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M. Cherif Bassiouni

Eugene M. Fisher

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THE ARAB-ISRAELI CONFLICT—REAL AND APPARENT ISSUES: AN INSIGHT INTO ITS FUTURE FROM THE LESSONS OF THE PAST

M. Cherif Bassiouni®

AND

Eugene M. Fisher®

Observations on the Nature of Conflict Resolution and the International Process

The Arab-Israeli confrontation provides the world community with one of history's greatest opportunities for implementation of the "Rule of Law" as a substitute for the "Rule of Force" in international relations and institutionalized conflicts. Thus far, unfortunately, the opportunity has proved elusive and the challenge has gone unanswered. The world community continues to clamor for peace, order, and justice, but yet is unable or unwilling to attain any of those avowed goals.

The resolution of conflicts in a consensual system of law, such as international law, is rendered difficult by the lack of fact-finding processes, inadequate analytical methodology, non-compulsory adjudication, and unenforceable dispositions and determinations. However, unlike most international conflicts, the Arab-Israeli dispute is not clouded by seriously controverted facts. Virtually all of its elements are grounded in issues which are susceptible to legal formulation and, hence, of juridical adjudication and determination.

In juridical controversies, the manner in which the relevant issues are formulated is frequently outcome-determinative. Notwithstanding, modern world conflicts have been shaped by what is referred to as "world public opinion." (The most significant aspect of this state of affairs is that world public opinion can, and frequently does formulate issues which, through repetition, become so solidified that they sometimes cannot be altered by the very parties to the conflict.) When one considers the informational sources of world public opinion, it is clear that all too often they are either the product of a guided or controlled governmental policy or subject to the more subtle, but almost

® Professor of Law, DePaul University; Fulbright-Mays Professor of International Criminal Law and Visiting Professor of Law, University of Freiburg, 1970. LL.B., University of Cairo, 1961; J.D., Indiana University, 1964; LL.M., John Marshall Lawyer's Institute, 1966.

** Member of the Indiana Bar.
equally, effective pressure of nongovernmental, politically-oriented interests. Additionally, one cannot overlook the impact of propaganda upon such already doubtful credentials. This word, often misused, is a euphemism for the propagation of information, which can range from biased to falsified, by means of "facts" scientifically dispensed by interested governments or political pressure groups acting directly or through covert channels. Ever since Paul Joseph Goebbels mastered it in the 1930's, propaganda has become a weapon of such magnitude that its effectiveness can be raised to the level of indirect or subjective aggression. Its subliminal impact affects world public opinion by implanting a version of the facts which is conducive to the formulation of issues in a controlled (outcome-determinative) manner. And when considering the American system of criminal justice, in which trial by public opinion has been recognized as devastatingly prejudical from a psychological and legal point of view, one can only imagine the effects of propaganda on a discipline such as international law, in which, in addition to such psychological considerations, world public opinion becomes forum and fact-finder, free to formulate and sustain the issues by a selective and often discriminating choice of supporting facts.

The observer will not fail to recognize that in the Arab-Israeli conflict, world public opinion has been shaped and conditioned by exposure to a biased version of the facts as a paper curtain has apparently fallen on any aspect of the conflict which supports the Arab position. In spite of these obstacles, however, intellectual honesty, as well as the tradition of the legal profession, requires that this position be examined.

The "international process" of conflict resolution usually becomes operative when the parties to the controversy submit to one of its classical devices, i.e., conciliation, negotiation, mediation, arbitration or adjudication. However, quite often one of the parties will undertake a "holding pattern," awaiting further development, or perhaps, termination of the crisis.

In either case, the basic consideration will not only be predicated upon proposed resolutory grounds; rather, such delaying tactics will generally be pursued in conjunction with a guided campaign to condition world public opinion to a particular version of the conflict.

1 The term "international process" includes all aspects of international interrelationships, encompassing political and diplomatic action by one nation-state vis-à-vis another as well as the workings of international organizations through which conflicts may be channelled.
Accordingly, this period will be characterized by an escalation of propaganda efforts which are often destined to conceal the real issues behind apparent ones. Whether the issues advanced by the parties or by world public opinion are indeed real will become evident only when the international process attempts to fashion a solution to the conflict. When reasonable solutions are thwarted or rejected, it will then be clear that the apparent issues were camouflage for the real ones which were concealed, in whole or in part, for reasons better known to the concealing party or parties. While these observations may appear elementary, they do provide a foundation for the proposition that, even though virtually all of the issues arising from the Arab-Israeli confrontation can be juridically formulated, no juridical solution to the conflict has been achieved because the issues, as presented, are not in fact real.

The Legal Issues

The following schematic statement of the apparent issues arising from the Arab-Israeli conflict (formulated in a manner heretofore unseen in American professional publications and virtually never disclosed in rather obviously prejudiced popular literature) is presented to demonstrate that a juridical solution is certainly within the realm of the possible. Theoretically, the conflict could immediately be removed from the opposing parties and placed in the context of international adjudication, with justiciability of the issues almost assured. As stated previously, the fact that it is not substantiates the proposition that the issues that lie at the heart of the conflict are not those apparent issues, but rather psychological and political issues which will be explored below. Additionally, this discussion will illustrate that even if these apparent issues are in fact real, the Arab position is the meritorious one.

1. In 1947 the United Nations, as successor to the League of Nations, decided to partition the “provisionally independent State of Palestine” into a “Jewish” and “Arab” State. By virtue of what authority did the United Nations assume such a right?

2. Assuming that the United Nations, under its trusteeship
articles, possessed sufficient authority to make such a decision, should it not have complied with the Palestinian peoples' right to self-determination as a condition precedent to the partition; and if the people elected separate States, should not the allocation of territory to each State have been on the basis of citizenship and property ownership? Would the failure to do so render the partition decision void or voidable?

3. Assuming the legitimacy and validity of the United Nations action in Palestine, would not Israel's borders be confined to its allotted partition share? If this position is correct, would not all territory subsequently acquired by force of arms constitute illegal occupation and, therefore, violate international law (jus ex injuria non oritur)?

4. Does the United Nations have a supervisory duty over the obligations it imposed upon the creation of Israel, such as the obligation to repatriate and compensate the Palestinian Arabs, who have been denied such rights in violation of both international law and various United Nations resolutions?

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5 See notes 120-30 and accompanying text infra. It should also be noted that in 1920 the Arab population of Palestine was 90 percent Christian and Moslem and 10 percent Jewish. By 1930, as a result of increasing British immigration quotas to European Jews, that segment of the population rose to 19 percent and by 1940, it became 30 percent of a total population of 1,530,000. By then Great Britain pledged to keep a lid on immigration so as to maintain a one-third to two-thirds ratio. Between 1940 and 1947, no less than an estimated 250,000 Jews entered Palestine illegally, i.e., without an immigration visa. In 1947 the Arab non-Jewish citizens owned all but 12 percent of the registered real property. These figures appear in Documents on British Foreign Policy 1919-1939 (E. Woodward & R. Butler eds. 1951) and are referred to in W. Yale, The Near East ch. 28 (1958). It is believed, however, that these figures are approximated and not exact.

6 Notwithstanding the figures cited in note 5 supra, the Partition Plan allocated 58 percent of Palestine to Israel. See notes 3-5 supra; Bassionu, supra note 2, at 42-43.


7 The U.N. Charter trusteeship provisions specify in article 79:

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In this context it should be noted that article 5 of the Palestine Mandate provided for "safeguarding of the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion." The Mandate will be discussed subsequently. For a discussion of British Policy implementing the Mandate, see Parliamentary Papers Cmd No. 1700, at 18 et seq. (1922); Cmd No. 1785 (1922); Cmd No. 6019, at 2-3 et seq.
5. If Israel is a legally constituted State by virtue of the United Nations partition decision, did the Arab States commit aggression when they attacked Israel in 1948? In the event, however, that the decision of the United Nations was either without authority or in violation of international law, was the Arab States' action that of a third party intervening on behalf of the Palestinian Arabs in the course of a civil war?²⁸

6. Assuming the validity of the United Nations partition resolution, did it create the State of Israel proper or was State created by its own subsequent declaration of independence? Under the former interpretation, Israel's borders are limited to the territory allocated by the United Nations; but under the latter, did Israel become the state successor of the "provisionally independent State of Palestine," thereby freeing itself from any such limitation?²⁹

7. Having subsequently conquered all of the territory of Palestine, would Israel not then, in fact, have become the successor State of Palestine?³⁰ In this case, would the Palestinian Arabs be entitled to

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(1938-1939). See Count Bernadotte's report incorporated into Secretary General Trygve Lie's report to the Security Council in 2 U.N. SCOR, Supp. 1948, at 103-104. Specifically, the right of the Palestinians to return and to be compensated was first established in G.A. Res. 194, U.N. Doc. A/810 at 21 (1948), and has been often reiterated. Israel pledged implementation of this right to the U.N. Conciliation Commission, and this pledge was incorporated in the Commission's Lausanne Protocol, 2 U.N. GAOR, U.N. Doc. A/927 at 6 (1949).

From 1949 to date, 22 U.N. Resolutions reaffirmed Resolution 194, not including Res. 242, Nov. 22, 1967, which also mentioned the settlement of the refugee problem. Israel's admission to the U.N. in 1949 was conditioned upon its compliance with the U.N. Charter membership requirements which include compliance with international obligations.

The Resolutions accepting Israeli membership of May 11, 1949 state in paragraph 4 that Israel "unreservedly accepts the obligations of the U.N. Charter and undertakes to honour them from the day when it becomes a member of the U.N." G.A. Res. 273, U.N. Doc. A/500 at 18 (1949). The Lausanne Protocol was signed the following day to emphasize Israel's obligations not only as a creation of the U.N., but also as a member of the U.N.


9. Palestine was the only nation in Class A of the League of Nations' Mandate which did not receive its independence even though it was referred to in the Mandate as a "provisionally independent state." See LEAGUE OF NATIONS COVENANT art. 22 and the "Mandate" discussed at notes 121-31 and accompanying text infra. For a discussion of state succession, see generally D. O'CONNELL, TIMELINE OF STATE SUCCESSION (1956); L. OPPENHEIM, INTERNATIONAL LAW (8th ed. 1955).

10 After the 1967 war, all of Palestine fell under Israeli occupation and the question of state succession may arise more significantly again. See G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 360-77 (1943); I. HYDE, INTERNATIONAL LAW 333-438 (2d ed. 1945).
equal citizenship rights in the successor State? Would the denial of these rights on such a basis constitute a violation of international law?

8. Is Israel entitled to claim a right of free and innocent passage in the Straits of Tiran and the Gulf of Aqaba? Would that right accrue to Israel as a State whose borders are limited to the territory allotted under the partition plan or because it is the successor State of Palestine? Can that right, depending upon the basis of its existence, be abridged by a “state of belligerency,” or by Israel’s violations of international law, such as the military conquest of additional territory or its refusal to repatriate and compensate the Palestinian Arabs? Alternatively, is the Gulf of Aqaba an internal waterway possessing historical characteristics which would not be available to a new state?

Is the 1958 Geneva Convention applicable in determining the right of access to the Gulf and the Straits, regardless of whether Israel is a lawful riparian nation? Would it apply to a state which acquired riparian territory by force of arms, or only if Israel is to be considered the state successor of Palestine? Does the closing of the Straits to Israeli navigation constitute an act of aggression, a violation of international law, or a casus belli as Israel claimed in 1967?

9. The right to free and innocent passage through the Suez Canal raises questions which again pertain, in part, to the origin of Israel. As the successor State of Palestine, which was part of the Turkish Ottoman Empire at the time of the 1888 Constantinople Convention, Israel is entitled to free and innocent passage, and so are goods directed to its territory on board other flag-carrying vessels. However, could the most recent American position see 2 M. WHITMAN, DIGEST OF INTERNATIONAL LAW 754-936 (1963). See also A. KEITH, THEORY OF STATE SUCCESSION 5 (1905); D. O'CONNELL, supra note 9, at 156-69, 571-73; L. OPPENHEIM, supra note 9, at 944-45.


12 For an analogous situation see the case of the Guatemala-Honduras boundary arbitration of 1933 which involved the Bay of Fonseca. Bay of Fonseca Case (Guatemala-Honduras), 2 U.N.R.I.A.A. 1907 (1939-1934). A contrary view can be seen in the Corfu Channel Case, [1949] I.C.J. 28. The Arab position that it is a mare clausum appears in 12 U.N. GAOR 223 (1957). Since 1841, the ports on the Gulf of Aqaba had been recognized as Egypt's by the Turkish Ottoman Empire and acknowledged by Israel in a Ministry of Foreign Affairs' publication, BACKGROUND PAPER ON THE GULF OF AQABA 5 (May 1956). The American position can be found in 36 DEP'T STATE BULL. 482-89 (1957).

13 THE GENEVA CONVENTION OF HIGH SEAS, TERRITORIAL SEA AND CONTIGUOUS ZONES art. 16, para. 4, recognizes a right to innocent passage. See also art. 14, para. 4, which states: “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state.” See note 15 infra.


that right be limited to non-strategic goods or abridged by reason of the existence of a state of belligerency between Egypt and Israel or by reason of Israel's forceful occupation of Arab territory in violation of international law and its denial of the Palestinians' rights, which were enunciated by the United Nations and were in accordance with Human Rights Conventions and international law in general? If Israel is the product of its own declaration of independence, rather than the resolution of the United Nations, and is not deemed the successor State of Palestine, can it then claim a right to passage under the 1888 Convention? If so, on what legal basis? If the claim is based upon status as a third-party beneficiary, for whose benefit was the right to passage stipulated (even though Israel did not exist at the time)?\textsuperscript{16}

10. The United Nations condemned Israel for its attack against Egypt in 1956. Was Egypt subsequently authorized to prohibit passage of Israeli or Israeli-bound vessels through the Tiran Straits and the Canal? Was Israel guilty of aggression in 1967,\textsuperscript{17} and what legal consequences derive from its policy of preemptive attack?

11. Is Israel's continued occupation of territory beyond the 1947 partition lines a continuous violation of international law and a condition of permanent aggression?\textsuperscript{18} Does Israel's continued violation of the rights of the Palestinian Arabs have the same effect?\textsuperscript{19} And finally do such actions activate the Palestinians' rights to self-defense and

\textsuperscript{16}See Bassiouni, \textit{supra} note 2, at 47-49.

\textsuperscript{17}The contention was made at the Security Council, \textit{See} 22 U.N. SCOR, 1347th meeting 17-21 (1967); \textit{see also} Res. 242 (1967) which ordered Israel's withdrawal from occupied territory; notes 18, 24 \textit{infra}.

\textsuperscript{18}The question remains unresolved by Res. 242 (1967); but, it states: \textit{Emphasizing The inadmissibility of the acquisition of territory by war . . . , (I) withdrawal of Israeli armed forces territories occupied in the recent conflict. However, Moshe Dayan has stated: Our fathers had reached the frontiers which were recognized in the Partition Plan. Our generation reached the frontiers of 1949. Now the Six-Day Generation has managed to reached Suez, Jordan and the Golan Heights. This is not the end. After the present cease-fire lines, there will be new ones. They will extent beyond Jordan — perhaps to Lebanon and perhaps to central Syria as well. The Times (London), June 25, 1969, at 1, col. 1. For a discussion of the Resolution see Bassiouni, \textit{The Middle East in Transition: From War to War}, 4 \textit{Int'l Law} 379 (1970). \textit{See also} Levie, \textit{The Nature and Scope of the Armistice Agreement}, 50 \textit{Am. J. Int'l L.} 880 (1956).

\textsuperscript{19}See note 7 \textit{infra}.
the rights of neighboring States to collective self-defense under the United Nations Charter and general principles of international law.\(^{20}\)

12. The partition plan contemplated an internationalized Jerusalem with free access for all faiths.\(^{21}\) Did the Jordanian occupation of Old Jerusalem from 1948 until 1967 constitute a violation of international law? Did Israel's 1967 annexation of the same territory and its refusal to heed subsequent United Nations resolutions condemning this action also constitute a violation of international law?\(^{22}\) Would a doctrine of better title be applied? In that case, would the result not depend on the "clean hands" of the party seeking equity under the International Court of Justice's \textit{ex aequo et bono}\(^{23}\)?

13. Does Resolution 242 of November 22, 1967, commanding (the word \textit{commanding} can be at issue since there is disagreement on whether or not this resolution is recommendatory or resolutory) Israel's withdrawal from territory occupied in that conflict include \textit{all} territory? Must the withdrawal be accomplished prior to any guarantees of secured and recognized borders for Israel, or is the resolution unconditional and peremptory? In the latter case, Israel would be in violation of this United Nations resolution in particular and of international law in general, since territory acquired by force is invalid and illegitimate.\(^{23}\) If Israel is to comply with the resolution, would its return to pre-1967 lines sanction these lines as the permanent borders of its legitimate territory, or would that still be in issue?\(^{24}\)

14. Could Israel's claim to be the political institution representing the "Jewish people," in violation of accepted principles of nationality status under international law, be considered an act of subversion against those countries having "nationals" of the Jewish faith?\(^{25}\) Could Israeli-sponsored attempts to induce such nationals to abandon their citizenship in favor of Israel, coupled with its claim of representation, constitute a subversive condition amounting to indirect aggression against such nations and, in view of this in-gathering policy, a permanent threat to Israel's neighboring States?

15. Does the effective deprivation of the Palestinian peoples' rights, including their right to return, to be compensated, to live and


\(^{23}\) For a discussion of Resolution 242, see Bassiouni, \textit{supra} note 18.

\(^{24}\) See Levie, \textit{supra} note 18.

\(^{25}\) See notes 36-67 and accompanying text \textit{infra}.
organize on territory allotted them by the United Nations in 1947, in addition to violating United Nations resolutions,\textsuperscript{26} Human Rights Conventions,\textsuperscript{27} and international law in general, constitute a violation of the 1948 Genocide Convention?

16. Does the avowed propaganda of some Arab news media, promising the annihilation or destruction of Israel by its neighboring Arab States, coupled with their military alliances, offensive armaments, and military preparedness constitute direct aggression, or to a lesser degree, indirect aggression,\textsuperscript{28} or conspiracy to commit genocide in violation of Genocide Conventions\textsuperscript{29} Does it justify Israel’s preemptive and reprisal policies?

**Psycho-Political Underpinnings of the Conflict**

As previously noted, the most startling observation which arises from even a cursory examination of the conflict is that the facts giving rise to these issues are, for the most part, uncontroversial.\textsuperscript{30} This is rather unique in the history of modern conflicts, although certainly many secondary facts are disputed. Arguments are made with respect to the actual number of pre-1967 Palestinian Arabs and Jews, the number of legal and illegal Jewish immigrants between 1936 and 1947, and the number of Palestinian Arab refugees after the 1948 and 1967 wars. Claims of initial aggression and reprisals are also a matter of factual contention. However, these arguments are not material to the formulation of the issues proper. Thus, while the lack of a fact-finding process has been one of international law’s most glaring weaknesses, it has not been one of the factors in this conflict. The parties admit the material facts and are, therefore, in agreement with them — even though only by implication. Furthermore, the United Nations has maintained a close fact-finding operation from the inception of the problem in 1947.\textsuperscript{31}

\textsuperscript{26} See notes 5 & 6 supra.


\textsuperscript{29} E.g., the Genocide Convention of 1948.

\textsuperscript{30} See note 28 and accompanying text supra.

\textsuperscript{31} An Ad Hoc Commission formed in 1947 filed several reports with the U.N. Secretary General and the General Assembly, among them 2 U.N. GAOR, at 209, U.N. Doc. A/AC/13/32. Count Bernadotte was dispatched by the U.N. in 1948 and reported to the Secretary General on September 19, 1948. Many reports followed, including some by his successor Ralph Bunche. See reports by the U.N. Conciliation Commission work in Switzerland in 1948, the Jordan Waters Commission, the Mixed Armistice Commission following the 1949 Rhodes Armistice under U.N. auspices, the United Nations Emergency
Jurists will readily recognize that, notwithstanding its limitations, international law has formulated a sufficient legal framework for a juridically based resolution of the issues raised by this conflict. Consequently, one must question why such a juridically based solution has not been found. The authors submit that the reason why no viable alternative to the use of force has been offered, or, if proposed, has not been adopted, is because the underpinnings of the conflict are psycho-political rather than legal. This article proposes to explore these psycho-political underpinnings, in order to gain a better understanding of their effect on the prospects of peaceful resolution.

The crux of these psycho-political differences lies in the view that Israel is the fulfillment of the first stage of the Zionist dream of Eretz Israel. The in-gathering of all the Jews to reestablish the “Jewish people” on the “land of Israel,” in fulfillment of the prophecy and in keeping with the divine covenant, is to be implemented by a strong State capable of insuring the safety of its people and attaining their political, religious, spiritual, and cultural goals. Unfortunately, the Zionist leaders chose to build this State on what they understandably claimed as ancestral territory — in total disregard of what had come to be, in over 13 centuries, the land of the Arabs.

Palestine, as part of the Arab land, plays a much greater role than that of being mere real estate. It is the geopolitical link of the “Arab nation” — an equally political concept, also resting on historical arguments, but much more realistic and natural to the area and its indigenous population. Arab nationalist secularism is not as well formulated, dogmatically or ideologically, as Zionism, but that is because it requires less artificial dogmatic formulation. It is predicated on the historical unity of the Islamic nation, which was founded by the Arab people in the seventh century (Palestine became part of it in 640 A.D.) and united by the universalism of Islam. The aspirations of the Arab people are currently linked by common modern experiences, language, religion, culture and, to a large extent, future political expectations. The geographic continuity of the Arab States is a political and eco-

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Forces after 1956 and the cease-fire line observers after 1967. U.N. Secretary General U Thant made several trips to the area and reported twice to the Security Council on May 19 and 26. For a discussion of these reports see C. von Horn, Soldiering for Peace 127-40 (1967). See also Anabtawi, The United Nations and the Middle East Conflict of 1967, 14 The Arab World 53-60 (special ed. 1968).

32 This author, as Chairman Pro-Tern of an Ad-Hoc Commission composed of eighteen professors of international law, made such a proposal which was presented to the members of the U.N. Security Council.

nomic factor which also militates in favor of these regional aspirations. Thus far, however, the political basis of these future aspirations is undefined and thereby constitutes what is probably the most significant impediment to Arab expectations. To that extent, the present conflict over Israel is its most binding element; yet, it is clear that Israel is not the raison d'être of Arab nationalism but merely its contemporary catalyst.

The central issue underlying the entire conflict, then, is Zionism versus Arab nationalism. The two doctrines are, in their original form, irreconcilable. It is this conflict of concepts which explains why no juridically-based solution has been adopted. Neither side has been willing to alter its ideological course. Arabs and Zionists are suspicious and fearful of each other, and coexistence cannot be envisioned by either as long as such positions are maintained. Thus, in addition to the very nature of the ideological conflict, derivative psychological factors must also be considered. These factors are varied, and can be said to have their roots in mutual fear and distrust. Lately, however, there has evolved the conviction that the destruction of the opposite ideology is essential. Both sides now regard this as an objective because their popularized social psychology is impregnated with the conviction that if one ideology is bent on the destruction of the other, the survival of either can be insured only by the preemptive destruction of the other. In other words, as Mr. Eban aptly referred to it (but only one-sidedly), each side is bent on "politicide" (to say the least). The initial respective claims of righteousness and legality are now replaced by rationalizations of survival and self-preservation, at which point logic, reason and law fade away behind allegedly justifiable extremism. To understand the present stage of the situation and to explore its future, we must first examine these underlying factors which support and fuel the conflict at present, and thereby affect its future development.

Recent events in the Middle East underscore the failure of the governments and peoples of most Western countries to understand or even recognize the true nature of the conflict between Israel and her adversaries. This struggle began more than 50 years ago between the Arabs of Palestine and Zionist Jews. Powerfully aided by the Western powers, the Zionists were determined to restore Palestine to the status it had once enjoyed for a brief time: an independent Jewish State. The recent emergence of a rapidly coalescing Palestine liberation movement, planned, led, and carried forward by Palestinians, demonstrates that the Arab-Israeli conflict continues to bear the imprint
of its original form—a bitter war between a people who had inhabited Palestine continuously for more than 1300 years and those who would deny the Palestinians their claim to nationhood or their national right to self-determination.\textsuperscript{34} When this basic conflict between contending claims of nationhood and nationality—that of the Palestinians seeking the reestablishment of their State and that of a "Jewish people" claiming sovereignty, to the exclusion of the Arab Palestinians in particular and non-Jews in general, in a "national home"—is at last resolved, other issues between Israel and the Arab States (most of which derive from this central issue) can be expected to wither into relative insignificance and virtually certain peaceful resolution.

To understand the Palestinian claim to nationhood, we must first study the validity of the Jewish claim to nationhood and sovereignty within the same disputed territory.

The basis for such a scheme of study rests upon the fact that Palestine existed before Israel (1948). Correlatively, it is the Palestinian people who are presently dispossessed of a homeland they are now seeking to recover, by force of arms if necessary, against those who claim a superior right. The surrounding Arab States are only secondary parties to that issue and are, therefore, only derivatively involved as third-party intervenors.

One must be mindful of the very significant fact that Zionism is an international doctrine of which Israelism and Judaism are but constitutive factors. Conversely, Arab nationalist secularism is indigenous and regional. While the former political doctrine draws support from its international base, the latter remains local. Opportunities for foreign intervention in the conflict have, since its inception, resulted from the international character of Zionism, which has been able to attract foreign support. In contrast, the search by the Arabs for foreign support was a reaction to that of the Zionists and, as such, was belated. Simi-

\textsuperscript{34} The Israeli position on this subject is manifested by its leaders' positions.

Asked whether the Palestinians were not also entitled to their homeland, Premier Levi Eshkol answered: "What are the Palestinians?"


Asked about the role of the Palestinians in any future peace settlement, Foreign Minister Abba Eban said: "They have no role to play."


The Palestinians "are not a party to the conflict between Israel and the Arab states." Ruling by the Israeli Military Court at Ramallah.

\textit{Jewish Observer}, April 18, 1969, at 1, col. 2.

There was no such thing as Palestinians... It was not as though there was a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them. They did not exist.

larly, the Arabs were forced to turn to those who, for other reasons, opposed the solicited supporters of Israel. Thus the entry of this conflict into the "cold war" was caused by Israel's successful polarization policy, which allied the Western powers to it and effectively compelled Arab alignment with anti-Western nations.

THE JEWISH PEOPLE QUESTION: SOCIAL, POLITICAL, HISTORICAL, AND LEGAL DEVELOPMENT OF ITS NATIONALITY CLAIM AND PALESTINE

The claim for the existence of a "Jewish people" as a legally and juridically recognizable entity rests primarily on the historical, religious, and sociological background of the Jews in Palestine and on the premise (widely accepted in Western lands) that these factors entitle Jews of diverse national origins to establish and maintain a sovereign State in Palestine. The claim presupposes the continuous existence of a Jewish nationality group deriving from Jewish history in Palestine, notwithstanding the individual assumption of various nationalities by its claimed membership over the centuries. To understand this claim, a knowledge of that history is required.

Recorded Palestinian history is rooted in the Old Testament of the Bible, although modern research has produced supplementary knowledge. Arabs migrating from Yemen had settled in Palestine as early as 3500 B.C., while the Hebrews, led by Moses, came there 2,000 years later. The first Hebrew kingdom was established by King David circa 1010-970 B.C., and the chief symbol of Hebrew culture and thought has always been the temple built by David's son, Solomon, in Jerusalem circa 970-930 B.C. Although at one point Hebrew rule extended as far as the borders of Egypt and Assyria, before David and after Solomon no central government exercised undisputed dominion over Palestine (the kingdom of David and Solomon lasted only about 70 years).

In 65 B.C., Roman legions seized Jerusalem, and thereafter, until 1948 A.D., there was no independent Jewish rule in Palestine. For seven centuries Palestine remained a Roman, then Byzantine province. From 640 A.D. until 1948, the country was wholly Arab in character, history and tradition. Palestine existed as part of the nation of Islam, and although it remained subject to the political control of the Ottoman Empire for over 600 years, it preserved and maintained its local character as an Arab country.

35 A. Nutting, The Arabs ch. 7 (1965).
After the Romans destroyed Jerusalem in 135 A.D., successive waves of Jewish emigration swelled the Jewish communities in Egypt and Mesopotamia, flowed into Syria, and moved across the Mediterranean to Greece. Another wave followed the Arab conquest in 640 A.D., as the Jews resettled in North Africa and Iberia. It is especially significant that Jews in all Arab-ruled countries accepted assimilation into the Arab nation (as Prime Minister David Ben-Gurion conceded in interviews with American newsmen in 1964), and yet preserved their religious affiliation. The Muslim Arabs practiced a degree of religious tolerance which was unmatched in the Western world until the advent of the French Revolution; Jews and Christians were permitted to practice their religious creeds while enjoying the civic, political, and economic benefits of citizenship. In sharp contrast, an era of Christian persecution of the Jews followed the downfall of Moslem rule in Spain. Those Jews who survived the Grand Inquisition without converting to Christianity, either retreated to Arab North Africa or sought refuge in Central Europe. However, those adopting the latter course quickly discovered that the religious freedom available to their co-religionists in the Arab world was unavailable in Europe. They were driven into walled ghettos by Pope Paul IV, a practice which was to be frequently adopted by other European rulers. Indeed, the vicious brutality of the treatment imposed upon European Jews during the Middle Ages shocks the modern mind, and one marvels that any survived. No figures can be cited with certainty, but scholarly estimates indicate that there were approximately four million Jews in the world in the early years of the Diaspora and only about one and a half million by 1700.

After the French and American Revolutions introduced new concepts of individual rights to the world community, Judaism began to flourish again. Yet, in many areas, particularly Eastern Europe, persecution continued. Even in the Western countries, Jews remained the victims of social and economic discrimination, the spread of anti-Jewishness culminating in the Dreyfus case. Similarly, the frequent pogroms and massacres in Russia continued to demonstrate that the status of Jews was still insecure, their safety and well-being remaining

38 ROYAL PALESTINE COMMISSION REPORT ch. 1, ¶ 26 (1937) [hereinafter ROYAL COMM.].
39 Use of the word “anti-semitism” is purposely avoided; Semites include Arabs, and just as Arabs cannot be anti-semites, it is believed that, since Europe had no Arab minorities living therein, her experience was with Jews and the discrimination anti-Jewish oriented.
40 See note 13 supra.
in jeopardy; and in Eastern Europe, conditions continued to resemble markedly those which existed in medieval times. In those lands of continuing oppression, large scale emigration seemed to offer Jews their brightest hope. Accordingly, huge majorities of migrating Jews turned to the West, particularly Great Britain and the United States. However, some did "return" to Palestine; while there were some 12,000 Jews in that land in 1845, this number increased to 80,000 in 1914, the difference due, in large part, to European immigrants.41

Zionists vigorously contend that throughout 18 centuries of dispersion, Jews everywhere nourished a memory of, and prayed for return to, a Palestine homeland. Nevertheless, history raises serious doubts as to this claim, and indicates that their attachment to Palestine was religious, spiritual, and perhaps even cultural (even though strong Arab influence makes it unseemly), rather than political or temporal. A continuing spiritual attachment to the birthplace of their religious faith cannot be denied, but desire for a physical return there is historically doubtful. In the Arab countries, as we have noted, Jews were thoroughly Arabized. To cite one example, Maimonides (Moshe ben Maimon) served as court physician to the famed Salah-El-Din (Saladin) and wrote his still revered Commentary on the Mishma and Book of Commandments in Arabic at Fostat, a suburb of Cairo. Similarly, many Jews served as the ambassadors of Muslim rulers and occupied other high government posts throughout the history of the Islamic nations. Jews taught at Arab universities, pursued advanced study in medicine, science, history, and philosophy, and wrote freely concerning both sacred and secular subjects. Indeed, a century before Prophet Muhammad's time, a Himyarite Arab ruler at Sa'nāa, Dhu Nuwas, adopted Judaism and took his people into that faith with him.42

Russian Jews appear to have kept the story of a Jewish homeland in Palestine glowing as a beacon of hope, but it seems unlikely that they had any direct historical or ancestral link with the birthplace of Judaism. History has recorded no mass migration of Jews to Russia. Rather, Russian Jews seem to have descended from the Khazars, a Turkish-speaking people who once ruled southern Russia. About 800 A.D., a Khazar king, along with his subjects, converted to the Jewish faith,43 and although the Khazars subsequently relinquished their political power to the Muscovites, they continued to cling to their reli-

41 ROYAL COMM. at 9, ¶ 19.
42 A. NUTTING, supra note 35, at 24.
gious faith, keeping it alive until modern times. Significantly, however, the Khazar Jews had no access to learning after their fall from power. Even the history and the laws of Judaism were preserved almost entirely in oral tradition, and it is extremely likely that Russian Jews of the 19th century knew little or nothing of their actual ethnic origin. In such circumstances, the natural tendency was to identify themselves with all other followers of Judaism, their brethren in faith, and to believe in an ancestral link with Palestine which did not in fact exist.

The yearning of Eastern European Jewry for a better, brighter future promoted a sense of Jewish nationalism in which Palestine - Zion - was the goal. Branches of a new nationalist movement, Hoveve Zion (Love of Zion), began to appear in Eastern Europe during the late 1800's. This was the origin of the Zionist movement, which achieved wide notice and international attention when Theodor Herzl, angry and bitter over the flagrant injustice of the Dreyfus case in 1894, wrote his pamphlet, Der Juden Staat (The Jewish State), contending that only a sovereign Jewish nation capable of dealing with other nations on a basis of equality could protect Jewish rights throughout the world.

From the anger and indignation aroused by both the Dreyfus affair and Herzl's works, there came into existence a new World Zionist Organization established at Basel, Switzerland, in 1897. With Herzl as its first international president, the group set, as its prime objective, the creation for the "Jewish people" of a Palestinian home secured by public law. Herzl saw in the World Zionist Organization a symbolic embodiment of the sovereign will of the "Jewish people," a kind of government in exile of the Jewish State which he hoped to help establish. Despite his belief that such a body could win international recognition as the accepted representative of the "Jewish people," this task was virtually insurmountable at that time. The primary obstacle was the Organization's contention that it represented a constituency scattered throughout the world, whose members had long since acquired full citizenship in the States they inhabited, and who had no interest whatsoever in a program designed to establish for them a

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44 Der Juden Staat, published originally in Vienna in 1894, has been republished in many languages and is still in print. T. HERZL, THE JEWISH STATE: AN ATTEMPT AT A MODERN SOLUTION OF THE JEWISH QUESTION (S. D'Avigor & A. Cohen transl. 1943).

45 In 1894, a French military court sentenced Captain Alfred Dreyfus, a Jew, to life imprisonment for treason. His conviction was based on the testimony of gentle fellow officers who committed perjury to protect a gentle aristocrat. Theodor Herzl reported the trial for Neue Freie Presse of Vienna.

46 See note 11 supra.
new national status or identity based solely upon the fact of their Jewishness.

In terms of contemporary nationality law, the Zionist claim to represent a Jewish nation, in which every Jew is and remains a de facto natural citizen, until he claims it de jure is unprecedented, without legal foundation in international law, and difficult to sustain. Although citizenship is a question of municipal law, the competence to constitute a nationality entity and to confer membership in it, while emanating from municipal law, is nonetheless limited by international law. The constituting authority must be a State, and the constituted entity must be the nationality of that State, as conferred by the former to a juridical subject whose links with the conferring state warrant the grant of nationality. Even a sovereign State lacks unrestricted power to confer nationality. There must be a factual connection or “genuine link” between the individual and the State which attempts to confer nationality, with its legally binding and enforceable duties and obligations upon him. This mutuality of citizen-state obligations was well expressed in the case of Lurie v. United States: “Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other.” Accordingly, statehood differs from nationhood, in that the former is predicated on a political concept subject to the regulation of international law, while the latter is a label for an association predicated on factors other than juridical. Only a State, then, can confer nationality, subject to the limitations of international law.

47 “Nationality Law is closely connected with the political structure of a country. . . . It determines who shall be a ‘citizen’ and thus what shall be the composition of the ‘nation.’” Silving, Nationality in Comparative Law, 5 Am. J. Comp. L. 410 (1959). “The competence to constitute a nationality entity and confer membership in it is limited by law. The juridical limitations are as applicable to the Jewish people nationality claims as to any others.” Mallison, The Zionist-Israel Juridical Claims to Constitute “the Jewish People” Nationality Entity and to Confer Membership in It. Appraisals in Public International Law, 32 Geo. Wash. L. Rev. 983, 1050 (1964). See also L. Oppenheim, supra note 9, at 645. See also The Times-Morocco Nationality Decrees [1923] P.C.I.J., ser. B, No. 4; The Hague Convention on Conflict of Nationality Laws, April 12, 1930, 179 L.N.T.S. 89; Koessler, Subject, Citizen, National and Permanent Allegiance, 56 Yale L.J. 58, 65-75 (1946); McGovney, Our Non-Citizen Nationals, Who Are They?, 22 Calif. L. Rev. 593 (1934); Note, Developments in the Law—Immigration and Nationality, 66 Harv. L. Rev. 643, 703-04 (1953).

48 See also M. Panhuys, The Role of Nationality in International Law (1959); Mallison & Koessler, Rights and Duties of Declarant Aliens, 91 U. Pa. L. Rev. 821 (1942); Harvard Research in International Law, Nationality, 23 Am. J. Int'l L. 11 (special supp. 1929).

49 See notes 47 and 48 supra and note 52 infra.

50 231 U.S. 9 (1913); see also note 57 infra.

51 231 U.S. at 22.
Organized Zionism prior to the creation of the State of Israel was not in any sense the type of "State" contemplated by public law, and until the establishment of Israel, there was no "political society" constituted as a State which was capable of granting "Jewish" nationality. In regard to the second requirement, various factors are to be considered in determining the existence of a "genuine link" between an existing State and those upon whom it seeks to confer nationality, and the nature of those factors will determine their significance. Habitual residence is one such factor; others include the center of individual interests, family ties, participation in public life, service in the military forces of the conferring country, attachment to the interests of a given State as manifested by cultural conduct, and declaration of the individual's intentions. Furthermore, the sentiments forming the link must be secular; religious attachment alone is not enough, for if that factor, without more, was regarded as sufficient, the procedure would be discriminatory, and as such, of internationally enunciated human rights.

Application of these criteria to the "Jewish people" issue is difficult, but we believe that on the facts, they support the following findings:

1. The only States capable of conferring Jewish nationality were the ancient Hebrew States in Palestine and their successor States, whenever bound by the obligations thus created.
2. Only those Jews who have maintained the effective link between themselves and the ancient Hebrew states by successfully resisting assimilation into another nationality have not

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62 Lichtenstein v. Guatemala, (Nottebohm Case) [1955] I.C.J. 4. Genuine link includes the following requirements: (a) some social basis both in an objective sense in terms of tangible interest and a subjective sense in terms of sentiments to ideals, cultural and perhaps religious attachment; and (b) reciprocal rights and duties between the individual and the state. Hence, the basis utilized in countries such as Israel, Red China and Russia, where citizenship can be granted only on ideological grounds, would not be sufficient to be recognized under international law. The main arguments advanced by the court in favor of the "genuine link" requirement are: (1) its use in cases of dual nationality; (2) the definition of nationality by third states as a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties; (3) the writing of publicist; (4) the tendency of nationality laws which make naturalization dependent on conditions indicating the existence of a link; (5) the practice of certain states to refrain from exercising protection in favor of a naturalized person when the latter has, in fact, severed his links with his new country (Bancroft treaties); and (6) the existence of article 5 of the Hague Convention (1930) which called for a genuine link. Hence, the court derived from custom and general principles the added requirement, beyond naturalization by a state, of a "genuine link" between that state and the individual to whom it wishes to afford diplomatic protection. The case was discussed in Kunz, The Nottebohm Judgment, 54 AM. J. INT'L L. 536 (1960).
abandoned their citizenship in those ancient states, and thus, in the successor States. Every Jew who participated in the public life of any other State, swore allegiance to such a state, or by some other positive act, exercised the rights of citizenship in such a State at any time since the original conferring or adoption of nationality in one of the ancient Hebrew states, must be held to have abandoned his Jewish nationality for himself and his children. This would seem to exclude practically all modern Jews from any contemporary Jewish nationality status.

3. Those Jews whose direct ancestors were never members of the nationality group represented by the ancient Hebrew States have never enjoyed Jewish nationality, and therefore, could not be members of a continuing "Jewish people" in any political sense. This conclusion would apply specifically to the Jewish Khazars of Russia and to the Jews of Yemen.\(^5^3\)

This restrictive view of the "Jewish people" question is vigorously contested by the Zionists, who maintain an open-ended concept of Zionism and thus, of Jewish nationality status. This concept, which finds its clearest expression in the Israeli Law of Return,\(^5^4\) enjoyed its most telling victory when Israel secured reparations from West Germany for German acts against all European Jews, regardless of their nationality, even though the State of Israel did not exist at the time of those acts (1939-1945).

Zionists contend that no Jew has ever broken the effective link because the people of the Diaspora were exiled from Palestine by force, and were prevented from returning. Hence, the Zionists claim that any prescriptive loss of nationality would be unconscionable. However, this view ignores the fact that after the Arab conquest in 640 A.D., the Arab rulers of Palestine rescinded the Roman decree of exclusion against Jews, and that some Jews of the Diaspora did indeed take up residence in the country.\(^5^5\) For these very few, the Zionist claim of a continuing Jewish nationality would certainly have to be acknowledged. But for the enormous majority of Jews who accepted the

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\(^5^3\) See notes 42 and 43 supra.

\(^5^4\) In 1950, the Israeli Knesset (parliament) enacted a "Law of Return," which recognizes every Jewish immigrant as a full citizen as of the moment of his arrival and confers upon him the right to exercise all the functions of citizenship forthwith. This will be discussed further in note 62 infra. For a critical discussion of the practical application of this law, see Galanter, A Dissent on Brother Daniel, COMMENTARY, July 1963, at 10-17.

\(^5^5\) See Tibawi, supra note 36.
rights and obligations of nationality in other States _after Palestine was reopened to them_, the Zionist claim would appear to possess no validity.

As intimated previously, the Zionist claim of a continuing Jewish nationality poses significant problems of dual nationality, especially for Jews in the United States. That issue is beyond the scope of this article, but it may be proper to mention here the principal question thus raised: Can a Jewish American claim the Jewish nationality that Zionism contends he possesses (even though he does not, in fact, assert it), and at the same time, remain compatible with those citizenship obligations imposed by the Constitution and laws of the United States? For those who do not claim or accept Israeli offers of citizenship, there is no conflict. As to those who do not refuse or repudiate the offer, but subjectively further its purposes by monetary contributions, political allegiance, and other forms of support, the question is at least open to exploration.

The issue of dual nationality, especially as it affects U.S. citizens, continues to present problems. David Ben-Gurion, former prime minister of Israel, defined Zionist loyalty to Israel in these terms: "The basis of Zionism is neither friendship nor loyalty but the love of Israel, of the State of Israel . . . . It must be an unconditional love. There must be a complete solidarity with the state and the people of Israel." Address by David Ben-Gurion before the Action Committee, World Zionist Organization, in Jerusalem, April 25, 1950, in A. Lilenthal, _The Other Side of the Coin_ 76 (1965). Nahum Goldmann, President of the World Zionist Organization, has said "American Jews must have the courage to openly declare that they entertain a double loyalty, one to the land in which they live and one to Israel. Jews should not succumb to patriotic talk that they owe allegiance only to the land in which they live." Jewish Daily Forward, Jan. 9, 1959.

See _Afroyim v. Rusk_, 387 U.S. 253 (1967), which overruled _Perez v. Brownell_, 356 U.S. 44 (1957), and held that expatriation must be based upon the voluntary relinquishment of nationality as manifested by the intent of the party. Justice Harlan’s dissenting opinion supports the _Perez_ holding on the ground that Congress has the power to decide what conduct is deemed in "derogation of undivided allegiance to this country." 356 U.S. at 68. The majority, by implication, would hold that finding a breach of allegiance is an offense under American law but not sufficient to warrant expatriation in the absence of a showing of intent. The Justice Department maintains the attitude that for administrative purposes, and until the courts have clarified the scope of _Afroyim_, the Nationality Act of 1940 continues to be held applicable and that voluntary relinquishment of citizenship is not confined to a written renunciation, as under section 349 (a) (6), (7) of the Act. 8 U.S.C. § 1481 (a)(6),(7) (1964). But it can also be manifested by other actions declared expatriative under the Act, if such actions are in derogation of allegiance to this country, even if in those instances _Afroyim_ leaves it open to the individual to raise the issue of intent. The burden of proof of such intent is on the party asserting it. _Afroyim_ suggests that this burden is not easily satisfied by the Government. In _Nishikawa v. Dulles_, 356 U.S. 129 (1958), Mr. Justice Black had stated that the voluntary performance of some acts can "be highly persuasive evidence in the particular case of a purpose to abandon citizenship." _Id._ at 139 (concurring opinion). Yet some kinds of conduct, though within the proscription of the statute, simply will not be sufficiently probative to support a finding of voluntary expatriation. In each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship. The principles of _Afroyim_ reach and, therefore, include all of sections 349(a) and 350 of the Act, insofar as it relates to dual nationals born or naturalized in the United States, and section 405(c) insofar as it purports to continue the effectiveness of individual losses of nationality under
Zionists argue that their concept of a continuing "Jewish people" throughout the history of mankind, as predicated on the notion of the "chosen people," was implicitly recognized in the Balfour Declaration. This view completely ignores one very important provision of the Declaration: "It being clearly understood that nothing shall be done which may prejudice the... rights and political status of Jews in any other country." This provision was specifically designed to avoid the juridical and political consequences of open-ended Zionism, which the mandatory powers contemplated with apprehension.

The concept of a subjective Jewish nation, existing through more than 19 centuries without territory, government, or political continuity, and imposing obligations and limitations upon all adherents of the Jewish religious faith, regardless of ethnic origin, choice of nationality or time of conversion to Judaism (or for that matter continued adherence to Judaism), has no foundation or precedent in any recognized legal doctrine. The United States has specifically and expressly rejected it, as is evidenced by a letter dated April 20, 1964 and addressed to Rabbi Elmer Berger (then executive vice president of the American Council for Judaism), wherein Assistant Secretary of State Phillips Talbot officially asserted:

The Department of State recognizes the State of Israel as a sovereign State and citizenship of the State of Israel. It recognizes no other sovereignty or citizenship in connection therewith. It does not recognize a legal-political relationship based upon the religious identification of American citizens... Accordingly, it should be

the similar provisions of sections 401 and 404 of the Nationality Act of 1940. See also Schneider v. Rusk, 377 U.S. 163 (1964); Perri v. Dulles, 230 F.2d 259 (3d Cir. 1956); In re Becher, I. & N. Dec., interim decision No. 1771 (Att'y Gen. 1967); Speer, The Place of Foreign Law in Expatriation Cases, 4 INT'L LAW 139 (1969).


59 A decision of mandatory powers including the United States was made on April 25, 1920

to accept the terms of the mandates' article as given below with reference to Palestine on the understanding that there was inserted in the proces-verbal an undertaking by the mandatory powers that this would not involve the surrender of the rights hitherto enjoyed by the non-Jewish communities in Palestine.

For a discussion of the viewpoint that the nationality of native inhabitants of the mandated territories is definitely different from that of the nationals of the Mandatory Power, see G. HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIPS 77-80 (1948); L. OPPENHEIM, supra note 9, at 220-22; Goldie, Wong Man On v. Commonwealth of Australia, 1 INT'L & COMP. L.Q. 557 (1952); Wright, Status of the Inhabitants of Mandated Territory, 18 AM. J. INT'L L. 306 (1924). While most of the trusteeship agreements concluded by the United Nations are silent as to the nationality of the inhabitants of the trust territories, the trusteeship agreement for the former Japanese mandated islands provides in article II that the United States, as administering authority, "shall take the necessary steps to provide the status of citizenship of the Trust Territory for the inhabitants of the Trust Territory." Trusteeship Agreement for Japanese Mandated Islands, July 18, 1947 T.I.A.S. No. 1685, 8 U.N.T.S. 181.
clear that the Department of State does not regard the “Jewish people” concept as a concept of international law.\(^6\)

Professor W. T. Mallison, Jr., one of the foremost authorities on this subject, proposes recognition of what he has termed “limited, political membership” in the “Jewish people.” It is Mallison’s contention that the “Jewish people” referred to in the political promise clause of the Balfour Declaration, included only those who, at that time were, or thereafter might become, Zionists. In his view, a limited “Jewish people” concept was recognized in international law and put into effect through such international agreements as the Balfour Declaration and the League of Nations Mandate over Palestine, which incorporated that Declaration.\(^6\)

It would appear that Professor Mallison’s definition must be further clarified. Recognition of a “Jewish people” nationality group, entitled to be regarded, collectively and individually, as members of a political society in international law, must be based upon a declaration of their intention to abandon all preexisting allegiance to any other political society. A rejection of this contention would render their position analogous to that of a citizen of country A who has not publicly declared his intent to transfer his allegiance to country B but, in fact, admits his allegiance to the latter without the knowledge or consent of the former. On the other hand, adoption of that contention would mean that only those contemporary or future Zionists who intended (by virtue of a public act) to join the “Jewish people” nationality as an alternative to their previously existing political affiliations could be recognized as members of the “Jewish people.” An exception would occur whenever the States involved permitted dual citizenship under their municipal laws. In this regard it is interesting to note that neither the Zionist Organization nor the State of Israel has ever accepted any limitation on membership in the “Jewish people.” In Attorney General of Israel v. Eichmann,\(^6\) the Jerusalem

\(^6\) This letter is quoted in Mallison, Legal Problems Concerning the Juridical Status and Political Activities of the Zionist Organization; Jewish Agency: A Study of International and United States Law, 9 WM. & MARY L. REV. 556, 561 (1968).

\(^6\) Id.


The connection between the Jewish people and the State of Israel constitutes an integral part of the Law of Nations. . . . The Balfour Declaration and the Palestine Mandate given by the League of Nations to Great Britain constituted an international recognition of the Jewish people. . . .

\(^6\) Id.

Israeli nationality law should be distinguished from the “Jewish people” nationality claims, an endeavor which is beyond the scope of the present study. It is important to note, however, that Israeli nationality law is designed to facilitate the acquisition of
District Court, in a judgment affirmed by the Supreme Court of Israel, stated on May 29, 1962 that

[the connection between the Jewish People and the State of Israel constitutes an integral part of the law of nations. ... The Balfour Declaration and the Palestine Mandate given by the League of Nations to Great Britain constituted an international recognition of the Jewish People.]

In that case, Israel purported to be acting in behalf of every European Jew that was subject to the terrors of Hitler's regime, without regard to their place of residence or nationality. Similarly, almost immediately thereafter, the State of Israel claimed and collected reparations from the Government of West Germany for the losses sustained and the suffering endured by all Jews during the Nazi terror.

It is clear that the open-ended "Jewish people" nationality concept violates the generally accepted view of nationality status in international law. The dicta of both the League of Nations and the United Nations, as well as unilateral pronouncements by various governments are simply not a source of international law. Moreover, there has been no broad international agreement on the significance or validity of the "Jewish people" concept, even in the narrow sense proposed by Professor Mallison. It follows, we submit, that the "Jewish people" concept is not a valid concept of international law, and cannot be recognized as such solely because of Israel's unilateral declaration of adherence to it (particularly in view of the fact that it contravenes and violates the rights of others, i.e., the Palestinian people).

The confusion arising out of the "Jewish people" question is

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64 The sources of international law are embodied in article 38 of the statute of the International Court of Justice which states:
1) The court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2.) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.
65 See notes 52 & 59 supra.
understandable. Prior to the creation of the State of Israel, a political concept which would replace nationality or citizenship and compel some form of political allegiance, was tactically indispensable to the Zionist scheme. Once the State was established and the legal power to confer Israeli citizenship was gained, the “Jewish people” concept had to be legitimized. The solution to what would otherwise have proven a legally cumbersome question was found in the distinction between Israeli citizenship conferred by the State's civilian authority and “Jewish nationality,” which was borrowed by Israeli law from the Halakah. The reader must be cautioned in his interpretation of this intricate legal concept in Hebrew law. Halakah, or the religious law of the Hebrews, applies to the Le'om, or “peoplehood.” From this religious premise, it is easy to attach the political overtones which Zionism had created with respect to the definition and significance of the “Jewish people” political concept. Zionists played on the religious feelings of Jews, utilizing the rabbis’ desire to maintain their exclusive jurisdiction over religious matters by conveniently preserving a misleading category of Jewish nationality in addition to Israeli citizenship. Israeli identity cards and birth certificates not only have those two categories listed separately, but to further accentuate the point, a third category for religion is added. Thus, an Israeli Jew is a citizen of Israel, a Jewish national and a Jew by faith. Orthodox Jews, as well as non-Zionist groups such as the American Council for Judaism, reject this proposition. There are probably two main considerations for the Zionist approach: (1) to preserve the fiction of the political dogma embodied in the Zionist “Jewish people” concept, as it was developed prior to the establishment of the State; and (2) to perpetuate this doctrine. The purposes of its perpetuation are: (a) to attract, recruit and induce more Jewish immigration into the State by perpetuating a political link between the original Zionist idea and its political embodiment, i.e., the State of Israel; and (b) to claim, in this concealed manner, Israel's “protective jurisdiction” over all Jews of the World.

These considerations are laden with the implication, which many Jews specifically reject, that no Jew can escape his Jewish nationality. Consequently, adoption of this doctrine would give Israel a color of jurisdiction over Jews who, according to this dogmatic proposition, would only be “citizens by convenience” of another State. The danger of such a doctrine is that it saps the very foundation of allegiance to the State to which a citizen belongs. To that extent, it subverts the citizen's allegiance by claiming some right to it and by conferring upon him privileges which are usually attributable only to one's own
citizens. Certainly, the collection of reparations for Nazi wrongs against the "Jewish people," the Law of Return and the continued solicitation of non-Israeli Jews for financial support and immigration clearly indicate a claim by Israel on all Jews of the world. It is the authors' opinion that there is no surer way to invite anti-semitism.

The prospects for change were rekindled by the Shalit case, in which the Israel Supreme Court, in a rare en banc decision, held by a vote of 5 to 4 on January 26, 1970, that all Israeli citizens are Israeli nationals, and that official registries should record the nationality of a Jewish citizen as Jewish, even though he would not be a Jew under Halakahic Law. While the decision removes religious considerations from the determination of nationality, it reinforces the Zionist concept of "Jewish people" by leaving the category in existence (although devoid of religious significance). Politically, the decision secularizes nationality, so that it now has only the meaning which former Premier David Ben-Gurion once attributed to it, i.e., that anyone who wishes to be considered a Jew is part of the "Jewish people." This is not, however, an altruistic open credo, for what would otherwise prevent the Palestinian Arabs from declaring themselves "Jews" and claiming a right to return under the Law of Return. Ben-Gurion's view was a political necessity which still exists. Israel continues to seek the "return" of Russian Jews. That country will not recognize Israel's claim to its citizens even if they are of the Jewish faith, and like the United States, rejects the Zionist doctrine of "Jewish people." As indicated earlier, Russian Jews are descendants of the Khazars and indeed, many are the offspring of mixed marriages in which the mother was not Jewish. Under Halakahic Law, if the mother is not Jewish, the offspring would not be Jewish either. This was the problem which confronted Shalit. His wife was a Gentile and his children were not considered of Jewish nationality. Thus, prior to Shalit, most Russian Jews could not qualify as members of the "Jewish people" in a religious sense, and the Law of Return, under which they hypothetically would have emigrated to Israel, hinged on membership in the "Jewish people."

Notwithstanding the furor of the rabbinical centers of Israel, the Shalit decision furthered the Zionist doctrine, and was capitalized upon by the Israeli Cabinet, which proposed two laws to the Knesset. One stipulates that converts to Judaism, as well as the children of a Jewish mother are Jewish nationals. As for citizenship (and return) all

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members of an immigrant family in which one spouse is Jewish would be regarded as Jewish nationals. 67

THE EMERGENCE OF THE ZIONISTS AS AN "INTERNATIONAL PUBLIC BODY"

In any consideration of the juridical status of Zionism and the State of Israel, it is essential to distinguish sharply between Israelis (nationals of the State), Zionists (adherents to a political doctrine) and Jews (members of a religious community). 68 It is true that most Jews in the Western countries, particularly the United States (and some non-Jews as well), provide emotional and financial support to Zionism and Israel, and exercise political influence on behalf of either one or both. However, it is also true that many Jews actively dissociate themselves from Zionism. 69 One may certainly be a Jew without being a Zionist, and one may be a Zionist though not a Jew; an Israeli is a citizen of that State and theoretically can be neither a Jew nor a Zionist. These facts in themselves dispute the "Jewish people" concept, as it is defined and used by the World Zionist Organization, i.e., as the foundation of the State of Israel.

The Zionists contend that acceptance of the Zionist (not Jewish) claim to Palestine has been legalized through the exercise of diplomacy and world power politics, and that the participation of Zionists in international agreements has rendered it imperative that the Zionist Organization be established as an international public body recognized as a limited subject of international law. Obviously, the validity of these contentions must be explored in detail.

Legal personality is a legal fiction through which a legal system attributes rights and obligations to an entity. This proposition is applicable to both the domestic and the international legal orders. The existing subjects of international law are free to extend the application of international law to any entity which they see fit to admit into the realm of the international legal system. 70 Indeed, public


68 U. Avnery, a member of the Israeli Knesset, has proposed an Israel without Zionism. U. Avnery, Israeli Without Zionists (1960).

69 The American Council for Judaism, already referred to in connection with Zionist nationality claims, is an anti-Zionist organization dedicated to maintaining and preserving a sharp distinction between Judaism as a religious faith and the political concept of a "Jewish people." It is the largest and best known such group and has actively opposed the Zionist-Israeli position on Jewish nationality.

bodies are usually constituted as subjects of international law by means of multilateral agreements among States. However, no one State possesses the authority to establish any public body as a subject of international law by unilateral act or fiat. Nevertheless, such bodies may be said to achieve status under international law. This generally requires an appraisal of their substantive powers and the application of empirical tests. Professor Lauterpacht proposed these criteria:

In each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to experience and to the reason of the law as distinguished from a preconceived notion as to who can be subjects of international law.\(^7\)

The average international organization may be said to have an international personality in view of its functions:

An organization [such as the Zionist Organization] could not carry out the intentions of its founders if it was devoid of [an] international personality. It must be assumed that its members, by entrusting their functions to it... have clothed it with the competence to enable those functions to be effectively performed.\(^7\)

The Zionist Organization sought to gain recognition as an international public body (1) by explicit recognition from various States, and (2) through multilateral agreements among States in which its existence was explicitly mentioned. The most intensive of these efforts involved the negotiations preceding the Balfour Declaration. That Declaration is said to constitute recognition by the British Government of the Zionist Organization as a public body. It manifested the British view that the Organization had status to receive the political promise clause and to be subjected to the limitations imposed in the safeguard clause (both of which will be discussed below). This did not amount to recognition as an international public body by the community of nations, but it was the first step in that direction.

When, as a consequence of its political alliance with the British Government, the Zionist Organization was permitted to participate in the drafting of the League of Nations Mandate for Palestine, the Zionists were able to gain more, but not all, of their political objectives. Article 4 of the Mandate Agreement provided that "an appropriate Jewish agency shall be recognized" as a representative of the Jewish inhabitants of that country.\(^7\) Without considering here the question of the Mandate itself, we must conclude that by this act, the

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73 For the complete text of the Mandate Agreement, see 44 Stat. 2184 (1924).

international community of nations recognized the Zionist Organization as a public body, speaking on behalf of the Jews of Palestine. As can be seen from the full text of article 4, certain legal limitations were imposed upon the operations of the Jewish Agency, the new name of the Zionist Organization (these limitations will be discussed in a subsequent section). Finally, any reasonable doubt that might exist concerning the public body status of the agency was resolved by the decision in the first of the Mavromattis Concession Cases. There the International Court of Justice held, with respect to article 4 of the Mandate, that: "This clause shows that the Jewish Agency is in reality a public body, closely connected with the Palestine Administration and under its control in the development of the country."

The principal juridical consequence of the attainment of public body status is *subjection to the law*. There can be no grant of power and status as a public body without accompanying legal obligations. These include, at a minimum, both the specific legal limitations imposed in the Mandate Agreement and the general legal limitations and commitments which apply to all subjects of international law. Thus, recognition as a public body not only presupposes ability to undertake and carry out assumed obligations, but imposes the duty, under sanction of law, to discharge in fact all such assumed obligations. One may indeed question the recognition granted the Zionist Organization as a public body on these grounds.

THE ARAB EXPERIENCE WITH INTERNATIONAL AGREEMENTS, INTERNATIONAL ORGANIZATIONS, AND THE WESTERN POWERS

The Arab world labors under two basic notions, the first is that Israel's creation was the product of perfidious plotting and treacherous tactics, including both power politics and military force. The second is that Zionists are abetted by the Western powers, who see in Israel an extension of European colonization of the Arab world. To understand these beliefs, one must examine the progression of Zionism in Palestine, Israel's relationship, if any, with Great Britain and the Western world, and the conspiracy against the Arab world which apparently exists between them. An analysis of various international agreements, and their significance in international law, will illustrate how Great Britain, the Western world, and Israel have in fact, manipulated and distorted international law to the point where the Arab

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75 Id.
76 Id. This is also discussed in Mallison, supra note 60, at 566.
world, in particular, and most of the Third World in general, share the belief that international law is the product and tool of Western imperialism.

The declaration establishing the State of Israel cited the Balfour Declaration of 1917 as one of the legal guarantees for its creation. However, opponents of this view contend that the Balfour Declaration had no legal effect because Great Britain did not possess jurisdiction, sovereignty, or physical possession of Palestine either at the time of the declaration or when the State of Israel was proclaimed in 1948. Furthermore, they argue that no right exists under the terms of the Mandate Agreement of 1922 to transfer a trust confided by the League of Nations to Britain alone. They also assert that prior and subsequent to the date of the Balfour Declaration, Great Britain had already given conflicting pledges to Arab leaders. Thus, the Arabs understandably denounce the Balfour Declaration, and point instead to their reliance upon their treaty relations with Great Britain.

An understanding of some basic concepts of international law is necessary in order to analyze these conflicting contentions. Although some international instruments are called treaties eo nomine, there exists a wide vocabulary from which names for such instruments may be chosen, e.g., pact, convention, protocol, agreement, arrangement, declaration, act, statute, covenant. All these terms have been used to designate international contractual instruments in recent times, and in most cases, if not all, the choice of one term over another has little or no substantive significance. Thus, only the substance of the instrument is relevant—not its label.

International agreements, to be binding, must be made between subjects of international law. The case for the status of the Zionist Organization in international law has been discussed previously, and, as was illustrated, is one of marginal validity. That Great Britain and the Arab States were subjects of international law is beyond all question.

An international instrument need not be bilateral or multilateral, and need not follow a specific legal form to be a binding document. In regard to the interpretation of an international instrument, its negotiating history is of prime importance insofar as that history reveals or indicates the intent of the contracting parties. In Great

78 Mallison, supra note 47, at 1009.
79 See notes 36-67 and accompanying text supra.
80 Harvard Research in International Law, Treaties 937-39 (1932).
81 M. McDougal, H. Lasswell & J. Miller, The Interpretation of Agreements and
Britain, the legislative history of the issues involved is included in the interpretation of treaties to aid in ascertaining the intentions and objectives of the British government. It is clear, then, that various proposals, which are offered unilaterally by the parties to an international instrument, and abandoned or compromised in the course of the negotiations, are particularly important and significant to the interpretation of the parties' intent.\textsuperscript{82} Furthermore, an understanding of the negotiating history affords indispensable insight into its interpretation. Therefore, the key to interpretation of any of the terms involved is the political and historical context in which the agreements were made.\textsuperscript{83} In this respect, the aim of the Zionists was perhaps paramount, and was best expressed in the following terms:

The advantages Zionism appeared to bring to any diplomatic arrangement arose from Herzl's claim, through his position as president of the World Zionist Organization, to represent \[with the potential to activate and direct\] "the Jewish people" dispersed throughout the world. It was ironic that Herzl [and Weizmann too—some years later] should have projected this claim in negotiations with various governments, since \textit{the reality was that Herzl, to a great extent, sought major-power support to enhance Zionist influence among those \[Jews included\] who opposed Zionism's objectives}. Herzl, for example, aimed to have the British government induce its own citizens of Jewish faith to "collaborate" with him.\textsuperscript{84}

Herzl had begun negotiations with the British government as early as 1902, and his successors continued talks with the British at intervals thereafter.\textsuperscript{85} During the period of 1916 through 1918 when the agreements considered here were negotiated, Great Britain maintains two primary objectives: to enlist the support of the Arab world against the Ottoman Empire, and to enlist Jewish support against both...
the Ottoman Turks and the Central Powers (Germany and Austro-Hungary). 86

While the British were striving to gain the support of both the Arab world and the Jews, the immediate goal of the Zionists in Great Britain and the United States was to obtain a guarantee from the Allies that, in the event of a Turkish defeat, Palestine would be recognized as a Jewish Commonwealth open to unrestricted immigration. To this end, Chaim Weizmann, a prominent Jewish chemist in Great Britain (then leader of the World Zionist Organization and first President of Israel), building upon a reservoir of good will developed since Herzl's time, gained the sympathy and active collaboration of a number of important public figures in Great Britain. 87 Contrasted with the announced goal of the Zionists was the early manifestations of Arab nationalism; seeking to establish independent Arab States, various Arab leaders were responding to Britain's request for aid to drive the Turks out of the Arab lands. To secure the assistance of both the Arabs and Zionists, while serving their own best interests, Britain obligated itself to both sides through various commitments.

A. The Hussein-McMahon Correspondence

The Arab insistence that a British agreement with Arab leaders on the disposition of Palestine antedated the Balfour Declaration relies primarily on an exchange of letters in December of 1915 between Sheriff Hussein of Hejaz and Sir Henry McMahon, British High Commissioner at Cairo. 88 As previously noted, Britain stood in urgent need of help in her plan to expel the Turks from Palestine, Syria, Lebanon, Iraq, and the Arabian Peninsula. 89 In this correspondence, Hussein promised to declare war against Turkey and to raise an Arab army to assist the British in their military campaign. For their part, Commissioner McMahon, under instructions from London, pledged that Britain would "support the independence of the Arabs" in the large area bounded on the north by the 37th parallel (approximately the northern boundary of Syria), on the east by the Iranian border down to the Persian Gulf (enclosing Iraq), and in the south by the Arab Gulf States. When Hussein demanded that the Western boundary be established at the Red Sea and the Mediterranean, McMahon accepted the Red Sea border but excluded from his pledge the coastal belt of

87 Id. at 78.
88 Id. at 76; see also British Command Papers, Cmd No. 5987 (1939). See also G. Antonius, The Arab Awakening chs. 7-9 (1946).
Syria lying to the west of the districts of Damascus, Homs, Hama, and Aleppo. This meant that the Arabs would be denied Lebanon and the Alawi country to the north. Although Palestine was not explicitly mentioned in these letters, the Arabs have always contended that the region promised to them included Palestine. On the other hand, Winston Churchill declared when Arab delegates presented their claim:

This reservation [in the letters] has always been regarded by His Majesty's Government as covering the wilayet of Beirut and the independent Sanjuk of Jerusalem. The whole of Palestine west of the Jordan was thus excluded.

B. The Sykes-Picot Accord

McMahon's pledge to Hussein preceded by several months the Anglo-French accord, the Sykes-Picot agreement, on the Middle East. This pact, concluded on May 16, 1916, provided that upon cessation of hostilities, France was to get the area known as Cilicia (Syria and Lebanon), Britain, southern Mesopotamia (Iraq) with Bagdad, and the ports of Haifa and Acre in Palestine while Palestine was, in general, to be internationalized. Since secrecy was considered essential, the terms of this agreement were never communicated to Hussein.

Clearly, the Sykes-Picot agreement was incompatible with Great Britain's earlier pledge to Hussein which, disregarding the dispute over Palestine, specifically assigned Mesopotamia to the Arabs. These two agreements were followed 18 months later by the Balfour Declaration.

C. The Balfour Declaration

In form, the Balfour Declaration is a unilateral statement of British policy, but the years of negotiation that preceded its issuance, particularly the last three months of intensive discussion, reveal it as a tripartite agreement among the British, the Zionists, and representing a substantial majority of British Jewry, the British Anti-Zionists.

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90 G. Lenczowski, supra note 86.
91 Id. See also Royal Comm. at 20, ¶ 8.
92 G. Lenczowski, supra note 86, at 72. The provisions of the Sykes-Picot accord were incorporated into a corollary agreement with Russia which purported to recognize Russia's postwar claim to Constantinople. These documents were discovered in tsarist files after the October Revolution of 1917 and were published as evidence of western imperialist chancery. In this manner, the world first learned the details of the Sykes-Picot scheme. 42 Stat. 1012 (1922).
93 Zionist leaders maintain that, although unilateral in form, the Declaration was clearly a bilateral international instrument and that all its terms were binding upon both Great Britain and the Zionists. That the Declaration was at least bilateral is obvious; that it constituted an international instrument is at best highly debatable, both because the Zionist Organization had not yet attained the apparent status of an international public body and because of the intent of the parties at the time of the making of the Declaration.
94 Their purpose was to guard the interests of Jews already assimilated into the nationalities of other countries. L. Epstein, British Policies in the Suez Crisis 180-87 (1964).
David Lloyd George, then Prime Minister of Great Britain, and Foreign Secretary Sir A. J. Balfour, believed that the strong Jewish influence in the Russian revolutionary movement made a favorable response to Zionist aspirations essential. It was also deemed important to woo Jewish support in the United States where, before America's entrance into the war, the sympathies of the principal Jewish leaders, all of German or Austrian background, lay with the Central Powers. Zionists also argued, and many Britons believed, that an Allied pronouncement in favor of Zionism might influence Austro-German Jewry and help to induce disaffection and disloyalty within the enemy States. Therefore, Sir Mark Sykes (of the Sykes-Picot agreement of 1916) was instructed to initiate formal negotiations, on behalf of the Allies, with Nahum Sokolow, the representative of the Zionist Organization. During these talks the Zionists insisted upon a British protectorate over Palestine, and although this would have constituted yet another contradictory pledge, the British government was not adverse to it.

In any attempted analysis of the Balfour Declaration, two factors must be carefully weighted and contrasted:

1. **The Political Promise Clause:**

   His Majesty's Government views with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object.\(^5\)

2. **The Safeguard Clause:**

   [It] being clearly understood that nothing shall be done which may prejudice the civil and religious rights of non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.\(^6\)

The political promise clause can be considered to have been a political defeat for the Zionist objectives. It is clear that the British considered impracticable, at best, any thought of making Palestine as a whole available as a Jewish national home or State, and at no time during their negotiations did they entertain any such purpose.\(^7\) What the British did, in fact, was to promise to "facilitate"—nothing more—the establishment of a "national home" for the "Jewish people." In 1937, however, they modified their interpretation of this clause somewhat, and although still unwilling to commit themselves to the establishment of a Jewish national State, they indicated that the question

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\(^5\) See L. STEIN, supra note 58, app. II.

\(^6\) Id.

\(^7\) Correspondence with the Palestine Arab Delegation and the Zionist Organization, Fifth Report, Cmd No. 1700, at 19 (1922).
of eventual statehood would depend mainly upon the goal and enter-
prise of the Jews. Since the British contemplated the home as
encompassing those Jews already in Palestine, they never feared an
onslaught of immigration or any change in the demographic balance
of Palestine (an Arab majority was to be maintained).

The Zionists, however, never bound themselves to such a rigid
construction of the political promise clause, but viewed it as the initial
step in the implementation of their plans. They proposed to assure
that Jews would, in the first instance, settle in Palestine, in sufficient
numbers to guarantee their safety, and then, through an ever-increas-
ing tide of immigration, establish their numerical and political pre-
dominance. If, when that point was reached, Palestine should be ac-
corded self-government, the country could then become a Jewish com-
monwealth with full equality of rights, extended to the new Arab
minority. From this point, it would be but one short step to trans-
form Palestine into a refuge for World Jewry in the hope that Pales-
tinians would be driven to resettle in neighboring Arab States.

It is difficult to determine from these conflicting interpretations,
whether British and Zionist leaders contemplated that a portion of
Palestine was to become a Jewish commonwealth, with a small Arab
minority, or whether all of Palestine was to become a Jewish common-
wealth with a large Arab minority. In view of the avowed Zionist
objectives (rather than their long-range expectations) and Britain's
contradictory promises to Arab leaders, the clause when drafted, must
be construed to have had a very restricted political meaning. In this
context, it becomes important to note that the State of Transjordan
was partially carved out of Palestine in 1920, three years after the
Balfour Declaration and two years before the creation of the Palestine
Mandate, and Great Britain specifically exempted that Arab region
from the terms of the Declaration.

In contrast, the safeguard clause seems clear and unequivocal. The
words "it being clearly understood" prove that however vague or am-
biguous the political promise clause might be, it was subordinated to
and conditioned upon the implementation of the safeguard clause
which reassured the non-Jewish population of Palestine that there

88 Royal Comm. at 24, ¶ 20.
89 L. Stein, supra note 58, at 553.
100 The prime British purposes in the creation of Transjordan would appear to have
been political and military: to establish and preserve unhampered control of the territory
bordering Syria and to permit easy defense against any French designs on the Mosul-
Kirkuk oil field, which had been promised to France under the Sykes-Picot agreement,
then occupied and held by British troops in defiance of this accord.
would be no resulting injury to their rights from the political bargain struck between Britain and the Zionists. The specific words employed referred to actual rights enjoyed by Arabs under Ottoman rule, which were deemed to include, inter alia, such basic rights as freedom of religion, the right to own land, and mobility within the territory. Since the Arab population of Palestine included both Muslims and Christians, it was indispensable that their religious rights not be prejudiced. Therefore, it was implicit in the guarantees embodied within the safeguard clause that the rights of Christians and Muslims to the maintenance and protection of their shrines and religious exercises would be assured. As to their civil rights, the ultimate independence of Palestine was intended to be achieved through the implementation of gradual self-determination.

Since the clauses of any document must be interpreted in a chronological order to achieve an internal consistency, it is clear from the history of negotiations behind the Declaration that the British government agreed to support—if not, indeed, specifically to protect and secure—the recognition and observance of the rights of the non-Jewish population.

One vital item evidencing this intent was the creation of Transjordan, already referred to. A second was the White Paper on Palestine issued by the British government in June of 1922, which said in part:

Unauthorized statements have been made to the effect that the purpose in view is to create a wholly Jewish Palestine . . . that Palestine is to become "as Jewish as England is English." His Majesty's Government . . . have no such aim in view. . . . [T]he terms of the Declaration referred to 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.

During the period between the two world wars, the Arabs and their partisans argued that the political and safeguard clauses of the Declaration, far from being supplementary, were in fact and in law,

102 See note 100 and accompanying text supra.
103 Cmd No. 1700, supra note 97, at 18. In May 1939, the British government again reiterated this same view:

His Majesty's Government therefore now declare unequivocally that it is not part of their policy that Palestine should become a Jewish State—they would indeed regard it as contrary to their obligations to the Arabs under the Mandate, as well as to the assurances which have been given to the Arab people in the past, that the Arab population of Palestine should be made the subjects of a Jewish State against their will.

contradictory. After World War II, the British government itself veered toward this view. On February 25, 1947, Foreign Secretary Ernest Bevin told the House of Commons:

There is no denying the fact that the Mandate [which incorporated the Balfour Declaration] contained contradictory promises. In the first place it promised the Jews a National Home and in the second place, it declared the rights and position of the Arabs must be protected. Therefore, it provided what was virtually an invasion of the country by thousands of immigrants and at the same time said that was not to disturb the people in possession.\textsuperscript{104}

D. The Hogarth Message

When Sheriff Hussein learned of the contents of the Balfour Declaration, he demanded an explanation from the British government and protested that the Declaration violated the pledge made to him two years earlier. Britain responded by sending Commander D. C. Hogarth with a message which he delivered to Hussein on January 4, 1918, assuring the Arab emir that Britain's decision to assist the return of the Jews to Palestine meant only "so far as is compatible with the existing population" and did not contemplate establishment of a Jewish State.\textsuperscript{105} Hussein accepted this explanation, and his son, Emir Faisal, later discussed with Chaim Weizmann the terms and conditions under which immigrant Jews might enter Palestine.\textsuperscript{106}

With Britain committed to recognition of their organization and to at least a partial acceptance of their program, the Zionists turned to the other Allied Powers in an effort to win approval for the Balfour Declaration. France approved it on February 11, 1918, and Italy approved it 12 days later. President Woodrow Wilson signified his endorsement in a letter to Rabbi Stephen S. Wise on October 29, 1918.\textsuperscript{107}

In this manner, the Zionists were able to attain the status of unofficial allies of the Western powers. For example, the London Foreign Office went so far as to extend them the privilege of the British diplomatic pouch.\textsuperscript{108} In return, the Zionists were expected to render valuable assistance in the prosecution of the war. What contribution they may have made to that objective is uncertain, but David Lloyd George told the Palestine Royal Commission in 1936:

\textsuperscript{105}F. KHOURI, supra note 77, at 8-9.
\textsuperscript{106}The Faisal-Weizmann Agreement is discussed at notes 110-14 and accompanying text infra.
\textsuperscript{107}F. KHOURI, supra note 77, at 8-9.
\textsuperscript{108}Id.
Zionist leaders gave us definite promises that if the Allies committed themselves to giving facilities for the establishment of a national home in Palestine they would do their best to rally Jewish sentiment and support throughout the world for the Allied cause. They kept their word.\textsuperscript{109}

E. The Faisal-Weizmann Accord

As indicated earlier, the Arabs considered the Allied proposal to separate Palestine from Syria a breach of the McMahon pledge.\textsuperscript{110} Historically, they had always considered Palestine more closely linked to Syria than to any other part of the Arab nation. Hussein, however, appeared to have attained most of his objectives by October of 1918. His emirate of Hejaz was recognized as a sovereign State and he was accorded recognition as its king. In addition, his son, Emir Faisal, was to take part in the Paris peace conference as a representative of that kingdom. At this conference Faisal was persuaded not only to accept but also to welcome the policy set out in the Balfour Declaration, and his statement to the members of the conference was conciliatory in tone:

In Palestine the enormous majority of the people are Arabs. The Jews are very close to the Arabs in blood. . . . Nevertheless, the Arabs cannot risk assuming the responsibility of holding level the scales in the clash. . . . that [has] in this province so often involved the world in difficulties. They would wish for the effective supervision of a great trustee, so long as a representative local administrative organization commended itself by actively promoting the material prosperity of the country.\textsuperscript{111}

Even more conciliatory was the agreement reached between Faisal and Chaim Weizmann, President of the World Zionists, on January 3, 1919. The text of this agreement was in English, except for an important reservation inserted by Faisal at the end of the document. The agreement recited that the

surest means for the consummation of their [Arabs' and Zionists'] national aspiration is through . . . closest cooperation of the Arab State and Palestine . . . Arab and Jewish duly accredited agents shall be established and maintained in their respective territories. . . . The definite boundaries between the Arab State and Palestine shall be determined by a commission to be agreed upon. . . . The constitution and administration of Palestine shall afford the fullest guarantee for carrying into effect the [Balfour Declaration]. . . . All necessary measures shall be taken to . . . stimulate immigration

\textsuperscript{109} ROYAL COMM. at 31, ¶ 35.
\textsuperscript{110} See note 105 and accompanying text supra.
\textsuperscript{111} F. KHOURI, supra note 77, at 12.
of Jews into Palestine on a large scale. . . . In taking such measures
the Arab peasants and farmers shall be guaranteed in their rights.\textsuperscript{112}

However, since Faisal's authority to act derived from his father Hus-
sein, who considered Palestine to be part of the realm promised
him, Faisal added a final proviso, handwritten and in Arabic, to the
Declaration.

Provided the Arabs obtain their independence as in my Memoran-
dum dated the 4th of January, 1919. . . . [If] the slightest modifica-
tion were made I shall not be bound . . . by a single word of this
Agreement, which shall be deemed void and of no account or va-

As no available source material includes the text of Faisal's memorand-
um of January 4, it would appear that this document was, at the
time of signing the agreement, still to be written or that the date "4th
of January" was in error. In any event, unbiased historians agree that
the Faisal-Weizmann accord was never made effective.\textsuperscript{114}

F. The Effects of These Agreements and the Background of the
Mandate

An international agreement is binding upon the parties, and any
subsequent agreement between either of the parties to the original agree-
ment and a third party cannot derogate from the terms of the original
accord without being considered a breach thereof. Similarly, rights
acquired by a party to an international agreement cannot be undone
by a subsequent conflicting promise to another party. However, if
such a conflicting promise is actually made, the third party will acquire
no rights superior to those of the parties to the original compact—
there can be no derogation of the existing or acquired rights of others.
The acceptance of this doctrine is mandated by the world community's
need for international order and stability; for without such a doctrine,
no agreements could be relied upon as a source of rights, duties, and
obligations.

The Arabs, therefore, claim that as first in time they are first in
right; and hence, any benefits accruing from their agreements with the
British are superior to the subsequent and contradictory promises made
to the Zionists.

Faced with the need of securing multilateral international con-
firmation of the Balfour Declaration and of ensuring its inclusion in

\textsuperscript{112} \textit{Id.}
\textsuperscript{113} See text accompanying note 112 \textit{supra.}
\textsuperscript{114} B. Weinberg, \textit{supra} note 101, at 40.
the peace treaties after the defeat of Turkey, the Zionists encountered substantial opposition, even within Great Britain. For example, while the Declaration was still being debated within the British government, Edwin Montagu, the only Jew with direct access to such matters, was an implacable foe of political Zionism. In addition, the Board of Deputies of British Jews, the largest Jewish organization in Britain, campaigned against the Zionist program. Even in the United States, the Zionist movement encountered substantial opposition. In fact, the Zionists were unable to attract effective political support because the prevailing sentiment among Jewish Americans reflected the view posited 36 years earlier at a conference of Jewish reform rabbis.

We consider ourselves no longer a nation but a religious community. And therefore expect neither a return to Palestine, nor a sacrificial worship under the administration of the sons of Aaron, nor the restoration of any of the laws concerning the Jewish state.

Nevertheless, because Great Britain had included the Zionist program, or part of it, as official British policy, the United States Government acceded in the end.

By the time the peace treaties marking the end of World War I were drafted, world opinion had seemingly forced the framers of those treaties to conform to President Wilson's 14 points, the new principles of non-imperialism and national self-determination; even though that program conflicted sharply with British, French, and Italian plans. Pushed to its logical conclusion, the 14 points would have nullified nearly all of the agreements involving the postwar disposition of the conquered Turkish province. A device designed to compromise, and in some measure circumvent, President Wilson's principles for the benefit of the victorious allies' imperial interests was found in the mandate system embodied in the Covenant of the League of Nations.

G. The League of Nations Mandate

The mandate system was without precedent in the history of international law. Theoretically, mandated territories were potentially sovereign states, temporarily under the tutelage of one or another major power until such time as, in the League's judgment, full independence was merited. The Mandated Territory was to be under the control of the Mandatory Power which, in turn, was responsible to

115 L. Stein, supra note 58, at 484.
116 L. Erstein, supra note 94, at 182.
117 W. Yale, supra note 89, at 147.
118 Id.
the Permanent Mandates Commission of the League of Nations. Since the League itself and all its agencies were in fact managed and dominated by the major powers, the arrangement was a cozy one for ambitious European empires. For example, while the degree of control and authority to be exercised by the Mandatory Power was to be explicitly defined by the Council of the League of Nations, mandated territories were classified according to their degree of political ripeness, again, as determined by the League. In Class A were those considered provisionally independent, i.e., most ready for complete independence. Palestine was a Class A mandate, a “provisionally independent” state. Essentially, the theory behind the mandate system envisaged the independence of the mandated territory as the only natural conclusion of the mandate; the Palestine mandate, like the others, encompassed no other provisions for its termination.

On April 20, 1920, the Supreme Allied Council allocated the Palestinian Mandate to Great Britain. In March of 1921, the British detached all territory east of the Jordan River from Palestine—this territory had historically been a part of Palestine since before the arrival of the Hebrews led by Moses—and established the emirate of Transjordan. On June 30, 1922, the United States Congress adopted a resolution essentially identical to the Balfour Declaration, with the added provision that religious buildings and holy places in Palestine were to be adequately protected. On July 22, 1922, the League formally confirmed Great Britain as the Mandatory Power for Palestine, while France was granted the Mandate over Syria. The Syrian Mandate which then included Lebanon, was part of a plan to placate France for the violation of the Sykes-Picot accord, and was approved despite the bitter opposition of both the Syrian leaders and their people.

119 To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

LEAGUE OF NATIONS COVENANT art. 22, para. 1.

Mallison, supra note 47, at 1030, states:

By the terms of the Covenant the “sacred trust of civilization” was to be exercised for the benefit of the people inhabiting the respective territories. This applied, prima facie, to the existing inhabitants of Palestine, whatever the religious identification of individual Palestinians. This provision of the Covenant, protecting territories “inhabited by peoples,” is clearly inconsistent with “the Jewish people” nationality claims based upon the religious identification of individuals who are the inhabitants of many territories.

120 42 Stat. 1012 (1922).

121 President Woodrow Wilson, with Allied approval, sent an American commission
On the other hand, while the Palestinian Arabs were demanding immediate independence, their leaders were willing to accede to an American or British mandate. However, because the United States was not a member of the League it could not become a Mandatory Power. Thus, the Arabs had no choice but to accept Britain in that role.\textsuperscript{122}

On December 3, 1924, the United States and Great Britain entered into a convention setting forth the respective rights of the two countries and their nationals in Palestine. This pact recited the entire text of the Mandate Agreement, including its preamble, thus confirming complete American acceptance of all its provisions.\textsuperscript{123} The preamble of the Agreement reiterated the terms of the Balfour Declaration, which were specifically incorporated into article 2 of the Agreement. By the terms of article 4, the Zionist Organization was appointed to advise and cooperate with the mandatory administration on matters relating to the Jewish National Home; and the administration was to enact a nationality law whose provisions would facilitate the acquisition of Palestinian citizenship by Jews who might take up permanent residence in Palestine. Finally, under the terms of article 28, the League was to make such arrangements as might be deemed necessary for safeguarding, in perpetuity, free access to holy places, religious buildings, and sites should the Palestine Mandate be terminated.\textsuperscript{124}

Concerning the question of sovereignty during the period of the Mandate, there has been no general agreement among scholars. Some authorities contended that sovereignty, though temporarily in suspension, resided in the inhabitants of the mandated territory, while others found sovereignty in the League of Nations, or even in the Mandatory Power, either alone or acting in concert with the League. Still other views were offered, but perhaps the most logical suggestion placed sovereignty in the League, which had asserted its supreme authority

\textsuperscript{122} The allegation that the wishes of the Palestine community had been ignored in the selection of a Mandatory Power has to be considered in light of the July 2, 1919 resolutions of the General Syrian Congress. There, in considering the possibility of the establishment of a mandate of Arab countries under certain conditions, the Congress named the United States as its first choice to serve as a Mandatory Power and Great Britain as its second.

\textsuperscript{123} 44 Stat. 2184 (1924).

over Palestine and had delegated the exercise of that authority to the Mandatory Power. Whatever view we care to take as to the question of sovereignty, the Arabs asserted that the Mandate violated article 22 of the League Covenant for two reasons: first, because the community of Palestine was not recognized as an independent nation, and second, because the Mandatory Power was granted full legislative and administrative control over the Mandate by the League’s Council. In opposition to this claim it has been argued:

(a) that the provisional recognition of “certain communities formerly belonging to the Turkish Empire” as independent States is permissive, i.e., the words are can be provisionally recognized, not will or shall;
(b) that the penultimate paragraph of article 22 prescribed that the degree of authority to be exercised by the Mandatory Power shall be determined by the Council of the League as the need arises;
(c) that acceptance by the Allied Powers of the policy incorporated within the Balfour Declaration made it clear from the beginning that Palestine would be treated differently from Syria and Iraq; and that this difference was confirmed by the Supreme Council in the Treaty of Sévres and by the Council of the League in granting the Mandate.

Again, however, one must also consider the fact that the decision to establish a mandate system and to bring Arab communities within its purview was the product of an assembly of States in which no Arab country had any voice whatsoever. Therefore it was apparent that the territories inhabited by the Arabs were being bartered and parcelled out like common objects for everyone’s benefit but their own.

To this date, there has been much controversy over the relative weight to be accorded the provisions in the Mandate Agreement regarding the National Home and those that concerned self-government; in other words, whether they were consistent with each other. Some have suggested that between these obligations the Mandate recognizes no primacy, no order of importance, and that they were in no way irreconcilable. Others, however, contend that the primary purpose of the Mandate, as expressed in its preamble and its provisions, was

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126 See generally L. Stein, supra note 58. Reference is not made to the United Nations trusteeship provisions because the conditions and intent of the mandate system differs from the trusteeship system and because the context of the Palestine question has no parallel under the trusteeship system.

126 See, e.g., L. Stein, supra note 58.
to promote the establishment of a Jewish National Home, therefore subordinating the obligations to develop self-governing institutions. However, both positions are merely conjectural because they represent a narrow view of the overall question. This controversy was, however, of practical significance. If, for example, the country was to be administered so as to promote self-governing institutions, those conditions would in fact destroy the concept of a Jewish National Home; indeed, the Arab majority would never permit its establishment. Hence, it would appear that although difficulties were expected, the Mandate failed to recognize that these dual obligations would, in fact, prove incompatible.

The Mandate for Palestine is significant in international law because it contained an explicit agreement by the League to the provisions of the Balfour Declaration clearly amounting to international approval of the Declaration's compromise agreement. It thus becomes plausible to argue that the claims of the Zionist Organization, as embodied in the practices of Israel, are now a part of customary international law to the extent that they comply with its requirements.

Customary international law is traditionally regarded as the sum of two constituent elements; the first being the existence of a particular uniform pattern of conduct in the past which, without more, may be dismissed as mere recurring conduct which does not attain the status of custom. The second element requires an opino juris or an element of moral "rightness" ascribed to the past uniformities in conduct. To prescribe international law by custom does not require that the past uniformities in conduct must have existed over a long period of time. Time is only significant as evidence of continuity and the contemporary expectations of decision-makers as to the existence of the custom, so that it can acquire the characteristics of customary international law.\footnote{See 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 75-90 (1964) and citations therein.}

It is, of course, clear that the growth of a practice into a rule of international law depends upon the degree of its acceptance by the international community. If a State initiates a practice hitherto without precedent in international law, the fact that other States do not object is significant evidence that they do not consider it contrary to international law. If this practice becomes more general, as evidenced by common usage without objections from other States, the practice may give rise to a rule of customary international law.\footnote{Mallison, supra note 47, at 1061-63.}
Israel's consistency in continuing Zionist policy and the Arab States' persistence in denying its validity.

**The United Nations Partition of Palestine and the Creation of the State of Israel**

As Jewish immigration to Palestine increased, Arab opposition grew more and more intense. The Arabs demanded self-determination, and from the early 1920's insisted upon the establishment of a democratic, parliamentary form of government. In pursuit of this policy, they rejected an early British suggestion for an Arab Agency which would be equivalent to the Jewish Agency. Ultimately, however, various Arab groups did form a coalition called the Arab Higher Committee.

Added impetus to Jewish immigration was generated by the rise of Hitler's despotic regime in Germany; the consequent Jewish exodus alone accounted for more than 60,000 new arrivals in 1935. This, however, resulted in renewed Arab unrest. In 1937 the Arabs rebelled, and their struggle continued until finally suppressed by British troops in 1939. Although the revolt was unsuccessful it had two far-reaching effects. First, the Jews in Palestine formed several guerilla units, the predecessors of the Israeli army; and second, it brought about the inevitable British reaction to every manifestation of Arab unrest—after each new crisis a commission visited Palestine to investigate, and each time it went back to London with a voluminous report. This time, however, the report of the Palestine Royal Commission of 1936-1938 took on added significance. With all hope for an Arab-Jewish reconciliation abandoned, the Commission proposed partition: the division of Palestine into an Arab State, a Jewish State, and a neutral enclave around Jerusalem and Bethlehem under continued British administration. While the Arab Higher Committee virtually rejected the scheme, the Jewish Agency was willing to accept it, with some reservations.

With war coming in Europe, and the continued unrest in the Arab countries, intensified by universal Arab resentment to British support of Zionism in Palestine, a dangerous threat was posed to the security and stability of the entire British-Arab empire. As a result, on May 17, 1939, Great Britain issued a White Paper establishing new principles for the administration of the Palestine Mandate and reversing its earlier policy. Britain now proposed the creation, within

129 **Royal Comm.** at 1938.

130 British White Paper, **Cmd No. 6019** (1939).
10 years, of an independent Palestinian State linked with Great Britain by special treaty. On the two most important issues, land and immigration, the new policy marked a virtual acceptance of the Arab position. Jewish immigration was to be limited to a total of 75,000 persons during the ensuing five years, and thereafter no immigrant was to be admitted without specific Arab approval. In addition, the British High Commissioner in Palestine was authorized to regulate, limit, or prohibit the further transfer of Arab-owned land to Jewish ownership, and Palestine was to be partitioned into Arab, Jewish, and neutral zones under the same administration.

The 1939 White Paper shocked the Zionists and precipitated a violent reaction, the Permanent Mandates Commission of the League of Nations declared the Paper wholly incompatible with the terms of the Mandate, but Britain held steadfast to her newly announced policy; the hope of preserving her Arab empire for strategic reasons was more important than Zionists protests.

The first years of World War II witnessed a lull in the Palestinian dispute. Finally, in May 1942, the American Zionist Organization issued a manifesto called the Biltmore Program which declared that the Balfour Declaration was no longer valid and called for the establishment of an independent Jewish State. To this end, the manifesto further urged the creation of a strong Jewish army for the defense of, and the construction of a governmental structure for the administration of, the new State. In Jerusalem the Jewish Agency defied the mandatory authorities and adopted the Biltmore Program as official Zionist policy. As the war ended, tens of thousands of illegal immigrants entered Palestine, and Arab-Zionist tensions reached a new peak.

In February 1947, the British government announced that it was not prepared to continue indefinitely to govern Palestine itself merely because Arabs and Jews could not agree upon the means of sharing its government between them. Accordingly, on April 2, 1947, Britain asked the General Assembly of the United Nations to make recommendations, under article 10 of the Charter, concerning the future government of Palestine, and suggested convocation of a special Assembly session for the purpose of constituting and instructing a special committee to prepare a preliminary study for consideration by the Assembly at its next regular session. Thereafter, five Arab States

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132 The Suez Canal ran through Arab territory, and while the Red Sea was an Arab lake, it was through these waters that Britain ran her imperial lifeline to the Arab lands, India, and the islands of the Indian Ocean and the Pacific.
133 F. KHOURI, supra note 77, at 29-30.
asked that the special session consider the termination of the Mandate over Palestine and the declaration of its independence. The General Assembly refused to include the Arab request in its agenda and instead, named a special committee with the widest powers to ascertain and record fact and investigate all questions and issues relevant to the problem of Palestine. On the same day, the Assembly called upon all nations to refrain from invoking the use of force. Although the Arab Higher Committee refused to cooperate with the United Nations Special Committee on Palestine (UNSCOP), Arab representatives testified before the committee.

As a consequence of these hearings, UNSCOP reported two sets of recommendations: a majority plan calling for the partition of Palestine into Jewish and Arab States with economic union and an international trusteeship for Jerusalem, and a minority plan for a federal union with autonomous Arab and Jewish regions. This majority report, with some modifications, was adopted by the Ad Hoc Committee on the Palestine Question which had been created by the second session of the General Assembly to study the UNSCOP report. Initially this plan met with substantial opposition, but in the plenary session, some States changed their votes, and on November 29, 1947, a two-thirds majority of those voting approved the plan for partition.135

Great Britain had approached the General Assembly in the expectation that that body could offer recommendations under article 10 of the Charter, according to which the Assembly could discuss any question within the scope of the Charter and make recommendations to members of the United Nations or to the Security Council. Essentially the question involved the form of government to be established for a territory whose population was not yet self-governing. Such a question was clearly within the competence of the United Nations under the declaration regarding non-self-governing territories in Chapter XI of the Charter and the provisions of Chapter III concerning the international trusteeship system. Article 14 (recommendations for the peaceful adjustment of any situation likely to impair the general welfare or friendly relations among nations) could also be con-

134 L. SOHN, supra note 131, at 45-47.
135 This majority was achieved only through strong pressures applied by the United States. The methods used were bitterly criticized by Secretary of Defense James Forrestal (see THE FORRESTAL DIARIES 180, 363 (W. Millis ed. 1951) and Sumner Welles, Undersecretary of State (see S. WELLES, WE NEED NOT FAIL (1948)). Other U.S. officials and historians have also asserted that the Partition Resolution, G.A. Res. 181, U.N. Doc. A/519 at 131 (1947), was "steamrollered" through the General Assembly by the United States.
sidered relevant to the Palestine situation.\textsuperscript{138} It is clear, however, that any action by the General Assembly pursuant to articles 10 and 14 amounts to a mere recommendation and cannot be enforced by the Assembly acting alone. The central question, then, becomes: What is the binding effect of a General Assembly recommendation with respect to non-self-governing territories?

It may be said that the United Nations has clear jurisdiction with respect to countries formerly mandated under the League of Nations. This jurisdiction is set out in detail with regard to procedures and powers insofar as they concern conversion of a mandate to a trusteeship agreement. The way is left open for utilizing other solutions to the problems of an existing mandate. In a resolution adopted by the United Nations on April 18, 1946, the judgment was expressed that the functions previously performed by the League should be assumed by the United Nations. The League took further note of the intentions of the Mandatory Powers to continue to administer the mandated territories in accordance with the terms of the mandates until other arrangements could be agreed upon. Subsequently, in an advisory opinion on July 11, 1950, the International Court of Justice clarified the power of the General Assembly with respect to former mandates.\textsuperscript{137} The Court held that there were decisive reasons for an affirmative answer to the question of the obligation of the Mandatory Power to submit to the supervision and control of the United Nations.\textsuperscript{138} The obligation of the Mandatory Power to accept international supervision and submit reports of its stewardship is thus an integral part of the mandate system. In fact, the authors of the system considered that effective performance of this "sacred trust of civilization" required that administration of mandated territories be subject to international control and supervision; even to the extent that the necessity for supervision be continued despite the disappearance of the supervisory organ itself.

Having determined that the General Assembly was the legally qualified successor to the League of Nations, and, as such, could exercise the supervisory functions previously carried out by the League over the mandated territories, the Court further concluded that the Mandatory acting alone has not the competence to modify the international status of the mandated territory,\textsuperscript{139} that competence to deter-

\textsuperscript{138} Mr. El-Khourì expressed the Syrian view in the Ad Hoc Committee that neither article 10 nor article 14 applied. L. Sohn, \textit{supra} note 134, at 45.


\textsuperscript{138} \textit{Id.} at 130.

\textsuperscript{139} \textit{Id.}
mine and modify the international status of the mandated territory rests with the Mandatory acting with the consent of the General Assembly. The Court next declared that under articles 79 and 85 of the Charter the General Assembly was granted the authority to approve alterations or amendments to trusteeship agreements. By analogy it can then be inferred that the same procedure is applicable to any modification of the international status of a mandated territory which would not result in the acquisition of trusteeship for the mandated territory.

Article 79, referred to by the Court, provides that the terms of trusteeship shall be approved as provided in articles 83 and 85. Under article 83, the Security Council was granted jurisdiction over all functions of trusteeships in "strategic areas," whereas article 85 gives jurisdiction to the General Assembly in "non-strategic areas." Carried to its logical conclusion, the opinion of the Court would lead to the view that the Mandatory Power cannot unilaterally terminate the mandate and that any solution must be approved by the Security Council or the Assembly. The solution decided upon by the appropriate body would then be binding upon all member States. However, no method is prescribed to determine what may or may not be a "strategic area." Of paramount significance in this context is article 80, which prohibits the alteration in any manner of the existing rights of the population of trust territories. After the passage of the plan for partition, the United Nations Palestine Commission set up by the resolution was confronted by the refusal of the British to let the Commission enter Palestine, despite clear evidence of the impending collapse of the mandate administration.

As a result, on February 16, 1948, the Commission asked the Security Council to provide it with an adequate, non-Palestinian military force. The Council denied this request and another, proffered by the United States, which would have allowed the Council itself to enforce the terms of the partition resolution. Meanwhile, in Palestine disorders increased and on April 1, 1948, the Security Council asked the Secretary General to consider further the question of the future government of Palestine. On April 17, the Council called upon all parties to cease military operations and asked the British government to use its best endeavors to achieve a peaceful settlement. Subsequently, the Assembly met in special session on April 19, 1948, and considered several trusteeship proposals with respect to both Palestine as a whole and the City of Jerusalem. On May 14, 1948, the Assembly adopted a resolution abolishing the Palestine Commission and authorizing the ap-
appointment of a United Nations mediator to bring about a peaceful settlement in Palestine. On that same day, May 14, Britain withdrew from Palestine; the mandate thus expired and the Jewish community declared the birth of the State of Israel, a unilateral declaration which resulted in the immediate recognition of Israel, as an independent sovereign state, by the United States and several other members of the world community. Simultaneously, the Arab States declared that the collapse of peace and order in Palestine constituted a direct threat to peace and security in the Arab States themselves. On these grounds, the Arab States intervened on behalf of the Palestinian Arabs and opened a period of conflict that still continues. Shortly after Israel's declaration of independence, the General Assembly passed the famous and often reconfirmed resolution 194 of December 11, 1948, which in paragraph 11 recognized that under international law the Palestinian people were entitled to return to their homeland and to receive economic compensation. Today, the Palestinians still claim their right to return and to be restored to their civil and political rights as nationals of Palestine or its successor State. It was not until December 10, 1969, that the United Nations "[r]eaffirm[ed] the inalienable rights of the people of Palestine." The words people of Palestine constitute the first official recognition that it is no longer a "refugee" question, but one of nationhood. This resolution recalls prior United Nations' resolutions from 1948 to December 1968. Twenty years of resolutions noting, affirming, directing, calling upon, and emphasizing Palestinians' rights to no avail. The historical significance of this resolution warrants its partial inclusion in this text:

Part B. The General Assembly,

Recognizing that the problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights,

Gravely concerned that the denial of their rights has been aggravated by the reported acts of collective punishment, arbitrary detention, curfews, destruction of homes and property, deportation and other repressive acts against the refugees and other inhabitants of the occupied territories,

141 As former Secretary of State, Dean Acheson puts it: [Israel was] recognized the same day by President Truman on a de facto basis while his representative at the United Nations, Dr. Philip C. Jessup, was under instructions, speaking in the General Assembly in favor of a temporary trusteeship. D. ACHESON, PRESENT AT THE CREATION 258 (1969). Such duplicity is still vivid in Arab memory.
Recalling Security Council resolution 237 (1967) of 14 June 1967,
Recalling also its resolutions 2252 (ES-V) of 4 July 1967, and 2452 A (XXIII) of 19 December 1968 calling upon “the Government of Israel to take effective and immediate steps for the return without delay of those inhabitants who have fled the areas since the outbreak of hostilities,”
Desirous of giving effect to its resolutions for relieving the plight of the displaced persons and the refugees,
1. Reaffirms the inalienable rights of the people of Palestine;
2. Draws the attention of the Security Council to the grave situation resulting from Israeli policies and practices in the occupied territories and Israel’s refusal to implement the above resolutions;
3. Requests the Security Council to take effective measures in accordance with the relevant provisions of the Charter of the United Nations to ensure the implementation of these resolutions.

1827th plenary meeting, 10 December 1969.143

THE RIGHT TO SELF-DETERMINATION IN PALESTINE UNDER THE LEAGUE OF NATIONS AND THE UNITED NATIONS

The Arab nations claim that the guarantees accorded the Zionists and the actions of the United Nations subsequent to Israel’s self-declaration as a State violated the Palestinian Arabs’ right of self-determination.144

Self-determination originated as a political doctrine that first manifested itself in the French and American Revolutions. It refers, in its political context, to the free and genuine expression of the will of the people, and accordingly includes the right of the people to determine their own political, economic, and cultural status, together with what form of government shall attain permanent sovereignty over their territory, natural wealth and resources.

It has been said that every ethno-cultural group which constitutes the majority in a cultural area has the right to create a national State of its own. On the other hand, the theory has been advanced that the right of self-determination transcends such majority-minority divisions, and is applicable only to nations. This latter term connotes large groups of people inhabiting and identified with a particular territory, sharing common historical traditions, normally speaking a common

143 A/Res./2535 (xxiv).
tongue, who feel that they form a single and exclusive community, sharing compatible views as to their future political and civil association.

The right of self-determination may also be said to apply to any reasonably designated group, and this is the crux of the problem. It is not that individuals ask to form an independent state; it is that there are several groups of people in the world, who may or may not be "nations," which demand self-determination and its corollary, political independence. There is no agreement as to where to draw the line, and thus the political doctrine has failed to find a juridical foundation that would lend itself to legal implementation without resort to insurrection or a "war of liberation."

Essentially the doctrine of self-determination gained recognition as a principle of international law after World War I; indeed, procedures for the realization of this right were incorporated into the mandate system itself. It is clear, however, that under article 22 of the League of Nations Covenant, the right of self-determination was reserved to non-self-governing territories. The mandate system was thus justified as a means of aiding the establishment of self-governing institutions in the mandate countries. Therefore, to the extent that the mandate country was subject to the "tutelage" of the Mandatory Power, the right of self-determination was reserved for the people of the mandated territory.

In an effort to facilitate the eventual creation of a Jewish National Home, the greatest restrictions upon the right of self-determination under any mandate were imposed on the Palestinian people. To the extent that this attempted reconciliation of such antagonistic goals, placed greater restrictions upon the right of self-government, it can definitely be said that the establishment of the Jewish National Home conflicted with the right of self-determination.

Although article 2, which enumerates the principles of the United Nations, does not specifically refer to the right of self-determination, the doctrine was in fact incorporated into the United Nations Charter. Article 1 declares that the purpose of the United Nations is to develop friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples." It is clear that the use of the singular noun "principle" indicates that "equal rights and self-determination of peoples" are considered elements of a single principle. The same phrase occurs in article 55 which deals not with political but with social and economic matters. Many scholars feel,
however, that the enunciation of the principal of self-determination in the Charter is not the embodiment in toto of the positive aspects of that concept.\textsuperscript{147} For example, Hans Kelsen in \textit{The Law of the United Nations} has stated:

If the "peoples" in Article 1, paragraph 2 means the same as "nations" in the Preamble, then "equal rights and self-determination of peoples" in Article 1, paragraph 2 can only refer to the sovereignty of states.\textsuperscript{148}

It can be said, therefore, that while the Charter did not establish self-determination of peoples in the ethno-political sense as a principle of the organizational structure of the United Nations, by incorporating it in the material sense it did provide a general and recognized principle of international law.\textsuperscript{149} References to self-determination, however, appear in Chapter XII (International Trusteeship System). These sections refer to self-government and independence even though not specifically to self-determination, and are the counterparts of article 22 of the Covenant of the League of Nations. Other provisions of the Charter also evidence this principle. Article 73 (referring to trusteeship obliga-


tions) clearly imposes a duty, deemed "a sacred TRUST," to ensure, with due respect for the particular culture, the political, economic, social and educational advancement, the just treatment and the protection against abuses of the peoples concerned, thus, "to develop self-government, to take due account of the political aspirations of the peoples...."\(^{150}\) In addition, article 76 which sets forth the basic objectives of the trusteeship system states:

To promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned and as may be provided by the terms of each trusteeship agreement.\(^{151}\)

Finally, article 21 of the Universal Declaration of Human Rights adopted by the General Assembly provides that "[t]he will of the people shall be the basis of the authority of government...."\(^{152}\)

The United Nations has indeed a prolific history of resolutions seeking to uphold and implement the principle of self-determination. Notwithstanding these pronouncements, Professor Sohn states:

With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories, at the time of the creation of the "A" Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the sui generis Mandate for Palestine run counter to that principle.\(^{153}\)

The American position is, in that respect, theoretically in full support of the concept. Professor Moore quotes Thomas Jefferson who, as Secretary of State in 1792, with reference to the recognition of France's revolutionary government stated: \(^{154}\) "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared."\(^{155}\) Less remote is the particular significance which the doctrine has assumed with the

\(^{150}\) U.N. Charter art. 73.

\(^{151}\) U.N. Charter art. 76.


\(^{154}\) J. Moore, Digest of International Law 120 (1968).

\(^{155}\) Id.
international dislocation of the present century. In a speech, President Wilson proposed

[that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful.]

Reminiscent of the Wilsonian philosophy is the Atlantic Charter which in expressing the ideals of the United States and Great Britain established:

They respect the right of all peoples to choose the form of government under which they live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.

The same was embodied in the Declaration of Yalta on February 11, 1945, with respect to Europe; and what had been the position of the United States and France became that of the Allies and a cornerstone of the United Nations principles. Yet the principle was violated more often than it was implemented. It was given effect in Algeria, but violated or ignored in such cases as Formosa, Hyderabad, Kashmir, Palestine, the Congo, Cuba, Hungary, Viet Nam, Nigeria (Biafra), Goa, Angola, Czechoslovakia and in the matter of "Germany's unification"—to speak only of the most notorious instances.

CONSEQUENCES OF ARAB EXPERIENCE WITH INTERNATIONAL LAW AND ITS STRUCTURES, THE WESTERN POWERS AND ISRAEL

The Arab people, throughout their experience with Western powers, have, by and large, been the object of colonial domination, military occupation, and economic exploitation. Finally, with the creation of the State of Israel they have witnessed the implantation of a new State, composed of alien people, to occupy a portion of their territory. Israel thus became in the eyes of the Arabs not only the creation of the same Western powers who colonized them, but an extension thereof. Not only was the land Israel occupied usurped but the question of its future intentions became paramount. The first

156 A League for Peace, S. Doc. No. 685, 64th Cong., 2d Sess. 7-8 (1917). See also his address before a joint session of Congress, Jan. 8, 1918 (For. Rel. Supp. 1, Vol. I) for his fourteen points.

indication of its future course was its refusal to repatriate the Palestinians, while pursuing an active policy of recruiting immigrants from abroad. The pattern was obvious; Palestinian rights and aspirations were to be subordinated to Israel's in-gathering policy. The gradual swelling of Jewish immigration coupled with the avowed pledge of Israel to "return" all Jews, paralleled events that led to the gradual expansion of the territory under Israel's occupation. The conclusion was that Israel's main purpose lies in gradual expansionism to accommodate a progressive flow of Jewish immigration at the expense of the Arab peoples. Thus, it appears that such an objective is incompatible with the goals of Arab national regionalism and is itself a new form of imperialism.\(^{158}\) When one considers Western support

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\(^{158}\) The efforts of Zionism first produced the Balfour Declaration (discussed at notes 93-104 and accompanying text supra.) The next step was a massive world-wide propaganda campaign designed to convey the impression in world public opinion that only the "promise clause" was relevant in the entire instrument. The Declaration then found its way to the Preamble of the mandate provisions of the League of Nations Covenant; Zionists thus shared in the administration of Palestine and immigrants started to enter. Eventually, established quotas were ignored and illegal immigration flooded Palestine. In an effort to cloak this illegality in an air of respectability, the propaganda machine, playing on post-World War II sympathies, developed such incidents as depicted in the book and film *Exodus* into both legend and epic. Several hundred thousand Jews from over forty nations came to Palestine between 1939-1946 (no precise figures can be cited). Notwithstanding the fact that the Arab population numbered 900,000 and Jewish citizens and residents (official immigrants not yet citizens) numbered 450,000, in addition to which there were an estimated 250,000 illegal Jewish immigrants, the partition plan gave the proposed Jewish state 58 percent of Palestine. After 1948 Israel took 23 percent more of that portion of Palestine allotted by the Partition Plan to the "Arab State."

As to its neighboring states, Israel committed aggression in 1956 and started the military operations of the 1967 war. The occupied territories from then on have been settled by Israelis and there are indications of Israel's intention to annex some or all of that territory, as they have made it clear with respect to Jerusalem notwithstanding the United Nations condemnation of its annexation. See notes 17-23 supra. Within Israeli-held territory the Palestinian's experience is more startling.

It started with forcible expulsions, examples of which are indicated below:

1. On February 28, 1949, 700 refugees were expelled from the village of Kfar Yasif.
2. On June 5, 1949, the inhabitants of Hisam, Qatia and Jauneh in Galilee were expelled from their villages.
3. On January 24, 1950, the inhabitants of Ghasbyia were expelled.
4. In March 1950, the inhabitants of Batal were expelled.
5. On August 17, 1950, the inhabitants of Mijdal were expelled.
6. In February 1951, the inhabitants of 13 villages in Wadi Ara were expelled over the Israeli frontier.
7. On November 17, 1951, a military detachment surrounded the village of Buwaishat, expelled the inhabitants and dynamited their homes.
8. In September 1953, the inhabitants of Umm-el-Faraj were expelled from their village, which was immediately blown up.

Along with expulsion, several laws in Israel "legalized" expropriations:

1. The *Law on the Acquisition of Absentee Property* of 1950, which stipulates that the land and the property of a person declared an "absentee" is transferred to the Custodian of Absentee Property. Law of March 14, 1950, Absentees' Property Law, [1950] 4 *Laws of the State of Israel* 68. "Absentee" is defined as

[a]ny person who is a citizen of Israel, but who left his place of residence between
for Israel in light of the Arab experience with the same powers and their international structures, it is understandable that a sense of hope-

November 29, 1947 and the day on which the State of Emergency was abrogated, . . . if he went: (a) to a place which before 1 September 1948 was outside the land of Israel; (b) to a place inside the land of Israel but occupied at that time by hostile forces. Paragraph 28 empowers the Custodian to decide "in writing that a person or a group of persons are absentees," at which time "this person or group of persons shall be regarded as absentee."

Such language speaks for itself. Let it suffice to say that it has resulted in the confiscation of hundreds of thousands of dunums (measure of land) without due process of law.

Indeed, land which was part of the Islamic Wagi or religious trusts was transferred to the custodian of absentee property. This included one-sixth of the total area of Palestine's usable land in 1950.

2. Article 25 of the Defence Laws (State of Emergency, 1945) empowers the Military Governors to declare specific closed areas which no one can enter or leave without a written permit from the Military Governor.


4. The Emergency Articles for the Exploitation of Uncultivated Lands is the link in the chain of laws for the expropriation of Arab lands. This law empowers the Minister of Agriculture to "take possession of uncultivated land, to ensure it is cultivated in cases where 'the Minister is not satisfied that the owner of the land has begun, or is about to begin, to cultivate it, or is going to continue to cultivate it.'" Official Gazette, October 15, 1948, at 3.

Sabri Jiryis explains the use of these laws as follows. The Minister of Defense, by virtue of the Emergency Laws of 1949, declares a certain area a closed area, or a security area, entry to which without a written permit from the Military Governor is a grave security offence. At the same time, of course, the Military Governor is unwilling, "for reasons of state security," to grant such permits to the owners of the land, which soon becomes "uncultivated land." When this happens, the Minister of Agriculture immediately issues an order to the effect that the land is "uncultivated." This in turn gives him the right, "in order to ensure that it is cultivated," to have such land cultivated either "by laborers engaged by him" or by "handing it over to another party to cultivate it." The other party is always the neighboring Jewish colonist. According to the original version of the Emergency Articles, the Minister of Agriculture could not keep such uncultivated land for more than two years and eleven months from the date he takes possession of it. But this period was later extended to five years by an "extension order." And eventually the ownership of such land reverted to the State.

There are five more of these laws. Each of them effectively enabled the state to grab more and more land. Jiryis feels that the estimate of one million dunums of land expropriated from Arabs living in Israel can be regraded as reasonable and accurate. Accounts of several incidents follow:

Radio Israel confirmed the fact that nearly 300 hectares of land in East (Arab) Jerusalem had been requisitioned by the Israeli Government; about 7,000 Jewish families will be able to live there.


Israel announced the expropriation of 888 acres of the former Jordanian sector of Jerusalem.


Hundreds of Israeli citizens gathered today in front of the Land Registration Department to buy 265 lots of land offered for sale in Arab Jerusalem by the Israeli Government.

Al-Anwar, March 1968.

A decree signed by the Israeli Minister of Finance, Mr. Pinhas Sapir, makes legal the expropriation of 190 acres on the road to Ramallah. This expropriation
lessness and frustration resulted. The consequence was a realization that international law and international organizations are tools used to attain desired goals by certain nations and that impartiality or equal treatment for non-Western or nonaligned nations is a futile expectation.

In short, if the Mandate was valid and properly carried out, why were the rights of the Palestinians disregarded? The United Nations, as the successor to the League of Nations, partitioned the State, which Israel thereafter expanded territorially. In the interim, the United Nations spoke of self-determination, protection of civil, religious, and political rights, and repatriation of Palestinians. It also condemned the annexation of Jerusalem, affirmed its commitment to the principle that force is not a valid means of acquiring territory, and ordered Israel's withdrawal from occupied territory after 1967. Despite these laudable positions, the practical results for the Arabs were to the contrary. Not one of these principles or decisions was implemented; thus, the route of peaceful resolution failed. Arabs took to arms—in fact and in words—when all else, in their eyes, had failed. Perhaps Israel's worst accomplishment thus far has been its military victories, which have left its opponents more aggrieved and wronged than before, and thus, only too eager to recover the accrued losses. Somehow it seems that what has transpired can only lead to further escalation. Israel cannot seem to "shoot its way to peace," and the Arabs cannot seem to "swallow Israel with gun powder."

Everyone who has followed the development of this conflict has at one time or another asked a rather simple question: Why has there been no dialogue between the parties? Indeed, we have all witnessed a dual monologue, each side advocating its own position while, at the

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is intended for the establishment of a Jewish settlement.

Le Monde, April 20, 1968.

The Israeli authorities announced that they will expropriate 300 dunums in the neighborhood of Jerusalem on the pretext of wanting to plant a forest and name it the forest of peace, on the occasion of the unification of Jerusalem.


The Mufti of Jerusalem protested against the expropriation of 29 acres that belongs to Muslim Waqf property. The Mufti went on to say that there were 5 mosques, 4 schools, and between 1,000 and 15,000 houses on the land.


Mr. Ruhi el-Rhatib, the Arab Mayor of Jerusalem, declared that 116 dunums had recently been expropriated in the Arab sector of Jerusalem. The Israeli authorities had thus seized 1,048 apartments and houses inhabited by 6,000 Arabs in addition to 437 shops employing 700 people, 4 mosques, 4 old palaces and 2 schools.

Le Monde, June 20, 1968.

And so the program of expropriation of Palestinians continues while territorial expansion at the expense of neighboring states corroborates Arab distrust of Israel's alleged peaceful intentions.
same time, it remains oblivious to the other. The only lesson to be derived from this state of affairs is that both sides long for a "judge." The tradition of the Semitic people—whether Muslims, Christians or Jews—has been one of acceptance of law and obedience to its judgments. To that extent, the statesmen and diplomats of the world community have ignored this significant factor which would have required a process, a legal process, to direct this dual monologue. But lest the reader misunderstand us, the Rule of Law is not a matter of mere technicalities, and moral authority is not political power, just as peaceful solutions cannot only be predicated upon material consideration. To understand the Arabs, and we venture to say the Israelis as well, we cannot accept the proposition that their peaceful coexistence be viewed only in terms of material well-being. Ignoring the sense of historic dignity of the Arab peoples has resulted, and will continue to result, in misdirected efforts, just as Arab misunderstanding of Jewish history has proven an overwhelming stumbling block. So as not to avoid answering the question presented above, Arabs will engage in dialogue and are ready to accept peace with the people of Israel; the question is not will they, but how will they and why?

Negotiations are a means and not an end to effect a compromised result, which the parties cannot assess or anticipate without direct contact, thereby leading to a gradual rapprochement, brought about by their shared goals or mutually agreed upon interests. Before even reaching the question of substance, that of form is very significant. The argument may be reminiscent of the Paris peace talks which at one time hinged on the shape of the conference table. It is, nonetheless, a fundamental fact that the road to peace with the Arabs is not the gun or the pocketbook, but the language of the heart in the proper accompanying form. Regardless of how this argument may sound to the Western mind, it is a true historic reflection of Arab culture. To a proud nation humbled by defeat, the memory of past greatness and glory is indispensable and explains the necessity for the preservation of its moral integrity.

As to the question of substance, strong advocates of "negotiations" refute any a priori consideration of the relative positions of the parties with respect to their goals and interests; thus precluding any examination of the degree of flexibility of these positions. To ignore irrevocable or uncompromising announced positions accompanied by overt conduct to that effect implies that negotiations as to these given questions are doomed to failure. Consider the issue of territory occupied by force by Israel, and more significantly Jerusalem. The United Nations
has declared that these territories are to be returned. The Israeli response, evidenced by its annexation policies, was an avowed refusal to comply, to what extent can subsequent “negotiations” be distinguished from “capitulation”? The historical parallel recalls Pope Pius VII who, in response to Napoleon’s occupation of the Papal States and requested negotiation for their return, is reported to have answered from his prison in Savona: “No special treaty was required to return stolen property.”

As negotiations are intended to produce what Israel avows its goals to be, i.e., security, Israel’s objective has been to trade its military supremacy for legitimacy. Somehow it is felt by many that military supremacy is no substitute for legitimacy or voluntariness, just as submission is not the same as consent. Condonation does not erase the original transgression, but at least it has an element, even though ex post facto, of voluntariness. Its validity is dependent upon the degree of prior or subsequent coercion, be it military, political, economical or psychological.

The reader must be alerted to the significance of the values embodied in such word symbols as “peace” and “security,” since these conditions are the goals of the desired negotiations. Their significance will be determined by the social values ascribed to them by those who will be expected to adhere to them. On that assumption, the values embodied in the concepts of peace and security must be contemplated within the historical, cultural, social, and psychological framework of the Arab world; spawning from its roots in Islam to contemporary social psychology (including the Arab experience with Israel and its supporters). The term Arab, while in itself a subject of fascinating conjecture, must be accepted, notwithstanding its historical transformations, as indicating at least a people linked by the religious, spiritual, and cultural heritage of Islam as well as by the Arabic language. While one may question the absolute relevance of this observation, it is made with direct reference to the question of peace and security.

For some 12 centuries, the Arabs, as the major ethnic component of the Muslim State, viewed the world as divided into Dar El-Islam and Dar El-Harb. Dar El-Islam was also Dar Es-Selm, the land of peace, contrasted by the land of war. Dar Es-Selm represented the ideological value which Islam ascribed to the freedom of propagation of Islam in that given part of the world. But due to the fundamental universalism of Islam, that part of the world to which Islam could not be propa-

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gated in peace was a denial of that fundamental concept of freedom so dear to Islam’s first adherents, the Arabs. The alternative was to break open these barriers to freedom, whereupon it would be proclaimed as Dar El-Harb. Another observation, significant at this point, is the etymological origin of the word “peace,” which in Arabic is the same as that of istsislam, or “surrender.” Indeed, so slight is the semantic variation between the two words that it compels the conclusion that the use of the word “peace,” if not in the proper formal context, could mean istsislam and not salam, or “surrender” and not “peace.”

Historically, selm or “peace” is value-related to the concept of “freedom.” Freedom of thought, speech, choice, religion, movement and all forms of human and ideological activities deemed fundamental among the natural rights of man, as embodied in Islamic precepts. Translated to the contemporary problem, the alien ideology of Zionism is, therefore, a basic impediment to “peace,” as it stands in contradiction and opposition to the free propagation of “Arabism,” the successor, popular ideological concept to Islam—successor, not in the religious sense, but in terms of its acceptance as the common denominator of the people. As such, Arabism, replacing what Islam had once been, is the new ideological and psychological bond of the Arabs. Hence, the effective prohibition of the propagation or dissemination of Arabism by Israel in what is deemed Arab land, is tantamount to a direct challenge to Arabism’s very existence. This explains the readiness of Arabs to accept such formulas as Israel’s “de-Zionization” or “Arabization.” There is probably no literal significance attached to these proposed notions, for one can hardly envision a Pole, Russian, Hungarian, German or other, being literally “Arabized” for what that may mean. The significance of the point lies in the ideological, value-oriented goal of the State, be it called Israel, Palestine, or as could be suggested, “the United Arab Republic of Israel and Palestine,” if a new name is all it would take.

In essence, it is not whether that State will adhere to Arab nationalism, for that would be asking of it more than other Arab States, but whether it is open to the possibility. Thus, presently Israel not only disrupts the geographic contiguity of the Arab states, but also disrupts its ideological continuity. Whether we are dealing with an open-ended Zionist ideology or a limited one (narrowed by emerging nationalistic tendencies, brought about in Israel by its “Sabras”), such an Arabiza-
tion concept if presented as a superior or supplanting ideology will be hopelessly unacceptable to Israel. However, if it were offered as a broadening concept, relating "the Love of Zion" to "the Love of the Arab World," of which it is geographically a part, the concept would have some chance of being favorably received; and, therefore, the ideological confrontation may not be unavoidable. Obviously, this would require a reconsideration of the "Jewish people" concept, to which Israel's ruling class still adheres, as it was formulated in the wake of European anti-Semitism. With over 60 percent of Israel's population consisting of native born, and over half a million Sephardic Jews (Arab Jews), and now a larger segment of Muslim and Christian Arabs, Israel is not and will not be the same exclusivist State it had once hoped to be. Already signs of its transformation are appearing, even though it is premature to foretell their future course.

**The Arab-Israeli Conflict and the "Arab Revolution"**

Most writers believe that the central issue in Middle East affairs is the conflict over Palestine. Reporters, editors, commentators, and politicians interpret virtually every event in this context. In the end, their judgments are often dangerously misguided because they start from this premise to the exclusion of other considerations.

Certainly, the military and political conflict between Israel and some of her Arab neighbors has been the most spectacular feature of Middle East affairs for more than 20 years. It demands our notice, enlists our sympathies and grips our interest; but it is not and cannot be the most significant Middle East problem. If Israel should vanish from world maps tomorrow, the Arab regions would continue to live in torment and turmoil. Even if Israel is the apparent catalyst today, its role is aggravated by its ability to exploit an existing situation to its best interest.

A hundred million Arabs are casting aside the ways and ideas of an older time and looking forward to building a new Arab world. What has been, passes away; what shall be, is yet dimly seen as the Arab people strive to realize their rising expectations. This, too, is conflict. On one side stand those who cling to a dead past; on the other are those who plan and struggle to build toward something better. This is revolution. When the fact of Arab revolution is recognized and accepted, the events of the last two decades reveal a clear, unmistakable historical pattern. Men and movements, wars and political maneuvers fall into historical perspective as readily as the pieces of a jigsaw puzzle mate to reveal their ordained pattern.
Exclusive concern for Israel confuses the judgment of those who look upon the struggle merely as between Israel and the neighboring Arab States, thus misunderstanding the true nature of Middle East problems and failing even to recognize the basic character of the Palestine issue itself. Indeed, the observer can clearly see, if he will, the fact that every guerrilla infiltration, every commando raid, every act of sabotage has been the work, not of Israel's neighboring States, but of Palestinians determined to regain their homeland. States like Egypt, Lebanon, Jordan and Syria, which have given refuge to displaced Palestinians, as indeed they have, and made little effort to interfere with the activities of Al Fateh and other Palestinian groups, recall that, for a decade, the United States has given protection to refugees from Cuba, who have fought with arms obtained inside the United States; and large numbers of Americans have not only cheered but also aided them in the 1961 abortive Cuban invasion. The Palestinian freedom fighters are one segment of the Arab popular revolutionary trend. To oppose them is to accelerate local revolutionary movements which already threaten to burst throughout the entire Arab world.

An understanding of the roots of this trend is necessary. After the rise of nationalism and access to independence by the Arab States, economic necessity brought about Arab socialism. Arab socialism was not and is not the communism of the Soviet Union or China, nor is it the "Middle Way" of the Scandinavian countries; it is as an Arab program derived from Arab experiences to serve Arab needs. It did not spring from any body of socio-economic theory and has no organized ideology. It is still an inchoate movement, feeling its way forward, testing ideas, keeping those that work and discarding those that fail, governed by experience and undaunted by the problems that lie ahead. While it is groping for answers, one certain fact emerges — its immediate objective is socio-political and economic justice. Exactly where the priority lies and where the emphasis is to be laid is what truly differentiates among the Arab regimes in power today and distinguishes the various local revolutionary movements.

The very first manifestation of the Arab revolution is that where it advances, kings vanish, such as in Egypt, Iraq, Yemen and Lybia. Monarchies have been replaced by military dictatorships, but the following phase is one of popular movements to replace the sectarianism which has characterized the first phase. As French and British power evaporated in the Middle East and American power undertook to replace it with uncertainty and lack of purpose, it inherited an enmity which it had not sown, while fostering the belief
that its goals are neo-imperialistic as its policy often may have suggested. Like the French and British before them, American policymakers concerned themselves with the effort to maintain the political and economic status quo. Only then, so it was believed, could the enormous American interests in Arab oil be protected and the militarily strategic location that so recently had been a Franco-British enclave be preserved. America thereby earned the title of "colonial heir," and when it finds itself assuming the wardship of Israel, the effect of these roles on Arab-American relations is devastating.

The third phase of the Arab-Israeli war in 1967 brought the Soviet Union into the Middle East as a military power to reckon with, just as the Suez Canal crisis of 1956 has provided the political opening that Russia had sought in vain through long generations. Today, the Mediterranean, long a British lake, then an American mare nostrum, is no longer a closed sea. Soviet power already deprives the United States of the ability to determine the course of events in the Mediterranean basin, and the Soviet presence suggests that Western attempts to dictate the Arab future have now been foreclosed.

The role of the Soviet Union in Arab affairs is derivative of American-Israeli polarization of the conflict. The most telling fact is that no communist party exists in the Arab States, and the people have no sympathy for the Soviets. But the political alliance at the international level is a necessity dictated by America's one-sided position. Thus, the Soviet Union's influence in the outcome of the conflict is a factor which is a consequence of the American position and can, therefore, be controlled by the United States. Socialist doctrine is strong in the Arab world, but Marxism is relatively weak among left-wing thinkers, who, whatever doctrines they relate to, almost invariably adapt it to the context of Arab nationalism. Russian communism is not an element of the Arab revolution, and no strings pulled in Moscow will affect its course or future.

The Arab revolution transcends any local dispute and internal question. The struggle of the Arab peoples against what they believe is neo-imperialism and social inequities continues unabated in search of a more positive identity. One thing remains certain — the Arab peoples look forward to an Arab nation, and in the process of such a quest lies the difficulty of finding a common political ideology for all Arab peoples. The larger question of the Arab revolution does not absorb (though it encompasses), the many different and varied internal problems of each Arab State. Amidst these, Israel is only one problem — even though it appears to loom so largely over the others.
Those who founded and still govern Israel, although some of
Palestinian birth, were and are Europeans. They were bred in a Eu-
ropean culture, though it may have been affected by common religious
tradition. As the British historian Hugh Trevor-Roper has observed,
the history of European and other Western Jewry is an integral part
of European history.  

The customs, traditions and systems of law developed among the
Arabs and other non-European peoples have had no discoverable im-
 pact on international law as it now exists. Arabs are products of an
Islamic culture that has its roots in the Judaeo-Christian heritage but
diffs sharply from that which the same has become in the Western
world. Yet, existing international law demands that Arabs abide
by such customs, practices and precedents, in the shaping of which they
have had no part whatever. It may justly be said that they are com-
pelled to play for very high stakes under rules compiled by their
antagonists and adversaries.

It is significant that the acceptance of the Zionist Organization
as an international public body, the Palestine Mandate, and the in-
corporation of the Balfour Declaration in the Mandate Agreement
were all decreed by Europeans, in direct defiance of declared and
demonstrated Arab interests—that an ancient country dominated by
Islamic tradition and culture has, in crude fact, been seized and appro-
 priated for a new extension of the areas dominated by European
culture.

The concept of law and the Rule of Law is not alien to either
the Arabs or Islam itself. The Islamic heritage is one of law in its
purest form. In fact, the history of the present conflict demonstrates
that from its inception the Arabs have sought to rely upon the precepts
of international law and its organized structures to resolve the prob-
lem. It was not until their realization of its failure that the present
escalating trend of self-help has materialized.

A sound historical hypothesis is that events of a crude and violent
nature—war, revolution, the rise of tyranny—are usually not trig-
gered by ideas, ideals and beliefs which are the result of thought in
evolution. Ideology is seldom the catalyst that induces violence, al-
though it is often the target at which the opponents of revolutionary,
and even evolutionary, change aim.

161 Trevor-Roper, Jewish and Other Nationalisms, COMMENTARY, Jan. 1963, at 15-29.
162 Bassiouni, supra note 33, at 120.
163 Bassiouni, supra note 18. See note 158 and accompanying text supra.
In the Middle East today there exists two basic ideological conflicts—Arabism versus Zionism and Arab revolutionism versus reactionalism. It is the situational factors derived from these ideological conflicts which constantly threaten the peace and security of the Middle East; and as to the first, it is a political challenge to the Rule of Law in its quest for the peaceful resolution of world conflicts. In this regard, two basic points must be considered.

1. If the Arab-Israeli conflict is to be considered a permanent feature of the Middle East, deriving solely from irreconcilable ideologies, the conclusion is inevitable that peace and security will be possible only when one or the other can be annihilated or thoroughly subjugated by military force.

2. If, however, conflict is not deemed a permanent condition in the relations of Middle East peoples but a consequence of competing aspirations and struggling ambitions amenable to solutions other than inevitable collision, then the conclusion must be that the risk of violence between the parties can be obviated by a resolution of those situational factors that produce the violence.

Significantly, every violent episode throughout the history of the conflict has resulted from a situational factor only indirectly related to the central ideological conflict. The direct causes of these episodes have rarely, if ever, been within the individual or exclusive control of any contestants, yet despite the professed desire of the parties to prevent it, conflict has resulted. If this assumption is accurate, then elimination of those situational factors would remove the risk of military confrontation which threatens world peace. The legal and political aspects of the Arab-Israeli conflict have been widely discussed, and in another forum one of the authors of this article stated: "In the history of modern world conflict, there is no other instance where the very nature of the conflict can be examined in its entirety in a legal context." This does not imply that a legal determination is possible in the present practice of world affairs. Almost all the "political" issues of the Palestine question and the conflict between Israel and some of the Arab states are superimposed upon legal claims and moral rationalizations, or vice-versa. Thus, it is theoretically possible, and quite realistic in an anachronistic sense, to resolve the entirety of the Arab-Israeli conflict on a legal basis. Therefore, the Arab States and the United Arab Republic, in particular, seek to submit some or all of these legal issues to the International Court of Justice; Israel consistently refuses.

104 Bassiouni, supra note 2, at 51.
The lack of compulsory international adjudication of world conflicts provides the perfect escape for any nation which lives in the world community by means of self-serving might to the detriment of the peace-serving maintenance of world public order. The resolution of world conflicts by the Rule of Force and not by the Rule of Law is the most constant threat to world public order.\textsuperscript{165}

Although sporadic military encounters will occur, the bitter Arab-Israeli quarrel may well end, not in ultimate military confrontation but in the rapidly proceeding Arabization of the Zionist state. This process will be the result of the large influx of Jewish immigrants from Arab lands — men and women bred not in a Western but in an Islamic and Arabic culture — and the many Arabs living under Israeli rule. The Europeans who established Israel and still dominate both its politics and economy have been reduced to less than one-third of Israel's population. Experience and simple logic suggest that no minority can long control any country. Already Israel has ceased to be the European state in an Arab sea that its founder envisioned, and the Arabization of Israel is starting.\textsuperscript{166}

The very real likelihood is that before many years pass, Israel will be ruled by its majority, by people who are either themselves Arabs or have a history of 13 centuries of friendly coexistence with the Arabs. At their vanguard will be the "Sabras" — born and raised in Israel. They will view their future as part of the Arabs region and not as a beholden outpost of European Zionism.

This, of course, will depend upon Israel's realization that the arrogance of her present power must abate, if and when Arab power is not one day to repay it in kind.

In this event, the Arab-Israeli conflict that so dominates world public interest in Middle East affairs will simply wither away. Arabs will see no need to arm themselves for either defense or aggression against their Arab neighbors. Meanwhile, however, the "Arab revolution" will go on for several generations. Precisely what path it will take or how fast it will advance no one can say, but that revolution in the Arab lands will continue seems as certain as anything natural can be.

The "Arab Revolution" will dominate the search for identity and realization of the emerging Arab masses who long for no more than to enjoy life, liberty and the pursuit of happiness in human dignity.

\textsuperscript{165} Bassiouni, supra note 2, at 51-52.

\textsuperscript{166} See G. Friedman, The End of the Jewish People (1967). See also U. Aynery, supra note 59.
Yet, the most fundamental moralizing effect of religion remains smothered. Islam has not played its full and mature role in the development of this course of events. The contribution of Islam can have untold effects upon the development of the Arab world and its future institutions. Islam remains, however, the main barrier against communism in the Arab world and must be regarded as the main tenet of moral strength in the Arab world of today and tomorrow.

There are too many imponderables to predict the immediate future, but certainly the long-range course of the Arab world is unmistakably clear; and Israel or Palestine, whatever the label, will be part of that Arab world of tomorrow.