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Dr. Hans Köchler

Professor, University of Innsbruck, Austria
President, International Progress Organization

**THE EVOLUTION OF THE PALESTINE PROBLEM
AND THE STATUS OF JERUSALEM:
FORCE OF LAW OR LAW OF FORCE?**

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Outline

- The Jerusalem question cannot be dealt with in isolation from the larger problem of Palestine; it is an integral part of the struggle for independence of the peoples on the territory of the former Ottoman Empire. In view of the imperialist policies pursued upon the end of World War I, the Jerusalem issue is also the legacy of *de facto* colonial rule since the era of the British Mandate.
- It is an often overlooked, but legally important, fact that the Ottoman Empire, in the Treaty of Lausanne (1923), did not renounce its sovereign rights “in favour of the Principal Allied Powers” (as would have been the case under the stillborn Treaty of Sèvres). Consequently, these powers, including Britain, could not claim any right to dispose of former Ottoman territories as part of the exercise of their responsibilities.
- The status of Jerusalem is, first and foremost, an issue of self-determination of the Arab people of Palestine. International rights and privileges in regard to the places of worship of the three monotheistic religions (“The Holy City of Jerusalem”) are to be dealt with in the context of Palestinian sovereignty.
- The *status quo* in Jerusalem is the result of a series of injustices and violations of basic principles of international law since the end of Ottoman rule in Palestine.
- However: *ex injuria jus non oritur*; an accumulation of breaches of legal norms, even over an extended period of time, will not lead to a situation of legality – as long as those breaches have been identified as such and rejected, in a consistent and persistent manner, by the affected party.
- The specific provisions of the British Mandate for Palestine, insofar as they incorporated, as political commitments, the promises of the Balfour Declaration (1917), were technically illegal; they openly violated Article 22 of the Covenant of the League of Nations.
- United Nations General Assembly resolution 181 (II) of 29 November 1947 was *ultra vires* in terms of the UN Charter itself, and it violated the then generally recognized right of self-determination of peoples.
- The respective provisions for an international status of Jerusalem (as part of the partition plan) were, by implication, also legally invalid.

- The seizure of the eastern part of Jerusalem in 1967 and its subsequent annexation by Israel in 1980 (“Basic Law: Jerusalem, Capital of Israel”) are null and void since these unilateral measures have violated the generally recognized principle of contemporary international law of the “inadmissibility of the acquisition of territory by war” (as affirmed by Security Council resolution 242 [1967]).
- The resolutions adopted by the UN Security Council concerning the occupation of Arab territory and, in particular, the annexation of Jerusalem, are not based on Chapter VII of the UN Charter and, thus, lack any enforcement mechanisms.
- Repeated resolutions of the United Nations General Assembly under the provisions of the so-called “Uniting for Peace” resolution of 1950 may have had *political* significance (in terms of the mobilization of international public opinion), but they had no *legal* effect.
- The recent Israeli legislation (“referendum law” of 22 November 2010), making the restitution of annexed territories (in particular Jerusalem) conditional on a domestic political act (either a referendum or a decision by a 2/3 majority of the Knesset), constitutes an outright violation of international law since it interferes into the sovereign domain of another people or country. Israel possesses no right whatsoever over the annexed territory of Jerusalem; the referendum law is, thus, without object.
- As occupying power, Israel is bound, *inter alia*, by the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949, but possesses no rights of sovereignty which would entitle it to decide about the future status of occupied territories, including Jerusalem.
- Ever since the time of the British Mandate, the Arab people of Palestine have been prevented from exercising their inalienable right to self-determination, one of the fundamental norms of international law. They have the right to resist foreign occupation and annexation of their land.
- Since 1947, the United Nations Organization has repeatedly failed to properly acknowledge Palestinian rights and to exercise its responsibility, confirmed in its own resolutions, for the enforcement of international law in Palestine.
- Because of the non-enforcement of international law in Jerusalem (and Palestine in general), the Palestinian people is entitled to seek the support of concerned regional

states (and the international community at large) for the restoration of its legitimate rights.

- The State of Palestine, with Jerusalem as its capital, will be *legitimately* established not by diktat of outside powers (or by fiat of the world organization), but by the free decision of the Palestinian people whose collective will alone is the basis of sovereignty in Palestine – in terms of general international law as well as of the United Nations Charter.

Preliminary remarks

The Jerusalem question cannot be dealt with in isolation from the Palestine problem, which is essentially an issue of the *right to self-determination of peoples*, as enshrined in the United Nations Charter (Article 1[2]).¹ The *corpus separatum* approach, dating back to the “partition resolution” of the United Nations General Assembly,² is legally unfounded.³

The status quo in Jerusalem, as in the entire Palestine, is the result of a long and continuous series (a) of injustices inflicted on the native people of Palestine, particularly since the surrender of Jerusalem to British forces on 9 December 1917 and the end of the Ottoman Empire, and (b) of accumulated violations of international law⁴ since that date. However, *ex injuria jus non oritur*. Otherwise, colonial domination over peoples in distant countries could still be justified today. Continued and persistent violations of international norms, adding one transgression upon another, do not necessarily correct a legally deficient situation, i. e. do not create legal rights.

(I) Colonial legacy prior to World War II

We shall first give a brief overview of events in terms of international law (since the termination of Ottoman rule in Palestine upon the end of World War I),⁵ and from there proceed to an analysis of the legal facts pertaining to the present situation.⁶

In the period up to World War I, the Palestinians were subjects of the Ottoman Empire. According to the Ottoman Constitution of 1876, they did possess equal civil and

¹ For details see Hans Köchler, “The Palestinian People’s Right of Self-determination: Basis of Peace in the Middle East,” in: *IKIM Journal*, Vol. 7, No. 2 (July-December 1999), pp. 45-58; and *The Palestine Problem in the Framework of International Law: Sovereignty as the Crucial Issue of a Peaceful Settlement of the Palestinian-Israeli Conflict*. Lecture delivered at the international conference “1991-2000: The Palestinian-Israeli Peace Process – A critical evaluation of ten years of negotiations between the Palestinian Authority and Israel.” Madrid, 30 September - 1 October 2000. I.P.O. Research Papers, Vienna, October 2000, at i-p-o.org/palestine-sovereignty.htm.

² Resolution 181 (II), adopted on 29 November 1947 (“Future government of Palestine / Resolution adopted on the report of the *ad hoc* committee on the Palestinian question”).

³ We shall explain the specific legal reasons in chapter II below.

⁴ This is understood in terms of the norms that were in force at a given time. (We do not believe in a retroactive enforcement of legal norms.)

⁵ For a comprehensive historical overview until the post-1967 period see Edward W. Said, Ibrahim Abu-Lughod, Jenet L. Abu-Lughod, Muhammad Hallaj, Elia Zureik, *Porträt des palästinensischen Volkes*. Vienna: International Progress Organization, 1983.

⁶ For a comprehensive analysis see also Hans Köchler (ed.), *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem*. (Studies in International Relations, Vol. IV.) Vienna: Braumüller, 1981.

political rights with the Turks,⁷ including the right to elect representatives to the Parliament (Chamber of Deputies) of the Empire.⁸

As regards the subsequent developments, in particular the decisions taken by European powers that determined the status of formerly Ottoman territories, it is important to note that the Ottoman Empire, upon the termination of its rule over Arab lands, did never transfer sovereignty to the victors of World War I, namely the “Principal Allied Powers.” The Treaty of Sèvres (1920),⁹ which would have included such a provision,¹⁰ did not enter into force. The Treaty of Lausanne of 24 July 1923 (which entered into force in 1924, i. e. after the end of the Ottoman Empire) included Turkey’s renunciation of “all rights and title whatsoever” over the territories “outside the frontiers laid down in the present Treaty,” but not in favor of any other power(s); instead, the respective Article 16 contained the important proviso that “the future of these territories” will “be settled by the parties concerned,” a formulation that can only be meaningfully interpreted as to include the people that inhabited the respective territories at the time of Turkey’s abdication of her sovereign rights.¹¹

Nonetheless, the people of Palestine were subjected to an effectively colonial régime that denied them the rights they should have enjoyed under the terms of the Treaty of Lausanne. Furthermore, the “British Mandate for Palestine” that followed Ottoman rule violated the very principles of the definition of “mandate” in the Covenant of the League of Nations, incorporated in the Treaty of Versailles, which was the only, though in itself dubious, legal basis for the British administration in Palestine. Article 22 of the Covenant stipulates that the “well-being and development” of peoples of territories that “have ceased to be under the sovereignty of the States which formerly governed them [...] form a sacred trust of civilization.” This formulation would have required of the then international community (the member states of the League of Nations) to respect the civil and political

⁷ “All subjects of the Empire are called Ottomans, without distinction whatever faith they profess ...” *Kanûn-ı Esâsî* (“Basic Law”), proclaimed by Grand Vizier Midhat Pasha on 23 December 1876, Article 8, quoted according to the English translation published by Atatürk Institute of Modern Turkish History, Boğaziçi University (2004).

⁸ For details see Henry Cattan, *The Solution of the Palestine Refugee Problem*. (Studies in International Relations, Vol. VI.) Vienna: International Progress Organization, 1982, Chapter “Palestinian Sovereignty,” pp. 15ff.

⁹ Signed at Sèvres, France, on 10 August 1920.

¹⁰ Article 132: “Outside her frontiers as fixed by the present Treaty Turkey hereby renounces in favour of the Principal Allied Powers all rights and title which she could claim on any ground over or concerning any territories outside Europe which are not otherwise disposed of by the present Treaty.”

¹¹ This interpretation is also suggested by Henry Cattan, *op. cit.*, p. 20.

rights of the people of Palestine and to assist them, through the mandate, in the development of social, economic and political structures that would eventually have enabled the Palestinians, in the language of Article 22, “to stand by themselves.”

In spite of this solemn commitment, the framework and regulations for the Palestine Mandate, entrusted to Britain in 1923 by decision of the Council of the League of Nations,¹² violated the very principles of this “sacred trust of civilization” and prejudiced the political developments in Palestine in a manner that *curtailed* the concerned people’s political rights. In actual fact, the “British Mandate for Palestine” was tantamount to an outright negation of the Palestinian people’s right to self-determination. Its Preamble explicitly states the Mandatory Power’s (Britain’s) responsibility “for putting into effect” the declaration which the British government had itself made earlier “in favour of the establishment in Palestine of a national home for the Jewish people.” This was a reference to the so-called “Balfour Declaration,” a letter signed by British Foreign Secretary Arthur James Balfour on 2 November 1917 on behalf of the British government, in which he confirmed that Britain viewed “with favour the establishment in Palestine of a national home for the Jewish people,” and pledged that the government “will use their best endeavours to facilitate the achievement of this object.”¹³ Article 2 of the Mandate unambiguously states that “[t]he Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid out in the Preamble ...”

Through these provisions, the League of Nations was also implementing the resolution of the “San Remo conference” of the “Principal Allied Powers,” the victors of World War I (Britain, France, Italy, Japan), of 25 April 1920. Under item (b) and by reference to Article 22 of the Covenant of the League of Nations, the resolution entrusted the administration of Palestine to a Mandatory who “will be responsible for putting into effect” the Balfour Declaration of 1917, a formulation that was eventually incorporated into the wording of the British Mandate. It is worthy of note that this formulation of the San Remo resolution was also used in Article 95 of the stillborn Treaty of Sèvres, Article 97 of which further stipulated that “Turkey hereby undertakes, in accordance with the provisions of Article 132, to accept any decisions which may be taken in relation to the

¹² The decision was adopted on 24 July 1922, and the Mandate came into effect on 26 September 1923.

questions dealt with in this Section.” This Article would have required Turkey (i. e. the Ottoman Empire) to renounce all rights and title “in favour of the Principal Allied Powers” and “to recognise and conform to the measures which may be taken now or in the future by the Principal Allied Powers.” For the proper legal evaluation of the British Mandate it is extremely important to be aware of the fact that Turkey’s abdication of her sovereign rights in favour of the “Principal Allied Powers” was initially understood to be the *basis* for the mandatory régimes in the former Ottoman territories in the Arab world. In reality, those powers considered themselves entitled to establish a mandatory régime in Palestine by virtue of a transfer of sovereignty *that never occurred* (because the respective treaty never entered into force). The (peace) Treaty of Lausanne that superseded the Treaty of Sèvres (and that contained no provisions for mandates) entered into force on 5 September 1924, i. e. after the League of Nations had entrusted Britain with the Mandate in Palestine.

Whatever the legal shortcomings (in terms of international treaty law) and inconsistencies of the arrangements finally enacted under the auspices of the League of Nations may have been, the “Mandate for Palestine” effectively curtailed Palestinian rights, and in the most basic sense. The *denial of self-determination* was the cardinal sin committed by the self-appointed guardians of peoples’ rights in the post-Ottoman order. The “tutelage” over the Palestinian people (according to the terminology of Article 22 of the Covenant of the League of Nations), as interpreted in the Mandate for Palestine, has set in motion a process that led away from independence, instead of promoting it, and that undermined the professed (implicit) goal of the League’s mandatory régime to assist peoples “to stand by themselves.”¹⁴

Although the architects of the post-Ottoman colonial order were well aware of this commitment, the contradiction between *idea* (the definition of “mandate” in the Covenant of the League of Nations) and *reality* (the actual intentions of the victorious powers that resulted in the wording of the British Mandate, enacted by the League) was rarely admitted. In a Memorandum of 11 August 1919, addressed to Lord Curzon, the British Foreign Secretary, Lord Balfour frankly stated: “The contradiction between the letters of

¹³ Letter of Foreign Secretary Arthur James Balfour to Baron Rothschild, a leader of the Jewish community of Britain, dated 2 November 1917. (Text quoted according to *The Times*, London, November 9, 1917, p. 7: “Palestine for the Jews. Official Sympathy.”)

¹⁴ Article 22 of the Covenant of the League of Nations committed the member states to assist those peoples of territories formerly governed by countries defeated in World War I who were considered “not yet able to stand by themselves under the strenuous conditions of the modern world.” This formulation (“not yet able”) logically implied a commitment to their future independence.

the Covenant and the policy of the Allies is even more flagrant in the case of the ‘independent nation’ of Palestine [...]. For in Palestine we do not propose to even go through the form of consulting the wishes of the present inhabitants of the country ...”¹⁵

Furthermore, since the period of the war, the British had given contradictory promises to Arabs and Jews concerning the *allocation* of territories as well as the *future status* of the territories that were eventually given to one or the other side. In a letter dated 24 October 1915, Sir Henry McMahon, the British High Commissioner in Cairo, had, “in the name of the Government of Great Britain,” assured Husain Ibn Ali, the Sherif of Mecca, that “Great Britain is prepared to recognise and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca.”¹⁶ He only excluded from this pledge the “districts of Mersina and Alexandretta and portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo.”¹⁷ Since Palestine is situated to the south of these districts, it was meant to be included. (The exception was meant to exclude from the pledge territory which now is Lebanon.) It is to be recalled that Sherif Husain, in a letter to McMahon dated 14 July 1915, had demanded “the independence of Arab countries, bounded [...] on the west by the Red Sea, the Mediterranean Sea up to Mersina.”¹⁸ In view of these facts, Lord Curzon, the British Foreign Secretary, former Vice-Roy of India, admitted *that Palestine was promised to the Arabs*. On 5 December 1918 he stated in a Cabinet meeting: “If we deal with our commitments, there is first the general pledge to Hussein in October 1915, under which Palestine was included in the areas as to which Great Britain pledged itself that they should be Arab and independent in the future ...”¹⁹

Apparently aware that this pledge was in no way compatible with the commitment of the Balfour Declaration, Sir Winston Churchill, in his capacity as Secretary of State for the Colonies, tried to reinterpret the Balfour Declaration so as to alleviate concerns on both

¹⁵ Quoted according to: *Palestine Papers 1917-1922: Seeds of Conflict*. Compiled and annotated by Doreen Ingrams. New York: George Braziller, 1973, p. 73.

¹⁶ Quoted according to Michael S. Neiberg (ed.), *The World War I Reader: Primary and Secondary Sources*. New York/London: New York University Press, 2007, Chapter 6.2: “British Diplomacy – The Hussein-McMahon Letters” / “Sir Henry McMahon, British High Commissioner in Cairo, to Hussein Ibn Ali, the Sherif of Mecca,” p. 335 (paragraph 1 of the assurances).

¹⁷ *Ibid.*

¹⁸ Quoted according to: *Great Britain and Palestine, 1915-1945*. (Information Papers, No. 20.) London/New York: Royal Institute of International Affairs, 1946, Chapter “Extracts from the McMahon Correspondence of 1915-16 / No. 1. Letter from the Sherif of Mecca to Sir Henry MacMahon, July 14, 1915,” p. 144.

sides of the ethnic divide. In a rather ambiguous and misleading “White Paper” that was obviously meant to please both sides, he rejected, with an Arab audience in mind, “exaggerated interpretations of the meaning of the Declaration” and emphasized that its terms “do not contemplate that Palestine as a whole should be converted into a Jewish National Home, but that such a home should be founded in Palestine [emphases added].”²⁰ At the same time, he affirmed – with a Jewish audience in mind – that the Balfour Declaration “is not susceptible of change,” reminding the concerned public that it was “reaffirmed” by the Conference of the Principal and Allied Powers at San Remo (1920) and in the Treaty of Sèvres (1920) – whereby he could not know at the time (June 1922) that the latter would never enter into force. In legal terms, however, the importance of this fact should not be underestimated since it means the total lack of legitimization of the decisions that were subsequently taken in the name of the “abdicated” sovereign in Palestine. Furthermore, in spite of Churchill’s diplomatic maneuvering and word splitting, it cannot be denied that the foundation of a Jewish homeland in Palestine could only mean *partition* of the territory.

These well-documented and undeniable historical facts make it obvious that the problem of Palestine and Jerusalem, intractable as it seems until the present day, is part of the legacy of the colonial era. The outright denial of the right of self-determination to the Palestinian people was at the origin of the problem after the end of the Ottoman era. The text of the Mandate (which we have referred to above) cannot be interpreted in any other way. Britain, the major colonial power at the time, was, as “advanced nation” (Article 22 of the Covenant of the League of Nations), entrusted with a Mandate in Palestine that included a legally worded commitment “for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home.”²¹ It goes without saying that this “obligation” – which Britain, in a self-serving manner, had succeeded to introduce into the Mandate – *prejudiced* the determination of the future status of Palestine and Jerusalem, and in fact *precluded* the meaningful exercise of their political rights by the Palestinians (since it limited the options

¹⁹ Statement at the meeting of the Eastern Committee of the British Cabinet, chaired by Lord Curzon, 5 December 1918, quoted according to Jean Allain, *International Law in the Middle East: Closer to Power than Justice*. Aldershot, Hants (UK) / Burlington, VT (USA): Ashgate, 2004, p. 78.

²⁰ Quoted according to: *International Documents on Israel & Palestine 1915 to 2008*. Collected & Edited by David Lane. First Printed Edition June 2008, Chapter “The Churchill White Paper (June 1922),” p. 38.

²¹ Article 2 of the British Mandate for Palestine, confirmed by the Council of the League of Nations on 24 July 1922, and enacted on 26 September 1923.

and, thus, predetermined in a substantial sense the possible outcome of political developments).

It should not surprise us that, in such a framework, Jewish immigration into Palestine was strongly encouraged and, especially in the course of World War II, the concept of “population transfer” was propagated as a means to create an ethnically homogeneous territory for the promised “homeland.”²² Joseph B. Schechtman, author of the authoritative work “European Population Transfers, 1939-1945,”²³ referred to Palestine as “a classic case for quick, decisive transfer action [sic!] as the only constructive method of solving the basic problem and preventing extremely dangerous developments.”²⁴ His approach corresponds with an earlier statement of Chaim Weizmann, President of the World Zionist Organization, who, in a meeting of Hadassah leaders on 3 April 1941, had expressed the view that “after this war the whole problem of exchanges of population will not be such a taboo subject as it has before.” He continued: “It is going on now and probably will become part and parcel of the future settlement.”²⁵

(II) Colonial legacy after World War II

The colonial legacy since the end of the Ottoman Empire, with the ominous precedent of World War II policies, was reflected, and in a sense culminated, in the so-called “partition resolution” of the United Nations General Assembly upon the termination of the British Mandate (which was a unilateral decision by the British themselves).

Resolution 181 (II) (“Future government of Palestine”), adopted on 29 November 1947, is at variance with international law in different important respects:

- (a) If interpreted as legal basis for the existence of the State of Israel and an eventual Arab state in Palestine, it was *ultra vires*. According to Article 10 of the UN Charter, the General Assembly can only make

²² For details see Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations*. Princeton and Oxford: Princeton University Press, 2009, Chapter 3: “Nations, Refugees, and Territory – The Jews and the Lessons of the Nazi New Order,” esp. pp. 133ff.

²³ Joseph B. Schechtman, *European Population Transfers, 1939-1945*. New York: Oxford University Press, 1946.

²⁴ Joseph B. Schechtman, *Population Transfers in Asia*. New York: Hallsby Press, 1949, Chapter III: “The Case for Arab-Jewish Transfer of Population,” p. 84.

²⁵ Quoted according to Rafael Medoff, *Zionism and the Arabs: An American Jewish Dilemma, 1898-1948*. Westport, CT: Praeger Publishers, 1997, p. 104.

“recommendations” to the member states and/or to the Security Council, and in the exercise of this modest right it is tied to the Security Council.²⁶ When it adopted the resolution, the General Assembly was aware of this statutory limitation and merely “recommended” to the United Kingdom “as the mandatory Power for Palestine,” and to all other member states, the *partition of Palestine*. It “requested” the Security Council to “implement” the “Plan of Partition with Economic Union” and to determine as threat to the peace or breach of the peace under Article 39 of the UN Charter any attempt “to alter by force the settlement envisaged by this resolution.” It cannot be overlooked that the Assembly, by suggesting (in a rather construed way) measures under Chapter VII of the UN Charter, was seeking enforcement for a decision it had no power to adopt.²⁷ It is worthy of note that no such action has ever been taken by the Security Council. In legal terms, Security Council action on the basis of Chapter VII – to enforce the partition resolution or, more precisely, implement the Assembly’s “partition plan” – would also have been *ultra vires* since the Council cannot act as proxy in the exercise of a people’s right to self-determination; such action would be a blatant *abuse* of the Council’s coercive powers under Chapter VII.

- (b) The resolution of the General Assembly (Part III/A) was also *ultra vires* in regard to the “special international régime” envisaged in the partition plan for the City of Jerusalem as *corpus separatum*, and the designation of the United Nations Trusteeship Council as “Administering Authority on behalf of the United Nations.” In actual fact, however, due to the armed conflict triggered by this resolution, Jerusalem was never

²⁶ UN Charter, Article 12(1): “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

²⁷ Arab and other states had initially suggested, *inter alia*, that the General Assembly should seek an advisory opinion from the International Court of Justice on the following question: “Whether the United Nations, or any of its Member States, is competent to enforce or recommend the enforcement of any proposal concerning the constitution and future government of Palestine, in particular any plan of partition which is contrary to the wishes, or adopted without the consent, of the inhabitants of Palestine.” (*Official Records of the General Assembly, Second Session, Ad Hoc Committee on the Palestine Question*, Doc. A/AC 14/32 [1947].) The initiative was narrowly rejected (21 to 20 votes) by a resolution of the General Assembly acting as Ad Hoc Committee (24 November 1947).

established as a separate territory, but *divided* among the warring parties.

- (c) The resolution meant the negation of the Palestinian people's right to self-determination by the very organization that was supposed to uphold that right as one of its "Purposes" (Article 1[2] of the Charter). A legally correct procedure – that was in conformity with United Nations principles – would have had to be radically different: Upon termination of the British Mandate, the people in the territory should either have been entitled to vote in a referendum on the future status of the entire Palestine, or the mandate should have been transferred to a UN trusteeship régime (according to Chapter XII of the UN Charter) with the goal of securing independence at a later stage, i. e. in the sense of *preserving* the rights of the population of Palestine, not abrogating them.
- (d) Not only did the UN General Assembly lack the necessary legal authority to partition Palestine (should resolution 181[II] actually be interpreted in that sense), a territory can only be partitioned or attributed to newly created states by decision of the *territorial sovereign*. It is to be recalled that, in the course of the renunciation of sovereign rights by the Ottoman Empire, those rights were not transferred to the Principal Allied Powers, or the League of Nations collectively. These countries were, thus, not in any way entitled to practice the tutelage which they were exercising under Article 22 of the Charter of the League of Nations in such a way as to curtail, even negate, the Palestinians' right to self-determination, namely through a mandatory régime which implied the implementation of the Balfour Declaration and eventually ended in the partition resolution of 1947 (which incorporated the very rationale of that Declaration).

The subsequent General Assembly resolution 194 (III) of 11 December 1948 was equally *ultra vires* insofar as it "resolved" that the "Jerusalem area" (including the city and the surrounding villages) "should be accorded special and separate treatment from the rest of Palestine" and should be placed under effective United Nations control, envisaging "a

permanent international regime for the Jerusalem area” (Paragraph 8). This can only be seen as an *arrogation of powers* by the General Assembly, a body which possesses no authority whatsoever as “territorial sovereign” – neither under the UN Charter nor under general international law.

This also applies to General Assembly resolution 303 (IV) of 9 December 1949 which restated, “in relation to Jerusalem,” that the city should be placed under international regime and be established as *corpus separatum*,” administered by the United Nations, and which designated the Trusteeship Council to undertake the respective measures (Paragraph 1). At the same time, the General Assembly “confirmed” the geographical boundaries of Jerusalem and surroundings as they had been laid out in the “partition resolution.”

Accordingly, the Trusteeship Council, at its eighty-first meeting on 4 April 1950, adopted the “Statute for the City of Jerusalem.” It is a special irony that though it reads like a “Magna Carta” of the rights of the citizens and residents of Jerusalem it has never entered into force. In statutory terms, the General Assembly had no authority anyway to enact such measures through the Trusteeship Council, and the Security Council did actually not enforce those measures by way of a Chapter VII resolution, a step that would also have been *ultra vires* under the UN Charter (since neither Council nor Assembly can act as territorial sovereign).

It is important to be aware of the legal limits of United Nations action in this particular case since the Security Council, in the meantime, has resorted to a practice of using Chapter VII resolutions for purposes that go far beyond the scope of Article 39, and directly impact on the *jus cogens* domain of the sovereign rights of nations.²⁸

In strictly legal terms, the partition resolution of the General Assembly and all subsequent measures by the Assembly and the Trusteeship Council have remained dead letter. They were not at the origin and have never been part of an accepted legal régime in Palestine. The State of Israel was created *subsequent* to the partition resolution, but *not on the basis* of it. Resolution 181 (II) would have provided for the simultaneous (or parallel) creation of two sovereign entities, a Jewish and an Arab state; for the establishment of Jerusalem as *corpus separatum* under UN auspices; and for a demarcation of borders

²⁸ For details see Hans Köchler, *The Security Council as Administrator of Justice? Reflections on the Antagonistic Relationship between Power and Law*. (Studies in International Relations, Vol. XXXII.) Vienna: International Progress Organization, 2011.

between the two entities that would have been *different* from the area Israel claimed as its territory in the course of the events of 1948/1949.²⁹

For a comprehensive evaluation of the evolution of the Palestine and Jerusalem dispute, one also has to be aware of a fundamental legal issue that relates to the renunciation of the League of Nations Mandate by Britain in 1948:

The mandate régime had not brought about the *independence* of Palestine (which was meant to be the basic rationale of a League of Nations Mandate under Article 22 of the Covenant of the League). It had, to the contrary, curtailed Palestinian national rights in favour of the preparation of measures for the establishment of a Jewish “national home.” The territory should thus have been handed over to the United Nations Organization under the trusteeship provisions of Chapter XIII of the UN Charter. This would have been necessary so as not to further prejudice Palestinian rights (in the *entire* Palestine including Jerusalem). These regulations, should they ever have been enacted, would have been based on the objective to promote the “progressive development towards self-government or independence” (according to Article 76 of the UN Charter), a process which, however, was not allowed to begin – in total neglect of the United Nations’ lofty principle of “self-determination of peoples” (Article 1[2]).

It is worthy to note that, at the time, the United States delegation in the UN favoured, according to a statement delivered in the Security Council on 19 March 1948, a “temporary trusteeship for Palestine [...] to maintain the peace and to afford the Jews and Arabs of Palestine, who must live together, further opportunity to reach an agreement regarding the future government of the country ...”³⁰ With the unilateral declaration of independence by Israel – as a consequence, though not legal result, of General Assembly resolution 181 (II) – this opportunity was missed.

²⁹ It has been stated that Israel derives its existence from a UN resolution it pledged to respect upon its admission to the world organization, but has been violating from the outset. – Cf. the wording of UN General Assembly Resolution 273 (III) adopted on 11 May 1949: “[...] Recalling its resolutions of 29 November 1947 and 11 December 1948 and taking note of the declarations and explanations made by the representatives of the Government of Israel before the *Ad Hoc* Political Committee in respect of the implementation of the said resolutions, *The General Assembly* [...] 1. Decides that Israel is a peace-loving State which accepts the obligations contained in the Charter and is able and willing to carry out those obligations; 2. Decides to admit Israel to membership in the United Nations.”

³⁰ Statement by Ambassador Warren R. Austin, United States Representative in the Security Council, UN Doc. S/P. V. 271, March 19, 1948.

(III) The role of the Security Council

In view of the legal vacuum that resulted from the actions of incompetent bodies or governments since the end of Ottoman rule in Palestine, a general observation on the role of the UN Security Council seems appropriate. The Council has not used its enforcement powers under Chapter VII to enact the General Assembly resolutions (or more precisely, implement its recommendations) concerning the partition of Palestine and a special international status for Jerusalem, nor has it taken coercive measures to bring to an end the occupation of Palestinian territory since 1967 and to force Israel to abrogate the annexation of specific Arab territories (namely Jerusalem and the Golan).

This has resulted in a continued situation of *lawlessness* – due to the initial unilateral declaration of independence (1948) and the subsequent further occupation and annexation of territory. It also has undermined the legitimacy of the United Nations Organization, and the international rule of law as such. The Council has done effectively nothing to enforce its own resolutions calling for the withdrawal of Israel from occupied territories (242[1967] and 338[1973] respectively).³¹

The Security Council practice concerning the question of Palestine, including Jerusalem, preceding and following the creation of the State of Israel in 1948, has been characterized by a consistent pattern of appeals, affirmations and threats short of enforcement measures.

The Council was, *inter alia*,

- “calling upon” concerned parties to suggest or take measures for the implementation of the partition resolution of the General Assembly (resolutions 42[1948],³² 44[1948],³³ 49[1948]);³⁴
- threatening to “reconsider” the situation in Palestine “with a view to action under Chapter VII” (Resolution 50[1948]);³⁵
- “determining” that the situation in Palestine “constitutes a threat to the peace within the meaning of Article 39 of the Charter of the United Nations,” but again merely

³¹ It is obvious that this passive attitude is due to the position of at least one veto-wielding country.

³² Par. 1, Doc. S/691, 5 March 1948.

³³ Doc. S/714, II, 1 April 1948.

³⁴ Par. 1, Doc. S/773, 22 May 1948.

³⁵ Par. 11, Doc. S/801, 29 May 1948.

mentioning coercive measures as a possibility, without ever acting (Resolution 54[1948]);³⁶ and

- “affirming” that “withdrawal of Israel armed forces from territories occupied in the recent conflict” is a “*principle*” that is required for the establishment of just and lasting peace ([242]1967).³⁷

It is to be noted, however, that the Security Council has not been able to act decisively and make true its threats of Chapter VII action due to the veto that would have been used by at least one permanent member. The paralysis of the Council as enforcer of its own and General Assembly resolutions in Palestine is due to the procedural provision of Article 27(3) of the UN Charter; it does not necessarily reflect a lack of political will of the majority of member states.³⁸

Another aspect that highlights the Council’s “imposed” (or structural) lack of determination concerning the enforcement of the law in Palestine is the vagueness of the English text of Security Council Resolution 242 (1967) that uses the phrase “withdrawal [...] from territories occupied in the recent conflict” – without the article “the” before “territories.”³⁹ This wording has been considered, by some, as an invitation to the occupying power to *choose* the territories from which it may withdraw; this has complicated the legal situation concerning Jerusalem in particular.⁴⁰

(IV) The status of Jerusalem post-1948 and post-1967

The ambiguity and lacking enforcement mechanism of Resolution 242 are indeed evidence of the legal vacuum in which facts have been created “on the ground” since the end of

³⁶ Par. 1, Doc. S/902, 15 July 1948. The language of Par. 3 is typical of the Council’s “timid” approach concerning enforcement of its own resolutions in matters related to Palestine: the Council declared that failure to comply with the resolution – namely to “desist” from further military action” – “would demonstrate the existence of a breach of the peace within the meaning of Article 39 of the Charter requiring immediate consideration by the Security Council with a view to such further action under Chapter VII of the Charter as may be decided upon by the Council.”

³⁷ Par. 1(i), Resolution 242 (1967) of 22 November 1967.

³⁸ For an analysis of the implications of the veto provision for the legitimacy of the United Nations Organization in general see Hans Köchler, *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations*. (Studies in International Relations, Vol. XVII.) Vienna: International Progress Organization, 1991.

³⁹ Par. 1(i).

Ottoman rule, and since the partition resolution of the United Nations in particular. As we have explained earlier, the *corpus separatum* “recommendation” of the General Assembly⁴¹ – which apparently was considered as sufficient basis for the Trusteeship Council to adopt a “Statute for the City of Jerusalem” – was *ultra vires*, and was anyway never realized. The warring parties occupied the territory in the course of the armed confrontation following Israel’s unilateral declaration of independence in 1948, and the details were set out in the Armistice Agreement with Jordan of 3 April 1949.

Well aware of the Security Council’s (structural) inability to undertake coercive measures concerning Palestine, and Jerusalem in particular, the State of Israel took the drastic step to “unite” the divided city on its own terms by *annexing* the Eastern part, which it had occupied in the course of the 1967 war.⁴² Paragraph 6 of the 1980 annexation law explicitly excludes any form of internationalization of the Holy City: “No authority [of the Israeli State] ... may be transferred either permanently or for an allotted period of time to a foreign body.” It is obvious that it was the *special status* of Jerusalem, as perceived by the occupying power exclusively in terms of the *Jewish* tradition, that prompted this provocative unilateral act – in open defiance of the Security Council’s earlier (1967, 1973) calls for withdrawal.

The Security Council resolutions that were prompted by this act have remained empty threats and non-consequential angry condemnations because, unlike so many resolutions on Arab matters (such as those related to the Gulf conflict of 1990/1991⁴³ or the Lockerbie dispute⁴⁴), they were not based on Chapter VII of the United Nations Charter. When it comes to the use of its coercive powers, the Security Council undeniably has followed a policy of double standards.

⁴⁰ It is to be noted that the French version of the resolution differs from the English text insofar as it can also be interpreted as a call to retreat from “the” – not only some – recently occupied territories (“Retrait des forces armées israéliennes des territoires occupés lors du récent conflit” / underlining by the author).

⁴¹ *Plan of Partition with Economic Union*, Part III: “The City of Jerusalem,” attached to Resolution 181 (II).

⁴² Israeli Knesset, *Basic Law: Jerusalem, Capital of Israel*, 13 July 1980, Par. 1: “Jerusalem, complete and united, is the capital of Israel.” – A similar annexation law was later adopted by the Knesset regarding the Syrian Golan Heights: *Golan Heights Law*, 14 December 1981. (Par. 1: “The Law, jurisdiction and administration of the state shall apply to the Golan Heights ...”)

⁴³ For details see Hans Köchler (ed.), *The Iraq Crisis and the United Nations: Power Politics vs. the International Rule of Law. Memoranda and Declarations of the International Progress Organization (1990 – 2003)*. (Studies in International Relations, Vol. XXVIII.) Vienna: International Progress Organization, 2004.

⁴⁴ For a documentation of the respective Chapter VII resolutions see Hans Köchler and Jason Subler (eds.), *The Lockerbie Trial: Documents Related to the I.P.O. Observer Mission*. (Studies in International Relations, Vol. XXVII.) Vienna: International Progress Organization, 2002, pp. 121ff.

Resolution 476 (1980) of 30 June 1980 declared that all Israeli measures aimed at changing the status of the “Holy City of Jerusalem” have no legal validity (Paragraph 3), and threatened further measures in accordance with the UN Charter “to secure the full implementation of the present resolution” (Paragraph 6). In actual fact, no such measures have ever been taken by the Council. Resolution 478 (1980) of 20 August 1980 determined that Israel’s “Basic Law” on Jerusalem “constitutes a violation of international law” (Paragraph 2) and stated that all Israeli measures to alter the character and status of the Holy City of Jerusalem “are null and void and must be rescinded forthwith” (Paragraph 3). Again, no measures have ever been taken, over a period of 30 years, to enforce this resolution.

The illegality of the Israeli annexation of East Jerusalem has again become obvious in the “referendum law” adopted by the Israeli Knesset on 22 November 2010. According to that unilateral measure “at the meta-level” (in relation to the actual annexation by means of the “Basic Law”), either a 2/3 majority in the Knesset or a national referendum is required in order for Israel to give up, as part of a future peace deal, any annexed territory. It goes without saying that this provision openly contradicts one of the basic norms of international law according to which the acquisition of territory by force – as in the case of Arab Jerusalem’s occupation in 1967 and annexation in 1980 – is inadmissible, and all measures and legal claims resulting from such an illegal act are null and void. The “referendum law” is, thus, without object since Israel is not entitled to take any decision whatsoever on the legal status of occupied Jerusalem (or any other occupied or annexed territory for that matter). As occupying power, it is bound by the provisions of the Fourth Geneva Convention of 1949. It can in no way act as territorial sovereign.

(V) Conclusion: Law of force versus the force of law

The laws and international resolutions that relate to the status of Jerusalem, which we have briefly referred to above, highlight what may be characterized as disparity between law and politics, or *idea* and *reality*, in a most dramatic manner. The legal principles are clear and unambiguous as regards the inadmissibility of the occupation and annexation of Arab Jerusalem (the Holy City of Jerusalem). The law, however, may not be enforceable for the foreseeable future. The only international body with coercive powers – the United Nations

Security Council – has been paralyzed since the very beginning of the conflict because of the veto of at least one permanent member.

The situation is characterized by a *complex dilemma* between the “rule of law” and the “law of force.” Upon the end of Turkish rule, Jerusalem had become part of the territory of the British Mandate for Palestine. Upon the termination of the Mandate, a special international status was declared for Jerusalem, but without the involvement of the people concerned – and this status has never been implemented. In actual fact, the Holy City has been subjected to an occupation régime and subsequently become the victim of a usurpation of sovereignty by the occupant. The resulting dilemma can best be described by way of juxtaposition of the facts “on the ground,” created by *realpolitik*, including violent means, and the legal principles that underlie the Charter of the United Nations Organization:

- (A) **The law of force** has determined the course of events ever since the end of Ottoman rule in Palestine. The people directly concerned – who are referred to in the Treaty of Lausanne⁴⁵ – were never allowed to exercise their right of self-determination. This has been evident in numerous actions and decisions of non-Palestinian (non-Arab) parties such as:
- Part of the Palestinian territory was promised to another people – in fact to people residing outside Palestine.⁴⁶
 - Consequently, foreign immigration into Palestine was encouraged by the mandatory power during the League of Nations period.
 - The territory was – *illegally* – partitioned in a plan that nonetheless was never implemented according to its own provisions. One of the two states envisaged in the plan eventually emerged with a territory much larger than specified in it, and the regulations, attached to that plan, for an international status of Jerusalem remained dead letter.

⁴⁵ It is to be recalled that Article 16, dealing with Turkey’s renunciation of sovereignty in the territories it surrendered as a result of the war, was based on the understanding of “the future of these territories and islands being settled or to be settled by the parties concerned.”

⁴⁶ Through the Balfour Declaration of 1917 and subsequent statements by Britain and other interested parties after World War I and in the course of and shortly after World War II.

- In 1948/1949 and 1967 respectively, additional territories of the original mandated area (Palestine) were seized, and some were later annexed by Israel.
- Up to the present day, settlements are being established on illegally held (occupied or annexed) territory and systematic measures are being undertaken to change the status of Jerusalem (including its demographic composition).
- All these measures were and are being undertaken in constant defiance of United Nations resolutions that call for the withdrawal from occupied territories and declare the annexation of conquered land null and void.
- In the latest step in this escalation of illegal acts in Palestine and vis-à-vis the Palestinians, the occupying power has aimed to subject any decision about the future status of annexed land – in Arab – to the domestic political process, namely by conditioning the return of annexed territories on the consent of the Israeli electorate (according to specific voting requirements set out in the “referendum law” of 22 November 2010).

(B) In the face of all these transgressions and unilateral acts or arrogations of rights – that exemplify the law of force, or a policy of *faits accomplis*, the United Nations Organization, in particular the Security Council, has constantly propagated **the rule of law**; but the world organization has been effectively prevented to use its powers (namely the provisions laid out in Articles 41 and 42 of the Charter) to **enforce the law**.

Notwithstanding the resulting state of legal limbo, or international anarchy, the people of Palestine possess the inalienable right to decide the *future status of Palestine*, in particular of the territories occupied or annexed since 1967, and to establish, at a time of their choosing, the State of Palestine with Jerusalem as its capital. In the exercise of their right to self-determination they are legally independent of decisions by those international bodies that, up to the present moment, have proven to be incapable or unwilling to enforce

the international rule of law in Palestine, and that have anyway no right to substitute the rights of the territorial sovereign.⁴⁷

Ex injuria jus non oritur: violations of the law do not create legal title. The state of injustice resulting from the continued occupation of Palestinian territory and the annexation of Jerusalem, and the *systemic paralysis*⁴⁸ of the United Nations Organization in all matters related to Palestine entitle the Arab people of Palestine to defend themselves and to undertake appropriate and necessary measures, in conformity with international law and the United Nations Charter, to realize their inalienable rights – a step which they should have been enabled to undertake on the basis of the mandate régime of the League of Nations after the end of Ottoman rule.

Despite its name, the UN General Assembly's "Committee on the Exercise of the Inalienable Rights of the Palestinian People" has not been able to redress this situation in the several decades of its existence.⁴⁹ For statutory reasons, it can only *emphasize*, but not *enforce*, those rights while the Security Council would be able to enforce them, but will not make use of its prerogative for political reasons.

In regard to Jerusalem, "inalienable rights" means the entitlement of the Palestinian people to decide, without outside interference or tutelage, the future status of Arab Jerusalem, including the Holy City, with special guarantees for the rights of all religious communities of the three monotheistic faiths.⁵⁰ The international régime that was envisaged by the General Assembly of the United Nations in 1947 never materialized. The status quo is essentially the result of an *illegal* use of force. The annexation, following the occupation in 1967, is *null and void*. It is obvious that, in this "legal vacuum," an internationally accepted legal status can only be established by the legitimate inhabitants of Palestine on the basis of the exercise of their right to self-determination. This will include the full restoration of the Arab character of the now occupied and annexed city.

⁴⁷ On the historical and legal details of Palestinian sovereignty see esp. Henry Cattán, *The Solution of the Palestine Refugee Problem*, pp. 15ff.

⁴⁸ We refer here to the veto rule of Article 27(3) of the UN Charter, which has enabled the main strategic partner of the occupying power in Palestine to block each and every initiative towards the enforcement of the law in Palestine.

⁴⁹ The Committee was established by General Assembly resolution 3376 (XXX) on 10 November 1975.

⁵⁰ For details see also Sally V. Mallison and W. Thomas Mallison, "The Jerusalem Problem in public international law: Juridical Status and a start towards solution," in: Hans Köchler (ed.), *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem*, pp. 98-119.

It is important to emphasize that, in terms of modern international law, the Arab people of Palestine not only enjoys the right of self-determination (as all other peoples do),⁵¹ but that it also has the right to resist foreign occupation⁵² and to take measures against the continued annexation of East Jerusalem. Furthermore, absent action by the Security Council, Arab or other concerned states may undertake collective measures such as those adopted in 1973, within the limits of international law, to bring about the implementation of United Nations resolutions concerning Palestine.

After almost a century of false and contradictory promises to the Arab people of Palestine, of empty proclamations and appeals, of urgent calls of the international community that were not heeded, demands that were not met, and of resolutions that were never enforced, it seems appropriate, upon the conclusion of this analysis, to make a point of principle:

Norms of law are defined by their being linked to coercive measures (sanctions, punishment) in case of non-compliance.⁵³ Accordingly, norms that lack enforcement mechanisms are mere moral principles or “requests.” If the UN member states are indeed committed to the Charter of the United Nations, with its affirmation of the international rule of law, it is in their vital interest that coercive measures be taken to enforce, in Palestine, the fundamental norm of the non-admissibility of acquisition of territory by force (as affirmed, *inter alia*, in Security Council Resolution 242[1967]). If, as we have explained, the Council is paralyzed because of the special voting provision of Article 27(3) of the UN Charter, concerned member states, first and foremost those from the region, have the right to take measures of their own. Another General Assembly resolution on the basis of “Uniting for Peace,” in addition to the earlier resolutions,⁵⁴ will not bring tangible

⁵¹ For details see also Hans Köchler, “The Palestinian People’s Right of Self-determination: Basis of Peace in the Middle East,” *loc. cit.*

⁵² On the right of resistance see, *inter alia*, Richard A. Falk and Burns H. Weston, “The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza,” in: Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*. New York: Oxford University Press, 1992, pp. 143ff.

⁵³ On the definition of legal norms see Hans Kelsen, *Pure Theory of Law*. Translation from the second (revised and enlarged) German edition by Max Knight. Berkeley / Los Angeles / London: University of California Press, 1967, esp. Chapter I/6/c (“The Law As a Normative Coercive Order ...”), pp. 44ff.

⁵⁴ Resolution 377 [V] AA, adopted at the 302nd plenary meeting on 3 November 1950: The General Assembly “[r]esolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures (...) to maintain or restore international peace and security.” The Seventh

results either because nothing can do away with the statutory fact that the Assembly can only make recommendations.

Only *decisive* measures, not recommendations or appeals, will enable the people concerned to reverse the catastrophic course of events that has been determined by the law of force in Palestine since the era of the First World War.
