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Israel and the Palestinians:
Some Legal Issues

Ruth Lapidoth

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The Jerusalem Institute for Israel Studies
The Teddy Kollek Center for Jerusalem Studies

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Jerusalem, 2003

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Professor Ruth Lapidoth is the recipient of the Edna and Oscar Gass Award in 2001 for her contribution to Jerusalem studies.

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A. *Introduction*

Until September 2000 hopes were high that soon an agreement on the final status of the West Bank and Gaza would pave the way for peaceful coexistence between Israel and the Palestinians. These hopes have unfortunately been shattered. As these lines are being written (April 2001), Palestinians are violently attacking Israelis in the West Bank and Gaza as well as in Israel proper provoking violent reactions by Israel. One could wonder what is the purpose in analyzing legal issues related to a peaceful settlement when violence is the order of the day. If we nevertheless examine some of the legal issues, it is because we have not yet lost the hope that sooner or later the guns will be silenced and the parties will return to the negotiating table.

The underlying conflict is mainly of a political nature. However, for several reasons it should be analyzed also from a legal perspective. First, some of the questions involved are overwhelmingly of a legal nature. Second, the parties base their claims on legal arguments. And, third, if and when a compromise is reached, it will be drafted in legal terms and be included in a legal text.

In the following pages an attempt will be made to examine the legal aspects of some of the historical events related to the conflict. Then an analysis of the Oslo process that started in 1993 will be made followed by an examination of the main subjects that have to be tackled in the negotiations on the permanent status of the Palestinian areas. It is not intended to present in this article the attitude and positions of the Government of Israel, but to analyze the outstanding issues.

Let us start with some geographic and demographic data. The areas in dispute are the West Bank, the Gaza Strip and East Jerusalem. The

West Bank is the territory west of the River Jordan, sometimes referred to as Judea and Samaria, the names of its geographical components. The area, covering about 5,612 square kilometers (2,200 square miles), had been part of mandatory Palestine and was occupied by (1948) and annexed by or united with (1950) Jordan. Later, in 1967 it was occupied by Israel in the wake of the Six-Day War. In 1988 King Hussein of Jordan severed the legal and administrative links between Jordan and the West Bank. The Gaza Strip was also part of mandatory Palestine; it was occupied by Egypt in 1948 and by Israel in 1967. Its area is 365 square kilometers (135 square miles). Jerusalem was the capital of the mandatory administration and, as a consequence of the 1948 war, it was divided by the 1949 armistice line between Israel and Jordan. In 1967 the eastern part was occupied by Israel and reunited with the western part. The area of Israel proper (within the 1949 armistice lines) is 20,770 square kilometers (8,017 square miles). Both the West Bank and the Gaza Strip are directly adjacent to Israel.

During the British Mandate in Palestine (1923-48), all the inhabitants of the whole area were called Palestinians, both Arabs and Jews. Since the early nineteen sixties, however, the name has been used mainly for the Arab inhabitants of the West Bank, the Gaza Strip and eastern Jerusalem, as well as for Jordanians of Palestinian origin and for Arab Palestinian refugees. Some authors also use the term for Arabs who live in Israel and have Israeli citizenship. The population of the West Bank in 1997 was about 1.8 million, while the Gaza Strip had about 1.02 million inhabitants.[2] The population in the West Bank and Gaza is the fastest growing in the world, and has one of the highest

[2] The data about the West Bank and the Gaza Strip are from Palestinian sources, kindly given to me by Dr. Maya Choshen and Michal Korach, of the Jerusalem Institute for Israel Studies.

rates of density – 2964 persons per square kilometer.[3] Israel's population, including its Arab inhabitants, was at the end of 2001 6,508,800. Jerusalem had 670,000 residents of whom 215,400 were non-Jews.[4]

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3 The Economist, World in Figures, 2001 edition, London 2000, at pp. 15 and 16.

4 Statistical Yearbook of Jerusalem 2001, No. 19, Maya Choshen (ed.), Jerusalem 2002, at p. 41;
Maya Choshen, Jerusalem: Facts and Trends 2001, Jerusalem, 2002, p. 6. (Hebrew).

B. *Legal Aspects of Some of the Main Historical Landmarks*

From 1517 until 1917 Palestine (that is, the area known today as Israel, the West Bank, the Gaza Strip and Jordan) was under Turkish rule, like most of the Middle East. During World War I it was occupied by Britain, which was later granted a Mandate over the area. Under the Terms of the Mandate agreed upon in 1922 by Britain and the Council of the League of Nations, "the Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home... and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion".[5] Accordingly, Britain was to Facilitate Jewish immigration and intensive settlement by Jews on

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2 The data about the West Bank and the Gaza Strip are from Palestinian sources, kindly given to me by Dr. Maya Choshen and Michal Korach, of the Jerusalem Institute for Israel Studies.

3 The Economist, World in Figures, 2001 edition, London 2000, at pp. 15 and 16.

4 Statistical Yearbook of Jerusalem 2001, No. 19, Maya Choshen (ed.), Jerusalem 2002, at p. 41;
Maya Choshen, Jerusalem: Facts and Trends 2001, Jerusalem, 2002, p. 6. (Hebrew).

5 League of Nations, Official Journal, August 1922, pp. 1007-1012, reproduced in: The Arab-Israel Conflict and Its Resolution: Selected Documents, Ruth Lapidoth / Moshe Hirsch (eds.), Dordrecht 1992, pp. 25-32.

the land,[6] as well as the acquisition of Palestinian citizenship by these incoming Jews.[7] At that time Palestine was inhabited by 757,200 persons of whom 83,800 were Jews.[8]

It has been claimed that the above provisions of the Mandate were illegal.[9] First, the argument has been made that they contradicted Article 22 of the Covenant of the League of Nations which had established the Mandates system. That article dealt with three different groups of mandated territories and laid down that "[c]ertain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory..." – a provision which, according to the argument, left no room for the establishment of the Jewish national home in Palestine. This argument, however, fails to take into consideration that the above provision dealt only with *certain* communities formerly belonging to the Ottoman Empire and did not necessarily apply to all of them. Moreover, another paragraph of Article 22 provided that the terms of each Mandate should be

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6 Article 6 of the Terms of the Mandate.

7 Article 7 of the Terms of the Mandate.

8 Statistical Yearbook of Jerusalem 2001 (note 4), p.38. These data are based on the population of Palestine according to a census of the Mandatory authorities.

9 Colloque de Juristes Arabes sur la Palestine – La Question Palestinienne, Alger, 22-27 Juillet 1967, Alger 1968, pp. 73-83. For an English translation, see: Seminar of Arab Jurists on Palestine, Algiers, 22-27 July 1967 – The Palestine Question, Beirut 1968, partly reproduced in: The Arab-Israeli Conflict, John Norton Moore (ed.), Princeton, N.J. 1974, vol. I, pp. 253-385.

established in each case by the Council of the League of Nations, thus leaving a wide discretion in the hands of the Council.[10]

Under a second argument raised against the provisions of the British Mandate for Palestine, these provisions contradicted the principle of the right to self-determination of peoples. However, in 1922 that principle had not yet reached the status of a legally binding norm.[11] Moreover, Britain, with the consent of the Council of the League of Nations, excluded the areas lying east of the River Jordan, which constituted 74% of the area of the Mandate, from the application of the provisions intended to promote Jewish immigration and settlement, thus preserving those areas for self determination of the non-Jewish inhabitants of Palestine.[12] Much later this area became the Hashemite Kingdom of Jordan.

Despite some early intention of cooperation,[13] the Arab national movement in Palestine objected to Jewish immigration to western Palestine and resorted to violence. Due to Arab pressure, in 1939 Britain severely limited both Jewish immigration and the areas where Jews were permitted to purchase land. Britain's acts were criticized by the members of the Permanent Mandates Commission of the League of

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10 Nathan Feinberg, The Arab-Israel Conflict in International Law: A Critical Analysis of the Colloquium of Arab Jurists in Algiers, Jerusalem 1970, pp. 39-44.

11 Ibid., pp. 44-51.

12 Memorandum by the British Representative under Article 25 of the Palestine Mandate, approved by the Council on 16 September 1922, reproduced in: Terms of League of Nations Mandates, UN Doc. A/70, October 1946, pp. 2-7.

13 For example, Agreement between the Emir Faisal of Hedjaz and Dr. Chaim Weizmann of the Zionist Organization, 3 January 1919, reproduced in: Lapidoth/Hirsch (eds.) (note 5), pp. 21-22.

Nations.[14] The closing of the gates of Palestine and of other countries deprived many of the Jews of Europe of an asylum from Nazi persecution.

After World War II only a small number of the European Jews who had survived the Holocaust were permitted to enter Palestine, a fact which led Jews to commit acts of violence against the Mandatory administration. In 1947 Britain asked the UN General Assembly to consider the Palestine question and in November of that same year the General Assembly adopted its Resolution 181(II) on the Future Government of Palestine,[15] often referred to as "the partition resolution". It recommended the establishment of a Jewish and an Arab state in western Palestine, as well as a *corpus separatum* of Jerusalem with a special international regime to be administered by the United Nations. All three entities were to constitute an economic union. The borders recommended by the General Assembly were rather queer – each of the two states to be established would have been composed of three chunks of territory, linked to each other by a mere road. This resolution received the consent of the national leadership of the Jewish community of Palestine[16] but was categorically rejected by the Arabs,[17] who immediately started to attack Jewish towns and villages.

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14 Nathan Feinberg, The Attitude of the Members of the Mandates Commission to the Palestine Mandate, in: Gesher, nos. 79-80 (1974), at pp. 96-106 (Hebrew).

15 UN General Assembly resolution 181(II) on the Future Government of Palestine, of 29 November 1947, GAOR, 2nd session, 1947, pp. 131-151, reproduced in: Lapidoth/Hirsch (eds.) (note 5), pp. 33-54.

16 GAOR, 2nd session 1947, Ad Hoc Committee on the Palestine Question, pp. 12-19.

17 Ibid., pp. 5-11; and Plenary Meetings, vol. II, pp. 1425, 1426, 1427.

Resolution 181(II) was criticized from a legal point of view. We will limit ourselves to an examination of the main arguments.[18] It was claimed that the General Assembly had exceeded its powers by purporting to adopt a binding resolution on the subject. This argument, however, would not detract from the validity of the resolution as a lawful recommendation. It was also argued that a Mandated area could not be partitioned, but history has shown that in other instances too such territories had been partitioned, e.g. Ruanda-Urundi which had been under a Belgian mandate was later divided into the two states of Rwanda and Burundi.

It was further claimed that the resolution was not in conformity with the principle of self-determination, since there were about 1,255,000 Arabs and only 579,200 Jews in Palestine at that time.[19] It is doubtful whether at the relevant date – 1947 – this principle had already reached legally binding effect.[20] Moreover, the very proposal of partition was an attempt to satisfy the aspirations for self-determination of both communities.

From time to time one nowadays hears the claim that the dispute between Israel and the Palestinians should be solved on the basis of the 1947 partition resolution including its proposed borders. However, it seems that at this point of time the Palestinians cannot request the implementation of that resolution. First, one has to bear in mind that resolution 181(II) was a mere recommendation. If it had been accepted at the time by both parties, it could have become binding by agreement. But, as mentioned, the Arabs rejected it. A party that has rejected a

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18 Colloque de Juristes Arabes (note 9), pp. 80-100; Henry Cattan, Palestine, The Arabs and Israel: The Search for Justice, London 1969, pp. 261-269.

19 Statistical Yearbook of Jerusalem 2001 (note 4), at p. 38. These numbers are based on the population census in Palestine of the end of 1945.

20 Nathan Feinberg (note 10), at pp. 44-51.

resolution and acted violently to defeat it, causing grave damage to another party, cannot come after half a century and try to benefit from that resolution. In legal terms, one would speak of "estoppel": the party is estopped from relying on that resolution. The principle, however, is based not only on legal considerations, but also on plain common sense.

Moreover, as we shall see later, in 1967 the UN adopted a new framework for solving the Arab-Israel conflict – Security Council Resolution 242. This resolution served as a basis for the peace treaties between Israel and Egypt (1979) as well as Jordan (1994). Israel and the Palestinians have agreed that this resolution should be the basis for their permanent status negotiations. The solutions foreseen by Security Council Resolution 242 are very different from those recommended in 1947 by the General Assembly.

On 14 May 1948, when the British mandate over Palestine drew to its end, representatives of the Jewish community in Palestine proclaimed the establishment of the State of Israel.[21] The declaration was followed by an invasion of the new state by the armies of five Arab states. Because of the war, many Palestinian Arabs fled and some were expelled from areas that came under Jewish control. In parallel, about 586,000 Jews from Arab countries poured into Israel. In December 1948 the UN General Assembly adopted resolution 194(III)[22] which was intended to achieve a final settlement of all outstanding questions, including the refugee problem. We'll discuss this resolution later, in the context of the permanent status negotiations. The 1948 war ended with four armistice agreements, between Israel on the one side and Egypt, Lebanon, Jordan and Syria respectively on the other.[23]

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21 For an English translation, see: Laws of the State of Israel, Authorized Translation, vol. 1, 5708-1948, p. 3.

22 GAOR, 3rd session part 1, 1948, Resolutions, pp. 21-24.

23 United Nations Treaty Series, 1949, vol. 42, nos. 654-657, pp. 252-340.

The formation of the Palestine Liberation Organization (PLO) was approved in 1964 by the Arab summit conference. According to its covenant (of 1968) it preached the elimination of the State of Israel by violence and the establishment of a Palestinian state in the whole of mandatory Palestine.[24] The PLO is an umbrella organization that includes a number of Palestinian groups, the most important of them being *Fatah*, headed by Yassir Arafat. Although the organization resorted to cruel acts of terrorism, it was recognized by many states as a national liberation movement, and in 1974 was granted observer status at the United Nations.[25]

In 1967 The Six Day War broke out. Arab writers are of the opinion that Israel was the aggressor, but most western experts do not share this view[26] and are of the opinion that Israel acted lawfully in self-defense. As a result of this war, Israel occupied eastern Jerusalem and applied its law, jurisdiction and administration to the eastern parts.[27] The question arose whether this amounted to annexation, and, if so, was Israel authorized to annex the eastern parts – a question to be discussed later, in the context of the permanent status negotiations. As to the West Bank and the Gaza Strip, Israeli law and jurisdiction have not been extended to them.

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[24] For an English translation, see Lapidoth/Hirsch (eds.) (note 5), at pp. 136-141.

[25] UN General Assembly resolution 3237 (xxix), of 22 November 1974.

[26] See e.g. Julius Stone, The Middle East under Cease-Fire, Sydney 1967, p. 6 et seq.; Quincy Wright, Legal Aspects of the Middle East Situation, in: Law and Contemporary Problems 3 (1968), pp. 5-31, at p. 27. For a fuller list, see Ruth Lapidoth, Security Council Resolution 242 at Twenty Five, in: Israel Law Review 26 (1992), pp. 295-318, at p. 304, note 22.

[27] Law and Administration Ordinance (Amendment no. 11) Law, 5727-1967, Laws of the State of Israel, Authorized translation, vol. 21, 5727-1966/67, p. 75; Law and Administration (no. 1) Order, of 28 June 1967, Collection of Subsidiary Legislation (Kovets Ha-Takanot), 5727 (1966/67), at p. 2690.

In November 1967, in the wake of the Six Day War, the Security Council adopted resolution 242, which until this day is considered as the central building block for peace.[28] Some of its provisions will be analyzed in detail later, and at this point we will limit ourselves to a short summary. The Council laid down certain principles to be applied in future negotiations: an Israeli withdrawal from territories occupied in 1967 (according to Arab interpretation: withdrawal from all the territories occupied in 1967), the establishment of secure and recognized boundaries, mutual recognition, freedom of navigation in international waterways in the area, a just settlement of the refugee problem, and the adoption of measures to guarantee the new boundaries.

Originally the resolution was in the nature of a recommendation, but its effect grew through its acceptance by the parties and its inclusion in several treaties and agreements concluded later. It also gained some additional effect by Security Council resolution 338 adopted after the October 1973 War.[29]

Although the resolution speaks only of *states* in the region, eventually Israel and the Palestinians agreed (in 1993) that their permanent settlement should also be based on resolutions 242 and 338.[30]

A first attempt to solve the Palestinian problem by peaceful means

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[28] SCOR, 22nd year, Resolutions and Decisions, pp. 8-9. For its legislative history, see e.g. Arthur Lall, The U.N. and the Middle East Crisis 1967, New York 1968. For an analysis, see e.g. Adnan Abu Odeh, Nabil Elaraby, Meir Rosenne, Dennis Ross, Eugene Rostow, Vernon Turner, articles in: UN Security Council Resolution 242: The Building Block of Peacemaking, Washington, D.C. 1993; Ruth Lapidoth (note 26).

[29] SCOR, 28th year, Resolutions and Decisions, p. 10.

[30] Declaration of Principles on Interim Self-Government Arrangements, in: International Legal Materials 32 (1993), pp. 1525-1544, Article 1. Similar provisions were also included in later agreements.

was made by Egypt and Israel with the active mediation of U.S. President Jimmy Carter in one of the two 1978 Camp David accords – "A Framework for Peace in the Middle East".[31] The parties agreed to conduct negotiations for establishing a regime of full autonomy for five years for the Arab inhabitants of the West Bank and the Gaza Strip. Not later than the third year after the establishment of autonomy, negotiations would take place to determine the final status of these regions. Jordan and the Palestinians refused to participate in the negotiations for autonomy which were held in 1979-1982 by Egypt and Israel, and no agreement was reached.[32]

Later a few attempts were made to revive the Camp David formula – for example, President Reagan's initiative of 1982,[33] Secretary of State Shultz's plan of 1988,[34] and Israel's 1989 peace initiative.[35] However, none of them was successful.

In 1988 King Hussein of Jordan announced the disengagement of the West Bank from Jordan in the sphere of law and administration.[36] In the same year the Palestine National Council of the PLO proclaimed the establishment of the State of Falasteen (Palestine) with Jerusalem as its capital.[37] This proclamation was recognized by many states. A

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31 United Nations Treaty Series, vol. 1138, no. 17853, pp. 39-45.

32 For the points of disagreement, see e.g. Ruth Lapidoth, The Autonomy Negotiations: A Stocktaking, in: Middle East Review 15 (1983), pp. 35-43; Harvey Sicherman, Palestinian Self-Government (Autonomy): Its Past and Its Future, Washington D.C., 1991.

33 International Legal Materials 21 (1982), pp. 1199-1202.

34 Lapidoth/Hirsch (eds.) (note 5), pp. 337-338.

35 For an English translation, see ibid., pp. 357-360.

36 For an English translation, see: International Legal Materials 27 (1988), pp. 1637-1645.

37 For an English translation, see: UN Doc. A/43/827; S/20278, of 18 November 1988.

mere proclamation, however, even if followed by a considerable number of recognitions, is not sufficient for the establishment of a state, unless the four prerequisites for the existence of a state are present: territory, population, effective government, and the ability to conduct international relations.[38]

In a press conference held at the end of 1988 Yassir Arafat hinted that the above-mentioned provisions of the Palestine National Covenant had become obsolete, and that a Palestinian state could exist in parallel with Israel.

In the wake of dramatic changes that had occurred in Eastern Europe, and under the influence of the 1991 Gulf War, the United States and the Soviet Union invited all parties to the Arab-Israel conflict to the 1991 Madrid Peace Conference.[39] After that meeting direct bilateral negotiations began between Israel and each of its neighbors. In addition, multi-lateral talks on concerns common to the peoples of the region were started in five working groups: water, refugees, environment, regional economic development, arms control and regional security.

The post-Madrid bilateral negotiations between Israel and the Palestinian delegation, which upon Israel's demand did not include members of the PLO, did not make much progress.

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38 James Crawford, The Creation of the State of Palestine: Too Much Too Soon?, in: European Journal of International Law 1 (1990), pp. 307-313. For a different opinion, see Francis A. Boyle, The Creation of Palestine: Too Much Too Soon?, ibid., pp. 310-306.

39 For the text of the invitation, see Lapidoth/Hirsch (eds.) (note 5), pp. 384-386.

C. *The Oslo Process*

In 1993 the PLO and Israel held secret negotiations in Norway. As a result, the parties exchanged three letters[40] and signed a Declaration of Principles on Interim Self-Government Arrangements.[41] Two of the letters were sent by the chairman of the PLO, Yassir Arafat, one of them to Israel's Prime Minister and the other to Norway's Foreign Minister. He recognized Israel's right "to exist in peace and security" and renounced "the use of terrorism and other acts of violence". Israel's prime minister Yitzhak Rabin stated that the government of Israel had decided to recognize the PLO as the representative of the Palestinian people and intended to negotiate with it. From the legal point of view, these texts could perhaps be considered as an agreement concluded by exchange of letters, but, more plausibly, as two legally binding unilateral declarations.

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[40] Published in: Israel Law Review 28 (1994), pp. 440-441.

[41] International Legal Materials 32 (1993), pp. 1525-1544. On this declaration, see e.g. Joel Singer, The Declaration of Principles on Interim Self-Government Arrangements, in: Justice (Tel Aviv), no. 1 (1994), pp. 4-21; Eyal Benvenisti, The Israel-Palestinian Declaration of Principles: A Framework for Future Settlement, in: European Journal of International Law 4 (1993), pp. 542-554; Antonio Cassese, The Israel-PLO Agreement and Self-Determination, ibid., pp. 564-571; Raja Shihadeh, Can the Declaration of Principles Bring About a 'Just and Lasting Peace'?, ibid., pp. 555-563; Karin Calvo-Goller, Le régime d'autonomie prévu par la déclaration de principes du 13 Septembre 1993, in: Annuaire Français de Droit International 39 (1993), p. 435; K. W. Meighan, The Israel-PLO Declaration of Principles: Prelude to a Peace?, in: Virginia Journal of International Law 34 (1994), pp. 435-468.

Politically as well as legally, these letters constituted a watershed in the relations between the parties. The 1978 Camp David Framework had already mentioned that the final status negotiations should also "recognize the legitimate rights of the Palestinian people",[42] but these negotiations had not taken place. Thus, until the 1993 exchange of letters, the dispute had been a zero-sum one: non-recognition of each other's rights and existence. The letters actually transformed the dispute into one about borders, powers and responsibilities.

Soon the letters were followed by the 1993 Declaration of Principles on Interim Self-Government Arrangements.[43] This declaration has been the framework for all the negotiations that have since taken place between Israel and the Palestinians. According to the declaration, a timetable has been set for various sets of negotiations intended to lead to a staged transfer of powers from the Israeli military government and its civil administration to the Palestinians, accompanied by a withdrawal and redeployment of Israel's forces.

The first stage concerned the transfer, subject to certain limitations, of most powers in the Gaza Strip and the Jericho area – except for external security, settlements, Israelis, and foreign relations.[44] This stage, completed in May 1994,[45] also involved a substantial withdrawal and redeployment of Israel's army.

The second stage (not involving changes in the deployment of the army) concerned an early transfer of certain powers in the rest of the West Bank: education and culture, health, social welfare, direct taxation

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42 UN Treaty Series, vol. 1138, no. 17853, pp. 39-45, Article A (1) (c).

43 Supra, note 41.

44 Article 14 and Annex 2 of the Declaration of Principles.

45 Agreement on the Gaza Strip and the Jericho Area, of 4 May 1994, in: International Legal Materials 33 (1994), pp. 622-720.

and tourism.[46] The relevant agreement was signed in August 1994.[47] A year later another batch of powers was transferred: the spheres of labor, commerce and industry, gas and petroleum, insurance, postal services, statistics, local government, and agriculture.[48]

In September 1995 the parties completed the third stage foreseen by the Declaration of Principles – the conclusion of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip.[49] This agreement provided for a large-scale transfer of powers in the West Bank, preceded by the election of a Palestinian Council. On the eve of these elections, the Israeli army redeployed outside populated areas. Further redeployments to specified locations were to be gradually implemented. The 1995 agreement (more than three hundred pages long) includes detailed provisions on the election of a Palestinian self-governing council and a *Ra'ees* (which in Arabic means both president and chairman), a staged redeployment of Israeli forces,

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46 Article 6 and Agreed Minutes to Article 6 of the Declaration of Principles.

47 International Legal Materials 34 (1995), pp. 457-481.

48 Protocol on Further Transfer of Powers and Responsibilities, signed in Cairo on 27 August 1995.

49 Articles 1, 3, 4, 7, 13 and Annex I of the Declaration of Principles. Excerpts of the 1995 agreement were published in: International Legal Materials 36 (1997), p. 551. For the full text, see Kitvei Amana (Israel's publication of treaties), vol. 33, no. 1071, pp. 1-400. For commentaries, see Joel Singer, The West Bank and Gaza Strip: Phase Two, in: Justice, no. 7 (1995), pp. 1-12; Rotem M. Giladi, The Practice and Case Law of Israel in Matters Related to International Law, in: Israel Law Review 29 (1995), pp. 506-553, at pp. 506-534; Raja Shihadeh, From Occupation to Interim Accords: Israel and the Palestinian Territories, London 1997, at pp. 31-72; Geoffrey R. Watson, The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements, Oxford 2000.

security arrangements and an obligation to fight terrorism, the transfer of forty spheres of civilian powers from the Israeli military government and its civil administration to the Palestinian authority, legal matters (such as jurisdiction of the courts), economic relations, Israeli-Palestinian cooperation programs and the release of Palestinian prisoners and detainees. The transfer of powers in both civilian and security matters was to take place in stages, depending on the nature of the relevant power, and on the demographic and strategic situation of the various areas (areas A, B and C in the West Bank).

In a nutshell, Israel was obliged, under the various agreements to redeploy its forces, to permit a "safe passage" by Palestinians between the Gaza Strip and the West Bank, to negotiate with them on the construction of a sea port and air ports, to cooperate on security matters and on passage from the Gaza Strip to Egypt as well as from the West Bank to Jordan, to cooperate on economic issues and to share certain tax and tariff revenue with the Palestinian authority. In addition, Israel was to respect internationally accepted norms of human rights and to release Palestinian prisoners in accordance with an agreed schedule. The Palestinians, for their part, were obliged to amend the Palestinian National Covenant and remove its anti-Israel provisions, to combat terrorism, to transfer terror suspects to Israel, and to cooperate with Israel on security matters as well as in the sphere of economics, legal, and other civilian matters. They were to meet regularly with the Israeli side on security matters. They too committed themselves to the protection of human rights.[50] Incitement to hatred was strictly forbidden.

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[50] For an analysis of the various obligations and their implementation or violation, see Geoffrey R. Watson (note 49), pp. 103-263.

The most difficult subjects were not dealt with in the 1995 Interim Agreement and they were to be discussed in the negotiations on the permanent status which started formally in May 1996 and were continued intensively in 2000, but so far unfortunately without success: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, water issues and certain archaeological matters.

The 1995 Interim Agreement raises some interesting legal questions. What is the legal nature of the document – an international agreement, a contract, binding unilateral declarations or a mere political commitment?[51] What is its effect on the status of the PLO? Do the entities who signed the text as witnesses – the U.S., the Russian Federation, Egypt, Jordan, Norway and the European Union – have any rights or obligations? Who is internationally responsible for the protection of human rights?[52] Did the agreement survive after the expiration of five years, the period originally intended for interim arrangements?[53] A detailed analysis of these matters would be beyond the scope of this article.

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51 Ibid., pp. 55-102; Peter Malanczuk, Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law, in: European Journal of International Law 7 (1996), pp. 485-500, at pp. 488-492.

52 Eyal Benvenisti, Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements, in: Israel Law Review 28 (1994), pp. 297-317; Justus R. Weiner, Human Rights in Limbo during the Interim Period of the Israeli-Palestinian Peace Process: Review, Analysis and Implications, in: New York University Journal of International Law and Politics 27 (1995), pp. 761-857.

53 Herbert Hansell/Nicholas Rostow, Legal Implications of May 4, 1999, Washington, D.C. 1999.

After the 1995 Interim Agreement, several implementation documents were signed: the 1997 Protocol Concerning the Redeployment in Hebron,[54] the 1998 Wye River Memorandum,[55] the 1999 Sharm el-Sheikh Memorandum,[56] and the 1999 Protocol Concerning Safe Passage between the West Bank and the Gaza Strip.[57] They mainly dealt with the modalities and the timetable for the implementation of the earlier commitments, undertaken by the 1993 Declaration of Principles and the 1995 Interim Agreement.

As is well known, the parties have accused each other of violating their respective obligations.[58]

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54 International Legal Materials 36 (1997), pp. 650-666.

55 International Legal Materials 37 (1998), pp. 1251-1257.

56 International Legal Materials 38 (1999), pp. 1465-1468

57 Protocol Concerning Safe Passage between the West Bank and the Gaza Strip, of 5 October 1999. The author wishes to thank Ms. Hilla Garmiza-Adler for having provided her a copy of this document.

58 See Geoffrey R. Watson (note 49), pp. 103-263.

D. The Permanent Status Issues

So far (March 2003), unfortunately no agreement has yet been reached on the most difficult issues. We will briefly examine some of these issues and try to envision some possible solutions. In order to keep this article within reasonable dimensions we will concentrate on some of the more difficult issues to be dealt with in the permanent status negotiations – Jerusalem, settlements, borders, security arrangements and refugees. Other important issues, such as relations and cooperation with other neighbors, economic matters, water and archaeology have not been examined here.

1. Jerusalem

The Israeli claim to Jerusalem is based on the fact that in 1948 Britain left the area and a vacuum of sovereignty ensued. Only a state acting lawfully had the right to fill this vacuum. In 1948 Israel acquired control over the western parts of the city in an act of self-defense and hence was authorized to fill that gap, whereas Jordan acquired control over the eastern neighborhoods in an act of aggression and therefore had no right to annex them. In 1967 Israel took the eastern parts in an act of self-defense and thus had a right to acquire sovereignty in that part as well.[59]

According to other theories, sovereignty over Jerusalem is suspended until a final settlement is reached; or Jerusalem is still subject

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[59] Elihu Lauterpacht, Jerusalem and the Holy Places, London 1968, reprinted in 1980.

to the *corpus separatum* notion recommended by the UN General Assembly in 1947; or the Palestinian Arab people have full legal sovereignty over all of Palestine, including Jerusalem.[60] In rejecting the Israeli claim, the Palestinians also rely on Security Council resolution 242 (1967), to be discussed later, in the section on borders.

The international community has not recognized Israeli de jure sovereignty in Jerusalem, although in practice Israeli's control over the western neighborhoods has usually been accepted, in particular the applicability of Israeli law and jurisdiction.[61] Most states, as well as the UN organs, however, consider the eastern parts as occupied territory.[62]

There are at least four components to the Jerusalem problem:

1. The *National Aspirations*: Israelis and Palestinians have conflicting claims to sovereignty. Israel claims sovereignty over the whole city, and the Palestinians have a similar claim, at least over the eastern neighborhoods of the city.
2. The *religious aspect*: Some of the most sacred places according to Judaism, Christianity and Islam are located in the city. These places are holy to many millions of people who do not live in the city nor in the area.

60 For a summary of the various opinions and references, see Ruth Lapidoth, Jerusalem: Past, Present and Future, in: Revue internationale de droit comparé 48 (1996), pp. 9-33, at pp. 19-21.

61 See, e.g., The Jerusalem Question and Its Resolution: Selected Documents, Ruth Lapidoth/Moshe Hirsch (eds.), Dordrecht 1994, at pp. 147-148 and pp. 447-449.

62 See, e.g., Security Council resolutions 465 (1980) and 478 (1980), SCOR, 35th year, Resolutions and Decisions, pp. 5 and 14. But see, the Jerusalem Embassy Act, 1955, of the U.S. Congress.

3. *Municipal managemet:* The population of Jerusalem is very heterogeneous, and hence special solutions are needed for the municipal management.
4. The *periphery:* whatever solution is reached with regard to borders, Jerusalem will be between Israel and the Palestinian entity. The relationship between the city and its periphery requires special arrangements.

In the above-mentioned Declaration of Principles on Interim Self-Government Arrangements of 1993, Israel and the Palestinians dealt, although to a very limited extent, with Jerusalem. Jerusalem was not to be included in the interim arrangements – a concession by the Palestinians – and, on the other hand, Israel conceded that the city would be one of the subjects to be dealt with in the framework of the negotiations on the "permanent status". In addition, it was agreed that "Palestinians of Jerusalem who live there will have the right to participate in the election process" for the Interim Self-Government Authority (the Council) for the West Bank and the Gaza Strip (Annex I, para. 1). These elections took place on 20 January 1996, and the Jerusalemites did participate.

In October 1993 Israel's Foreign Minister Shimon Peres sent a letter to the Foreign Minister of Norway, recognizing the essential task performed by Palestinian institutions in East Jerusalem, including the economic, social, educational and cultural, and the holy Christian and Moslem places.

Whenever the permanent status negotiations resume, they will have to deal inter alia with the above-mentioned components of the Jerusalem issue.

As to the question of sovereignty, one should remember the words of George Shultz written in 1990 in the context of the Middle East: "...Thinking must increasingly be on a region-wide scale. A little creativity about new mixes of sovereignty might help move the peace

process forward..."[63] The search for a compromise may be facilitated by the fact that the concept of sovereignty has undergone considerable change, and has become more moderate, due to certain developments: the process of democratization, the introduction of federalism into many states, the limitation of the right to use force, the development of the international protection of human rights, the permeability of borders, and the globalization in economics as well as communications.[64]

One could thus envisage certain compromise solutions for Jerusalem: joint, shared or cooperative sovereignty over certain areas, functional sovereignty (namely, sovereignty for the performance of certain functions only), mutual suspension of claims to sovereignty, attributing sovereignty to God,[65] or even agreeing not to agree on the question of sovereignty while establishing a detailed division of powers and responsibilities.[66] Different solutions could be adopted for different neighborhoods. Since the parties may have difficulties to make concessions on the question of sovereignty, one may also have to consider the possibility of a deferred or staged solution.

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63 George P. Shultz, A Chance for Some Serious Diplomacy in the Middle East, in: The Washington Post, 6 March 1990.

64 See, e.g., Ruth Lapidoth, Redefining Authority: The Past, Present and Future of Sovereignty, in: Harvard International Review 17 (1995) 3, pp. 8-11 and 70-71.

65 Proposed by the late King Hussein of Jordan - see, e.g., 140 Congressional Records H6204, H6205 (daily edition, 26 July 1994).

66 A solution adopted by Britain and Argentina for their disagreement about sovereignty over the Falkland/Malvinas islands - see, e.g., the 1995 Joint Declaration on Cooperation over Offshore Activities in the South West Atlantic, in: International Legal Materials 35 (1996), pp. 301-308, Article 1.

Regarding the subject of holy places, one has to remember that many people have difficulties in making compromises in this sphere. "How can a human being compromise over rights that belong to God", they would say. However, it seems that one can reach solutions over rights at holy places, without offending religious feelings of the mainstream believers. It is crucial not to allow pious feelings to be exploited for political purposes.

In the absence of a legally binding general definition,[67] there is a need to establish an agreed list of the holy places in order to prevent a proliferation of such places. A UN document of 1949 listed 30 holy places in Jerusalem[68] while in 2000 a group of three experts found 328![69] Holy places often enjoy a special status – like exemption from taxes, limitations on the powers of the local police, and sometimes a certain autonomy.[70] The existence of many "enclaves" with such prerogatives

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67 Ruth Lapidoth, Commentary on Basic Law: Jerusalem Capital of Israel, Jerusalem (1999), pp. 82-87 (Hebrew); Shmuel Berkovits, The Legal Status of the Holy Places in Israel, Ph.D. diss. Jerusalem 1978, at pp. 409-491 (Hebrew).

68 UN Doc. T/L. 49, of 7 March 1950.

69 Yitzhak Reiter/Marlen Eordegian/Marwan Abu Khalaf, Between Divine and Human: The Complexity of Holy Places in Jerusalem, in: Jerusalem: Points of Friction - and Beyond, Moshe Ma'oz/Sari Nusseibeh (eds.), The Hague 2000, pp. 95-164, at pp. 155-159.

70 Christian Rumpf, Holy Places, in: Encyclopedia of Public International Law, Rudolf Bernhardt (ed.), Amsterdam 1995, vol. 2, pp. 863-866. For a comprehensive historical, political and legal study of the main holy places in the area, see Shmuel Berkovits, The Battle for the Holy Places, Jerusalem 2000, (Hebrew). For a comprehensive recent study of the Temple Mount, see: Sovereignty of God and Man: Sanctity and Political Centrality on the Temple Mount, Yitschak Reiter (ed.), Jerusalem 2001, (Hebrew).

may be a burden for the state authorities, and may also be exploited for political purposes.

In addition, it is necessary to make arrangements on the right of access and of worship as well as on the prevention of desecration and other harmful acts. These arrangements have to respect the "historical status quo" established by the Ottoman Empire, in particular by a *firman* of 1852, for a small number of Christian holy places[71] – a regime recognized by both Israel[72] and the Palestinians.[73] For those places that are holy for two or more religions or denominations, access and worship have to be regulated so as to allow all the groups for whom the place is sacred to visit and pray. The arrangements can be based on simultaneous access and prayers at different parts of the place, or non-simultaneous access to all parts according to an agreed timetable. Special provision has to be made for permitting and regulating pilgrimage. All arrangements for the holy places have to be subject to public order and decorum.

Mutual respect for each other's beliefs is indispensable. The fact that a certain event which a group attributes to a place could historically not have happened, is irrelevant.[74] What counts is what people believe in, and that is what has to be respected and taken into account. On the other hand, religious leaders should not "invent" new holy places for

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71 Shmuel Berkovits (note 67), pp. 35-45; L. G. A. Cust, The Status Quo in the Holy Places, London 1929, reprinted Jerusalem 1980.

72 Fundamental Agreement Between the Holy See and The State of Israel, in: International Legal Materials 33 (1994), pp. 153-159, Article 4.

73 Basic Agreement Between the Holy See and the Palestine Liberation Organization, of 15 February 2000, Article 4.

74 Zvi Werblowsky, The Meaning of Jerusalem to Jews, Christians and Muslims, rev. edition Jerusalem 1983.

political purposes. An advisory council composed of members of the religious communities could help to enhance cooperation and understanding among the various religious communities.

Concerning demographic aspects, the heterogeneity of the population of the city contributes to the problem: Jerusalem is inhabited by members of about 40 different religious and ethnic groups. In order to allow each group a maximum of self-identification, the municipal administration could be based on a division into boroughs or *arrondissements*, each with a degree of autonomy.[75]

The relationship between Jerusalem and its periphery has to be dealt with in a pragmatic way. The city is a cultural center for both Israelis and Palestinians, it has an Israeli and a Palestinian university (The Hebrew University and the al-Quds University respectively). Many people who live beyond the municipal area work in the city. Questions of access routes, water supply, sewage discharge and recycling have to be dealt with in coordination with the areas adjacent to the city. For all these reasons, Jerusalem should not be cut off from its periphery. Irrespective of the political status of the various areas, close technical, cultural, religious, economic and social (i.e. non-political) links between Jerusalem and its surroundings should continue to exist.

Last but not least, one has to take into consideration that many people have developed a strong emotional attachment to the city, and it has become of great symbolic significance. The relevant leaders should try to diffuse some of these strong feelings.

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[75] Shlomo Hasson/Nili Schory/Hagit Adiv, Neighborhood Governance: The Concept and Method, Jerusalem 1995, (Hebrew).

2. The Settlements

After 1967 a number of Israeli settlements were established in the West Bank and the Gaza Strip. Some of them were actually located on land which before 1948 had belonged to Jews who were expelled from those places by the Arabs in the 1947-48 war. Most of the settlements were established for security reasons, according to spokesmen of the government. In 2001 the number of settlers reached 201,300 in the West Bank, and 7,000 in the Gaza Strip.[76]

The legality of the settlements has been the subject of conflicting opinions. The Palestinians, as well as the UN organs and the EU, consider that these settlements have been established in violation of Article 49 (6) of the Fourth 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".[77]

Israel, on the other hand, has based their legality on the reasoning that the above provision prevents the deportation and transfer of civilians to the occupied territory but it does not deal with the voluntary movement of individuals who do not displace the local inhabitants. This interpretation is based on the plain meaning of the words and on the legislative history of the provision: it was adopted soon after World War II, in 1949, in order to prevent the recurrence of mass transfers of civilians against their will for the purpose of displacing

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[76] The author wishes to thank Dr. Maya Chosen and Ms. Michal Kochan for these data.

[77] UN Treaty Series, vol. 75 (1950), pp. 287-417. On the attitude of the UN, see e.g. Security Council resolution 465 (1980), SCOR, 35th year, Resolutions and Decisions, p. 5.

the population of the occupied territory, as practiced by the Nazis during the war.[78]

In the various agreements concluded in the framework of the Oslo process, the settlements have not been declared illegal nor has their dismantlement been requested. These texts have left the issue to be negotiated in the permanent status negotiations. One may hope that bona fide negotiations will lead to a rational and pragmatic compromise.

In addition to these legal considerations, it has also been claimed on a practical plane that, since about a million Arabs live in Israel, there should not be an obstacle against Jews living in the Palestinian territories.

As to the future of the settlements, several solutions could be envisaged. Israel could incorporate a small area where a great number of settlers are located, while compensating the Palestinians with other chunks of land. The remaining Israelis could either return to Israel proper, or stay under Palestinian jurisdiction. One could also envisage a regime of territorial or personal (cultural) autonomy for some of those who remain.

3. Borders

The borders to be established have to be examined from two aspects: their location, and their character. Borders are usually delimited mainly on the basis of strategic, geographic, economic, historical and demographic considerations.[79] However, in the case of the Israeli-Palestinian border the question arises as to the relevance and meaning

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78 Israel National Section of the International Commission of Jurists, The Rule of Law in the Areas Administered by Israel, Tel Aviv 1981, pp. 54-55; Yoram Dinstein, Settlements and Deportations in the Occupied Territories, in: Tel Aviv University Law Review 7 (1979), p. 188, (Hebrew).

79 On the delimitation of boundaries, see e.g. Charles Rousseau, Droit International Public, vol. 3, Paris 1977, pp. 231-272.

of two UN resolutions: General Assembly resolution 181(II) of 1947,[80] and Security Council resolution 242 (1967).[81] As explained in the first part of this paper, the Palestinians are estopped from relying today on a General Assembly recommendation which they rejected in 1947 in a hail of bullets.

Security Council resolution 242 (1967), on the other hand, has been accepted by the two parties. Moreover, in 1993 and 1995 they expressly agreed that the permanent status negotiations would be based on this resolution.[82] However, the parties disagree on the meaning of the territorial provisions in the resolution. It will be remembered that in the preamble the Council emphasized inter alia "the inadmissibility of the acquisition of territory by war..."

Under the first paragraph of the resolution,
The Security Council...

1. Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
   (a) Withdrawal of Israel armed forces from territories occupied in the recent conflict;[83]
   (b) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;...

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80 Supra, note 15.

81 Supra, note 28.

82 Supra, note 30.

83 The French version reads: "retrait des forces armées israéliennes des territoires occupés lors du récent conflit".

Israel and the Palestinians disagree on the interpretation of this withdrawal clause. While the Arabs insist on complete Israeli withdrawal from all the territories occupied by Israel in 1967,[84] Israel is of the opinion that the call for withdrawal is applicable in conjunction with the call for the establishment of secure and recognized boundaries to be established by agreement.[85]

The Palestinians base their claim on the combination of two phrases: the provision in the preamble on "the inadmissibility of the acquisition of territory by war", and the "withdrawal of Israel armed forces from territories occupied in the recent conflict" in the French version of the resolution.

Israel's interpretation is based on the plain meaning of the English text of the withdrawal clause which was the draft presented by the British delegation. It is also based on the fact that proposals in the Council to add the words "all" or "the" before "territories" were rejected; and on the idea that, in interpreting the withdrawal clause, one has to take into consideration the other provisions of the resolution, including the one on the establishment of "secure and recognized boundaries".

It seems that the resolution does not require total withdrawal for a number of reasons:

1. The inadmissibility of the acquisition of territory by war merely reiterates the principle of international law that military occupation,

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84 See e.g. replies by Jordan (23 March 1969) and by Lebanon (21 April 1969) to questions submitted by Ambassador Gunnar Jarring, in the Report by UN Secretary-General U Thant, UN Doc. S/10070, of 4 January 1971.

85 Statement by Ambassador Abba Eban, UN General Assembly Official Records, 23rd session, 1686th Plenary Meeting, 8 October 1968, pp. 9-13 at pp. 9 (sec. 92), and 11 (sec. 110).

although lawful if it is the result of an act of self-defense, does not *by itself* justify annexation and acquisition of title to territory.

2. The English version of the withdrawal clause requires only "withdrawal from territories", not from *all* territories, nor from *the* territories. This provision is clear and unambiguous. As Lord Caradon, the representative of Great Britain, stated in the Security Council on 22 November 1967: "I am sure that it will be recognized by us all that it is only the resolution that will bind us, and we regard its wording as clear..."[86]
3. Since there seems to be a discrepancy between the English and the French texts, the English version should be preferred because it is identical with the original version of the British draft on which the resolution is based.[87] It is a well-established rule in international law that multilingual texts of equal authority in the various languages should be interpreted by "accordant la primauté au texte original"[88], or the "basic language".[89] Various authorities deal with

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86 Security Council Official Records, 1382nd meeting of 22 November 1967, p. 7, sec. 61. See also Cyrus R. Vance/Joseph J. Sisco, Resolution 242, Crystal Clear, in: The New York Times, 20 March 1988.

87 UN Doc. S/8247, of 16 November 1967.

88 Charles Rousseau (note 79), at p. 290.

89 Sir Arnold Duncan McNair, The Law of Treaties, London 1961, p. 434. The 1969 Vienna Convention of the Law of Treaties, too, implicitly refers to the original text of the document since it recommends having recourse to the preparatory work of the treaty and the circumstances of its conclusion (Article 33, sec. 4). See also Mala Tabory, Multilingualism in International Law and Institutions, Alphen 1980, at p. 211; Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, 2nd ed. Manchester 1984, at p. 152; Anthony Aust, Modern Treaty Law and Practice, Cambridge 2000, at p. 205; Prosper Weil, Le réglement territorial dans la résolution du 22 Novembre 1967, in: Nouveaux Cahiers, no. 23 (1970).

this question in the context of the interpretation of treaties, but by analogy the relevant rules may also be applied to the interpretation of other categories of documents. One should remember that English was not only officially a "working language" in the Council, but also in practice the language of most of the deliberations. Indeed, English was used by ten members of the Council, while French was used by three, and Russian and Spanish by one each.[90]

4. The provision on the establishment of "secure and recognized boundaries" included in para. 1, subpara.(ii) of the resolution would have been meaningless if there had been an obligation to a withdrawal of Israeli armed forces from all the territories occupied in 1967. Similarly, there would have been no need to negotiate on borders, as is foreseen for the negotiations on the final status between Israel and the Palestinians[91], if Israel had to withdraw from all the territories.

To conclude, the gist of the withdrawal clause is that "[w]hen peace is made, the resolution calls for Israeli withdrawal to 'secure and recognized boundaries'."[92] Those who quote only one provision taken from the preamble, contort the meaning of that passage and ignore other provisions of the main text which are no less important.

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90 Shabtai Rosenne, On Multi-Lingual Interpretation, in: Israel Law Review 6 (1971), pp. 360-365.

91 Declaration of Principles of 1993, (note 41), Article V (3); and Interim Agreement of 1995, (note 49), Article XXXI (5).

92 Eugene V. Rostow, The Perils of Positivism: A Response to Professor Quigley, in: Duke Journal of Comparative and International Law 2 (1992), pp. 229-246, at p. 229.

The second aspect of the border issue concerns the nature of those borders. Should they be rigid and closed, or should they be open and permeable, in order to allow economic, social, cultural and political people-to-people interaction.[93] Even if the parties wished to establish rigid borders, this would be difficult to implement due to the length and configuration of that border. Moreover, if for Jerusalem the parties agree on freedom of access between the various parts and probably also the adjacent periphery, it would be useless to try to close off the border at other places. However, a condition for flexible and permeable borders is peace and an end to acts of violence.

4. Security Arrangements[94]

Security arrangements are of great importance to Israel since certain states in the region are still intent on destroying it, and various terrorist groups supported by some of those states continue to commit the most heinous acts of violence against its citizens. Security Council resolution 242 (1967) also affirmed the necessity "[f]or guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones."[95] Demilitarization, or, to use a different term, limitation of forces, would not constitute a limitation of the Palestinians' sovereignty,

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93 Barry A. Feinstein/Mohammed S. Dajani-Daoudi, Permeable Fences Make Good Neighbors: Improving a Seemingly Intractable Border Conflict Between Israelis and Palestinians, in: American University International Law Review 16 (2000) , pp. 1-176.

94 Jeffrey Boutwell/Everett Mendelsohn, Israeli-Palestinian Security: Issues in the Permanent Status Negotiations, Report of a Study Group of the American Academy of Arts and Sciences, Cambridge/Ma 1995; Ze'ev Schiff, Israeli Preconditions for Palestinian Statehood, Washington, D.C. 1999.

95 Supra, note 28.

since the regime would be established by agreement. Additional security arrangements could include early warning stations, the stationing of Israeli units at certain agreed strategic spots, and perhaps monitoring by foreign neutral experts. One could also consider the possibility of establishing security arrangements on a trilateral basis, namely, including Jordan.[96]

It would also be helpful if the Palestinians committed themselves not to allow the stationing in their territory of units of a foreign army that is hostile to Israel, as well as to avoid the conclusion of military alliances for offensive military purposes.

Since all the security arrangements would be agreed upon, no restriction of sovereignty would be involved, and they may ultimately be to the benefit of both parties.

5. Refugees

The plight of the refugees is a serious human problem. During the 1947-48 period, many Arabs "left, ran away, or were expelled".[97] At the same time Jews escaped from Arab countries. While the Jews were integrated into the countries to which they fled, the Arabs were on purpose denied integration in most Arab countries (except Jordan) in order to prevent any possible accommodation with Israel. The refugees have been receiving support and assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), established by the UN General Assembly in 1949.[98]

According to various estimates, the number of refugees in 1948

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96 See, e.g., Geoffrey R. Watson (note 49), p. 298.

97 Eyal Benvenisti/Eyal Zamir, Private Claims to Property Rights in the Future Israeli-Palestinian Settlement, in: American Journal of International Law 89 (1995), pp. 295-340, at p. 297.

98 UN General Assembly resolution 302 (IV) of 8 December 1949, adopted at the 273rd plenary meeting.

was between 538,000 (Israeli sources), 720,000 (UN estimates), and 850,000 (Palestinian sources). By 2001 the number of refugees registered with and supported by UNRWA had grown to about 3.8 million, since also children, grandchildren and great grandchildren have been registered. Another reason for this increase is the fact that UNRWA does not systematically delete all deceased persons from its registry. According to UNRWA, in 2000 there were about 550,000 refugees in the West Bank, some 800,000 in the Gaza Strip, 1,500,000 in Jordan, 350,000 in Lebanon and 350,000 as well in Syria. Only part of them have lived in refugee camps. The situation of the refugees has been particularly severe in the Gaza Strip and in Lebanon.[99]

The plight of the refugees raises at least three legal questions:

1. Who should be considered to be a refugee?
2. Do the Palestinian refugees have a right to return to Israel?
3. Do they have a right to compensation?

The question arises whether all those registered with UNRWA should be considered as refugees. The 1951-1967 Convention Relating to the Status of Refugees[100] has adopted the following definition:

> ...[A]ny person who:
> (2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not

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99 Yitzhak Ravid, The Palestinian Refugees, Ramat-Gan 2001, pp. 1-12, (Hebrew).

100 UN Treaty Series, vol. 189, no. 2545, (1954) pp. 137-221, at pp. 152-156, Article 1A (2).

> having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it...

There is no mention in this definition of descendants. Moreover, the convention ceases to apply to a person who, inter alia, "has acquired a new nationality, and enjoys the protection of the country of his new nationality."[101]

Under this definition, the number of the Palestinians qualifying for refugee status would be well below 1/2 million. However, the Arab states managed to exclude the Palestinians from the definition, by introducting the following provision into the 1951-1967 Refugees Convention:

> This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection and assistance...[102]

In no official document have the Palestinian refugees been defined, and UNRWA has been adopting varying definitions, such as:

> A Palestinian refugee is a person whose normal residence was Palestine for a minimum of two years preceding the conflict in 1948, and who, as a result of this conflict, lost both his home and his means of livelihood and took refuge in one of the countries where UNRWA provides relief. Refugees within this definition and the direct descendants of such refugees are eligible for Agency assistance if they are: registered with

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101 Ibid., Article 1 C (3).

102 Article 1 D.

> UNRWA; living in the area of UNRWA operations; and in need.[103]

This is a very broad definition under which the number of refugees constantly increases. It may be appropriate for UNRWA purposes in order to decide who qualifies for assistance, but it is hardly suitable for other purposes. It follows that the parties should agree on a more suitable definition.

Another legal controversy concerns the question whether the refugees, whatever their definition, have a right to return to Israel. We will discuss this subject from three points of view: general international law, the most relevant UN resolutions, and various agreements between Israel and her neighbors.

Several International human rights treaties deal with the freedom of movement, including the right of return.[104] The most universal provision is included in the 1966 International Covenant on Civil and Political Rights, which says: "No one shall be arbitrarily deprived of the right to enter his own country".[105]

The question arises, who has the right of return, or: what kind of

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103 Don Peretz, Palestinians, Refugees, and the Middle East Peace Process, Washington, D.C. 1993, at pp. 11-12.

104 The 1948 Universal Declaration of Human Rights, Article 13 (2); The 1966 International Covenant on Civil and Political Rights, Article 12 (4); The 1963 Protocol IV to the European Convention on Human Rights, Article 3 (2); The 1969 American Convention of Human Rights, Article 22 (5); The 1981 Banjul Charter on Human and People's Rights, Article 12 (2) - see: Basic Documents on Human Rights, Sir Ian Brownlie (ed.), 3rd edition Oxford 1992, pp. 21, 125, 347, 495, 551; for additional examples, see Paul Sieghart, The International Law of Human Rights, Oxford 1985, pp. 174-178.

105 Article 12 (4).

relationship must exist between the state and the person who wishes to return? A comparison of the various texts and a look at the discussions which took place before the adoption of these texts lead to the conclusion that the right of return is probably reserved only for nationals of the state, and perhaps also for "permanent legal residents".[106]

Even the right of nationals is not an absolute one, but it may be limited on condition that the reasons for the denial or limitation are not arbitrary.

Moreover, according to Stig Jagerskiold, the right of return or the right to enter one's country in the 1966 International Covenant

> Is intended to apply to individuals asserting an individual right. There was no intention here to address the claims of masses of people who have been displaced as a by-product of war or by political transfers of territory or population, such as the relocation of ethnic Germans from Eastern Europe during

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106 Paul Sieghart (note 104), p. 179; Geoffrey R. Watson (note 49), p. 283; Ruth Lapidoth, The Right of Return in International Law, With Special Reference to The Palestinian Refugees, in: Israel Yearbook on Human Rights 16 (1986), pp. 103-125, at pp. 107-108.
Some experts are of the opinion that the right of return applies also to "permanent legal residents" - see e.g. the discussion that took place in the sub-commission on Prevention of Discrimination and Protection of Minorities, as reported in the Report by Chairman-Rapporteur Mr. Asbjorn Eide, UN Doc. E/CN.4/Sub.2/1991/45, of 28 August 1991, at p. 5. The Human Rights Committee established under the International Covenant on Civil and Political Rights has adopted an interpretation according to which the right of return belongs also to a person who has "close and enduring connections" to a certain country - UN Doc. CCPR/C/21/Rev. 1/Add. 9, 2 November 1999, at pp. 5-6.

> and after the Second World War, the flight of the Palestinians from what became Israel, or the movement of Jews from the Arab countries.[107]

In the context of general international law one also has to observe that humanitarian law conventions (such as the 1949 Geneva Conventions for the Protection of Victims of War) have not dealt with a right of return.

The first major UN Resolution that refers to the Palestinian refugees is Resolution 194 (III) of 11 December 1948, adopted by the General Assembly.[108] This Resolution established a Conciliation Commission for Palestine and instructed it to "take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them". Paragraph 11 deals with the refugees:

> The General Assembly... resolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible...

Though the Arab States originally rejected the Resolution because it assumed recognition of Israel, they later relied on it heavily

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107 Stig Jagerskiold, The Freedom of Movement, in: The International Bill of Rights, Louis Henkin (ed.), New York 1981, pp. 166-184, at p. 180. For a different opinion, see Geoffrey R. Watson (note 49), p. 283.

108 GAOR, 3rd session, part I, 1948, Resolutions, pp. 21-24.

and have considered it as a recognition of a wholesale right of repatriation.

This interpretation, however, does not seem warranted: the paragraph does not recognize any "right", but recommends that the refugees "should" be "permitted" to return. Moreover, that permission is subject to two conditions – that the refugee wishes to return, and that he wishes to live at peace with his neighbors. The violence that erupted in September 2000 forecloses any hope for a peaceful co-existence between Israelis and masses of returning refugees. Moreover, the Palestinians have linked the request for return to a claim for self-determination. If returning refugees had a right to external self-determination, this would mean the end of the very existence of the State of Israel. Under the 1948 resolution, the return should take place only "at the earliest practicable date". The use of the term "should" with regard to the permission to return underlines that this is only a recommendation – it is hortatory.[109] One should also remember that under the UN Charter the General Assembly is not authorized to adopt binding resolutions, except in budgetary matters and with regard to its own internal rules and regulations.

Finally, the reference to principles of international law or equity refers only to compensation for property and does not seem to refer to the permission to return.

It should also be borne in mind that the provision concerning the refugees is but one element of the Resolution that foresaw "a final settlement of all questions outstanding between" the parties, whereas the Arab States have always insisted on its implementation (in accordance with the interpretation favorable to them) independently of all other matters.

In this context one should bear in mind that the General Assembly

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[109] Geoffrey R. Watson (note 49), p. 281.

has also recommended the "reintegration of the refugees into the economic life of the Near East, either by repatriation or *resettlement*" (Emphasis added, R.L.)[110]

As a result of the Six Day War in 1967, there were about 200,000 Palestinian displaced persons (i.e. persons who had to leave their homes and move to another place in the same state). These were dealt with by Security Council resolution 237 of 4 June 1967,[111] which called upon the government of Israel "to facilitate the return of those inhabitants [of the areas where military operations had taken place] who have fled the areas since the outbreak of hostilities". The Resolution does not speak of a "right" of return and, like most Security Council resolutions, it is in the nature of a recommendation. Nevertheless, Israel has agreed to their return in various agreements, to be studied later. Some 30% of the displaced persons of 1967 had already been counted as refugees of 1948.[112]

Of great importance in the Arab-Israel peace process is Security Council resolution 242 of 22 November 1967.[113] Its territorial provisions have already been studied above.[114] In its second paragraph, the Council "Affirms further the necessity... (b) for achieving a just settlement of the refugee problem". The Council did not propose a specific solution, nor did it limit the provision to Arab

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110 UN General Assembly resolution 393 (V), of 2 December 1950, adopted at the 315th plenary meeting. See also the second paragraph of UN General Assembly resolution 194 (III), of 11 December 1948, and resolution 513 (VI), of 26 January 1952, adopted at the 365th plenary meeting.

111 SCOR, 22nd year, Resolutions and Decisions, 1967, p. 5.

112 Salim Tamari, The Future of Palestinian Refugees in the Peace Negotiations, in: Palestine-Israel Journal 2 (1995), pp. 8-14, at p. 12.

113 Supra, note 28.

114 Text accompanied by footnotes 82-92.

refugees, probably because the right to compensation of Jewish refugees from Arab lands also deserves a "just settlement". There is no basis for the Arab claim that resolution 242 incorporates the solution recommended by General Assembly resolution 194 of 1948 analyzed above.

Turning now to agreements between Israel and her neighbors, we find that already in the Framework for Peace in the Middle East agreed at Camp David in 1978 by Egypt and Israel[115] the refugee problem was tackled: It was agreed that a "continuing committee" including representatives of Egypt, Israel, Jordan and the Palestinians should "decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza in 1967" (Article A, 3). Similarly, it was agreed that "Egypt and Israel will work with each other and with other interested parties to establish agreed procedures for a prompt, just and permanent implementation of the resolution of the refugee problem" (Article A, 4).

In the Declaration of Principles on Interim Self-Government Arrangements of 1993 between Israel and the Palestinians,[116] again it was agreed that the modalities of admission of persons displaced in 1967 should be decided by agreement in a "continuing committee" (Article XII). The issue of refugees should be negotiated in the framework of the permanent status negotiations (Article V, 3). The 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip[117] adopted similar provisions (Articles XXXVII, 2 and XXXI, 5).

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115 UN Treaty Series, vol. 1138, (1987), no. 17853, pp. 39-45.

116 Supra, note 41.

117 Supra, note 49.

Somewhat more detailed is the relevant provision (Article 8) in the Treaty of Peace between Israel and Jordan of 1994.[118] As to the displaced persons, they are the object of a text similar to the above ones. As to the refugees, the Peace Treaty mentions the need to solve their problem both in the framework of the Multilateral Working Group on Refugees established after the 1991 Madrid Peace Conference, and in conjunction with the permanent status negotiations. The Treaty also mentions "United Nations programs and other agreed international economic programs concerning refugees and displaced persons, including assistance to their settlement".[119]

None of the agreements between Israel and Egypt, the Palestinians and Jordan respectively has granted the refugees a right of return into Israel.

This short survey has shown that neither under the general international conventions, nor under the major UN resolutions, nor under the relevant agreements between the parties, do the Palestinian refugees have a right to return to Israel. In 2000 there were about 3.8 million Palestinian refugees registered with UNRWA. If Israel were to allow all of them to return to its territory, this would be an act of suicide on its part, and no state can be expected to destroy itself. On the other hand, at least some of the refugees would object to and try to delegitimize any agreement that did not grant a wholesale right of return.[120] Moreover, they threaten those who would like to settle for a different solution. It seems to be a vicious circle.

The solution may include a right to return to the new Palestinian homeland, settlement and integration in various other states (Arab

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118 International Legal Materials 34 (1995), pp. 43-66.

119 Article 8, para. 2 (c), at pp. 49-50.

120 Salim Tamari (note 112), at pp. 11-12.

and non-Arab), and possible return to Israel if compelling humanitarian reasons are involved, such as family unification.[121]

The third legal problem about the refugees to be mentioned is the question whether they have a right to compensation for their lost property, and to a subsidy for their rehabilitation, i.e. integration or resettlement or return, respectively.[122] General international law recognizes the obligation to pay compensation in case of confiscation of property belonging to foreigners. There is, however, disagreement about the amount that should be paid. In this case, two experts have suggested a standard of "adequate compensation", taking into account the value of the property and the specific needs of the respective refugee.[123] If a definitive solution to the problem is sought, one should consider paying – either by law or ex gratia – not only compensation for lost property as mentioned in General Assembly resolution 194 (III), but also a reasonable subsidy for rehabilitation, and perhaps also compensation to the host country, where the refugee has lived and where he may perhaps settle. Since Israel had not started the 1947-48 war but was attacked by the Arabs, it is not responsible for the creation of the refugee problem. Hence it is not under an obligation to recruit the necessary sums. Preferably an international fund should be

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121 For possible solutions, see Geoffrey R. Watson (note 49), pp. 286-290; Donna E. Arzt, Refugees Into Citizens: Palestinians and the End of the Arab-Israeli Conflict, New York 1997; Joseph Alpher/Khalil Shikaki, The Palestinian Refugee Problem and the Right of Return, Cambridge/MA 1998 (Harvard University, Weatherhead Center for International Affairs; Working Paper no. 97-8).

122 Geoffrey R. Watson (note 49), pp. 286-290; Eyal Benvenisti/Eyal Zamir (note 97).

123 Ibid., pp. 331 and 338.

established for that purpose, to which other countries as well as Israel would contribute. The difficulty is the enormous sums that would be needed.[124]

It is advisable to resort to a lump sum arrangement which would settle all financial claims between the parties and preclude any further claims. An international commission could be in charge of registering all claims and distributing appropriate sums. A way would have to be found in order that the arrangement would bind not only Israel and the Palestinian Authority, but also all the refugees. One could also envision a provision under which the Palestinian Authority would replace Israel with regard to any claim which might be submitted beyond the implementation of the agreement.

To conclude our discussion of the refugee problem, it is recommended that the parties agree on a reasonable definition of the refugees and not automatically adopt the one used by UNRWA. The refugees do not have a right of return to Israel, neither under general nor special international law; the adequate solution seems to be return to the Palestinian homeland, resettlement and absorption in other countries (preferably according to the wishes of each refugee), and that some may be allowed to return to Israel on humanitarian grounds. A prompt and adequate solution will also involve the payment of compensation for lost property and a subsidy for rehabilitation.

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[124] Yitzhak Ravid (note 99), at pp. 36-40.

E. Conclusions

In this survey we have analyzed some of the major resolutions of the League of Nations and of the United Nations concerning the relations between Israel and the Palestinians. The conclusions reached are that the provisions of the British Mandate for Palestine encouraging the establishment of a Jewish national home while preserving the civil and religious rights of the other inhabitants of the country were lawful. The 1947 UN General Assembly resolution on the future government of Palestine, proposing the establishment of a Jewish and an Arab state as well as a *corpus separatum* for Jerusalem was a lawful recommendation which at the time was agreed to by the representatives of the Jewish community in Palestine, but not by the Palestinians; after fifty years of rejection, the Palestinians are estopped from relying on it. Both the mandate and the partition resolution were in conformity with the principle of self-determination since the establishment of both a Jewish and an Arab entity was foreseen.

The Oslo process involved mutual recognition and a commitment to solve the conflict in stages by peaceful means. A study of some of the major issues to be discussed in the negotiations on the permanent status of the West Bank and the Gaza Strip led us to the conclusion that the parties should reach a compromise on Jerusalem, based on modern developments of the concept of sovereignty and on a clear settlement of the issue of the holy places: It is essential to agree on a list of holy places which can be altered only by agreement; the parties should secure rights of access and of worship at holy places subject to public order and decorum; and they should respect the religious beliefs of all those concerned. On the municipal level, Jerusalem could be

managed as separate boroughs in order to enhance the influence of the various communities on their own affairs. Economic, cultural and technical cooperation between the city and its periphery has to be preserved.

The conflicting opinions on the legality of the Jewish settlements have led us to the search of possible compromises. The question of the future boundaries was examined in the light of Security Council resolution 242 (1967), which calls for Israeli withdrawal to new secure borders to be established by agreement. The choice between rigid and permeable borders was also mentioned.

Various possible security arrangements were examined in the light of that same resolution 242 (1967), in particular a limitation of forces. In the context of the refugee problem we have mentioned the need for an agreed authoritative definition and have concluded that neither under general international law nor under the relevant UN resolutions or the agreements between Israel and its neighbors do the Palestinians have a right to return to Israel. The general contours of a compromise solution have been outlined, including return to the Palestinian homeland, resettlement and compensation.

Some of the questions discussed above are no doubt difficult to solve, but with mutual good intentions and positive political will they can be overcome by reasonable compromises. If it is not possible to reach a complete solution to all the outstanding issues at this stage, one could perhaps envisage a partial interim agreement or a definite settlement based on phased implementation. Whichever way is chosen, it is high time that violence stops and that the parties return to the negotiating table in accordance with their commitment.

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