THE ARAB-ISRAELI CONFLICT FROM THE PERSPECTIVE OF INTERNATIONAL LAW

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The Washington agreement of September 1993 between Israel and the Palestinians,[1] has raised hopes worldwide that the Arab-Israeli conflict which has been raging for many decades (and in fact precedes the birth of the State of Israel) is drawing to a close. In reality, while the Washington agreement undoubtedly represents a major breakthrough, it is premature to regard the conflict as settled. Many more agreements, not only with the Palestinians, will be required in order to augur a comprehensive peace in the Middle East. In the meantime, numerous issues remain unresolved and there is still much opposition in many circles to the idea of Arab-Israeli reconciliation. The need to study the international legal aspects of the conflict is, therefore, as topical today as it was in earlier days.

The following observations on the Arab-Israeli conflict will be based on international law. No attempt will be made to examine "historical rights". Moreover, no reference will be made here to justice or morality. History, justice and morality are constantly invoked by both parties to every conflict and, as a rule, they are neither helpful nor unequivocal. Being subjective perspectives, they are more conducive to the definition of the problem than to its solution. Unfortunately, the arguments heard on both sides of the Arab-Israeli conflict are frequently grounded on a confusing (not to say confused) combination of law, justice, morality and history. If the conflict is to be probed in a rational and hopefully productive way, it is imperative to identify the level on which the analysis is to be conducted.

An argumentation predicated on historical rights is characteristic of extremists on both sides of the Arab-Israeli conflict. Arab extremists rely on centuries of constant Arab habitation in Palestine. Yet, Jewish extremists believe that in relying on historical rights they are pulling off a trump card. After all, Arab historical rights in Palestine go back at best to the Moslem conquest which took place in the 7th century A.D. Jewish historical rights can be substantiated all the way to the 2d millennium B.C.

As far as I am concerned, either approach is a non-starter. Personally, I am far less interested in the question where King David lived in the remote past and feel much more engagé in the issues linked to where I live today and where my children will live tomorrow. In any event, if one traces historical footprints, why

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[1] *Israel - Palestine Liberation Organization, Declaration of Principles on Interim Self-Government Arrangements, 1993* in (1993) 32 International Legal Materials at 1525.

stop at the point when one of the Caliphs or the Kings of Judea reigned in Jerusalem? Why not go beyond Arab as well as Jewish annals and reach the Canaanite era? Ought we to look for the descendants of the aboriginal inhabitants of Palestine, with a view to handing the land back to them? Indeed, even if we do not go that far back in history, it is noteworthy that some Japanese believe that they are the true descendants of the lost Ten Tribes of Israel. Assuming that they can substantiate that belief, do we have to recognize the primacy of any claim that they may care to make? I do not think that such a claim ought to be taken seriously, although from an economic standpoint the idea of the return of the Ten Tribes backed by the industry and the industriousness of Sony and Panasonic is quite alluring.

Certainly, the implications of searching for elusive historical rights of past inhabitants must strike a chord in the Province of New Brunswick. Should the entire province be given back to the offspring of the indigenous tribes who used to live here before the arrival of European explorers and settlers? The problem is not confined to the New World where the Europeans arrived only a few centuries ago. In Europe itself, land has changed hands many times over in the course of human history. Is Britain, for instance, to be returned to descendants of the Picts and the Druid Priests who lived there prior to the Roman and the Anglo-Saxon invasions?

It should be evident that reliance on historical rights is liable to produce ahistorical and incongruous conclusions. We must start at some point in recent times and not in antiquity. Interestingly enough, in the context of Palestine we have an authoritative definition of the term "antiquity". It appears in Article 21 of the Mandate for Palestine, according to which "antiquity" means any product of human activity earlier than the year 1700 A.D.[2] Let us forget about antiquity, and concentrate on modern history.

II

If we begin at any point which is post antiquity under the Mandate's definition, we find that Palestine has been inhabited by both Arabs and Jews. The proportions vary from one generation to another, but the coexistence of the two communities in a single land is an incontrovertible and constant reality. In fact, Jews constituted the majority of the population of Jerusalem in the 1860s, that is to say, well before the dawn of Zionism.[3]

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[2] *Mandate for Palestine* in (1922) 1 International Legislation 109 at 117.

[3] 9 *Encyclopaedia Judaica* at 1458.

From an international legal perspective, the first step for any meaningful discussion of the Palestine Question is the *Balfour Declaration* of 2 November 1917. This is a brief text and, for the sake of clarity, it ought to be quoted in its entirety:

> His Majesty's Government views with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[4]

The text was hammered out by the British cabinet after careful deliberation.[5] As usual, it reflects a compromise.[6] Yet, there can be no doubt that the Declaration was intended to lay the foundations of some form of a Jewish national entity in Palestine.[7]

Although the *Balfour Declaration* was issued by Britain unilaterally, it had a binding force as far as that country was concerned. Under international law (as elucidated in two subsequent decisions of the International Court of Justice, in the *Eastern Greenland* case[8] and in the *Nuclear Tests* cases[9]), a unilateral declaration issued by the competent authorities of a State can have a binding effect upon that State, if such was the intention behind it. As regards the *Balfour Declaration*, the British intention to be bound by the text (formally acknowledged and reiterated by successive British Governments) can easily be ascertained.[10]

Of course, the *Balfour Declaration* was merely a first step. After the victory of the Allied Powers in the First World War – and pursuant to Article 22 of the Covenant of the League of Nations[11] – the former Turkish territories in the

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[4]J.N. Moore, ed., *The Arab-Israeli Conflict: Readings and Documents* (Princeton: Princeton University Press, 1974) 31 at 32.

[5]L. Stein, *The Balfour Declaration* (London: Valentine-Mitchell, 1961) at 502-549.

[6]The greatest opponent of the Declaration was the Jewish Secretary of State for India, Edwin Montagu, who entertained the notion that the creation of a Jewish national home in Palestine would "vitally prejudice" the position of Jews elsewhere; see *ibid.* at 502-503.

[7]Balfour himself, in the War Cabinet, took the position that the "establishment of an independent Jewish State" was "a matter for gradual development"; see *ibid.* at 547.

[8]*Legal Status of Eastern Greenland (Denmark* v. *Norway)*, [1933] 3 W.C.R. 151 at 192-94.

[9]*Nuclear Tests Case (Australia* v. *France; New Zealand* v. *France)*, [1974] I.C.J. Rep. 253 at 267; 457 at 472.

[10]The Balfour Declaration was adduced by M. Bartos as an illustration of a declaration issued *urbi et orbi* with a binding character, [1962] 1 Yearbook of the International Law Commission at 48 and 50.

[11]H.W.V. Temperley, ed., (1920) 3 *A History of the Peace Conference of Paris* 111 at 120-121.

Middle East were placed under the Mandates system. Palestine was assigned as a Mandate to Britain. Like all other Mandates, the Mandate for Palestine was an international agreement concluded between the League of Nations, on the one hand, and the Mandatory Power (Britain), on the other.[12] It was not only Britain that was bound by the instrument, but also the League of Nations (the international organization in which most of the then-existing States of the world were members). There is no need to investigate here the manifold obligations flowing from a Mandate as an international agreement. Suffice it to mention that the International Court of Justice at The Hague expounded the matter at length in a series of cases pertaining to another Mandate, i.e. Namibia (South West Africa).[13]

The Mandate for Palestine explicitly reconfirms and even incorporates word-for-word the *Balfour Declaration*. The relevant paragraph appears in the Preamble:

> Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2d, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[14]

Thus, through the Mandate for Palestine (as an international agreement), the entire membership of the League of Nations became bound by the *Balfour Declaration*.

It is well known that one major Power, namely the United States, never joined the League. However, Britain went to the length of concluding a special bilateral agreement with the United States on the subject of Palestine. This is the 1924 *Anglo-American Convention*, in which the United States gave its assent to the

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[12]On the nature of a Mandate as an international agreement, see *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), (Preliminary Objections)*, [1962] I.C.J. Rep. 319 at 329-32.

[13]*International Status of South-West Africa*, [1950] I.C.J. Rep. 128; *South-West Africa - Voting Procedure*, [1955] I.C.J. Rep. 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, [1956] I.C.J. Rep. 23; *South West Africa Cases (Preliminary Objections)*, [1962] I.C.J. Rep. 319; *South West Africa Cases (Second Phase)*, [1966] I.C.J. Rep. 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. Rep. 16.

[14]*Supra*, note 2 at 110.

administration of Palestine by Britain pursuant to the Mandate.[15] It follows that virtually the whole international community, as it existed in the era between the two World Wars, was legally committed to the Mandate for Palestine, which included the obligation for the establishment in Palestine of a national home for the Jewish people. Admittedly, the *Balfour Declaration* and the Mandate for Palestine did not ignore the rights of non-Jews in Palestine. Nevertheless, whereas Jews were granted the right to establish a national home, non-Jews were conceded only civil and religious rights. In other words, the expectation was that non-Jews would live as a protected minority within the Jewish national home.

III

The implementation of the Mandate for Palestine proved a much more arduous task than Britain had envisaged at the outset. Over the years, the British Government began to flag and tire, especially in the face of growing Arab opposition both within and without Palestine. Jewish cynics used to say that it was all a matter of punctuation: the British Government simply chose to put a full stop in the *Balfour Declaration* after the words "it being clearly understood that nothing shall be done".

Towards the end of the Mandatory period, Britain acted clearly in violation of the provisions of the Mandate with its introduction of the "White Paper" in 1939, which drastically cut down the rate of Jewish immigration into Palestine (after five years no further immigration was contemplated without the consent of the Palestinian Arabs) and imposed severe limitations on the purchase of lands by Jews.[16] The majority of the Permanent Mandates Commission of the League of Nations (the principal organ responsible for the supervision of the implementation of the Mandate) arrived at the obvious conclusion that the White Paper was not in conformity with the terms of the Mandate and the fundamental intentions of its authors.[17] Notwithstanding the open-and-shut nature of the case, not much could be done to countermand the new British policy. Owing to the outbreak of the Second World War, the report of the Commission was not even brought before the League's Council.

When the Second World War came to a close, the British Government was in a quandary. It did not really wish to stray from the 1939 White Paper. Yet, it was

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[15] *United States - United Kingdom, Convention Respecting the Rights of the Governments of the Two Countries and their Respective Nationals in Palestine* in (1924) 43 *League of Nations Treaty Series* 41 at 56, Article I.

[16] *Supra*, note 4 at 210, 220-221.

[17] N. Feinberg, *Studies in International Law* (Jerusalem: Magnes Press, 1979) at 497.

subjected to tremendous pressure by world (above all, American) public opinion to enable Jewish "displaced persons", the survivors of the Holocaust, to find a haven in Palestine. An Anglo-American Committee of Enquiry Regarding the Problems of European Jewry and Palestine recommended in 1946 that 100,000 Jewish victims of Nazi persecution should be allowed forthwith to immigrate to Palestine.[18] Still, the British did not budge. Instead, early in 1947 the British cabinet (led by the Foreign Minister, Ernest Bevin) decided to refer the Palestine problem to the United Nations (UN).[19] The British expectation seems to have been that the problem would prove intractable, so that the UN would be forced, however reluctantly, to endorse any and all measures taken by the British Government.[20] Much to their chagrin and surprise, a random factor then entered the equation: the United States and the USSR proved capable of cooperating on the Palestine issue. Otherwise, the two super-Powers were already poles apart. Yet on this point, they converged.

As a result of American-Soviet cooperation, the UN General Assembly was able to adopt (with some amendments) recommendations, submitted by a Special Committee (UNSCOP,[21] of which Ivan C. Rand was a leading member), calling for the partition of Palestine. The *Partition Resolution*, No. 181 (II), was carried by the required two-thirds majority on 29 November 1947.[22] The partition plan was premised on the termination of the Mandate and the establishment of two independent States, one Jewish and the other Arab, linked by an economic union, plus a special international regime for the city of Jerusalem as a corpus separatum.[23]

Under the UN Charter, the *Partition Resolution* (like all General Assembly resolutions of the same nature) was "no more than a recommendation" that "can have no legally binding effect".[24] In actuality, it was totally rejected by the Arabs and soon it was erased by blood. Many people are under the impression that Israel was created by the *Partition Resolution*. Historically, as well as legally, the impression is false. The whole recent history of the Middle East might have been different had the resolution been carried out. But, lamentably perhaps, it was not. If the resolution is still memorable, this is so only because it served as a link in the

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[18]*Supra*, note 4 at 243, 245.

[19]A. Beker, (1988) *The United Nations and Israel* at 29.

[20]*Ibid.* at 28.

[21]*Supra*, note 4 at 259-60.

[22]*General Assembly Resolution 181(II), 1947*, in D.J. Djonovich, ed., 1 United Nations Resolutions, Series I: Resolutions Adopted by the General Assembly at 322.

[23]*Ibid.* at 324.

[24]C. Eagleton, "Palestine and the Constitutional Law of the United Nations" (1948) 42 A.J.I.L. at 397.

chain of events that ultimately led to the establishment of the State of Israel. Israel was born not in the United Nations, but on the battlefield. Israel exists as a sovereign nation not as a result of a vote in the General Assembly, but by consequence of emerging victorious from the hardiest of all crucibles. Had Israel been defeated militarily, the *Partition Resolution* would not have saved it.

The Arabs' immediate response to the *Partition Resolution* was the initiation of hostilities against the Jewish community in Palestine. Between 30 November 1947 and 14 May 1948, these hostilities were in the form of a civil war in Palestine. In the early days, the military balance tilted distinctly in favour of the Arabs, whereas by March-April 1948 the tide turned, so that the Jews prevailed almost everywhere.

It is noteworthy that the country most immediately affected by the *Partition Resolution*, *viz.* Britain, did not lift a finger to enhance the chances of its implementation. The British resolutely abstained from using their power to impose law and order in Palestine after 29 November 1947. Indeed, they did not even wish to remain in Palestine until the last possible date envisaged by the Resolution, which was 1 August 1948.[25] They preferred to accelerate the schedule of the evacuation of their armed forces and administration. That is why Israel's Independence Day is celebrated on 15 May, rather on than the anticipated date of 1 October (two months after the completion of the evacuation as originally scheduled).[26]

IV

On 15 May 1948, within hours of Israel's Declaration of Independence, five Arab armies invaded the newly born State. The invasion transformed the conflict from a civil war to an international (interstate) war. I regard that particular event as a tragic milestone in the history of the United Nations. Until 15 May 1948, there were high hopes that the Organization would enforce peace throughout the world. After all, the UN Charter is based on the fundamental principle of collective security against aggression in international relations. The Arab invasion of Israel on 15 May 1948 was the first time since the end of the Second World War that sovereign nations went to war against another State, proclaiming brazenly that they were launching an invasion. It soon became clear to all observers that the United Nations was impotent in the face of naked aggression. The Security Council did not activate military or other sanctions against the aggressors. At no time did the Council even determine that a breach of the peace had occurred as a result of the

[25] *Supra*, note 22 at 323.

[26] *Ibid.* at 324.

Arab invasion. In the middle of July 1948, after much bloodletting between Arabs and Jews, the Security Council merely determined for the first time that the situation in Palestine constituted a threat to the peace![27]

The second interstate phase of Israel's War of Independence ended with a series of Armistice Agreements in 1949 with four of the five invading countries: Egypt, Jordan, Lebanon and Syria.[28] The fifth, Iraq, benefited from the fact that it has no common borders with Israel. It simply withdrew its armed forces from the front line, without concluding any agreement with Israel. Hence, from a legal standpoint, the war between Iraq and Israel, which commenced in 1948, persists to this very day. The state of war between the two countries is not a mere technicality. Israel and Iraq clashed militarily on several occasions in the post-1948 era: mutual bombing raids in 1967; the Iraqi expeditionary force which stopped the Israeli army at the gates of Damascus in 1973; Israel's destruction of an Iraqi nuclear reactor in 1981; and, most recently, Iraq launched Scud missiles at Israeli population centres in 1991.[29]

Insofar as the four Arab countries which did sign Armistice Agreements with Israel are concerned, these Agreements terminated the war that had begun in May of 1948. Most Israelis today, like many Arabs in the past, tend to read the Armistice Agreements in a selective fashion, stressing certain clauses that pay lip service to the transitional character of the Agreements (as a phase between truce and full peace) and ignoring their non-temporary nature. The true essence of the Armistice Agreements is that they brought to an end Israel's War of Independence. Armistice agreements have been used as a mode of terminating war both before and after 1949: the Italian Armistice of 1943 (in the course of the Second World War)[30] and the Panmunjom Armistice Agreement of 1953 (at the close of the Korean War)[31] are prime examples. The focal point of the Palestine Armistice Agreements is that they totally proscribed any warlike or hostile act by military or para-military forces of either party for any purpose whatsoever.[32]

The Armistice Demarcation Lines, as set forth in the Palestine Agreements, were not envisaged as final frontiers, yet they were not to be altered except by mutual consent. It must be appreciated that, pursuant to international law, no

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[27]SC Res. 54/902, UN SCOR, 3rd Year, 338th Mtg., UN Doc. S/INF/2/Rev. 1(III) (1948) at 22.

[28]*General Armistice Agreements, 1949: Israel-Egypt* in 42 *U.N.T.S* at 251; *Israel-Lebanon* in 42 *U.N.T.S.* at 287; Israel-Jordan in 42 *U.N.T.S.* at 303; Israel-Syria in 42 *U.N.T.S.* at 327.

[29]Y. Dinstein, *War, Aggression and Self-Defence*, 2d ed. (Cambridge, U.K.: Grotius Press, 1994) at 47.

[30]*Conditions of an Armistice with Italy, 1943* in 9 International Legislation at 50.

[31]*Panmunjom Agreement Concerning a Military Armistice in Korea, 1953* in (1953) 43 A.J.I.L., Supp. of Official Docs. at 186.

[32]*Supra*, note 29 at 43-45.

international frontiers are "final" in the strict sense of the term. All existing frontiers are subject to modification by consent of the parties. Indeed, the frontiers of well-established States are redrawn by consent quite frequently. A case in point is the United States, the frontiers of which have been redemarcated several times in two centuries. An international frontier is perceived as final if and when it can be modified exclusively by mutual consent. In other words, once frontiers are fixed, they cannot be redelineated by force. Consent is a condition *sine qua non* to any new demarcation of established frontiers. In this crucial respect, the Palestine Armistice Lines are no different from any other established international frontiers.

Far be it from me to suggest that the Palestine Armistice Agreements were equivalent to peace treaties. A peace treaty introduces peace in a positive sense. Peace in a positive sense means normalization of relations between the former belligerents in the spheres of diplomacy, trade, tourism, cultural exchanges, shipping, aviation and any other interstate activity. By contrast, an armistice agreement is only negative: it no more than terminates war. Relations between parties to armistice agreements may remain tense and strained. The armed phase of the conflict has come to an end, but the conflict may continue unabated.[33]

V

The only Arab country with which Israel has concluded a full-fledged peace treaty is Egypt. The Israeli-Egyptian peace treaty, signed in 1979,[34] brought to an end not the 1948 War (which had been terminated by the Armistice Agreement of 1949), but an altogether different war begun in June 1967. In between 1949 and 1967, there was another short war between Egypt and Israel in 1956-57. Conversely, various so-called wars between the two countries, such as the "War of Attrition" of 1970 or the "Yom Kippur War" of 1973, did not qualify as separate wars, but must be regarded as new rounds of hostilities in the course of a single on-going war punctuated by lengthy cease-fires. A cease-fire, like a truce, but unlike an armistice or a peace treaty, does not bring war to an end; it merely suspends hostilities while the state of war continues.[35]

In the relations between Israel, on the one hand, and Jordan and Syria, on the other, the 1948 War also ended upon the conclusion of the Armistice Agreements of 1949. Conversely the 1967 War, precipitately called "the Six Days War", has

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[33] *Supra*, note 29 at 46.

[34] *Treaty of Peace Between the State of Israel and the Arab Republic of Egypt, 1979*, 1138 *U.N.T.S.* 59 at 72 [hereinafter *Treaty of Peace, 1979*].

[35] *Supra*, note 29 at 50-51.

not been terminated among these countries. There have been a number of rounds of fighting since 1967, especially between Israel and Syria. Currently, we are in the midst of a prolonged cease-fire and peace talks are under way. Israel and Jordan even signed a "Common Agenda" in September 1993.[36] However, the war will not be terminated, until either a peace treaty or an armistice agreement is concluded. The "Six Days War" has thus become, in reality, a twenty-seven years war (and still counting).

It may sound odd, but the one Arab country with which the armistice regime of 1949 is still in force is Lebanon. There has been no new war between Israel and Lebanon since 1949. The 1982 hostilities, although conducted on Lebanese soil, did not constitute a war between Israel and Lebanon. There was not a single incident in 1982 in which Israeli troops exchanged fire with Lebanese soldiers. The fighting that took place then in Lebanon represented (a) another round of hostilities between Israel and Syria in the course of their on-going war; and (b) military operations by Israel against the Palestinians, who had used Lebanese soil as a springboard for attacks against Israeli targets. In 1993, once more Israel traded blows with Moslem fundamentalists on Lebanese soil without plunging into war with Lebanon.

During the six days of fighting in June 1967, Israel occupied sizeable Arab territories. The Sinai peninsula has been returned to Egypt following the peace treaty. A segment of the Golan Heights, occupied from Syria, was relinquished in 1974. Yet, otherwise Israel continues to occupy these territories. The occupation as such has not impacted upon the boundaries of Israel. Belligerent occupation does not transfer sovereignty and the Armistice Lines of 1949 still represent the Israeli frontiers with Jordan and Syria respectively. Only a peace treaty or another armistice agreement, based on mutual consent, can change these frontiers.

In September 1993, a Declaration of Principles on Interim Self-Government Arrangements was signed in Washington by Israel and the Palestinian team in the Jordanian-Palestinian delegation to the Middle East Peace Conference.[37] Under this Declaration, Israel is to withdraw its military government from the Gaza Strip and the Jericho area, and a five-year transitional period is to begin thereafter.[38] Negotiations about the permanent status of the West Bank and the Gaza Strip will commence by the third year of the interim period.[39] Israelis expect the

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[36]*Israel-Jordan, Common Agenda for the Bilateral Peace Negotiations, 1993* in (1993) 32 International Legal Materials at 1522.

[37]*Supra*, note 1 at 1527.

[38]*Supra*, note 1 at 1528-29 (Articles V-VI).

[39]*Supra*, note 1 at 1529 (Article V (2)).

permanent status negotiations with the Palestinians and the Jordanians to introduce changes in Israel's pre-war borders. Consent must be postulated for such changes to be valid.

VI

In order to understand the legal status of the West Bank, it is necessary to focus first on the Kingdom of Jordan. Originally, Jordan constituted an integral part of the Mandate for Palestine. However, Article 25 of the Mandate prescribed that, in the territories lying between the Jordan River and the eastern boundary of Palestine, the Mandatory Power was entitled (subject to the approval of the Council of the League of Nations) to withhold application of provisions of the Mandate deemed unsuitable for local conditions.[40] The text of the Mandate for Palestine was drafted in the San Remo Conference of 1920 and the League's Council gave its formal consent to the Mandate. Shortly thereafter, in the same year, the British Government obtained the approval of the Council for the exclusion of (what came to be known as) Transjordan from the application of manifold provisions of the Mandate, especially those connected with the *Balfour Declaration*. While Britain remained a Mandatory Power in Transjordan, the area was organized as an autonomous emirate ruled by Abdallah (the son of the Sherif of Mecca who had been ousted from Arabia). The degree of autonomy was increased over the years until Transjordan gained full independence as a monarchy in 1946.

As indicated in the above text, Jordan participated in the 1948 invasion of Israel. In fact, the fighting with the Jewish community in Palestine commenced even before Israel's Declaration of Independence. To the extent that the Jordanian army (then called "Arab Legion" and, incidentally, commanded by British officers headed by Glubb Pasha) remained in the Arab sections of Palestine, its presence could be justified on the ground of a call for help by the local population. It was a case of flagrant aggression, however, when the Jordanian army marched against Jewish towns and settlements.

When the military lines between the Arab armies and Israel consolidated late in 1948, the Arab population of the West Bank was still opposed to the partition plan and to its concomitant, the creation of an independent Arab State within a portion of Palestine. In December 1948, a Palestinian Conference was convened in Jericho. The Conference "decided that Palestine and the Hashemite Kingdom of Transjordan be united into one Kingdom and that King Abdallah Bin Hussein

[40] *Supra*, note 2 at 119.

be proclaimed constitutional King over Palestine".[41] In April 1950, free elections (certainly as free as elections ever are in any Arab country) were held on both sides of the River. The elections were regarded as a referendum on the issue of the incorporation of the West Bank into the Hashemite monarchy.[42] The newly elected Parliament (in a joint session of both Houses) adopted the following resolution: "Approval is granted to complete unity between the two banks of the Jordan, the Eastern and Western, and their amalgamation in one single state: The Hashemite Kingdom of the Jordan".[43]

There can scarcely be any doubt that in 1948, and more significantly in 1950, the Palestinians of the West Bank chose to have a union with Transjordan. They had ample opportunity to create an independent Arab State in Palestine. Still, due to their implacable opposition to the principle of the partition of Palestine west of the River Jordan, they preferred a merger with the East Bank. Following the union of the two banks, Jordanian nationality was extended to the permanent inhabitants of the West Bank.

Anti-Jordanian propagandists claim that only two countries in the world, Britain and Pakistan, recognized the union of the two banks. They rather conveniently ignore the fact that the United States also announced at the time that it had "no objection whatever to the union of peoples mutually desirous of this new relationship".[44] More significantly, they completely gloss over the relevant norms of international law. In conformity with international law, recognition only plays a role subsequent to the creation of a new state or if a new government is brought to power by a revolution or a coup d'état. No recognition is necessary when an existing country, such as Jordan in 1950, expands its boundaries. As pointed out, the frontiers of existing States undergo frequent modifications and recognition of these changes is not required as long as their own borders remain unaffected. Consequently, when Britain and Pakistan formally recognized the union of the two banks of the Jordan River, the act of recognition was entirely redundant.

The sole foreign country which was directly affected by the amalgamation of the two banks was, of course, Israel. Israel, having concluded an Armistice Agreement with Jordan in 1949, laid the groundwork for the incorporation of the West Bank into Jordan in 1950. It must be reiterated that, to all intents and purposes, the Armistice Lines constitute international frontiers. The eastern frontiers of Israel are the Armistice Lines with Jordan. By the same token and in

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[41]M.M. Whiteman, ed., (1963) 36 Digest of International Law at 1163.

[42]*Ibid.* at 1165.

[43]*Ibid.* at 1166.

[44]*Ibid.* at 1167.

a complementary way, the western frontiers of the Kingdom of Jordan are the Armistice Lines with Israel.

The trouble with many Israelis today is that they impale themselves on the horns of inconsistency. Every Israeli takes it for granted that the territory west of the so-called Green Line (the Armistice Line) constitutes Israeli territory beyond any question or doubt. Yet, if so, why does the territory east of the same line not belong to Jordan, to wit, the other signatory to the same Armistice Agreement which established the Green Line in the first place?

For my part, I believe that a frontier is a frontier. As a frontier between Israel and Jordan, the Armistice Line denotes that the territory west of it belongs to Israel whereas the territory east of it belongs to Jordan. Israel, which occupied the West Bank from Jordan, cannot ignore Jordanian rights in and over the region. Jordan has accepted the idea of the PLO negotiating with Israel on behalf of the Palestinians in the occupied territories, but any agreement regarding their permanent status will require Jordanian endorsement. Certainly, any alteration of Israel's frontiers beyond the 1949 Armistice Line must be premised on Jordanian approval. One of the fundamental principles of law is *nemo dat quod non habet*: a valid transfer of sovereignty to Israel presupposes consent by the former sovereign, i.e. Jordan.

VII

For the time being, the West Bank is under Israeli belligerent occupation which some Arabs claim is intrinsically unlawful. Yet this is a spurious contention: armies are on the move in every war which is not confined to a Sitzkrieg. The areas between the frontiers and the front lines are subjected to belligerent occupation when the situation stabilizes. While belligerent occupation does not transfer title, it does mean that the occupying power has a temporary right of possession. Possession may continue as long as the war does (unless the legitimate sovereign regains by the sword what it has lost by the sword).[45]

Far from viewing belligerent occupation as innately unlawful, there is a whole body of international law regulating this state of affairs. The relevant norms are both customary and conventional in nature. The conventional norms are embodied in Articles 42 through 56 of the 1899 and 1907 Hague Regulations Respecting the Laws and Customs of War on Land,[46] and in the (Fourth) Geneva

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[45]Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights" (1974) 8 Israel Yearbook on Human Rights 104 at 105-106.

[46]J.B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, 2d ed. (1918) 100 at 107, 122ff.

Convention of 1949 Relative to the Protection of Civilian Persons in Time of War.[47] To date, the belligerent occupation of the West Bank (and the other occupied territories still held by Israel) has been going on for twenty-seven years. The length of the period of belligerent occupation has precedents in past history, yet for the local population a quarter of a century amounts to an enormous space of time. The prolonged occupation is not unlawful, but it is tragic.

A completely different issue is whether Israel complies in fact with the international legal norms regulating belligerent occupation and especially with regard to the (Fourth) Geneva Convention. There is a myth abroad that Israel does not apply the Convention and it is sometimes even averred that Israel does not regard itself as bound by the Convention. Let me state that:

(i) Israel is a contracting party to the Convention, and the Convention is fully binding on it;

(ii) it is true that, *de jure* (in some abstract and theoretical fashion), Israel used to deny the applicability of the Convention in Palestine because of conflicting claims of sovereignty;

(iii) however, Israel "decided to act *de facto* in accordance with the humanitarian provisions of the Convention";[48]

(iv) since every provision of the Convention is by definition humanitarian (the entire Convention forms part of what is usually called "international humanitarian law"), Israel is supposed to apply every section of the Convention;

(v) the most palpable way in which Israel has always conceded in practice that the West Bank constitutes an occupied territory is the continued application of the Jordanian legal system in the area;

(vi) as a rule (subject occasionally to exceptions), the military government of the West Bank observes the Convention strictly and rigorously;

(vii) on several points, chiefly, deportations and demolition of houses, the military government in the occupied territories has its own interpretation of the text of the Convention, which is at variance with the interpretation of others (myself included);[49]

(viii) the Convention is quite long and complex, consisting as it does of more than 150 Articles with many paragraphs and sub-paragraphs;

(ix) since the adoption of the Convention in 1949, Israel is the only contracting party to have implemented its stipulations governing occupied territories;

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[47]*The (Fourth) Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War* in 75 *U.N.T.S.* at 287.

[48]M. Shamgar, "The Observance of International Law in the Administered Territories" (1971) 1 Israel Yearbook on Human Rights 262 at 266.

[49]Y. Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Deportations" (1993) 23 Israel Yearbook on Human Rights.

(x) due to the absence of *Knesset* legislation incorporating the Convention into the Israeli domestic legal system, it is theoretically impossible to rely on the instrument in petitions to the Supreme Court of Israel sitting as a High Court of Justice;
(xi) nevertheless, in a number of cases, the Supreme Court has already either applied or at least interpreted the Convention;
(xii) at all times, the Supreme Court is willing to test the legality of the acts and legislation of the military government in the occupied territories in the light of customary international law, and The Hague Regulations, albeit not the Geneva Convention, are considered a reflection of customary international law (by now the case-law pertaining to the occupied territories is quite substantial).[50]

VIII

I have so far referred to Jordanian rights in the West Bank. This is not intended to suggest that the right of the Palestinians to self-determination can be ignored since it is granted by contemporary international law to all peoples. There is a Palestinian people, just as there is a Jewish people; both groups are entitled to self-determination. For a long stretch of time Jews and Palestinians mutually denied each other's claim to peoplehood. This was incongruous, inasmuch as it is not for the Jews to decide whether there is a Palestinian people, nor is it for the Arabs to resolve whether there is a Jewish people. Each group is free to establish its own identity as a people, without interference from the other side. In any event, the question of mutual recognition was finally resolved in the September 1993 Washington agreement.

There is no doubt that the right of all peoples to self-determination forms part and parcel of present day international law. Nonetheless, one should beware of an anachronistic application of legal norms in temporally wrong settings. As a political clarion call, self-determination was first sounded in the days of the French Revolution and gained impetus as a result of U.S. President Wilson's Fourteen Points. It was not deemed a right vouchsafed by international law, however, until the post Second World War era. For the first time, self-determination was spelt out as a collective human right of all peoples in common Article 1 of the twin 1966 International Covenants on Human Rights (one dealing with Civil and Political Rights while the other is devoted to Economic, Social and Cultural Rights).[51] Thus, the right of self-determination did not exist in international law when the

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[50]Y. Dinstein, "The Application of Customary International Law Concerning Armed Conflicts in the National Legal Order" in M. Bothe, ed., (1990) National Implementation of International Humanitarian Law 29 at 31-33.

[51][1966] United Nations Juridical Yearbook 170 at 171; 178 at 179.

Balfour Declaration or the Mandate for Palestine was adopted. In my opinion, neither was it extant when the *Partition Resolution* was formulated.

Even if self-determination was viewed as a legally binding principle in the late 1940s (a controversial assumption, at best), it is important to bear in mind that the Palestinians in the West Bank in fact exercised that right when they chose to cast their lot with Jordan. The crux of self-determination is the right of a people to freely determine their political status, up to and including sovereign independence, but there is no duty of establishing a sovereign State. If a people elect to join an existing State, that is indisputably their right within the purview of self-determination. The Palestinians have manifestly changed their outlook since the onset of the Israeli occupation of the West Bank; but it is undeniable that they had earlier been given an opportunity to create their own State in Palestine and that they opted not to grasp it.

Let it be noted that the Palestine Question was not removed from the international agenda between the late 1940s and the late 1960s. As a matter of fact, year in and year out the UN General Assembly adopted resolutions, sponsored by Arab members of the Organization, relating to the problem of the Palestinian refugees. The operative term at the time was "refugees", and the Palestinians themselves did not discuss their plight in terms of a people deprived of its right of self-determination. As late as 22 November 1967, the celebrated Security Council Resolution No. 242 affirmed the necessity "[f]or achieving a just settlement of the refugee problem".[52] It was only as of 1969 that the General Assembly, prompted by the Arab countries, started to reaffirm "the inalienable rights of the people of Palestine".[53]

Following the Washington agreement, Israel and the Palestinians will negotiate the permanent status of Palestine. Eventually, a Palestinian State may emerge from these negotiations, although other options cannot be ruled out at the present juncture. As previously indicated, no matter what political arrangement is agreed upon between Israel and the Palestinians, Jordanian rights must not be disregarded.

IX

I have already alluded to widespread expectations in Israel that portions of the occupied territories will be ceded to it. This raises another important issue. Pursuant to Article 52 of the 1969 Vienna Convention on the Law of Treaties, "[a]

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[52]*Supra*, note 4 at 1034-35.

[53]*General Assembly Resolution 2535 (XXIV), 1969*, in D.J. Djonovich, ed., 12 United Nations Resolutions, Series I: Resolutions Adopted by the General Assembly 234 at 235.

treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".[54] Is it therefore to be inferred that a peace treaty ceding territory from the vanquished to the victorious State is null and void? One often hears the argument that, in the words of the Preamble to Resolution 242, "the acquisition of territory by war" is inadmissible.[55] Yet such a formulation is based on a misconception. As accentuated in Article 52, only a treaty induced by an unlawful use of force is invalidated. There is nothing wrong in a peace treaty providing for the acquisition of territory by the victim of aggression, if the latter emerges victorious from the war. Only the aggressor State is barred from reaping the fruits of its aggression. Article 75 of the Vienna Convention clarifies that its provisions "are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State" in consequence of its aggression.[56] That is the reason why the post Second World War boundaries of Europe, reflecting a substantial loss of territory by the aggressor State, Nazi Germany, are valid and legitimate although acquired by force. It is the illegality of the use of force which invalidates treaties whereby territories are ceded from one country to another. Since Jordan was the aggressor State in June 1967, any border rectifications favourable to Israel (agreed upon in a prospective peace treaty) would be legitimate under current international law.

X

So far, I have referred exclusively to the West Bank. There are different issues arising with respect to East Jerusalem, the Golan Heights and the Gaza Strip. A few words are necessary about the status of Gaza, which was governed by Egypt prior to the Israeli occupation. This is admittedly a complicated problem. Unlike Jordan, which brought about a merger of both banks of the river whose name it carries and extended its nationality to the inhabitants of the West Bank, Egypt treated the Gaza Strip as a separate entity. There was no freedom of movement between Egypt and the Gaza Strip, and Egyptian nationality was not offered to the local populace. The issue of sovereignty over the Gaza Strip is far from settled. I am inclined to the view that sovereignty was suspended. In any event, as an enclave between Egypt and Israel, the fate of the territory depended in large measure on what these two countries would do. In actuality, in the *Israel- Egypt, Camp David Framework for Peace in the Middle East, 1978*[57] and in the *Treaty of*

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[54][1969] United Nations Juridical Yearbook at 153.

[55]*Supra*, note 52 at 1035.

[56]*Supra*, note 54 at 159.

[57]*Israel- Egypt, Camp David Framework for Peace in the Middle East, 1978* in 1138 *U.N.T.S.* 39 at 40 [hereinafter *Camp David Agreement*].

Peace, 1979,[58] they agreed to leave Gaza, if only temporarily, in the hands of Israel. The *Camp David Agreement* stipulated a five year transitional period of autonomy resulting from preliminary negotiations, and the long-term future of the area was to be determined by further negotiations.[59] The *Camp David Agreement* time-frame was not observed. Yet the Washington agreement of September 1993 finally lays the groundwork for Israeli withdrawal from Gaza.[60]

XI

The Washington agreement as such does not resolve the future of the West Bank, let alone East Jerusalem[61] or the Golan Heights. The Palestinian right to self-determination must be reconciled with the equally valid Jewish right to self-determination in Palestine. Currently, no one knows how to satisfy both Arab and Jewish claims within the tiny land that is Palestine. Only when Arabs and Jews come to realize that they must arrive at a compromise on this cardinal issue, will the Middle East conflict really come to an end.

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[58] *Supra*, note 34 at 73 (Article II).

[59] *Supra*, note 34 at 41-42.

[60] *Supra*, note 1 at 1529 (Article VI (1)).

[61] *Supra*, note 1 at 1529 (Article V (3)).