴ Vienna Convention on Diplomatic Relations, *supra* note 89, Art. 21.

ensure the provision of accommodation for the mission if the latter is not permitted to acquire it.¹⁸⁵

The operative words are the “receiving State territory” which implicitly indicates that locating a diplomatic mission by the sending State in a territory that does not belong to the receiving State (for example in an annexed and occupied territory) is not permissible, particularly if the ambassadors or nuncio are accredited to the occupying power’s executive organ. This, however, should be investigated on a case-by-case basis. In Kuwait, in the aftermath of its occupation and annexation by Iraq, customary international diplomatic or consular law did not dictate the sending States to withdraw their diplomatic or consular missions. The diplomatic agents were accredited to the legitimate Government of Kuwait. In Southern Rhodesia, even though the overwhelming majority of States affirmed that the British Crown and not the rebellious minority régime granted their staff exequaturs, there was a prohibition under customary international diplomatic and consular law on establishing or maintaining diplomatic or consular missions in that territory.

Article 13 of the Vienna Convention on Diplomatic Relations provides that

[t]he head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry.¹⁸⁶

Article 14 of the Vienna Convention on Diplomatic Relations mentions *inter alia* that ambassadors or nuncios are accredited to Heads of State and *chargés d'affaires* are accredited to Ministers for Foreign Affairs.¹⁸⁷ The 1958 commentary on the Draft Articles on Diplomatic Intercourse and Immunities provides that

¹⁸⁵ Draft Articles on Diplomatic Intercourse and Immunities with commentaries, *supra* note 179, vol. II 95.

¹⁸⁶ Vienna Convention on Diplomatic Relations, *supra* note 89, Art. 13.

¹⁸⁷ *Id.* Art. 14.

[s]o far as concerns the time at which the head of the mission may take up his functions, the only time of interest from the standpoint of international law is the moment at which he can do so in relation to the receiving State — which must be the time when his status is established. On practical grounds, the Commission proposes that it be deemed sufficient that he has arrived and that a true copy of his credentials has been remitted to the Ministry for Foreign Affairs of the receiving State, there being no need to await the presentation of the letters of credence to the head of State.¹⁸⁸

Given that the US has moved its embassy from Tel Aviv to Jerusalem, the accreditation of the current American Ambassador to the president of Israel violates customary international diplomatic law concerning Jerusalem. The prohibition on establishing diplomatic missions in Jerusalem is also equated with the prohibition on accreditation to the Israeli executive organ. A new Ambassador of Guatemala took his post a few months after the transfer of Guatemala's embassy to Jerusalem, where he presented his credentials to the president of Israel. Ambassador Mario Bucaro Flores presented his Credentials on the 25th of October 2018.¹⁸⁹ Customary international diplomatic law obliges all States not to relocate their embassies to Jerusalem or otherwise establish embassies in Jerusalem.

¹⁸⁸ Draft Articles on Diplomatic Intercourse and Immunities with commentaries, *supra* note 179, vol. II 93.

¹⁸⁹ ISRAEL MINISTRY OF FOREIGN AFFAIRS, *Presentation of Credentials of the Ambassador Mario Búcaro Flores (Guatemala)*, ISRAEL MFA (Oct. 25, 2018), <https://mfa.gov.il/MFA/AboutTheMinistry/Foreign%20representatives/Pages/Guatemal-a-.aspx>.

6. OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

On the 2nd of April 2014, the State of Palestine acceded to the Vienna Convention on Diplomatic Relations of 1961¹⁹⁰ and on the 22nd of March 2018, it acceded to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.¹⁹¹ The United States of America is a State party to the Vienna Convention on Diplomatic Relations of 1961 and to its Optional Protocol, since 1972.¹⁹² Israel is a State party to the Vienna Convention on Diplomatic Relations but not a State party to its Optional Protocol as it has signed the latter on 18 April 1961 but has neither ratified it nor acceded to it.¹⁹³ Similarly, Guatemala is a State party to the Vienna Convention on Diplomatic Relations but is not a State party to its Optional Protocol.¹⁹⁴

6.1. ACCESSION TO TREATIES

On the first of May 2018, the United States of America submitted a Depositary Notification in which it stated that “[t]he Government of the United States of America does not believe the “State of Palestine” qualifies as a sovereign State and does not recognize it as such”.¹⁹⁵ The United States of America Depositary Notification added that: “the Government of the United States of America believes that the “State of Palestine” is not qualified to accede to the Optional Protocol and affirms that it will not consider itself to be in a treaty relationship with the “State

¹⁹⁰ For the status of Ratification, Accession(a), Succession(d) see https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en.

¹⁹¹ For the status of Accession(a), Succession(d), Ratification, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en.

¹⁹² *Supra* note 190, *supra* note 191.

¹⁹³ For the status of Accession(a), Succession(d), Ratification, see *Supra* note 190, *supra* note 191.

¹⁹⁴ *Id.*

¹⁹⁵ United States of America: Communication (March 23, 2018), <https://treaties.un.org/doc/Publication/CN/2018/CN.228.2018-Eng.pdf>.

of Palestine” under the Optional Protocol”.¹⁹⁶ The State of Palestine Communication of 31 May 2018, regretted the United States of America position and recalled General Assembly resolution 67/19 of 29 November 2012 which accorded Palestine the non-member observer State status in the United Nations.¹⁹⁷ It must be noted that instruments of accession are deposited with the depository of the relevant Treaties, Conventions or Statutes or Protocols. In this specific convention, it is the Secretary-General of the United Nations who has the authority to examine instruments of accession and as corollary to accept or reject or otherwise seek guidance from the General Assembly. This is not within the discretion of the United States of America.

By its Statement on the 1st of May 2018, the United States of America interfered with the functions of the depository under customary international law. Article 76 provides that “[t]he functions of the depository of a treaty are international in character and the depository is under an obligation to act impartially in their performance”.¹⁹⁸ The fourth paragraph of Article 77 of the Vienna Convention on the Law of Treaties mentions that one of the functions of depositaries entails “[e]xamining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question”.¹⁹⁹ The fact that the United States of America - or any other State - does not recognize the State of Palestine does not mean that Palestine is not a State or does not qualify to accede to among others the Vienna Convention on Diplomatic Relations and its Optional Protocol. The Summary of practice of the Secretary-General as Depository of Multilateral treaties provided that:

¹⁹⁶ *Id.*

¹⁹⁷ State of Palestine: Communication (May 31, 2018), <https://treaties.un.org/doc/Publication/CN/2018/CN.272.2018-Eng.pdf>.

¹⁹⁸ Vienna Convention on the Law of Treaties, *supra* note 172, Art. 76.

¹⁹⁹ *Id.* Art. 77(4).

The question of whether the Cook Islands was an “independent” entity, i.e. a State, was also raised. For a period of time. . . . it followed that the status of the Cook Islands was not one of sovereign independence in the juridical sense However, in 1984, an application by the Cook Islands for membership in the World Health Organization²⁰⁰ was approved by the World Health Assembly In the circumstances, the Secretary- General felt that the question of the status, as a State, of the Cook Islands, had been duly decided in the affirmative by the World Health Assembly, whose membership was fully representative of the international community. The guidance the Secretary-General might have obtained from the General Assembly, had he requested it, would evidently have been substantially identical to the decision of the World Health Assembly.²⁰¹

Likewise, the membership of the Cook Islands in one of the specialized agencies of the United Nations, Palestine membership in the UNESCO in 2011 as one of the United Nations specialized agencies made it easier - and eligible - to accede to the overwhelming majority of treaties under international law. ²⁰² Had Palestine not been a member in any of the specialized Agencies of the United Nations, it can still guarantee accession to the Vienna Convention on Diplomatic Relations and its Optional Protocol through the invitation of the General Assembly. Article 48 of the Vienna Convention on Diplomatic Relations provides that

[t]he present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies Parties to the Statute of the International

²⁰⁰ See Constitution of the World Health Organization, U.N.T. S. Vol. 15, 185. Quoted in U.N. Office of Legal Affairs, Summary of Practice of the Secretary-General as Depository of Multilateral Treaties (New York, United Nations 1999), 24.

²⁰¹ U.N. Office of Legal Affairs, *supra* note 200.

²⁰² Basheer AlZoughbi, “*The de jure State of Palestine under Belligerent Occupation: Application for Admission to the United Nations*,” in Palestine Membership in the United Nations, ed. Mutaz Qafisheh (Cambridge Scholars Publishing, 2013), p. 174.

Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention.²⁰³

Article 50 of the Vienna Convention on Diplomatic Relations provides that “[t]he present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations”.²⁰⁴ The Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties asserted that:

Since that difficulty did not arise with regard to membership in the specialized agencies, where there is no “veto” procedure, a number of those States became members of specialized agencies, and as such were in essence recognized as States by the international community. Accordingly, and in order to allow for as wide a participation as possible, a number of conventions then provided that they were also open for participation to States members of specialized agencies. This type of entry-into-force clause was called the “Vienna formula”. Thus, whenever a treaty specified, under the Vienna formula or otherwise, which entities could become parties thereto, the Secretary-General had no difficulty in complying with the participation provision of the treaty concerned.²⁰⁵

6.2. TREATY RELATIONSHIP

The question that arises is whether the United States’ communication that establishes it, is not in a treaty relationship with the State of Palestine is legally valid under existing principles of international law or a violation of it. Article 78 of the Vienna Convention on the Law of Treaties

²⁰³ Vienna Convention on Diplomatic Relations, *supra* note 89, Art. 48.

²⁰⁴ *Id.* Art. 50.

²⁰⁵ U.N. Office of Legal Affairs, *supra* note 201, at 22.

governs the notifications and communications process by State parties, while Article 77 of the Vienna Convention on the Law of Treaties provides with one of the functions of the depository to include examining notifications.²⁰⁶ The commentaries on the Draft Articles on the Law of Treaties of 1966 provides that, “unless the treaty otherwise states, “notification” is not, as such, an integral part of the process of establishing the legal nexus between the depositing State and the other contracting States”.²⁰⁷ In the *Case concerning right of passage over Indian territory (Preliminary Objections)*, the I.C.J. ruled that “[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it”.²⁰⁸

Should a State have the right to deprive another State - which is equally a party to Compulsory Settlement of Disputes Treaty - of the right to initiate proceedings through a refusal of the former to acknowledge the multilateral treaty relationship with the latter, then it would be incompatible with the object and purpose of the Compulsory Settlement of Disputes mechanism. If the communication of the United States of America is legally valid then this would be one of the grounds to exclude the I.C.J. jurisdiction in the pending case (*Palestine v. United States of America*). If, on the other hand, it is not legally valid then it is one of the grounds why the I.C.J. has jurisdiction over the pending case. In the *Nottebohm case Preliminary Objection*, the I.C.J. provided that “[i]t makes use, as do the declarations relating to it, of the words “compulsory” and “jurisdiction”, and the structure of the text is sufficient to show that of these two words the first is the more important”.²⁰⁹ Commenting on the third condition of the Declaration of Portugal, the I.C.J. provided in the

²⁰⁶ See Vienna Convention on the Law of Treaties, *supra* note 172, Art. 77, 78.

²⁰⁷ Draft Articles on the Law of Treaties with commentaries, 1966 Yearbook of the International Law Commission, vol. II 271.

²⁰⁸ Right of Passage over Indian territory (Portug. v. India), Preliminary Objections, 1957 I.C.J. 142 (Nov. 26).

²⁰⁹ Nottebohm case (Liech. v. Guat.), Preliminary Objections, 1953 I.C.J. 122 (Nov. 18).

case concerning right of passage over Indian territory (Preliminary Objections) that

[i]t is a rule of law generally accepted, as well as one acted upon in the in the past by Court, that, once the court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction.²¹⁰

It is noteworthy to mention that several ratifying States made declarations or reservations under several conventions such as the Vienna Convention on Diplomatic Relations, stating that the mere ratification of such convention does not imply a recognition of Israel nor does it amount to entering into relations with it.²¹¹

6.3. INITIATION OF LEGAL PROCEEDINGS (PALESTINE V. UNITED STATES OF AMERICA)

On the 28th of September 2018, the State of Palestine initiated legal proceedings against the United States of America before the I.C.J. in relation to violations of the Vienna Convention on Diplomatic Relations of 18 April 1961. Article 1 of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, provides that “[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol”.²¹² In its application Instituting Proceedings in the International Court of Justice, the State of Palestine provided that

²¹⁰ Right of Passage over Indian territory (Portug. v. India), 1957 I.C.J 142 (Nov. 26).

²¹¹ On this matter, see the reservations or declarations made by Bahrain, Kuwait, Libya, Qatar Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates, Yemen, Oman and formerly Egypt available at https://treaties.un.org/Pages/ViewDetails.aspx?src=Treaty&mtdsg_no=III-3&chapter=3&lang=en.

²¹² Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes art. 1, Apr. 18, 1961, 241 U.N.T.S. 500.

[b]y the present Application, the State of Palestine requests the Court to settle the dispute it has with the United States of America over the relocation of the embassy of the United States of America in Israel to the Holy City of Jerusalem. In so doing, it places its faith in the Court to resolve the dispute in accordance with its Statute and jurisprudence, based on the Vienna Convention on Diplomatic Relations (V.C.D.R.) read in appropriate context.²¹³

The phrase “read in appropriate context” is redundant but not necessarily wrong. The sentence could be legally restructured to read as follows: “In so doing, it places its faith in the Court to resolve the dispute in accordance with its Statute and jurisprudence, based on the Vienna Convention on Diplomatic Relations . . . ”. in line with its applicable customary provisions of international diplomatic law. Earlier on the 14th of May 2018, the State of Palestine sent a note verbale, whereby it informed the State Department of the United States of America, of its position: that any steps taken to relocate the embassy constitute a violation of the Vienna Convention on Diplomatic Relations, read in conjunction with the relevant Security Council resolutions.²¹⁴ The 14 May 2018 note verbale of the State of Palestine further requested that the United States of America inform it of “any steps the United States is considering to ensure that its actions are in line with the Vienna Convention on Diplomatic Relations” which the latter did not provide.²¹⁵ On 4 July 2018 the Palestinian Ministry of Foreign Affairs and Expatriates notified the State Department of the United States of America of the existence of a dispute between the two Parties, pursuant to Articles I and II of the Optional Protocol concerning the Compulsory Settlement of

²¹³ Application Instituting Proceedings in the International Court of Justice (Ps. v. U.S.), ¶ 2 (Sep. 28, 2018).

²¹⁴ Annex III. Note Verbale of the Ministry of Foreign Affairs of the State of Palestine addressed to the Department of State of the United States of America, 14 May 2018, Ref.: MA-201805-MO002 available at <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-01-EN.pdf>.

²¹⁵ *Id.*

Disputes, arising out of the interpretation or application of the Vienna Convention on Diplomatic Relations, read in conjunction with relevant Security Council resolutions on the alteration of the status of Jerusalem.²¹⁶

Article 2 of the Optional Protocol concerning the Compulsory Settlement of Disputes of the Vienna Convention on Diplomatic Relations provides that:

[t]he parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.²¹⁷

The lack of a response from the Government of the United States of America had not allowed the parties to use the option of agreeing on resorting to other mechanisms of pacific dispute settlement which are provided under the Optional Protocol to the Vienna Convention on Diplomatic Relations under article II (arbitral tribunal) or article III (resorting to conciliation procedure).

6.4. WITHDRAWAL FROM TREATIES

On 12 October 2018, the Secretary-General received from the US Government a communication notifying its withdrawal from the Optional Protocol. Earlier, on 7 March 2005, the Secretary-General received from the Government of the United States of America, a communication notifying its withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement

²¹⁶ Annex IV. Note Verbale of the Ministry of Foreign Affairs of the State of Palestine addressed to the Department of State of the United States of America, 4 July 2018, Ref.: MA-201807-M0006 available at <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-01-EN.pdf>.

²¹⁷ Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, *supra* note 212.

of Disputes.²¹⁸ The communication of 12 October 2018 of the Government of the United States of America reads as follows:

[T]he Government of the United States of America [refers] to the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, done at Vienna on April 18, 1961. This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.²¹⁹

The United States of America's notification of a purported withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes occurred in the aftermath of two litigations brought before the I.C.J. against it: *LaGrand case (Germany v. United States of America)* and the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*. In both cases, the I.C.J. found the United States of America in breach of its obligations under the Vienna Convention on Consular Relations.²²⁰ The United States of America's notification of a purported withdrawal took place soon after the State of Palestine initiated proceedings against the former, while pending a decision of the I.C.J. on its jurisdiction and admissibility of the case law. The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and their optional protocols concerning the Compulsory Settlement of Disputes are silent as to the termination or withdrawal of these treaty instruments. Article 56 of the Vienna Convention on the Law of Treaties (1969) provides that

²¹⁸ The text of the U.S. Communication is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&clang=_en#1.

²¹⁹ The text of the U.S. Communication is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en#10.

²²⁰ See *LaGrand (Ger. v. U.S.)*, Judgment, 2001 I.C.J. 514-516, ¶ 128 (June 21) & *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 70-73, ¶ 153 (Mar. 31).

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months notice of its intention to denounce or withdraw from a treaty under paragraph 1.²²¹

The commentaries on the Draft Articles on the Law of Treaties mention that no clause of denunciation or withdrawal was inserted during the Vienna Conferences on Diplomatic and Consular Relations and that the omission of the clause from the conventions was accepted without discussion.²²² In the *Case Concerning the Gabčíkovo–Nagymaros Project Hungary/Slovakia*, the I.C.J. ruled in 1997 that “[t]he 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal . . . the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention”.²²³

On 25 August 1997, the Secretary-General received from the Government of the Democratic People’s Republic of Korea (hereinafter D.P.R.K.) a notification of withdrawal (dated on the 23rd August 1997) from the International Covenant on Civil and Political Rights (hereinafter I.C.C.P.R.).²²⁴ The I.C.C.P.R. does not contain a withdrawal provision. On 23 September 1997 the Secretariat of the United Nations issued an *aide-memoire* asserting that the D.P.R.K. could only withdraw from the I.C.C.P.R. with the consent of all the parties as provided under Article 54 of

²²¹ Vienna Convention on the Law of Treaties, *supra* note 172, art. 56.

²²² See generally Draft Articles on the Law of Treaties with commentaries, *supra* note 207, vol. II 251.

²²³ *Gabčíkovo–Nagymaros Project (Hung. v. Slovak.)*, Judgment, 1997 I.C.J. 62–63 ¶ 100 (Sep. 25).

²²⁴ See Denunciation of the International Covenant on Civil and Political Rights by the D.P.R.K., C. N. 4 6 7 .1997. Treaties -10 (Sep. 23).

Vienna Convention on the Law of Treaties. In its General Comment number 26, the Human Rights Committee stated clearly that: “The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it”.²²⁵ Article 54 of the Vienna Convention on the Law of Treaties provides that “[t]he termination of a treaty or the withdrawal of a party may take place: (a) In conformity with the provisions of the treaty; or (6) At any time by consent of all the parties after consultation with the other contracting States”.²²⁶

Similarly, the Secretary-General received, on 9 June 1971, a communication from the Government of Senegal denouncing the Convention on the Territorial Sea and the Contiguous Zone as well as the Convention on the Living Resources of the High Seas, and specifying that the denunciation would take effect on the thirtieth day from its receipt.²²⁷ Neither convention contained provisions on withdrawal or denunciation. A communication from the UK Government was sent to the Secretary-General on the 2nd of January 1973, concerning the aforementioned notification by the Senegalese Government. The UK Government did not consider those Conventions as susceptible to unilateral denunciation by a State party (Senegal).²²⁸

6.5. THE PRINCIPLE OF GOOD FAITH

The United States of America failed to act in good faith under international law in at least five different aspects. First, when it relocated its embassy from Tel Aviv to Jerusalem. Second, when it challenged the

²²⁵ General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, ¶ 5, C.C.P.R./C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

²²⁶ Vienna Convention on the Law of Treaties, *supra* note 172, art. 54.

²²⁷ See also The text of the communication of Senegal is available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-1&chapter=21&clang=_en#8.

²²⁸ See For a text of the communication of the United Kingdom see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-1&chapter=21&clang=_en#8.

qualification of the State of Palestine to accede to the Optional Protocol against the authority of the depository (the Secretary-General of the United Nations). Third, when it decided to withdraw from the Optional Protocol soon after the State of Palestine instituted legal proceedings before the I.C.J., at a time when a case was pending against it. Fourth, when it did not consider itself in a treaty relationship with the State of Palestine. Fifth, when it did not respond to the 14 May 2018 note verbale of the State of Palestine and as corollary violated the principle of peaceful settlement of international disputes. Article 26 of the V.C.L.T. entitled “*pacta sunt servanda*” provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.²²⁹ Referring to “*pacta sunt servanda*”, which is the rule according to which treaties are binding on the parties and must be performed in good faith, the Commentaries on the Draft Articles on the Law of Treaties of 1966 provided that is “the fundamental principle of the law of treaties”.²³⁰ In the *Nuclear Tests Case (Australia v. France)*, the I.C.J. held that “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith”.²³¹ The I.C.J. went on to say in the *Nuclear Tests Case* that “[j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration”.²³²

Conversely, the State of Palestine is acting in good faith and in accordance with the pacific mechanisms of international disputes, as codified under the conventions and declarations relative to pacific mechanisms of international disputes in general and under Article 33 of the United Nations Charter in particular. The State of Palestine is seeking a judicial settlement as one of the means to a friendly settlement of its disagreement with the United States of America in relation to its act of

²²⁹ Vienna Convention on the Law of Treaties, *supra* note 172, art. 26.

²³⁰ Draft Articles on the Law of Treaties with commentaries, *supra* note 207, vol. II 251, p. 211.

²³¹ *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 268 ¶ 46 (Dec. 20).

²³² *Id.*

relocating its embassy from Tel Aviv to Jerusalem. In the *Mavrommatis Palestine Concessions case*, the P.C.I.J. defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”.²³³

The State of Palestine asserts that the United States of America must not establish its embassy in Jerusalem under the applicable provisions of the Vienna Convention on Diplomatic Relations while the United States of America has relocated its embassy to Jerusalem and ipso facto opposes the State of Palestine argumentation. Palestine should lay emphasis on the provisions of customary international diplomatic law that are not explicitly governed under the Vienna Convention on Diplomatic Relations. In the *Case of the Free Zones of Upper Savoy and the District of Gex (Order of Aug. 19)*, the P.C.I.J. stated, that “[w]hereas the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties”.²³⁴ In *South West Africa Cases (Ethiopia V. South Africa; Liberia V. South Africa) Preliminary Objections*, the I.C.J. ruled that:

It must be shown that the claim of one party is positively opposed by the other. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate”.²³⁵

²³³ *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30).

²³⁴ *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1929 P.C.I.J. (ser. A) No. 22 (Order of Aug. 19).

²³⁵ *South West Africa (Eth. v. S.Afr. ; Liber. v. S. Afr.)*, Preliminary Objections, 1962 I.C.J. 328 (Dec. 21).

7. QUESTIONS OF JURISDICTION AND ADMISSIBILITY

The sixth paragraph of Article 36 of the I.C.J. Statute provides that “[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court”.²³⁶ The distinction between the two kinds of objections, objection to jurisdiction and objection to admissibility, is well recognized in the practice of the I.C.J.²³⁷ In the *Nottebohm case (Preliminary Objection)*, the I.C.J. provided that

[s]ince the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.²³⁸

As a general rule, the international courts and tribunals decide on their own jurisdiction should any doubt arises, where they exclusively have the *Kompetenz–Kompetenz*.²³⁹ The first paragraph of Article 79 of the Rules of the I.C.J. provides that “[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible”.²⁴⁰ The second paragraph of Article 79 of the Rules of the I.C.J. provides that “[n]otwithstanding paragraph 1 above, following the submission of the application and after the President has met and

²³⁶ Statute of the International Court of Justice art. 36(6).

²³⁷ See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. 465, ¶ 120 (Nov. 18).

²³⁸ *Nottebohm (Liech. v. Guat.)*, Preliminary Objection, 1953 I.C.J. Rep. 119 (Nov. 18).

²³⁹ See Eds Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian J. Tams, Assistant eds Maral Kashgar, David Diehl, *The Statute of the International Court of Justice (2nd Edition): A Commentary*, Oxford: Oxford University Press 2012, p. 694.

²⁴⁰ Para (1), Article 79, Rules of Court (1978) adopted on 14 April 1978 and entered into force on 1 July 1978.

consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined separately”.²⁴¹

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections*, the I.C.J. provided that

[i]f the objection is a jurisdictional objection, then since the jurisdiction of the Court derives from the consent of the parties, this will most usually be because it has been shown that no such consent has been given by the objecting State to the settlement by the Court of the particular dispute.²⁴²

The consent of the United States of America and Palestine has been ipso jure given, as both States are parties to the Optional Protocol to the Vienna Convention on Diplomatic Relations.

The United States of America may, however, argue that it is no longer a State party to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes. As this concerns the Compulsory Settlement of Disputes, the United States of America thus claims that the I.C.J. has no jurisdiction in the pending case (*Palestine v. United States of America*). It is the I.C.J. which will ultimately decide if it has jurisdiction and thus if the U.S. purported withdrawal is valid, or otherwise, when its withdrawal will be valid or how could its withdrawal be validated in line with the customary international law of treaties. Similarly, if a State party to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes initiates proceedings against the United States of America for violations of provisions of the Vienna Convention on Consular Relations, the I.C.J. will decide on its jurisdiction and the matter of the United States of America withdrawal.²⁴³

²⁴¹ *Id.* art. 79 para 2.

²⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Preliminary Objections, 2008 I.C.J. 465, ¶ 120 (Nov. 18).

²⁴³ See John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*, 19 *Duke Journal of Comparative & International Law*, 2009, 290.

On admissibility, the I.C.J. mentioned in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Preliminary Objections* that “[a] preliminary objection to admissibility covers a more disparate range of possibilities” such as “a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim”.²⁴⁴ Other grounds of inadmissibility may include delay in bringing a claim, abuse of process and infringement of good faith, lack of power of representation, waiver of the right to have recourse to judicial settlement and the lack of locus standi.²⁴⁵ The United States of America’s allegation that Palestine is not qualified to accede to the Vienna Convention on Diplomatic Relations and its Optional Protocol implies that the United States of America is of the opinion that Palestine lacks a locus standi as a State and thus has no right or capacity to initiate legal proceedings. This allegation addresses issues of admissibility of the application of the State of Palestine before the I.C.J. and, if brought up, will be rebutted in one stroke. In the *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections*, the I.C.J. did not

find it necessary to consider all the objections, nor to determine whether all of them are objections to jurisdiction or to admissibility or based on other grounds. During the course of the oral hearing little distinction if any was made by the Parties themselves between “jurisdiction” and “admissibility”.²⁴⁶

On 15 November 2018 the I.C.J. issued an order in relation to the pending case of *Relocation of The United States Embassy To Jerusalem (Palestine v. United States Of America)* where it stated that

[I]n view of the fact that, according to the United States, the Court manifestly lacks jurisdiction to entertain Palestine’s

²⁴⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, *Preliminary Objections*, 2008 I.C.J. 465, ¶120 (Nov. 18).

²⁴⁵ See also Eds Zimmermann, Oellers-Frahm, Tomuschat & Tams, *op.cit.*, pp. 703 to 705.

²⁴⁶ *Northern Cameroons (Cameroon v. U.K.)*, *Preliminary Objections*, 1963 I.C.J. 27 (Dec. 2).

Application, it is necessary to resolve first of all the question of the Court's jurisdiction and that of the admissibility of the Application, and that these matters should accordingly be separately determined before any proceedings on the merits.²⁴⁷

The I.C.J. “[d]ecide[d] that the written pleadings shall first be addressed to the question of the jurisdiction of the Court and that of the admissibility of the Application”.²⁴⁸ In addition, the I.C.J. in its order of 15 November 2018 fixed the following time-limits for the filing of the pleadings: 15 May 2019 for the Memorial of the State of Palestine and 15 November 2019 for the Counter-Memorial of the United States of America.²⁴⁹

7.1. THE MONETARY GOLD PRINCIPLE

Article 62 of the I.C.J. Statute provides that “(1) [s]hould a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. (2) It shall be for the Court to decide upon this request”.²⁵⁰ In the case of *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, the I.C.J. ruled that “[t]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent”.²⁵¹ The I.C.J. went on to say that

Albania has not submitted a request to the Court to be permitted to intervene Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of

²⁴⁷ I.C.J., 15 November General List No. 176 15 November 2018 Relocation Of The United States Embassy To Jerusalem (Palestine v. United States Of America) Order, p. 3, available at <https://www.icj-cij.org/files/case-related/176/176-20181115-ORD-01-00-EN.pdf>.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Statute of the International Court of Justice art. 62.

²⁵¹ *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. and U.S.)*, Preliminary Objection, 1954 I.C.J. 32 (June 15).

the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.²⁵²

In the case of *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, the I.C.J. recalled the arbitrator's opinion of 20th of February 1953 that the gold belonged in 1943 to Albania.²⁵³ Since the expression of Monetary Gold principle, which relies on Article 62 of the I.C.J. Statute, several States have invoked it either to bar the I.C.J. from exercising jurisdiction or to request for an intervention in the proceedings. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the I.C.J. provided that

[t]he circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.²⁵⁴

In the *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, preliminary objections of 26 June 1992, the I.C.J. considered that “the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation”.²⁵⁵ The I.C.J. added that “[i]n the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim”.²⁵⁶ The I.C.J. further stated that

²⁵² *Id.*

²⁵³ *Id.* p. 26.

²⁵⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 431, ¶ 88.

²⁵⁵ *Certain Phosphate Lands in Nauru (Nauru v. Au.)*, Preliminary Objections, 1992 I.C.J. 261, ¶ 55.

²⁵⁶ *Id.*

a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia.²⁵⁷

In the *Case concerning East Timor (Portugal v. Australia)*, Portugal advanced several arguments before the I.C.J. to exclude the applicability of the Monetary Gold principle. The first argument was to make a separation of Australia's behavior from that of Indonesia.²⁵⁸ However, the I.C.J. did not accept this argument in this specific case and provided that "the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor".²⁵⁹

Portugal's second argument underlined the inapplicability of the Monetary Gold principle as it maintained that the rights which Australia allegedly breached were *erga omnes*.²⁶⁰ The I.C.J. expressly stated in the *Case concerning East Timor (Portugal v. Australia)* that "[w]hatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case".²⁶¹ The I.C.J. further provided that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things".²⁶²

The third argument advanced by Portugal cores at that "the status of East Timor as a non-self-governing territory and its own capacity as the administering Power of the Territory, have already been decided by

²⁵⁷ *Id.* pp. 261 & 262.

²⁵⁸ *East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. 102, ¶ 28.

²⁵⁹ *Id.*

²⁶⁰ *Id.* para 29.

²⁶¹ *Id.*

²⁶² *Id.*

the General Assembly and the Security Council”.²⁶³ Portugal added that “the Court might well need to interpret those decisions but would not have to decide *de novo* on their content and must accordingly take them as “givens””.²⁶⁴ Portugal further added that: “the Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory”.²⁶⁵

The I.C.J. noted that the third argument advanced by Portugal:

rests on the premise that the United Nations resolutions can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.²⁶⁶

The I.C.J. ruled that:

In this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia’s entry into and continued presence in East Timor are unlawful Indonesia’s rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State’s consent. ²⁶⁷

The I.C.J. provided that “[w]ithout prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as “givens” which constitute a sufficient basis for determining the dispute between the Parties”.²⁶⁸

²⁶³ *Id.* para 30, p. 103.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* para 31.

²⁶⁷ *Id.* para 34, p. 105.

²⁶⁸ *Id.* para 32, p. 104.

7.2. ASSESSING THE APPLICABILITY CRITERIA OF THE MONETARY GOLD PRINCIPLE

One can deduce from the jurisprudence of the I.C.J. *case of Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* the application of two major criteria for the determination of the applicability or inapplicability of Monetary Gold principle in relation to the pending case *Palestine v. United States of America*: does Israel have an interest of a legal nature which may be affected by the decision of the I.C.J.? And would Israel be the very subject-matter of the decision on the transfer of the United States of America embassy from Tel-Aviv to Jerusalem?

Following from the jurisprudence of the I.C.J., several sub questions can also be raised so as to provide assistance on the determination of the applicability or inapplicability of the Monetary Gold principle. Is the determination of the responsibility of Israel a prerequisite to determine U.S. responsibility? Does the existence or the content of responsibility attributed to the United States of America by Palestine have or may have implications for the legal situation of Israel, and if so, will this be used as a basis for the I.C.J. decision on Palestine argument against the United States of America? Would the I.C.J. need to rule on the lawfulness of the conduct of the United States of America when its judgment would imply an evaluation of the lawfulness of the conduct of Israel, which is not party to the proceedings? Has not the evaluation of the lawfulness of the conducts of Israel in relation to *jus ad bellum* and *jus in bello* already been determined by the main organs of the United Nations (General Assembly, Security Council, the United Nations Economic and Social Council and the I.C.J), the United Nations specialized agencies e.g. the U.N.E.S.C.O. and additionally customary international law?

Would the I.C.J. need not to decide *de novo* on the content of the voluminous of the United Nations resolutions and accordingly take them as “givens”? Have not the voluminous content of the United Nations resolutions gone further than the relevant United Nations resolutions on

East Timor? The counter-argument that Palestine's claim invokes the applicability of the Monetary Gold principle²⁶⁹ does not hold water as the I.C.J. will consider that it shall have jurisdiction to entertain Palestine's Application based on at least one of the following arguments.

7.3. THE INAPPLICABILITY OF THE MONETARY GOLD PRINCIPLE (PALESTINE V. UNITED STATES OF AMERICA)

7.3.1. A SENDING STATE'S PRACTICE

The first argument that must be advanced on the inapplicability of the Monetary Gold principle underlines that the issue in question concerns only the sending State's practice combined with the element of *opinio juris* without the need to look into the conduct of the *de facto* receiving State (Israel), albeit illegal under international law. In this respect, Israel would not be the very subject-matter of the decision of the I.C.J.

Security Council resolution 478 of 1980 mainly distinguishes between on the one hand, those obligations imposed on Israel and, on the other, those imposed on other States. Security Council resolution 478 called upon States other than Israel (obviously the Sending States) that have established diplomatic missions in Jerusalem to withdraw such missions from the Holy City.²⁷⁰ Security Council resolution 478 called upon Israel to rescind its legislative and administrative measures and actions which have altered or purport to alter the character and status of the Holy City of Jerusalem particularly the 1980 "Basic Law" on Jerusalem.²⁷¹ Security Council resolution 478 called on all Member States to accept this decision²⁷² (which includes Israel).

²⁶⁹ MARKO MILANOVIC, *Palestine Sues the United States in the I.C.J. re Jerusalem Embassy*, E.J.I.L.: TALK! BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (Sept. 30, 2018), <https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy/>.

²⁷⁰ S.C. Res. 478, *supra* note 28, ¶ 5.

²⁷¹ *Id.* para 3.

²⁷² *Id.* para 5(a).

In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the I.C.J. invoked United Nations resolutions relative to the question of Palestine including Security Council resolution 478 (1980). The I.C.J. recalled the second, third and fifth provisions of the Security Council resolution 478 i.e. affirming that the enactment of the 1980 “Basic Law” constitutes a violation of international law, that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void” and deciding on “not to recognize the “Basic Law” and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”.²⁷³

In the wider sense, a distinction could be drawn between at least five categorical obligations of States as a result of the United Nations resolutions and/or customary international law. Firstly, Israel’s obligations e.g. to rescind its legislative and administrative measures and actions which are illegal international law including the 1980 “Basic Law” on Jerusalem. Secondly, obligations of the sending States, which are diplomatically represented in Israel, not to establish embassies in Jerusalem. Thirdly, all States’ (other than Israel) obligations e.g. not to recognize any changes carried out by Israel in the occupied territory of Palestine including East Jerusalem and not to render aid or assistance to the Israeli occupation, annexation and colonization policies. Fourthly, obligations of all Member States of the United Nations to accept and carry out the decisions of the Security Council in line with Article 25 of the United Nations Charter, which may also be extended to non-member States of the United Nations. For example, one of the conditions on which Switzerland could become a Party to the I.C.J. at a time when it was not a member of the United Nations was its “Acceptance of all the obligations of a Member of the United Nations under Article 94 of the Charter”.²⁷⁴

²⁷³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 167, ¶ 75.

²⁷⁴ G.A. Res. 91, U.N. Doc. A/RES/91 (Dec. 11, 1946).

Fifthly, obligations of all States to abide by customary international law that emerged or existed as a result of General Assembly resolutions and/or Security Council resolutions. By a way of example on the second, third, fourth and fifth categorical obligations, the Holy See is not a member in the United Nations however its apostolic nunciature is in Tel Aviv and not Jerusalem.

Israel has of course committed internationally wrongful acts by among others its annexation of East Jerusalem and its legislative organ enactment of the 1980 Basic Law. However, the object of the litigation in the pending case is to adjudge and declare that the conduct of the United States of America (the sending State) in relocating its embassy from Tel Aviv to Jerusalem violated its international legal obligations as provided in preambular paragraph five of the Vienna Convention on Diplomatic Relations. Indeed, the purpose and objective of adjudication is to rule on the illegality of the conduct of the United States of America (the Sending State) and not on Israel's acts and/or omissions of breaches of its international obligations (the de facto receiving State). Therefore, the judgment will be binding on the sending State and not on the de facto receiving State. The very subject-matter of the decision of the I.C.J. would be the United States of America and not Israel.

The I.C.J. would be requested to rule on the illegality of the United States of America conduct of relocating its embassy from Tel Aviv to Jerusalem and to further request reparation from the United States of America in the form of restitution and satisfaction. For the purpose of this specific case, the I.C.J. would not need to request Israel to make restitution and give satisfaction for the internationally wrongful act of the United States conduct of relocating of its embassy. Article 59 of the I.C.J. statute provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”.²⁷⁵ In the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene*, the I.C.J. provided that “[t]he future judgment will not merely be limited

²⁷⁵ Statute of the International Court of Justice art. 59.

in its effects by Article 59 of the Statute: it will be expressed, upon its face, to be without prejudice to the rights and titles of third States”.²⁷⁶

7.3.2. A MATTER RELATIVE TO THE QUESTION OF PALESTINE VIS-À-VIS THE RESPONSIBILITY OF THE UNITED NATIONS

The second supplement or alternative argument that must be advanced on the inapplicability of the Monetary Gold principle in the present pending case rests on the premise that the issue in question is concerned with a matter relative to the question of Palestine vis-à-vis the responsibility of the United Nations and/or vis-à-vis the responsibility of merely third States. The very subject-matter of the decision of the I.C.J. would be the United States of America in its capacity as a third State. The I.C.J. as the principal judicial organ of the United Nations has the responsibility to invalidate the Monetary Gold principle in the present pending case in conformity with its statute, rules of procedure and the rules of consent to jurisdiction. Several General Assembly resolutions “[r]eaffirm[ed] the permanent responsibility of the United Nations with regard to the question of Palestine until the question is resolved in all its aspects in accordance with international law”.²⁷⁷ In its advisory opinion of 2004, the I.C.J. recalled the preamble of resolution 57/107 of 3 December 2002 and further provided that

[w]ithin the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.²⁷⁸

²⁷⁶ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1984 I.C.J. 26–27, ¶ 43.

²⁷⁷ G.A. Res. 49/62, Preamble (Dec 14, 1994). Other General Assembly resolutions used the term “international legitimacy” instead of international law for example, G.A. Res. 57/107, Preamble (Dec. 3, 2002).

²⁷⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 159, ¶49.

7.3.3. A DISPOSITIVE DETERMINATION OF ISRAEL'S OBLIGATIONS UNDER JUS AD BELLUM AND JUS IN BELLO

The third alternative argument that must be advanced on the inapplicability of the Monetary Gold principle in the present pending case rests on the premise that Israel's rights or rather title and obligations under jus ad bellum and jus in bello have been dispositively or authoritatively determined under international law. The content of the voluminous resolutions of the main organs of the United Nations (General Assembly, Security Council, the Economic and Social Council as well as the I.C.J. advisory opinion of 2004), the resolutions of the U.N.E.S.C.O. as one of the specialized agencies have authoritatively determined the scope of Israel's obligations. These intermingled with the existence of several provisions of customary international law in relation to the question of Palestine. The occupying power conduct under jus in bello (to name but a few, annexation of East Jerusalem, construction of a wall and its associated regime and extensive transfer of parts of the occupant's civilian population into settlements in the occupied territory of Palestine) and jus ad bellum (the Israeli occupying armed forces entry into and presence in the occupied territory of Palestine) have been determined as unlawful. In *the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion of 1971, the I.C.J. provided that "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design".²⁷⁹

Several General Assembly and Security Council resolutions emphasized Israel's own obligations in its capacity as the occupying power. For example General Assembly resolution 58/292 of 6 May 2004

²⁷⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Sec. Council Res. 276/1970, Advisory Opinion, 1971 I.C.J. 50, ¶105.*

provided that “Israel, the occupying Power, has only the duties and obligations of an occupying Power under the Fourth Geneva Convention and the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War of 1907”.²⁸⁰ General Assembly resolution 69/92 of 5 December 2014 “[c]alls upon Israel to . . . comply with all of its obligations under international law and cease immediately all actions causing the alteration of the character, status and demographic composition of the Occupied Palestinian Territory, including East Jerusalem”.²⁸¹ Security Council resolution 672 “[c]alls upon Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention, which is applicable to all the territories occupied by Israel since 1967”.²⁸² Security Council resolution 2334 of 2016 “[r]eaffirm[ed] the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention . . . and recalling the advisory opinion rendered on 9 July 2004 by the International Court of Justice”.²⁸³

The Security Council and General Assembly called upon Israel, the occupying power to withdraw from the occupied territory of Palestine and terminate its occupation. For example, Security Council resolution 242 of 1967 called for the “(i) [w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict”;²⁸⁴ Security Council resolution 471 of 1980 “[r]eaffirm[ed] the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem”;²⁸⁵ General Assembly resolution ES-7/2 of 29 July 1980 called upon Israel for complete and unconditional withdrawal from all Arab territories occupied since June 1967 including Jerusalem and urged that

²⁸⁰ G.A. Res. 58/292, ¶1 (May 6, 2004).

²⁸¹ G.A. Res. 69/92, ¶2 (Dec. 5, 2014).

²⁸² U.N. Sec. Council Res. 672, ¶3 (Oct. 12, 1990).

²⁸³ U.N. Sec. Council Res. 2334, Preamble (Dec. 23, 2016).

²⁸⁴ U.N. Sec. Council Res. 242, ¶1 (Nov. 22, 1967).

²⁸⁵ U.N. Sec. Council Res. 471, ¶6 (Jun. 5, 1980).

the withdrawal should start before 15 November 1980.²⁸⁶ The General Assembly has repetitively and explicitly labeled the Israeli occupation as illegal. General Assembly resolution 36/147 of 1981 recalled its previous resolutions in particular resolution 3414 (XXX), 31/61, 32/20, 33/28, 33/29, 34/70 and 35/122 E, “in which it, inter alia, called upon Israel to put an end to its illegal occupation of the Arab territories and to withdraw from all those territories”,²⁸⁷ General Assembly resolution A/73/L.49 of 2018 reiterated its call to end the Israeli occupation that began in 1967, including East Jerusalem.²⁸⁸ Labeling the Israeli occupation as illegal by the General Assembly is not a recommendation but is of a dispositive force and effect. The I.C.J. provided in *certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* advisory opinion that

the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with “decisions” of the General Assembly “on important questions”. These “decisions” do indeed include certain recommendations, but others have dispositive force and effect.²⁸⁹

The content of the relevant voluminous resolutions on the question of Palestine went much further than the ones in East Timor, have made authoritative determinations in relation to Israel’s obligations under jus ad bellum and jus in bello, have dispositive force and effect, have formulated a legal situation, apply a fortiori and in many instances established the existence of a rule or the emergence of an opinio juris. Commenting on the termination of South Africa’s mandate over South West Africa by the General Assembly, the I.C.J. provided in *Legal*

²⁸⁶ G.A. Res. ES-7/2, U.N. Doc. A/RES/ES-7/2, ¶17 (Jul. 29, 1980).

²⁸⁷ G.A. Res. 36/147/E, Preamble (Dec. 16, 1981).

²⁸⁸ See U.N. Doc. A/73/L.49 (Dec. 6, 2018).

²⁸⁹ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 1962 I.C.J. 163 (Jul. 20).

Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), advisory opinion that “[t]his is not a finding on facts, but the formulation of a legal situation”.²⁹⁰

7.4. TECHNICAL ANALYSIS OF PORTUGAL V. AUSTRALIA AND PALESTINE V. UNITED STATES OF AMERICA

Two judges wrote dissenting opinions regarding the reasons why the I.C.J. should have exercised jurisdiction to entertain the *case concerning East Timor (Portugal v. Australia)*.²⁹¹ The I.C.J. found a grey area in the East Timor situation where in the absence of Indonesia, it could not exercise jurisdiction over the case initiated by Portugal. Eventually, the I.C.J., which formulated the Monetary Gold Principle, has the greater leeway in making decisions on which cases falls within this principle. The I.C.J. seemed to have evaded exercising jurisdiction in that particular case concerning East Timor where it was caught between a rock and a hard case. The I.C.J. found itself in an undesirable situation of a complex formula. Firstly, there is an applicant State (Portugal) which the Security Council and General Assembly resolutions have called upon all States to refrain from rendering its Government any assistance that would enable it to repress the peoples of the Territories under its administration or would enable it to pursue the colonial war in the Territories under its domination. Secondly, there is a respondent State (Australia) which concluded the Timor Gap Treaty with Indonesia (which was not party to the case) and the Security Council²⁹² and General Assembly²⁹³ had

²⁹⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276/1970*, Advisory Opinion, 1971 I.C.J. 50, ¶ 105.

²⁹¹ See *Portugal v. Australia*, (Weeramantry, J., dissenting) available at <https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-05-EN.pdf> see also (Skubiszewski, J., dissenting) available at <https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-06-EN.pdf>.

²⁹² See e.g. U.N. Sec. Council Res. 384, ¶ 2 (Dec. 2, 1975).

²⁹³ See e.g. G.A. Res. 3485 (XXX), ¶ 5 (Dec. 12, 1975).

requested the Indonesian armed forces to withdraw from East Timor. In either case, in the event of a potential judgment of ruling in favour of one of the parties (Portugal or Australia), the I.C.J. would have contributed in one way or another to one of the two repressive States i.e. Indonesia or Portugal and it would have not contributed to the realization of the right of self-determination of the people of East Timor. General Assembly resolution 2507(XXIV) of 1969

[c]all[ed] upon all States, the specialized agencies and all the international organizations concerned to increase, in cooperation with the Organization of African Unity, their moral and material assistance to the peoples of the Territories under Portuguese domination who are struggling for their freedom and independence.²⁹⁴

In *Palestine v. the United States of America*, the I.C.J. is faced with a completely different formula. Firstly, there is an applicant State (Palestine) which is the injured State and is under military occupation and colonization where the General Assembly called upon all States, international organizations and specialized agencies to render assistance to its people to realize the right to self-determination. Secondly, a respondent State (the United States of America) where by its conduct of relocating its embassy from Tel Aviv to Jerusalem has not only violated existing customary international diplomatic law but also have rendered aid or assistance to Israel, the occupying power in pursuing of its policies of, inter alia, annexation and colonization, on the other.

In the case of *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, the gold belonged to Albania which was not party to the case. In *case concerning East Timor (Portugal v. Australia)*, East Timor was a non-self-governing territory torn between Portugal which had repressed the East Timorese people, and Indonesia, whose armed forces occupied it

²⁹⁴ G.A. Res. 2507 (XXIV), *supra* note 101, ¶11.

since December 1975. The people of East Timor territory were entitled to the right to self-determination and independence, as has been affirmed by the United Nations resolutions. However, the exact mode of self-determination was only decided with the 1999 referendum, with the majority of the East Timorese people willing for a transition to independence and for a refusal of a special autonomy within Indonesia. The Palestinian people have the right of self-determination although the mode of self-determination has been determined under customary international law in a form of an independent State. The international legal personality of the statehood of Palestine exists under international law, albeit it has no sovereignty and is under military occupation and colonization where parts of its territory has been annexed.

8. CONCLUSION

The prohibitive rule on establishing or maintaining diplomatic missions in Jerusalem established by the Security Council in its resolution 478 of 1980 was maintained by the General Assembly resolutions. This prohibitive rule established by Security Council resolution 478 has been intermingled with the emergence and existence of State practice with the element of *opinio juris*. The fact that certain States (currently the United States of America and Guatemala) and formerly Costa Rica, El Salvador and Paraguay violated this customary international diplomatic law does not by any means indicate an emergence of new rule. On the contrary, it is a violation of this existing customary international diplomatic law which incurred the responsibility of these States under international law and requires adequate reparation in the form of restitution and satisfaction.

The prohibitive rule on establishing or maintaining diplomatic missions in Jerusalem was seen a necessary measure under customary international diplomatic law so as not to recognize Israel's

internationally wrongful acts towards Jerusalem, by among others, its occupation, annexation, acquisition of territory by force, and declaration of the Holy City “complete and united” as the capital of its State under the Basic Law of 1980. Jerusalem is a situation of *sui generis* territory as the city has been unilaterally declared as the capital of Israel and is a combination of an annexed occupied territory (East Jerusalem) and a territory that international law does not consider it as occupied (West Jerusalem). However, the prohibitive rule imposed on the sending States to not establish embassies in Jerusalem include all the unilaterally declared boundaries of the municipality of Jerusalem.

The prohibition on establishing or maintaining diplomatic or consular missions in Southern Rhodesia (Zimbabwe) was seen as one of the necessary measures to denounce any legitimacy of the minority regime’s rule in Southern Rhodesia, to avoid recognizing its practices of racial discrimination and segregation and to support the Southern Rhodesian people right to self-determination. Similarly, the legal obligations to not maintain consulates in South West Africa (Namibia) and to abstain from sending diplomatic or special missions to South Africa, including in the occupied territory of Namibia were seen as necessary actions in order to refuse and not recognize South African practices of occupation and apartheid and support the people’s right to self-determination. In Kuwait, following Iraq’s occupation and annexation in 1990, the Security Council did not deem it necessary to call upon States to close diplomatic or consular missions or withdraw their diplomatic or consular agents, who were accredited to the Government of Kuwait (which went into exile). On the contrary, it was Iraq unilateral and illegal measures which have done so which purported to dissolve the legal personality of the State of Kuwait.

The relocation of the United States of America and the Republic of Guatemala of their embassies from Tel Aviv to Jerusalem is considered an act of aid and/or assistance, which will be used by the occupant (Israel) in its persisting colonial and annexation policies in the occupied territory of

Palestine including East Jerusalem. The internationally wrongful acts of the United States of America and the Republic of Guatemala runs contrary to their legal interests and obligations to protect the erga omnes right of self-determination of the Palestinian people. In its resolutions, the General Assembly did not only call upon all States but also international organizations and specialized agencies to not render any aid or assistance to Israeli annexation and colonization policies, on the one hand and assist and support the Palestinian people right to self-determination, on the other.

It stands to reason that the merits of the pending case are not the United Nations resolutions but the Vienna Convention on Diplomatic Relations and the applicable provision of customary international diplomatic law underpinning the prohibition on the sending States represented in Israel to not establish embassies in Jerusalem. The analysis of the violations of the Vienna Convention on the Diplomatic Relations lies within its preambular paragraph five whereby the rules of customary international law govern any questions that the present convention does not explicitly regulate. In addition to the Vienna Convention on Diplomatic Relations and customary international diplomatic law (the prohibitive rule of customary international diplomatic law on the sending States which are diplomatically represented in Israel to not locate their embassies in Jerusalem), the I.C.J. will have to recourse to the customary international law on State responsibility and the customary international law of treaties to determine the responsibility of the United States of America.

The United States of America's arguments relating to jurisdiction of the I.C.J. and admissibility of the Palestine Application may be based on inter alia four possible claims. Firstly, Palestine is a not a State under international law and hence it is not qualified to accede to the Vienna Convention on Diplomatic Relations and its Optional Protocol and accordingly lacks a locus standi. Secondly, the United States of America is not in a treaty relationship with Palestine. Thirdly, the United States of

America has submitted a (purported) withdrawal from the Optional Protocol of the Vienna Convention on Diplomatic Relations. Fourthly, the invocation of the applicability of the Monetary Gold principle. The aforementioned are not legally compelling arguments and neither hold water nor stand their ground under international law in relation to the pending case. The I.C.J. has jurisdiction to entertain the present pending case under the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes and that the Application filed by Palestine is admissible. The State of Palestine should advance at least three major arguments before the I.C.J. in order to exclude the applicability of the Monetary Gold principle.

The first argument that must be presented is that Israel would not be the very subject-matter of the decision of the I.C.J. as the issue in question concerns only the sending State's practice combined with the element of *opinio juris* without the need to look into the *de facto* receiving State conduct (Israel). The very subject -matter of the decision of the I.C.J. would be the United States of America in its capacity as the sending State and not Israel, the *de facto* receiving State. The second supplement or alternative argument that must be advanced on the inapplicability of the Monetary Gold principle in the present pending case rests on the premise that the issue in question is concerned with a matter relevant to the question of Palestine *vis-à-vis* the responsibility of the United Nations and/or *vis-à-vis* the responsibility of merely third States. The third alternative argument that must be advanced on the inapplicability of the Monetary Gold principle in the present pending case is that Israel's obligations under both *jus ad bellum* and *jus in bello* have been dispositively or authoritatively determined under international law. The content of the voluminous resolutions of the Security Council, the General Assembly, the United Nations Economic and Social Council, the specialized agencies such as U.N.E.S.C.O. as well as the I.C.J. advisory opinion of 2004 and customary international law, have determined Israel, to be the occupying power, and to hold obligations under that title. The

occupying power conduct under jus ad bellum and jus in bello have been determined as unlawful. The aforesaid arguments attest, in whole or in part, to the grist for the mill of the inapplicability of the Monetary Gold principle.

ANNEXES: MAPS

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Annex I

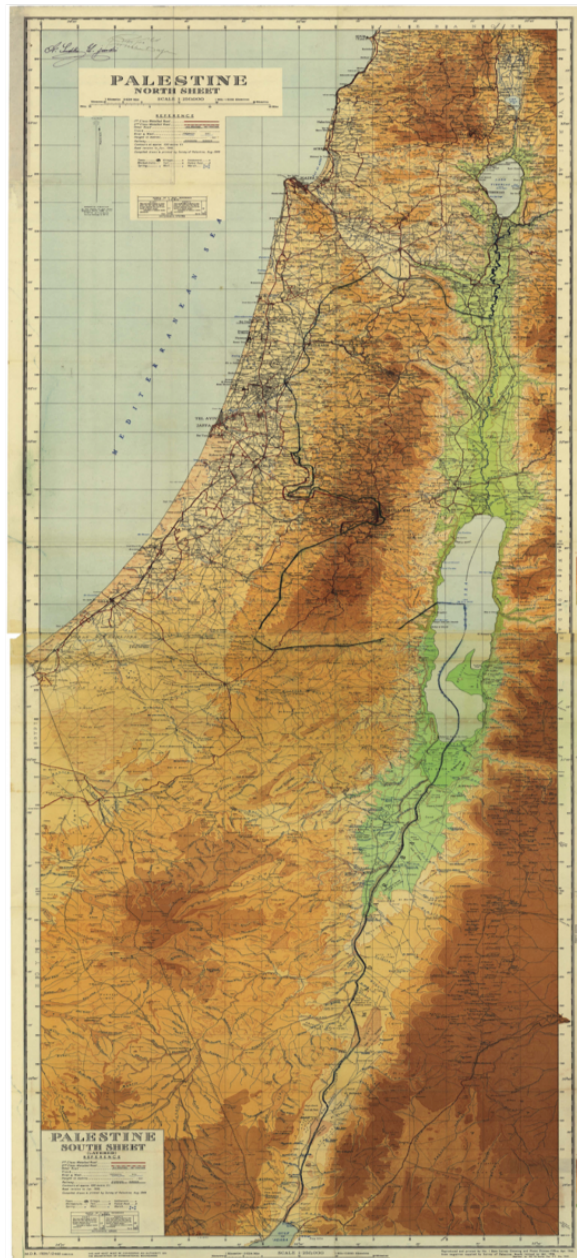


Figure 1: Map Delineating Armistice Demarcation Lines Palestine (North & South sheets), Jerusalem, Latrun. Document Sources: Hashemite Jordan Kingdom - Israel: General Armistice Agreement - Document sources: United Nations.

Annex II

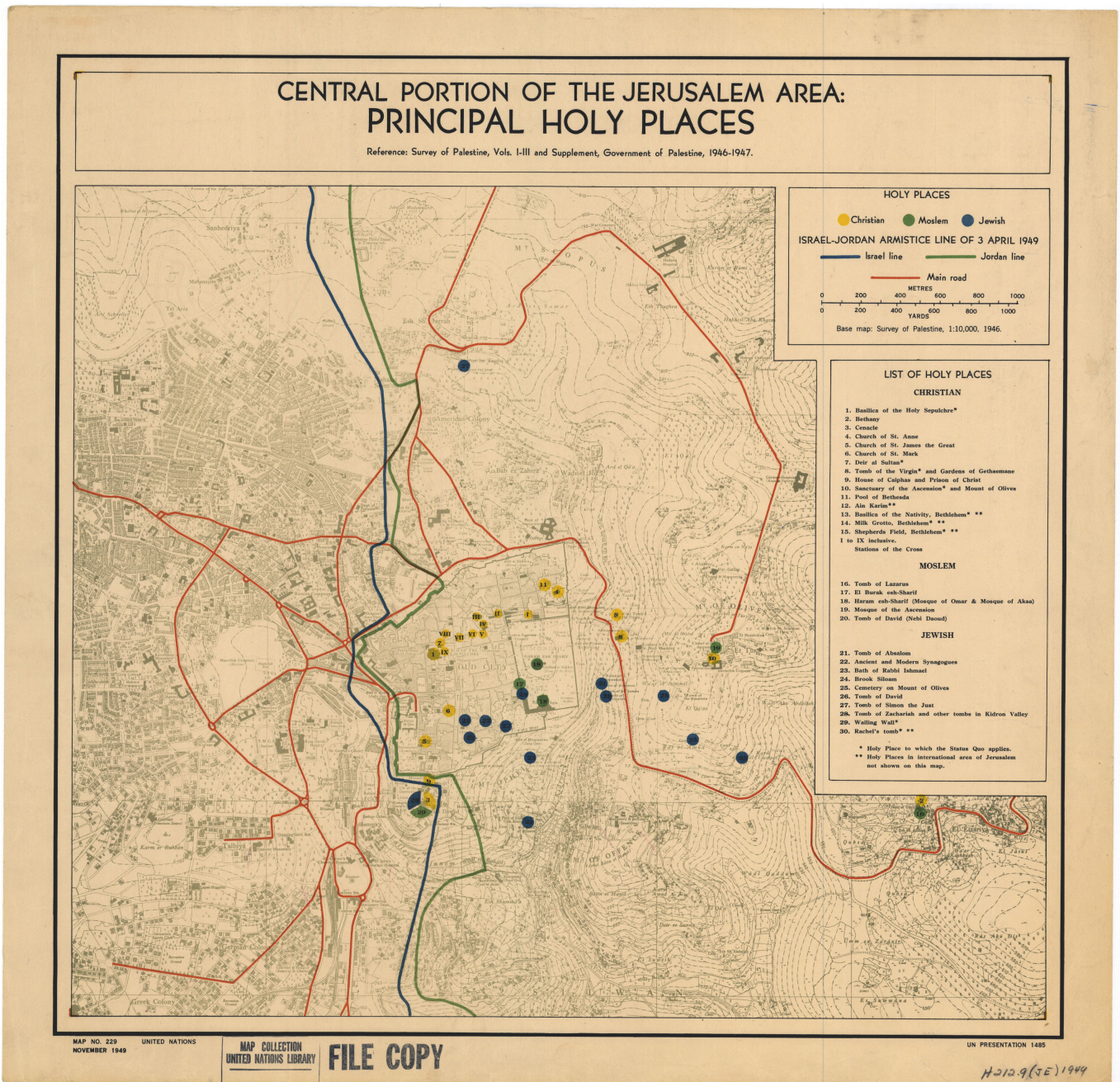


Figure 2: Jerusalem – Principal Holy Sites – Armistice line – Map No. 229 November 1949 - Document sources: United Nations.

Annex III

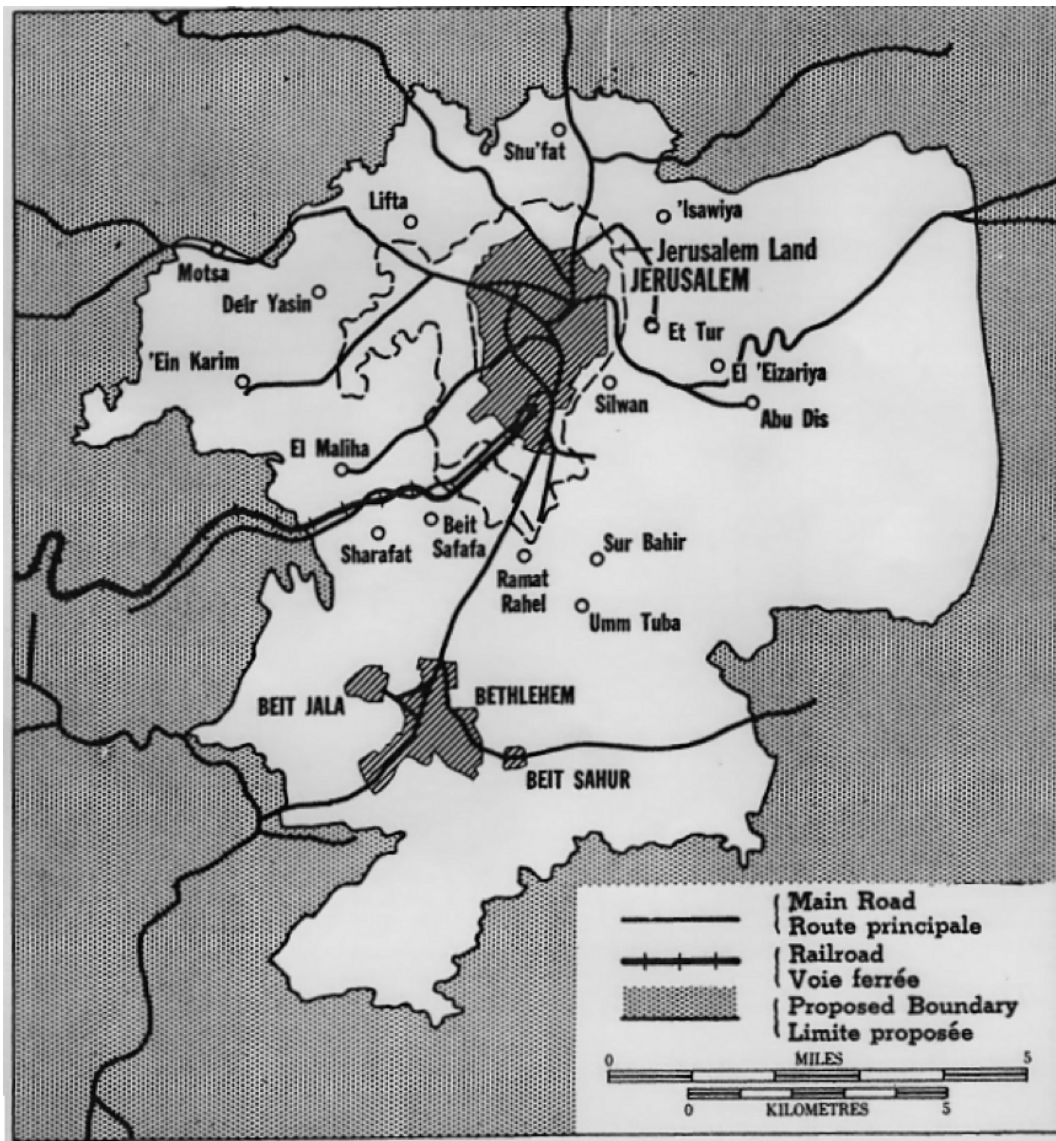


Figure 3: Map No. 104 (b), City Of Jerusalem Boundaries Proposed: [Annex B to resolution 181 (II) of the General Assembly, dated 29 November 1947] - Document sources: United Nations.

Annex IV

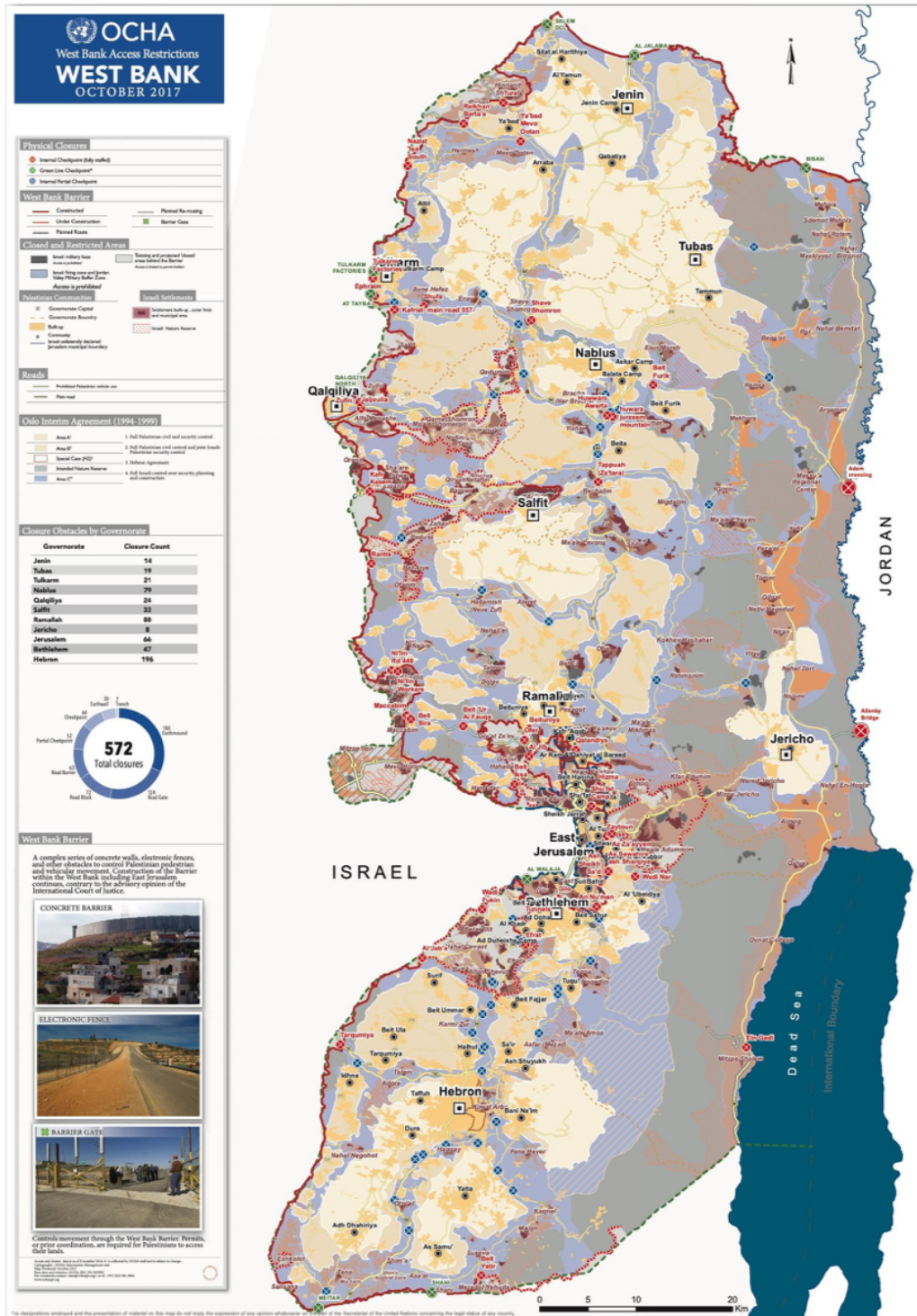


Figure 4: East Jerusalem Access and Closure Oct. 2017 – Document sources: Office for the Coordination of Humanitarian Affairs map.

Annex V

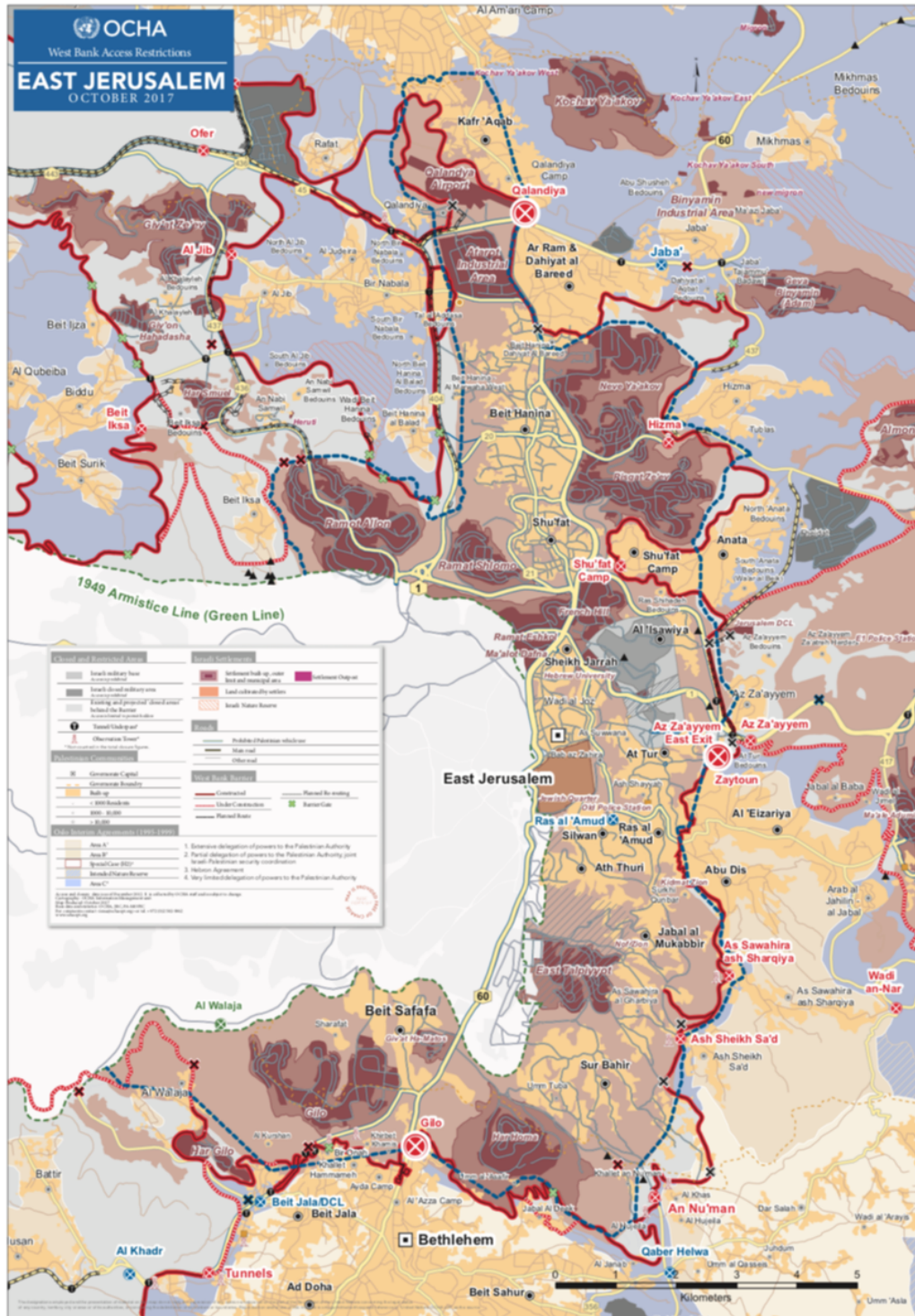


Figure 5: West Bank Access Restrictions Oct. 2017 – Document sources: Office for the Coordination of Humanitarian Affairs map.

Annex VI

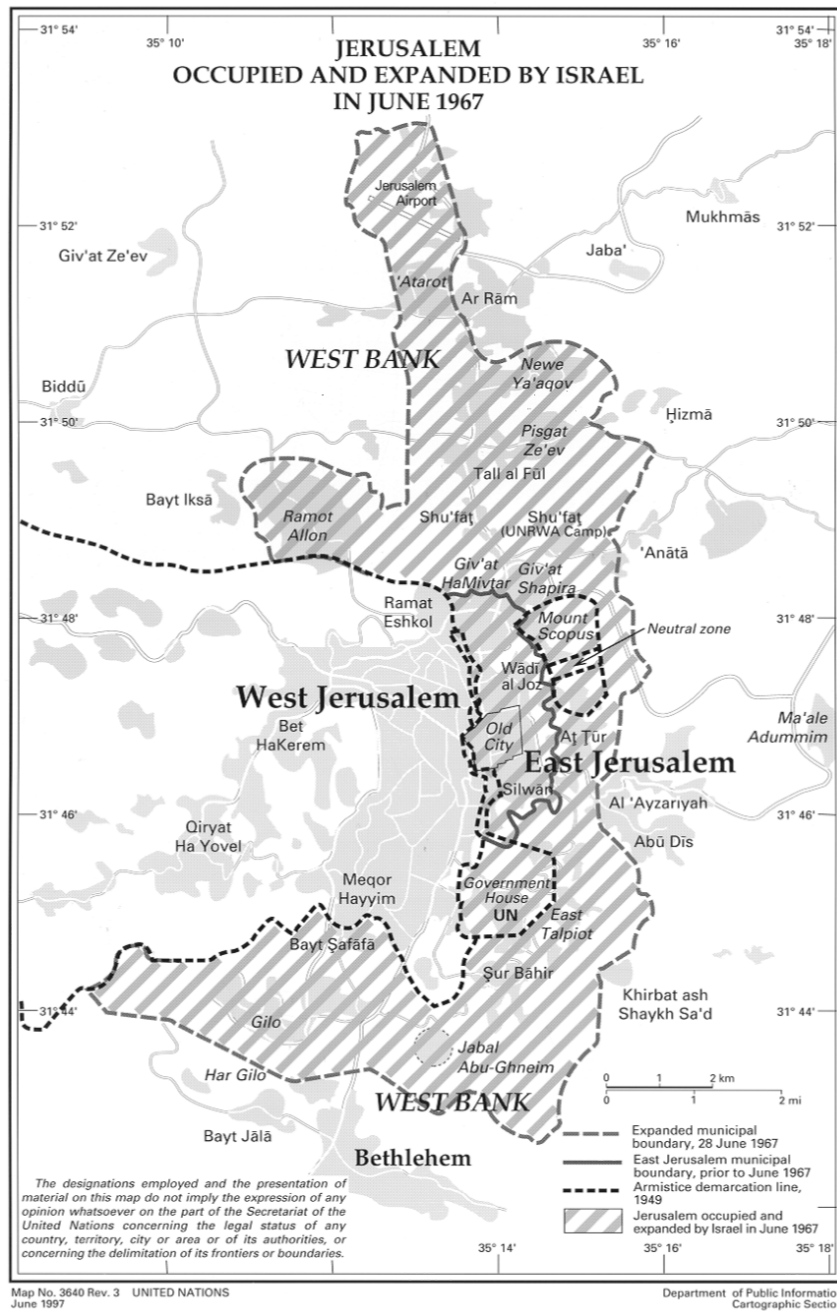


Figure 6: 'Jerusalem occupied and expanded by Israel in June 1967, Map No. 3640, Rev. 3, June 1997 - Document sources: United Nations, Department of Public Information Cartographic Section 1997.