

FOUNDATIONS OF THE INTERNATIONAL LEGAL RIGHTS
OF THE JEWISH PEOPLE & THE STATE OF ISRAEL:
IMPLICATIONS FOR THE CURRENT DEBATE

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INTRODUCTION

There is perhaps no area in the world more sensitive or strategic to world security and peace than the Middle East, and arguably no country or city more central to this sensitivity than Israel and its capital and most Holy City Jerusalem.

There are as many opinions on the corresponding issues – even legally speaking – as there are proposed solutions. This is not only true of Israel itself and the territories it administers, but it extends to the city of Jerusalem and the many different views concerning its legal status.¹ Israel in general and Jerusalem in particular represent unique circumstances and, in many ways, do not fit into the normal legal parameters.

Taking Jerusalem, for example, there is no city anywhere that holds such deep-seated roots of religious and spiritual heritage and emotional and cultural bonds. These deep roots and the potential threats to their sanctity play an extraordinarily vital role in that city's significance and can seem to 'trump' even national and international law norms in terms of relevance.

Why is this so vitally significant?

The Jewish heritage reaches back more than three thousand years, Jerusalem itself having been established perhaps more than 2,000 years before it was captured from the Jebusites by King David about 1,000 B.C. The Temple Mount in the Old City (now so-called "East Jerusalem") is the site of the first and second Jewish sacred Temples, containing the "Holy of Holies" – the most hallowed of all spiritual sites for the Jews. As regards the whole of the Land, expressed in their own words:

The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped....

After being forcibly exiled from their land, the people kept faith with it throughout their Dispersion [*Diaspora*] and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom.

Impelled by this historic and traditional attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland.²

Jerusalem is mentioned in the Bible by name over 600 times in the Old Testament alone, as well as throughout the New Testament, and has always been considered the 'capital' for the Jewish people.

The Muslim connection dates back to the oral tradition of Mohammed's 'miraculous night journey' ("*Miraj*"), in 621 AD, on a 'winged creature' from Mecca to the Temple Mount, accompanied by the Angel Gabriel, thus making it – after the Al-Aqsa Mosque and the Dome of the Rock – for many (though not all³) Muslims, the third holiest site of Islam. At the same time, even this 'night ride', as referenced in verse 1 of Sura 17 of the Koran, does not mention Jerusalem at all, only "the farthest [*al-aqsa*] mosque". Since there was no mosque in Jerusalem at that time, the "farthest" mosque cannot have been the one now bearing that name on the Temple Mount in the Old City of ("East") Jerusalem. Still, Islamic tradition holds fast to this claim. In actual fact, the city of Jerusalem is not

¹ For "features" that may explain the reason for these many differences, and "why it is such a thorny problem in the peace process", see Ruth Lapidot, "Jerusalem", in Rüdiger Wolfram, ed., *Max Planck Encyclopedia of Public International Law*, www.mpepil.com, at p. 1.

² Declaration of the Establishment of the State of Israel, *Official Gazette*: No. 1, Tel Aviv, 5 Iyar 5708, 14.5.1948, at p. 1.

³ This does not apply to the Shia Muslims who number some 150-200 million people worldwide, since they revere Najaf, Karbala, Qum, Isfahan, etc., well ahead of Jerusalem. (Appreciation to Salomon Benzimra, P.Eng. for this observation, e-mail of 15 June 2011.)

once mentioned in the Koran, nor has Jerusalem ever served as the capital of Islam or of Arab-controlled Palestine,⁴ under that or any other name.

The Christians date their heritage from the time of Christ, the Jewish “Founder” of their faith, as well as reaching back to take in the entire history of the Jewish people, which was Christ’s own heritage and which Christians regard as their own, mutually with the Jews. For Christians, the Holy Land is “holy” because that is where Jesus Christ was born, grew up, performed His ministry, was crucified, resurrected and ascended from the Mount of Olives, to which He promised to return.

But while the Christians are ‘at home’ in every land in which they choose to dwell, and while the Arabs enjoy jurisdiction over vast areas of territory (21 sovereign Arab States), the Jews have *only one* area of territorial “homeland”: the small State of Israel. For the Jewish people, Israel is their *only* national home and Jerusalem their *only* Holy City and proclaimed “indivisible” capital. The very term “Wailing Wall” – as the Western Wall of the Temple was commonly called prior to the 1967 Jewish recapture of the Temple Mount, under Arab control since 1949 – indicates the depth of the emotionally charged significance of this most sacred place for the Jewish people. As regards the whole of the Land, in the words of Dr. Chaim Weizmann (later President of the World Zionist Organization):

As to the land that is to be the Jewish land there can be no question. Palestine alone, of all the countries in which the Jew has set foot throughout its long history, has an abiding place in his national tradition.⁵

The recognition of the Jewish people’s singularly ancient *historic, religious and cultural* link with an ancestral home has more *legal* significance than it may at first appear, and is easily bypassed in the current heated and polarized debate. These religious and spiritual claims are what have thus far made attempted solutions to territorial and other questions of international law in this area particularly delicate. The real issues are often lacking in clear definition and consensual interpretation of the relevant ‘law’, at times even attributing to it a kind of *sui generis* (one of a kind, unique or ‘peculiar’) character. International law, in itself, does not rely on religious or cultural ties but rather on accepted international law norms and standards, which is why the *legal* recognition of these *historical* aspects, in a *binding international legal instrument*, is so highly significant. It is precisely these *age-old historic ties* which remain the *most compelling reason for maintaining sovereignty over all the territory the Jewish people are legally entitled to under international law*.

The particular sacredness of this Land to such differing ‘faiths’ is clearly demonstrated by the ongoing dispute over the governance of the Holy City of Jerusalem, from the Vatican to the United Nations, including periodic initiatives to give it a separate international legal status as a so-called “*corpus separatum*.” Indeed, because of the delicate and sensitive nature of these ‘spiritual’ connections, Jerusalem is frequently left out altogether from discussions over other disputed territories such as the “West Bank”⁶ and (earlier) Gaza.

The legal arguments will go on and on, with differing interpretations often even on the same side of the arguments. But the fundamental fact that the historical claims of the Zionist Organization, based on centuries-old connections between the Jewish people and “Palestine”, were given recognition in a small town on the Italian Riviera named San Remo, in 1920, and confirmed unequivocally by the

⁴ Arab Palestinians held control over Jerusalem for only 22 years, from 1948-1967.

⁵ Chaim Weizmann, “Essay on Zionism”, reprinted in B. Litvinoff, ed., *The Letters and Papers of Chaim Weizmann*, University of Israel Press, Jerusalem, 1983 (Vol. I) and 1984 (Vol. II) [hereinafter *Weizmann Papers*], Vol. I, Paper 28, pp. 139-140, at p. 139.

⁶ The designation “west bank” was first used by the Jordanians in 1950, after illegally (see Mandate for Palestine, Article 5) annexing the land, to differentiate it from the rest of the country on the east bank of the Jordan River.

terms of the League of Nations Mandate for Palestine in 1922, takes on enormous significance when questions of territorial rights persist.

The ongoing and never-ending legal arguments and political posturing on both sides of the question of the “Palestine” statehood issue will not be resolved in these pages. Yet if the above basic truths with regard to ancestral territory are ignored, all the legal arguments in the world will not bring about an equitable solution. Thus it is important to see in what way(s) this most significant factor of *historical* ties has been endowed with a *legal* character and status that undergird Israel’s legitimate rights in its Land as it confronts today’s territorial conflicts.

While there is no way that the complex current political issues, a culmination of centuries of conflict and legal ambiguities, can be adequately dealt with in one brief document, one thing is certain: laws may change, perceptions may vary, but historical fact is immutable. Therefore, for the special case of Israel and Palestine, we need to look at fact rather than opinion and seek to avoid the promulgation of law that can result from persistent pressures of often misguided, misinformed and/or manipulated public opinion.

Thus our mission here is not to attempt to pronounce legal judgments or to offer legal opinions, where even the best legal minds have not been able to achieve consensus, but rather to proclaim international legal truths in a largely political environment that is too frequently polluted with distortions of the truth and outright untruths. This is meant as a wake-up call and/or reminder of the fundamental international legal rights of the Jewish people that were conferred beginning at the San Remo Conference in 1920 and that had threatened to all but slip into obscurity in the current debate, despite the fact that these rights have never been rescinded.

A correlated intent here is to show where Israel’s age-old historic links with the land intersect with legal parameters to give effect to its international legal status in the face of current political initiatives.

To accomplish these aims, we have only to revert back to the milestone international legal instrument, the Mandate for Palestine of 1922, which emerged from the 1920 San Remo sessions of the Paris Peace Conference of 1919 and in effect transformed the Balfour Declaration of 1917 (the ‘Magna Carta’ of the Jewish people) into a legally binding international agreement that changed the course of history for the Jewish people worldwide.

PART I

FOUNDATIONS OF THE INTERNATIONAL LEGAL RIGHTS OF THE JEWISH PEOPLE AND THE STATE OF ISRAEL

Before we examine the all-important international legal decisions made at San Remo in 1920, it is useful to trace back a few years to get a sense of the legal and political environment that followed in the wake of the dissolution of the Ottoman Empire in 1918, leading up to these historic legal and diplomatic events that both emerged from historical roots and went on to shape Jewish contemporary history.

1. The Balfour Declaration

The history of the international legal turning point for the Jewish people begins in 1917. World War I was exposing a growing need of Jews dispersed all over the world to have a ‘national home’, and in 1917 Prime Minister David Lloyd George expressed to the British War Cabinet that he “was convinced that a Jewish National Home was an historic necessity and that every opportunity should be granted to re-create a Jewish State.”⁷ This ultimately led to Great Britain issuing, on November 2, 1917, a political declaration known as the “Balfour Declaration”. This Declaration stated that:

His Majesty’s Government view 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 should 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.

As confirmed by Lord Balfour to Prime Minister Lloyd George:

Our justification for our policy is that we regard Palestine as being *absolutely exceptional*; that we consider the question of the Jews outside Palestine as one of world importance and that we conceive the Jews to have an historic claim to a home in *their ancient land*; provided that a home can be given them without either dispossessing or oppressing the present inhabitants ... [emphasis added].⁸

This position was shared by the other Principal Allied Powers⁹ who, in the words of Lord Balfour, “had committed themselves to the Zionist programme which inevitably excluded numerical self-determination”.¹⁰ Still, a *Declaration* is not *law*, and a *British Declaration* is not *international*. So while it is arguable that certain obligations of the Balfour Declaration were attributable to the British Government, it was *neither applicable to other States nor a binding instrument under international law*.

⁷ Abraham J. Edelheit, *History of Zionism – A Handbook and Dictionary*, at p. 309.

⁸ Pro. Fo. 371/4179.

⁹ See text accompanying notes 13 and 14, *infra*.

¹⁰ Pro. Fo. 800/217. See also *Documents on British Foreign Policy, 1919-1939*, E.L. Woodward and Rohan Butler, eds., Vol. IV, pp. 1256-1278 (*reprinted* in Walid Khalidi, ed., p. 195, at p. 198).

2. Wilson's "Fourteen Points" and the League of Nations

At the time, the territory known as "Palestine" was still part of the Turkish Ottoman Empire, with which Britain and her allies were at war. Although the British forces entered Jerusalem in December 1917, the war with Turkey in Palestine continued into 1918. Once Britain liberated Palestine from Turkish rule in 1918, it was in a position to implement its policy.

Meanwhile, on 8 January 1918, U.S. President Woodrow Wilson delivered a speech to a joint session of the United States Congress that was to become known as his "Fourteen Points". Included in these points was the statement that the "Turkish portion of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development."¹¹ These Fourteen Points were accepted by some of the key Allied Powers and 'informed' (influenced and were incorporated in part into) certain principles embodied in the Covenant of the League of Nations.

Thus the League of Nations was a direct result of the First World War, its Covenant or Articles of Organization being incorporated in the Treaty of Versailles, which entered into effect in January 1920.

3. San Remo Sessions of the Paris Peace Conference¹²

The next important milestone on the road to international legal status and a Jewish national home was the San Remo Conference, held at Villa Devachan in San Remo, Italy, from 18 to 26 April 1920. This was a post-World War I international reconvening of the Supreme Council of the Principal Allied Powers that had met together in Paris in 1919 with the powers of disposition over the territories which, as a consequence of World War I, had ceased to be under the sovereignty of the Ottoman Turkish Empire.

The Principal Allied Powers of World War I present at San Remo in 1920 were Great Britain, France, Italy and Japan. The United States had entered the war as an "Associated Power", rather than as a formal ally of France and Great Britain, in order to pursue its new policy of avoiding "foreign entanglements".¹³ Thus while the United States was a member of the "Supreme Council of the Principal Allied and Associated Powers" of the Paris Peace Conference, and was known as one of the five "Great Powers", it is not to be associated with the term "Principal Allied Powers", of which there were four.¹⁴ These four Powers were represented in San Remo by the Prime Ministers of Britain (David Lloyd George), France (Alexandre Millerand) and Italy (Francesco Nitti) and by Japan's

¹¹ Woodrow Wilson's Fourteen Points were first outlined in a speech he delivered to a joint session of the U.S. Congress on 8 January 1918. The quote is from Point 12.

¹² The following sections on the San Remo Conference and its legacy borrow heavily upon – in some portions recording verbatim or virtually verbatim (with the full agreement of the author) – Dr. Jacques Paul Gauthier's monumental work, *Sovereignty Over the Old City of Jerusalem: A Study of the Historical, Religious, Political and Legal Aspects of the Question of the Old City*, Thesis no. 725, University of Geneva, 2007. At frequent intervals throughout Part I of this document, the text returns to Gauthier's thesis. While some citations are precisely footnoted, other portions are so interwoven, interchanged, interspersed, and integrated with the author's own contribution, and that of others, that it is virtually impossible to properly footnote them in detail. The author therefore hereby acknowledges the contribution to Part I of the voluminous and rich work of Dr. Gauthier.

¹³ See Spencer C. Tucker, ed., *The European Powers in the First World War: An Encyclopedia*, Garland, NY (1999), at pp. 1232, 1264.

¹⁴ Accordingly, it will be noted that the Paris Peace Treaties and other post-war peace settlements use the language: "Treaty of Peace between the *Allied and Associated Powers* and [e.g. Germany or other treaty partner(s)]".

Ambassador Keishiro Matsui. The United States was present as an “observer”, represented by Robert Johnson, the U.S. Ambassador to Italy.

The San Remo Conference acted as an ‘extension’ of the Paris Peace Conference of 1919 for the purpose of dealing with some outstanding issues that had not managed to be resolved in 1919, including certain claims and legal submissions made by key claimants in Paris, among which Zionist and Arab delegations. In San Remo, the aim of the Supreme Council of the Principal Allied Powers was to consider the claims, deliberate and hand down decisions on the legal recognition of each claim. The fundamental objective of the San Remo Conference, then, was effectively to decide the future of the Middle East following the collapse of the Ottoman Empire. In accordance with President Wilson’s “Fourteen Points”, it was not the intent of the victorious allies to acquire new colonies in the area, but rather to establish there new sovereign States, over the course of time.

The Principal Allied Powers in San Remo were charged, *inter alia*, with responding to the claims that the Zionist Organization had submitted in February 1919 at the Peace Conference in Paris, while taking into consideration the submissions of the Arab delegation. (The Arab and Zionist delegations had pledged to support each other’s claims.) The claims of the Zionist Organization included a demand for the recognition of “the historic title of the Jewish people to Palestine and the rights of the Jews to *reconstitute* their National Home in Palestine” [emphasis added].¹⁵

The boundaries of the “Palestine” referred to in these submissions included territories *west and east* of the Jordan River. The Zionist Organization had requested the appointment of Great Britain as Mandatory (or Trustee) of the League in respect of the Mandate over Palestine. The submissions specified that the ultimate purpose of the Mandate would be the “creation of an autonomous ‘Commonwealth’”, with the clear understanding “that nothing must be done that might prejudice the civil and religious rights of the non-Jewish communities at present established in Palestine, nor the rights and political status enjoyed by the Jews in all other countries.”¹⁶

The policy to be given effect in the Mandate for Palestine was to be consistent with the Balfour Declaration in recognizing the historic, cultural and religious ties of the Jewish people to the Holy Land and the fundamental principle that Palestine should be the location of the *reconstituted* national home of the Jewish people. It is particularly relevant to underline the inclusion in the terms of the Mandate (through Article 2) of the fundamental principle set out in the Preamble of this international agreement that:

recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for *reconstituting* their national home in that country....

Similarly consistent with the Balfour Declaration, as well as being reiterated in the submissions to the Paris Peace Conference, the Mandate’s Preamble, as noted above, was the condition 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.” This conferred no *new* rights on either the non-Jewish inhabitants of Palestine or the Jewish populations in other countries; it merely preserved existing rights in both cases (see also Articles 2, 6, 9 and 13). The Mandate can nonetheless be regarded as affecting the Jewish people worldwide to the extent that it provided a national home for all Jews everywhere to return to, encouraging settlement in Palestine and therefore immigration (Article 6) and facilitating the acquisition of citizenship (Article 7). It was anticipated that non-Jews would live as a protected population within the Jewish national home.

¹⁵ Opening submission of the Zionist Organization, point (1), *Weizmann Papers, supra* note 5, Vol. I, Paper 51, at pp. 221-232, at pp. 221-223.

¹⁶ *Ibid*, point (4).

4. The Decision of the Principal Allied Powers relating to the Mandate for Palestine

The Allied Powers, assembled in San Remo to deliberate this and other submissions, recognized that not all areas of the Middle East were yet ready for full independence, so they agreed to set up Mandates for each territory, with one of the Allied Powers to be in charge of implementing each Mandate, respectively, “until such time as [the territories] are able to stand alone.”¹⁷

Initially three Mandates were assigned – one over both Syria and Lebanon, one over Mesopotamia (Iraq) and one over Palestine. In the first two Mandates, the native inhabitants were recognized as having the capacity to govern themselves, with the Mandatory Power merely serving to advise and facilitate the establishment of the necessary institutions of government. Accordingly, Article 1 of the Mandate for Mesopotamia states:

The Mandatory will frame within the shortest possible time, not exceeding three years from the date of the coming into force of this Mandate, an Organic Law for Mesopotamia. This Organic Law shall be framed *in consultation with the native authorities*, and shall take account of the rights, interests and wishes of *all the populations inhabiting the mandated territory*.

The language notably differed in the case of the Mandate for Palestine, in which it was specifically stipulated in Article 4 that:

An appropriate *Jewish agency* shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine: in such economic, social and other matters as may affect the establishment of the *Jewish national home* and *the interests of the Jewish population in Palestine*, and, subject always to the control of the Administration, to assist and take part in ‘the development of the country.’ *The Zionist organisation*, so long as its organisation and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency.

So while the Preamble states that it is “clearly understood that nothing should be done which might prejudice the *civil* and *religious* rights of existing *non-Jewish* communities in Palestine,” the *political* authority was explicitly vested in the *Jewish people*, with the ultimate objective of the establishment of the *Jewish national home*. The language of the Mandate persistently refers specifically to the reconstituted “*national home*” for the *Jewish people*, the vast majority of whom were not yet living in the Land. Accordingly, while the civil and religious rights of the Arab and other inhabitants were safeguarded, including voting rights, no sovereign political rights were assigned to them. (It is of significance that the Mandate did not distinguish these inhabitants similarly as “a people” or as lacking a “national home”.)

Thus the Mandate for Palestine differed significantly from those established for the other former Ottoman Asiatic territories, setting out *how the Land was to be settled by the Jewish people* in preparation for their forming a viable nation within the territory then known as “Palestine”.¹⁸ The *unique* obligations of the Mandatory to the Jewish people in respect of the establishment of their National Home in Palestine thus gave a *sui generis* character to the Mandate for Palestine.

¹⁷ See San Remo Resolution, Appendix III, para. (c).

¹⁸ It should be noted that the geographical area of Palestine was not identical to that which pertained when it was part of the Ottoman Empire, the borders being left undefined.

It is also important to note that, pursuant to Article 5 of the Mandate:

[N]o Palestine territory shall be ceded or leased to, or in any way placed under the control of the government of any foreign Power.

So having considered the claims, deliberated and reached a decision, the parties to the San Remo Conference thus produced *binding resolutions* relating to the recognition of claims to the Ottoman territories presented in Paris. The members of the Supreme Council reached an agreement which had the force of a *binding decision* of the Powers with the right to dispose of the territories in question.

Accordingly, the Principal Allied Powers, in conformity with the provisions of Article 22 of the Covenant of the League of Nations, decided to entrust to Great Britain the Mandate for Palestine which involved a “sacred trust of civilization” in respect of “the establishment in Palestine of a national home for the Jewish people”,¹⁹ confirming the decision made a few months earlier by these same Powers at a conference in London in February of that year.

The decision made in San Remo was a watershed moment in the history of the Jewish people who had been a people without a home for some two thousand years. From the perspective of Dr. Chaim Weizmann, President of the newly formed Zionist Organization and later to become the first President of the State of Israel, the decision made relating to the destiny of Palestine at the San Remo sessions of the Paris Peace Conference was a turning point in the history of the Jewish people. In Weizmann’s own words:

[T]hat recognition of our rights in Palestine is embodied in the treaty with Turkey;^[20] and has become part of international law, this is the most momentous political event in the whole history of our movement, and it is perhaps, no exaggeration to say in the whole history of our people since the Exile. [The decision of the Supreme Council of the Principal Allied Powers] crowns the British declaration^[21] by enacting it as part of the law of nations of the world.

There are a number of points that should be noted concerning the San Remo decision.²²

1. For the first time in history, Palestine became a legal entity. Hitherto it had been just a geographical area.
2. All relevant agreements prior to the San Remo Conference were superseded. (Although not named at the Conference, this would include both the Sykes-Picot agreement²³ and the Feisal-Weizmann agreement²⁴).

¹⁹ Minutes of Meeting of the Supreme Council of the Allied Powers in San Remo at the Villa Devachan – April 25, 1920 (under “(b) That the terms of the mandates article should be as follows:”).

²⁰ The reference here is to the Treaty of Sèvres (see note 25, *supra*).

²¹ The reference here is to the Balfour Declaration (see Appendix I, *infra*).

²² These points are derived from a lecture by Howard Grief in San Remo on 24 April 2010, as noted by Roy Thurley, “90 Years On: Legal Aspects of Jewish Rights in the Mandate for Palestine”, CFI Communications, Eastbourne UK, 2010, at pp. 4-5.

²³ The Sykes–Picot Agreement of 1916 (in official terminology, “the 1916 Asia Minor Agreement”) was a secret agreement reached during World War I between the British and French governments, with the assent of imperial Russia, defining their respective spheres of influence and control in Western Asia after the expected downfall of the Ottoman Empire during World War I.

²⁴ The Feisal–Weizmann Agreement of 3 January 1919, signed by Emir Feisal (son of the King of Hejaz) and Chaim Weizmann (later President of the World Zionist Organization) was part of the Paris Peace Conference of 1919, settling disputes stemming from World War I. It is noteworthy that, although it was short-lived, the agreement was for Arab-Jewish co-operation on the development of a *Jewish homeland in Palestine* and an *Arab nation in a large part of the Middle East*, NOT in *Palestine*.

3. The Balfour Declaration, which had been given recognition by many Powers prior to San Remo, achieved international legal status.
4. “Jewish people” were designated as beneficiaries of a sacred trust in the Mandate, the first step on the road to leading to national sovereignty, even though most of the Jews had not yet returned to their Land.
5. Henceforward, transfer of the title on Palestine could not be revoked, either by the League of Nations or the United Nations as its successor, unless the Jewish people choose to give up their title.
6. The San Remo decisions were incorporated into the Treaty of Sèvres,²⁵ signed on 10 August 1920 by, *inter alia*, the four Principal Powers and Turkey. [Note: Although the treaty was never ratified by Turkey,²⁶ the same parties (including Turkey) did sign and ratify the superseding Treaty of Lausanne in 1923.²⁷]
7. The Arabs gained even greater rights in Lebanon, Syria and Mesopotamia, as they were considered ready, or near ready, for autonomy.
8. The San Remo decision marks the end of the longest colonized period in history, lasting around 1,800 years.

With reference to the historic connection of the Jews with Palestine, as recognized in the Mandate, Churchill wrote in his White Paper of 1922, shortly before the Mandate’s adoption by the League of Nations:

... it is essential that [the Jewish community in Palestine] should know that it is in Palestine as of right and not on sufferance. That is the reason why it is necessary that the existence of a Jewish National Home in Palestine should be internationally guaranteed, and that it should be formally recognized to rest upon ancient historic connection.²⁸

5. The League of Nations and the Mandate for Palestine

The ultimate Mandate for Palestine approved by the Council of the League of Nations on 24 July 1922 explicitly refers back to the decisions of the Supreme Council of the Principal Allied Powers of 25 April 1920. The Mandate begins: “Whereas the Principal Allied Powers have agreed...”. Upon approval by the League Council, the Mandate became binding on all 51 Members of the League. Since the United States officially endorsed the terms of the Mandate but had not joined the League of Nations, special negotiations between Great Britain and the United States with regard to the Palestine mandate had been successfully concluded in May 1922 and approved by the Council of the League in July. The United States ultimately signed a bilateral treaty with Britain (on 3 December 1924),²⁹ actually incorporating the text of the Mandate for Palestine, thus completing its legal alignment with the terms of the Mandate under the League of Nations.

This act of the League Council enabled the ultimate realization of “the long cherished dream of the restoration of the Jewish people to *their ancient land*” and validated “*the existence of historical facts and events linking the Jewish people to Palestine*”. For the members of the Supreme Council, these

²⁵ The Treaty of Peace Between the Allied and Associated Powers and Turkey, signed at Sèvres, 10 August 1920, *The Treaties of Peace 1919-1923, Vol. II*, Carnegie Endowment for International Peace, New York, 1924.

²⁶ The Treaty of Sèvres was annulled in the course of the Turkish War of Independence.

²⁷ See Part I, section 9, *supra*.

²⁸ The Churchill White Paper of 1922, Cmd 1700 ‘British Policy in Palestine’ published June 1922. This was picked up later in an address by Chaim Weizmann in London in November 1929 (declaring that, subsequent to the Mandate, the Jews were “in Palestine not on sufferance, but by rights”), reprinted in *Weizmann Papers, supra* note 5, Vol. I, Paper 80, pp. 415-420, at p. 417.

²⁹ The Anglo American Treaty of 1924, 44 Stat. 2184; Treaty Series 728.

historical facts were considered to be *accepted and established*.³⁰ In the words of Neville Barbour, “In 1922, international sanction was given to the Balfour Declaration by the issue of the Palestine Mandate.”³¹

In actual fact, the Mandate went *beyond* the Balfour Declaration of 1917. The incorporation, in the Preamble of the Mandate, of the principle that Palestine should be *reconstituted* as the national home of the Jewish people represented a deliberate broadening of the policies contained in the Balfour Declaration, which did not include the concept of *reconstitution*. It is of some interest that, while the word “reconstitute” was absent from the Balfour Declaration, it was actually Lord Balfour himself who ensured the inclusion of this concept in the final, legally binding Mandate. Thus it was not a new idea, ‘grafted on’ at the last moment, but was well deliberated. The ultimate effect was that the rights of the Jewish people under the Mandate for Palestine were thereby *greater* than the rights contemplated in its source document, the Balfour Declaration. According to Abraham Baumkoller:

[T]he choice of the term “*reconstitute*” clearly indicates that in the eyes of the Council, it was not a question of creating something new, but of admitting the *reconstitution* of a situation that already existed ages ago. This idea coincides, if you will, with the notion of ‘historic ties’, even if these are not altogether identical.³²

In addition to the insertion of the ‘*reconstituting*’ language, the phrase in the Mandate’s Article 2: “...*will secure* the establishment” (of the Jewish national home, as laid down in the Preamble of the Mandate) could equally be said to go beyond the Balfour Declaration which uses the considerably milder language: “...*view 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.”

Looking beyond the details, the important point is that the *primary objective of the Mandate* to provide a national home for the Jewish people – including Jewish people dispersed *worldwide* – in their ancestral Land, had been fulfilled. The Arab people, who already exercised jurisdictional sovereignty in a large number of States,³³ were guaranteed protection of their civil and religious rights under the Mandate as long as they wished to remain – even after the State of Israel was ultimately formed in 1948 – including citizenship if they so chose. Moreover, for the Arab population, Trans-Jordan had meanwhile been added as a territory under Arab sovereignty, *carved out of Palestine itself, the very mandated territory at issue*, prior to the actual signing of the Mandate in 1922.

In sum, the Mandate for Palestine, approved by the Council of the League of Nations in July 1922, was an international treaty and, as such, was legally binding. The International Court of Justice (I.C.J.) has since confirmed that the Mandate instrument “in fact and in law, is an international agreement having the character of a treaty or convention”.³⁴

6. The Mandate for Palestine as it Pertains to Jerusalem and the Old City

The rights granted to the Jewish people in the Mandate for Palestine relating to the establishment of the Jewish national home were to be given effect in all parts and regions of the Palestine territory. No exception was made for Jerusalem and its Old City, which were not singled out for special reference

³⁰ Gauthier, *supra* note 12, p. 824; see also *ibid.*, Chapter IV, Section III.5.

³¹ Neville Barbour, *Nisi Dominus – A Survey of the Palestine Controversy*, London: George G. Harrap, 1946, at p. 5.

³² Abraham Baumkoller, *Le mandat sur la Palestine*, Paris: Rousseau, 1931, at p. 150 [translated into English from the original French by the present author].

³³ The Arab people have 21 sovereign States.

³⁴ See International Court of Justice, *South West Africa Cases (Preliminary Objections)*, I.C.J. Reports (1962), pp. 319, 330-332.

in either the Balfour Declaration or the Mandate for Palestine, other than to call for the preservation of existing rights in the Holy Places. As concerns the Holy Places, including those located in the Old City, specific obligations and responsibilities were imposed on the Mandatory.

It follows that the *legal rights* of the claimants to sovereignty over the *Old City of Jerusalem* similarly derive from the decisions of the Principal Allied Powers in San Remo and from the terms of the Mandate for Palestine approved by the Council of the League of Nations. In evaluating the validity of the claims of Israel relating to the Old City, the Council decision is of great significance from the perspective of the rights and obligations that it created under international law. In the view of Oxford international law Professor Ian Brownlie, “in many instances the rights of parties to a dispute derive from legally significant acts, or a treaty concluded very long ago.”³⁵ As a result of these “legally significant acts,” there are *legal* as well as *historical* ties between the State of Israel and the Old City.

The *intellectual* ties were further solidified by the official opening of the Hebrew University on the 1st of April 1925 in Jerusalem, attended by many dignitaries, including the University’s founding father, Dr. Chaim Weizmann, Albert Einstein (another of its founders), Field Marshall Allenby, Lord Balfour, Professor William Rappard and Sir Herbert Samuel and among many others distinguished guests. According to Dr. Weizmann, addressing the dignitaries and some 12,000 other attendees at this memorable event, the opening of the University in Jerusalem was “the distinctive symbol, as it is destined to be the crowning glory, of the National Home which we are seeking to rebuild.”³⁶

In addition to the *legal, historical* and *intellectual* heritage, in the words of one international legal scholar on Jerusalem, Dr. Jacques Paul Gauthier: “To attempt to solve the Jerusalem/Old City problem without taking into consideration the historical and *religious* facts is like trying to put together a 10,000 piece puzzle without the most strategic pieces of that puzzle.”³⁷ In his monumental work entitled *Sovereignty Over the Old City of Jerusalem: A Study of the Historical, Religious, Political and Legal Aspects of the Question of the Old City*,³⁸ Dr. Gauthier offers an exhaustive review of these historical/spiritual/political/legal bonds,³⁹ emphasizing the “extraordinary meaning” of the Old City of Jerusalem and the Temple to the Jewish people.⁴⁰

Indeed, in respect to the question of the Old City, the historical facts and the *res religiosae* (or things involving religion) are rendered legally relevant by the decisions taken at the San Remo sessions of the Peace Conference, together with the terms of the Mandate for Palestine. Notwithstanding the fact that historical, religious or other non-legal considerations may not be considered relevant or sufficient to support a legal claim in other international law cases, these aspects of the issue of the City of Jerusalem are relevant in evaluating the claims of Israel and the Palestinians relating to sovereignty over the Old City, just as much or perhaps even more than over the entire State of Israel and the Holy Land, as noted at the very outset, in the Introduction to the present paper.

7. Arab Opposition

The Arabs of Palestine took the position that the terms of the Mandate for Palestine relating to the establishment of a Jewish national home there contravened the provisions of Article 22 of the Covenant of the League of Nations (setting up the Mandates). This argument is, however, not valid regarding the Mandate for Palestine, since the Principal Allied Powers who were the founders of the League of Nations and the authors of its Covenant had specifically approved the inclusion of the policies of the Balfour Declaration in the Mandate for Palestine in San Remo in April 1920. The

³⁵ Ian Brownlie, *Principles of Public International Law*, Oxford: Clarendon Press, 5th edn, 998, at p. 129.

³⁶ Reprinted in *Weizmann Papers*, *supra* note 5, Vol. I, Paper 87, pp. 442-445, at p. 445.

³⁷ Jacques Gauthier, *supra* note 12, at p. 806.

³⁸ See *ibid.*

³⁹ See *ibid.*, Chapter II, Section II, at p. 812.

⁴⁰ See *ibid.*, Chapter II, Section I.

members of the League of Nations did not challenge the validity of this Mandate after it was approved by the Council of the League in July 1922. The Council was very much aware of the objections of the Arabs of Palestine when it decided to approve the terms of the Mandate.

8. The 1921 Partition of Palestine

One possible exception regarding the Mandatory's obligations related to the "territories lying between the Jordan and the eastern boundary of Palestine". In March 1921, in Cairo, Great Britain decided to partition the mandated territory of Palestine, for international political reasons of its own.⁴¹ Article 25 of the Mandate gave the Mandatory Power permission to "postpone or withhold" most of the terms of the Mandate in the area of land east of the Jordan River ("Trans-Jordan"), if it did not consider them to be applicable. Great Britain, as Mandatory Power, exercised that right.

The Palestine partition proposal was approved by the Council of the League of Nations on the 16th of September 1922. Thus from 1921-1922 there was not yet any effective "partition", only a separate administration. The Zionist Organization presented its objections to this partition decision because part of the "Promised Land" was located on the east bank of the Jordan River (referred to in Hebrew as *Everhayarden*). Therefore,

...to all intents and purposes [*Trans-Jordan was*] *an integral part of Palestine*. We do not differentiate in our sentimental and historical relation between west and east of the Jordan [emphasis added].⁴²

Sir Hersch Lauterpacht – Cambridge professor and *ad hoc* Judge at the International Court of Justice, and considered one of the leading international lawyers of the twentieth century – has expressed the opinion that this fundamental modification of the Mandate for Palestine made by Great Britain and later approved by the Council of the League of Nations contravened the terms of the Mandate for Palestine which was an *international treaty* concluded between the Principal Allied Powers and the Mandatory Power. For Lauterpacht, the consent of the Principal Allied Powers should have been obtained prior to modifying one of the material terms of the Mandate agreement. Furthermore, the modification failed to protect the rights of *non-Arabs* in Trans-Jordan.

In actual fact, the language of Article 25 ("postpone or withhold") suggests that this provision was meant to be temporary. Whatever the case, once the territory of Palestine was partitioned, Winston Churchill – British Colonial Secretary at the time – reaffirmed the commitment of Great Britain to give effect to the policies of the Balfour Declaration in *all the other parts of the territory* covered by the Mandate for Palestine west of the Jordan River. *This pledge included the area of Jerusalem and its Old City*. In Churchill's own words:

It is manifestly right that the Jews who are scattered all over the world should have a national centre and a national home where some of them may be reunited. And where else could that be but in the land of Palestine, with which for more than 3000 years they have been intimately and profoundly associated?⁴³

The effect of the partition of the territory covered by the Palestine Mandate was that 90,000 square kilometers out of a total area of about 117,000 square kilometers – representing about 78 per cent of the territory under the Mandate granted to Great Britain in Palestine – was placed under partial control of an Arab government.

⁴¹ See text accompanying note 46, *infra*.

⁴² From address of Chaim Weizmann of 21 November 1926 in Boston, reprinted in *Weizmann Papers*, *supra* note 5, Vol. I, Paper 95, pp. 484-498 at p. 491.

⁴³ PRO. CO. 733/2.

The increasing tensions during the next decades between Jews and Arabs in the remnant of the territory covered by the Mandate was, according to Chaim Weizmann, partially attributable to the fact that:

...in the dead of the night Trans-Jordan had been separated from Palestine. *When the policy of the National Home was framed, eastern and western Palestine were considered a unit.* Suddenly, more than half [in fact over *three quarters* of] the territory was cut off and an embargo laid on it as far as Jewish colonization was concerned. [Emphasis and bracketed text added.]⁴⁴

There was no new Mandate for Trans-Jordan. It was still covered by the Mandate for Palestine. Thus Great Britain continued as the Mandatory Power over both Jewish and Arab portions. The real partition was finally consummated only in 1946 when, on May 25th, Trans-Jordan achieved independence, relying on the support of Great Britain and the endorsement of the Council of the League of Nations. For former Israeli Ambassador to the UN, Professor Yehuda Zvi Blum, *the rights vested in the Arab people of Palestine with respect to the principle of self-determination were fulfilled as a result of this initial partition of Palestine approved by the Council of the League of Nations in 1922.* According to Professor Blum:

*The Palestinian Arabs have long enjoyed self-determination in their own state – the Palestinian Arab State of Jordan.*⁴⁵

Even more significantly, in a letter of 17 January 1921 to Churchill's Private Secretary, Colonel T.E. Lawrence ("Lawrence of Arabia") wrote that he had reached an "agreement" with Emir Feisal, the eldest son of King Hussein (internationally recognized King of Hejaz and self-proclaimed King of all Arabs). Feisal – a man said by Lawrence to be known for keeping his word – had agreed that in return for Arab sovereignty in Iraq, Trans-Jordan and Syria, he would *abandon all claims of his father to Palestine.* While such an agreement cannot be enforced under international law, Great Britain nonetheless accepted this condition in good faith and acted upon it in a way that had *legally binding consequences.* King Hussein himself exclaimed: "*The truth is that Jordan is Palestine and Palestine is Jordan.*"⁴⁶ The terms of the agreement have apparently been conveniently forgotten or ignored by Feisal's successors, in what might be deemed indicative of the hazards of the notion of "land for peace" or "land swaps", as evidenced from the very outset of the "Palestinian question".

This is apart from the fact that, before the dissolution of the League of Nations on 17 April 1946, all the so-called "Class A" mandates (i.e. those mandated territories that had been deemed ready or near ready for self-government), including the Hashemite⁴⁷ Kingdom of Trans-Jordan, had become autonomous or gained their independence – all *except* for the territory covered by the Mandate for Palestine located west of the Jordan River. It should be mentioned that the partition of Palestine by Great Britain did not remove the rights under the terms of the Mandate for Palestine of the Arab inhabitants of the territory of Palestine located west of the Jordan River. The rights thereby granted to

⁴⁴ Reprinted in *Weizmann Papers*, *supra* note 5, Vol. I, Paper 116, pp. 590-593, at p. 591.

⁴⁵ On behalf of Israel, in submissions to the UN General Assembly on 2 December 1980, United Nations General Assembly Official Records (GAOR), XXXVth Session, Plenary Meetings, 77th Meeting, 1318, para. 108.

⁴⁶ King Hussein, 1981. Further similar statements: "We are the government of Palestine, the army of Palestine and the refugees of Palestine." Prime Minister of Jordan, Hazza' al-Majali, 23 August 1959. "Palestine and Transjordan are one." King Abdullah, Arab League meeting in Cairo, 12 April 1948. "Palestine is Jordan and Jordan is Palestine; there is one people and one land, with one history and one and the same fate." Prince Hassan, brother of King Hussein, addressing the Jordanian National Assembly, 2 February 1970. "Jordan is not just another Arab state with regard to Palestine, but rather, Jordan is Palestine and Palestine is Jordan in terms of territory, national identity, sufferings, hopes and aspirations." Jordanian Minister of Agriculture, 24 September 1980.

⁴⁷ The Hashemites were the most powerful Arab tribe of that time.

the Jewish people (with the exception of the provisions of Article 25 of the Mandate, relating to Trans-Jordan) were aimed at the establishment of a Jewish national home *throughout* Palestine.

History is left to judge how Britain carried out the “sacred trust” vested in it by the League of Nations.

9. The Treaty of Lausanne

One year after the approval of the Mandate for Palestine by the Council of the League of Nations, on 24 July 1923, the Treaty of Lausanne was signed by Turkey. While this Treaty contained no specific reference to Palestine, by its Article 16 Turkey renounced “all rights and title whatsoever over or respecting the territories” which implicitly included Palestine, “the future of these territories and islands being settled or to be settled by the parties concerned”. Turkey thereby relinquished all rights and title over the region (including Jerusalem and its Old City). This paved the way for the entry into force of the Mandate for Palestine on 29 September 1923, when the British officially assumed control of the Palestine Mandate.⁴⁸

10. The UN Partition Plan – Resolution 181 (II) and Arab Rejection

After the Second World War, the League of Nations was disbanded and a new international peacekeeping body, the United Nations Organization, was set up. This new body inherited all the agreements made by its predecessor, including the Mandate for Palestine. In 1947 Britain decided to terminate her stewardship of the Mandate, and notified the United Nations accordingly. It should be noted that *the Mandate itself was not terminated*, but only Britain's stewardship of it. In a similar way, Britain's stewardship of the Trans-Jordan portion of the Mandate had been terminated the previous year by virtue of that country gaining its independence.

In November 1947, the United Nations proposed a Partition Plan for Palestine (Resolution 181 (II)), recommending the setting up – in the remaining 22 per cent of the original Palestinian Mandate – of another Arab State, a Jewish State and an international zone to include Jerusalem. This Resolution to consider partition, as is the case with all UN General Assembly Resolutions, was only a *recommendation*.⁴⁹ It was accepted by the Jewish leadership but rejected by the Arabs. This important fact is often left out of the debate. It should also be noted that if UN Resolution 181 were valid today (which it is not), then so would be the provision in Part III-D that stipulates that after ten years, Jerusalem's international status could be subject to a referendum of all Jerusalem residents as to a change in the status of the City – a decision that today, as in the past, would have been made by Jerusalem's decisive Jewish majority.

Around the time of the reconstitution of Israel as a State, in May 1948, there was some talk of reviving the Partition Plan, but by the end of Israel's forced 1948 War of Independence and the

⁴⁸ See League of Nations Official Journal, November 1923, 4th Year, No. 11, Twenty-Sixth Session of the Council, paras. 1087 and 1092, at pp. 1349 and 1355.

⁴⁹ Security Council Resolutions are legally binding only where international peace and security are threatened, as specified in Chapter VII of the Charter (“Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”). Resolutions made under Chapter VI (“Pacific Settlement of Disputes”) are *not* legally binding, primarily because there is no international enforcement mechanism. (See e.g. Hillier, Timothy, Taylor & Francis Group. *Sourcebook on Public International Law*, London: Cavendish Publishing, 1998, at p. 568; Philippe Sands, Pierre Klein, D. W. Bowett, *Bowett's Law of International Institutions*, London: Sweet & Maxwell, 2001, at p. 46; *et alia.*) Exceptions are made by certain States that give constitutional or special legal status to the UN Charter and Security Council resolutions. (See generally, e.g., *National Implementation of United Nations Sanctions: A Comparative Study*, Vera Gowlland-Debbas, Djacoba Liva Tehindrazanarivelo, The Hague: Brill, 2004; John Dugard, *Recognition and the United Nations*, Cambridge UK: Cambridge University Press, 1987.)

conclusion of the 1949 armistice agreements, Resolution 181 had become largely moot, as the establishment meanwhile of a military armistice-line (the “Green line”) had created the expectation of an ensuing negotiation of peace treaties.

A July 1949 working paper of the UN Secretariat entitled “The Future of Arab Palestine and the Question of Partition” noted further that:

The Arabs rejected the United Nations Partition Plan so that any comments of theirs did not specifically concern the status of the Arab section of Palestine under partition but rather rejected the scheme in its entirety.⁵⁰

Israel was ready to declare its independence when it felt it was able to meet all the criteria and international responsibilities of statehood and assume full international legal responsibility. The actual declaration of statehood was somewhat hastened by the earlier than anticipated withdrawal of British forces, resulting in the State of Israel being born at midnight on the 14th of May 1948.⁵¹ This event basically fulfilled the ultimate aim of the drafters of the San Remo decision nearly thirty years before.

The primary objective of the Mandate for Palestine had been achieved, although the State established in 1948 was not exactly what was contemplated in San Remo in 1920, where the Jewish national home was first envisaged as including Palestinian territory on both sides of the Jordan (as was the case in *Eretz Yisrael*). In any case, Israel’s new status as a nation-state, essentially west of the Jordan River, was effectively confirmed and ‘officially’ recognized by the United Nations upon its acceptance of Israel into membership on 11 May 1949, one year after Britain’s termination of the Mandate and Israel’s simultaneous declaration of independence.

Thus, Israel’s statehood does *not* rely, as many suppose, on the United Nations Partition Plan of 1947 (Resolution 181). In a word, *the primary foundations in international law for the “legal” claim based on “historic rights” or “historic title” of the Jewish people in respect of Palestine are the San Remo decisions of April 1920, the Mandate for Palestine of July 1922 and the Covenant of the League of Nations (Art. 22).* These instruments alone constitute the ‘Charter of Freedom’ of the Jewish people.

⁵⁰ UN document A/AC.25/W.19.

⁵¹ The British had notified the UN of their intent to terminate the Mandate for the remaining part of Palestine (outside of Trans-Jordan) no later than 1 August 1948. Then early in 1948, they announced their resolve to end the Mandate on May 14th. The Jewish leadership, under future Prime Minister David Ben-Gurion, accordingly declared independence on the afternoon of Friday, 14 May 1948, with the declaration to become effective from the end of the Mandate at midnight of that day.

PART II

THE QUESTION OF A UNILATERAL DECLARATION OF A PALESTINIAN STATE

In order to get the proper perspective in considering the international legal framework surrounding the question of a unilaterally declared Palestinian State with the Old City of Jerusalem as its capital, we need first to go to some of the sources of contention. As this involves making reference to highly controversial “core” issues, the main aim here is *not* to presume to cover all aspects of each issue and/or offer cursory legal opinions. The objective is rather to provoke some new thinking beyond the current clichés and to raise awareness over (‘innocent’ or intentional) (mis)usages of language to influence and manipulate public opinion and potentially culminate in ill-founded legally binding decisions with long-term consequences.

As in Part I, in order to gain a better understanding of the roots of the current heated debate, a brief look at the historical setting out of which today’s issues arise is needed. This will help to make sense out of the following efforts at connecting the historical legal foundations with the current debate.

1. Israel’s War of Independence

On 15 May 1948, one day after the creation of the State of Israel, the Arab armies of Egypt, Syria, Jordan, Iraq, Saudi Arabia and Lebanon invaded the new Jewish State, soon joined by Yemen. By the time hostilities ceased in January 1949, Israel had lost a significant part of its mandated territory to the invading forces – namely, Judea and Samaria (including the eastern part of Jerusalem) to Trans-Jordan, and the Gaza Strip to Egypt. Such an invasion, unilaterally or collectively, for the purpose of acquiring territory, is contrary to international law. Whereas Egypt only *occupied* its captured territory, Trans-Jordan illegally *annexed* Judea and Samaria and called the combined entity the “west bank” in order to link the territory with the east bank of the Jordan. This annexation was only recognized by two nations, namely, Britain and Pakistan. It should be noted that, in any case, recognition of annexation, however limited or general, has no bearing upon the question of legality under international law.

The areas captured by the surrounding Arab countries by the time of the 1949 Armistice Agreements continued under Arab control until the Six-Day War of June 1967.

2. The Six Day War

The Six-Day War, fought from 5 to 10 June 1967 between Israel on the one hand and Egypt, Jordan and Syria on the other, was a swift and decisive victory for Israel, allowing it to reclaim those territories it had lost in 1948. From Israel’s perspective, this was a defensive war, since, for example, on May 15th, Israel’s Independence Day, Egyptian troops had begun moving into the Sinai and massing near the Israeli border, and by May 18th Syrian troops as well were positioned for battle along the Golan Heights. Egypt had also paved the way for war by ordering the removal of special UN peacekeeping forces in the Sinai as of May 16th, a withdrawal that, absent any consultation with the UN General Assembly, was completed within three days.⁵² Then on May 22nd, Egypt had effectively declared war by blocking the Straits of Tiran in the Gulf of Aqaba, Israel’s vital trading and supply link to the rest of the world; and by May 31st, Egypt had moved 100,000 of its own troops

⁵² See Martin Gilbert, *Israel, A History*, London: Black Swan, 1998, at pp 366-367.

plus 1,000 tanks and 500 heavy guns into the Sinai ‘buffer zone’.⁵³ The avowed objective was the “extermination of Zionist existence”⁵⁴ and the “annihilation” of the “Zionist presence”⁵⁵ in Israel.

Shortly after the outbreak of war, Jordan also declared war on Israel. These declarations of war gave rise to the right of military self-defence and legitimized the recapture of the territories Israel had lost in 1948. First, Israel was not acquiring territory as an aggressor, but rather in a defensive war which, like its War of Independence 19 years earlier, had been forced upon it by the surrounding Arab nations desiring to annihilate it. Secondly, the recaptured areas were a part of the territory rightfully restored to Israel in fulfilment of the Mandate for Palestine.

In fact, after returning the Sinai to Egypt in the peace agreement of 26 March 1979, the territory under Israeli control was almost identical to that which comprised the Mandate for Palestine allotted to it west of the River Jordan in 1922. Israel ultimately also withdrew from the Gaza Strip, on 12 September 2005, but did not transfer control to any other State. Thus, legally, the Gaza Strip remains part of Israel’s territory, even though it is not occupied by it at this time.

3. The “Palestinian” Identity

Something that is largely overlooked in the current debate is the point to which equitable resolutions to the issues of today’s Israeli / Arab Palestinian conflict is exacerbated by linguistic hyperbole, factual distortion or pure political manoeuvring and calculated rhetoric.

Take for example the word “*Palestinians*” itself. “Palestine” is actually a land the Jews have called “*Eretz-Israel*” (the “Land of Israel”) for over three thousand years. The name “Palestine” was actually first applied in Greek and Roman texts. At the time of the San Remo decision and the resulting Mandate for Palestine, the territory then known as “Palestine” was attributed *exclusively* to the Jewish people for the “*reconstitution*” of their national home. Indeed, this was the very purpose of the Mandate for Palestine and its precursor the Balfour Declaration. While care was taken to protect the rights of Arab inhabitants, the Jews alone were a people without a country. This fact is seriously clouded by the linguistic extension of the name “Palestinian” solely to the present-day remnant and descendants of those who fled or otherwise left the territory of the former greater Palestine (see next section).

“Palestine” was the name applied to the entire mandated territory at the time that Israel came under the League Mandate (i.e. *all* Jewish inhabitants of that territory were equally “Palestinians”). This means that when the Mandate was created there were effectively both “Palestinian Jews” and “Palestinian Arabs”, as well as other inhabitants of the territory.

At the time of the Mandate, it would have been more accurate to refer to “Palestinian Jews” and “Palestinian Arabs” (along with the various other non-Jewish inhabitants). But owing to the creation of the State of Israel, the Palestinian Jews reclaimed their ancient name of “Israelis” while the non-Jews (mainly but not all Arabs) continued under the name “Palestinians”, with the foreseeable result that they are now viewed as being the rightful inhabitants of the Land.

Thus by virtue of word association, the strong and distinct but erroneous impression is created that it is the (Arab) “Palestinians” who are the real ‘titleholders’ to the territory and that they have been displaced by an aggressive foreign occupying power with no natural or historical claim to the land.

⁵³ See Martin Gilbert, *Atlas of the Arab-Israeli Conflict*, Oxford: Oxford University Press, 1993 (6th edn.), at p. 67.

⁵⁴ The Voice of the Arabs radio station, 18 May 1967, as recorded in Isi Leibler, *The Case For Israel*, Australia: The Globe Press, 1972, at p. 60.

⁵⁵ Syrian Defense Minister Hafez Assad, 20 May 1967, as recorded in *ibid.*

In actual fact, the Land called “Palestine” covers territory that the Jews have called the “Holy Land” since well before the name “Palestine” was first used by the Greeks and Romans.

Thus in a word, the territory once known as “Palestine” has never – either since this name was applied or before – been an Arab nation or been designated to become a sovereign Arab nation. Yet this nomenclature carries with it great psychological impact, with the inference that it is the former Arab inhabitants of Palestine that are the *true* “Palestinians”, that they therefore uniquely *belong* in “Palestine” as a distinct ‘people’, and that they have been displaced from territory that was *their* ancestral heritage (although they controlled territory there for only 22 years), rather than that of the Jewish “Palestinians” who in actual fact inhabited the Land for thousands of years had no other ‘home’.

4. The “Refugee” Question

A simple but long-accepted legal definition of “refugee” is “a person who flees or is expelled from a country, esp. because of persecution, and seeks haven in another country.”⁵⁶ It must be recalled that the principal 1948 “refugee problem” was the direct result of the invasion of all the Arab League nations⁵⁷ upon the termination of the British Mandate and the resulting declaration of independence creating the modern State of Israel,⁵⁸ *not* as a result of any policy or practice of systematic persecution of Palestinian Arabs by Palestinian Jews / Israelis.

The new Jewish State had been quickly recognized by the Soviet Union, the United States, and many other countries, but not by the surrounding Arab States, which immediately attacked the new-born State of Israel, resulting in the understandable outflow of Palestinian refugees. The Arab States provided little help to Palestinians that became refugees as the result of their invasion. It was only Jordan, with understandably the largest Palestinian refugee community in the world, that early on extended full citizenship to all Palestinians who fled across the River into Jordan or who remained in the western areas of Palestine controlled by Jordan. Yet even Jordan – itself, after all, former Palestine and already home to many Palestinians – later revoked these citizenships in contravention of international law and human rights.

Further, it must be acknowledged that Arab Palestinians were not the only ones forced to flee the nascent State of Israel under the multi-pronged Arab attack. Jewish inhabitants themselves were forced to flee from their long desired national home. From Jerusalem alone, 25 percent (c. 25,000) of the *Jewish* population fled, and their synagogues were destroyed. The latter actually constitutes Arab persecution of Jews in their own land, in addition to the threat to their lives. Families of *all* inhabitants of the land, independent of race, religion or language, fled to escape the ravages of war. (Some of the wealthier Arab inhabitants actually left the country *prior* to the outbreak of war, on the inside knowledge of what was about to occur.⁵⁹ Indeed, “[m]any Arabs were encouraged to leave by their own political leaders, who promised them that they would soon be able to return to their homes, once Israel had been destroyed.”⁶⁰)

In addition to refugees of whatever description fleeing a newly re-born Israel under siege, the Jewish people suddenly found themselves subject to a new wave of persecution in Arab and other Muslim lands where there was no war waging. On 16 May 1948, two days after statehood was declared by Israel, the *New York Times* quoted a UN Economic and Social Council report as revealing that: “*The very survival of the Jewish communities in certain Arab and Moslem countries is in serious danger,*

⁵⁶ Black’s Law Dictionary, 8th edn., Bryan Garner, ed., Thomson, West [c. 2004].

⁵⁷ See Part II, section 1, *supra*.

⁵⁸ See Part I, section 10, note 51 and accompanying text, *supra*.

⁵⁹ See Letter 1355 from Howard Grief to Donna Bank of 23 January 2011.

⁶⁰ See Gilbert: *Atlas of the Arab-Israeli Conflict*, *supra* note 53, at p. 47.

unless preventive action is taken without delay.” Indeed, Israel’s declaration of independence caused a surge of “premeditated state-sponsored” persecution of Jewish populations in Arab countries on such a scale that some 900,000 Jews were obliged to flee from their homes in Arab nations “from Casablanca to Karachi”,⁶¹ thus becoming “refugees” to the full “letter” of the definition – *a fleeing or expelled persecuted people*. This side of the refugee question is rarely heard.

The point here is not one-upmanship. The point here is that these thousands of Jewish refugees, reportedly more numerous than their Arab counterparts,⁶² have long since reintegrated, been reabsorbed into society and resumed normal and productive lives. This is apart from the fact that since that time, Jordan (i.e. Arab Palestine) has actually *expelled* Jews, which not only makes them true refugees by definition (yet we never hear of them) but which is in direct contravention to Article 15 of the Mandate for Palestine. Article 25, which enabled the establishment of Trans-Jordan for the Palestinian Arabs and ultimately the sovereign State of Jordan, provides that “no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18.” Article 15 reads in part:

No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief.

This applies to *all* of former Palestine.

The present plight of all those living in refugee camps is truly pitiable and rightfully arouses the compassion of the world. As recently as August of 2011, a refugee camp in Syria came under sustained assault from Syrian Government forces. An UNRWA spokesperson said that “many people around the world were shocked by the images of unarmed refugees being shot at as they fled from their homes, amid the firing on their refugee camp.”⁶³ This was Arabs firing on Arabs refugees.

The fact is that most of the Palestinians identified as “refugees” are well over a generation away from the events that caused the foregoing generation to flee. Reportedly some 90 per cent of the “refugees” now living as such never, themselves, inhabited or fled the Land of Israel.⁶⁴ For the most part, the latest generation of those “refugees” situated outside of the Land does not even know Israel; it was never their home.⁶⁵

There are 21 sovereign Arab nations, most of which have already enjoyed statehood for generations, with the collective capacity and resources to have long since welcomed their Palestinian brothers back to be reabsorbed into their own vast homelands, particularly those lands carved out for them at the same moment in history that Palestine was being set apart for the Jewish national home. Indeed, *in addition* to the other San Remo mandated territories that gained statehood before Israel and could have absorbed their Arab brothers, Trans-Jordan was partitioned off *especially* for the Palestinian Arabs in territory originally envisaged for the Jewish national home. ***This already furnished a legitimate ‘new State’ for the Arabs within the very territory of ‘Palestine’ as it was then known.***

The “refugees” are in effect being inhumanely “used” for a political cause that is not inherently their own. Their plight has been ‘high-profiled’ for over six decades and prolonged interminably as a symbol and silent weapon for political and territorial gain in the interest of a further incursion into the Jewish mandated territory. This is not mere supposition. Arab leaders over the years have *expressly*

⁶¹ See Eli E. Hertz, “UN Resolution 194: Arab Leaders Point to Resolution 194 as Proof that Arab Refugees Have a “Right to Return” – False, 13 August 2009, <http://www.mythsandfacts.org/Conflict/10/Resolution-194.pdf>.

⁶² See Grief, Letter 1355, *supra* note 59.

⁶³ See UN News Service, 19 August 2011, “UN provides emergency help to Palestinian refugees displaced by fighting in Syria”, <http://www.un.org/apps/news/story.asp?NewsID=39342&Cr=Syria&Cr1>.

⁶⁴ See Grief, Letter 1355, *supra* note 59.

⁶⁵ Regions with significant “1948 refugee” populations outside of Israel (sometimes known as “present absentees”) and the Gaza Strip and “West Bank” are Jordan, Lebanon and Syria.

stated that the Palestinian refugees are maintained as a weapon against Israel. These statements and corresponding policy moves speak very powerfully for themselves. For example:⁶⁶

- In April 1949, at the UN Palestine Conciliation Commission at Lausanne, Israel offered to repatriate 100,000 Arab refugees within the framework of a general settlement. The Arab delegations rejected the offer.
- In 1950 the United Nations Relief and Works Agency (UNRWA) proposed resettling the Arab refugees in Sinai, Jordan and Syria, but the Arab Governments rejected this proposal.
- In 1952 the UN Refugee Rehabilitation Fund offered the Arab States \$200 million to find ‘homes and jobs’ for the refugees. The Arab States used some of the money for relief work, but did not even apply for the greater part of the fund.
- Al Siyyad, Beirut, 6 April 1950: “The return of the refugees....forming a powerful fifth column for the day of revenge and reckoning.”
- Abd Allah Al-Yafi, Lebanese Prime Minister, 29 April 1966: “The day of realisation of the Arab hope for the return of the refugees to Palestine means the liquidation of Israel.”^[67]
- Radio Cairo 19th July 1957: “The refugees are the corner-stone in the Arab struggle against Israel. The refugees are the armaments of the Arabs and Arab nationalism.”

The use of “refugees” as political pawns – “innocent victims” of the deliberate perpetuation of their refugee status, generation after generation, while their numbers and the related financial burden on the international community continue to increase exponentially – is unique in human history. The 1948 refugees and their descendants now reportedly number into the 5 to 6 million⁶⁸ and the issue is being kept alive *through simply prolonging the use of the term “refugees” into every succeeding generation*. It is UNWRA and not international law that has conferred refugee status on the descendants of the 1948 refugees. International law has never had to grapple with the question of the perpetual ‘inheritance’ of refugee status.

5. The “1967 Lines”

As a point of reference for a new Palestinian State, there is constant mention of withdrawal to the “1967 borders”. Firstly, this terminology is legally incorrect. The word “borders” is generally used in international law to mean “national boundaries”, which the “1967 lines” most decidedly are not. The definition of a “border” under international law is “a boundary between one nation (or a political subdivision [of that nation]) and another.”⁶⁹ No such national boundaries have ever been established for the reborn State of Israel. The 1967 so-called “boundaries” are purely *military* no-cross lines, *expressly* repeated in *numerous* Israeli-Palestinian agreements to neither represent national borders nor prejudice the future bilateral negotiation of same.

The term “1967 lines” is used to indicate the lines from which the Israeli military moved into territory to counter the attacks that initiated hostilities on 5 June 1967 (the Six-Day War). They do not – nor did they ever – represent national boundaries, nor have they ever even been defined as national

⁶⁶ The following bulleted quotes are found in Gilbert, *Atlas of the Arab-Israeli Conflict*, *supra* note 53, at p. 54.

⁶⁷ On the Right of Return as applied to the Arab Palestinians see Eli E. Hertz, “UN Resolution 194: Arab Leaders Point to Resolution 194 as Proof that Arab Refugees Have a “Right to Return” – False, 13 August 2009, <http://www.mythsandfacts.org/Conflict/10/Resolution-194.pdf>.

⁶⁸ These figures come from Benny Morris, “Exposing Abbas – Why Israel?”, 23 May 2011. In general, refugee figures are unreliable, since persons in need of support who became refugees as a result of the 1967 conflict have been added to the roles by UNWRA. Moreover, deaths are often not reported so as not to reduce aid for the family of the deceased. Other refugees are from time to time registered with the Palestinian refugees, as well as other needy individuals who have never been refugees, at the discretion of UNWRA. (See e.g. UNGA doc. A/2171 of 30 June 1952, General Assembly Official Records (GAOR): Seventh Session, Supp. No. 13 (A/2171), New York, 1952.)

⁶⁹ Black’s Law Dictionary, *supra* note 56.

borders in any legal document pertaining to “Palestine” or Israel. Thus such “lines” construed as “borders” can be derived from neither “history, law nor fact”.⁷⁰

These “lines” (also called the “Green Line” because they were originally marked out on a map with a green marker) are *armistice demarcation lines*, resulting from the armistice agreements signed between Israel and its Arab neighbours Egypt, Jordan, Syria and Lebanon in 1949, following the 1948 War of Independence. These 1949 armistice lines were no more than lines separating armies and were dictated exclusively by military considerations. They were never intended to do more than delimit the lines that the military forces of each affected party were committed not to cross “during the transition to permanent peace in Palestine”⁷¹ and until permanent borders could eventually be negotiated between the respective parties. This *transitional, provisional* character of the ceasefire lines was emphasized in all of the respective armistice agreements. They remained valid only until the outbreak of the 1967 Six-Day War. Accordingly, the most accurate, appropriate and transparent term for the “Green Line” would be the “*pre-1967 armistice lines*”. Falsely linking them with the 1967 war – where lost territory was recovered by the Israeli Defense Forces – by calling them “1967 borders” instead of 1949 armistice lines, fosters the erroneous notion that these are ill-gotten *national* “borders”, thus highly prejudicing the issue and its outcome.

The exact language of the Israel-Jordan Armistice Agreement, signed on 13 April 1949 and typifying all the respective agreements, reads:

The basic purpose of the Armistice Demarcation Lines is to delineate the lines beyond which the armed forces of the respective Parties shall not move.⁷² ... [as] agreed upon by the Parties *without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto* [emphasis added].⁷³

All of the 1949 armistice agreements expressly provide that such lines have no political or legal significance that could in any way prejudice future arrangements or agreements under international law. Nothing has ever changed this. On 28 May 1967 Professor Mughraby wrote in the *Beirut Daily Star*:

Israel is the only State in the world which has no legal boundaries except the natural one the Mediterranean provides. The rest are nothing more than armistice lines, can never be considered political or territorial boundaries.⁷⁴

In the aftermath of the Six-Day War, even the United Nations was forced to recognize that the armistice lines were not appropriate for the assurance of protection against aggression. Accordingly, UN Security Council Resolution 242 of 22 November 1967, which formed the “conceptual foundation”⁷⁵ for an eventual peace settlement, is aimed at guaranteeing that all States in the region have “safe and secure” borders. Even Resolution 242, which has been interpreted in many different ways, did not seek to determine where those boundaries should be drawn.

The U.S. ambassador to the UN at the time, former Supreme Court Justice Arthur Goldberg, pointed out in 1973 that the fact that the resolution omitted to call for total withdrawal is in recognition of the fact that “*Israel’s prior frontiers had proven to be notably insecure.*” Even the Soviet delegate to the

⁷⁰ See Alan Baker, “The Fallacy of the ‘1967 Borders’ – No Such Borders Ever Existed”, *Jerusalem Issue Brief*, Vol. 10, No. 17, 21 December 2010, at p. 1. (Allen Baker is former Israel Foreign Ministry legal advisor.)

⁷¹ See UN Security Council Resolution 62 of 16 November 1948.

⁷² Israel-Jordan Armistice Agreement, Article IV(2).

⁷³ *Ibid.*, Article VI(9).

⁷⁴ As excerpted and edited from and cited in Danny Ayalon, “Israel’s Right in the ‘Disputed’ Territories”, *Wall Street Journal*, Opinion Europe, 20 May 2011. (Mr. Ayalon is the Deputy Foreign Minister of Israel.)

⁷⁵ Eli E. Hertz, “No Return to the 1967 Borders”, *Myth and Fact*, 29 April 2011.

UN, Vasily Kuznetsov, who fought against the final text, conceded that the resolution gave Israel the right to “withdraw its forces only to those lines it considers appropriate.”⁷⁶

Lord Caradon, the British UN Ambassador at the time and the resolution’s principal drafter, who introduced it to the Council, said in 1974 unequivocally that:

It would have been wrong to demand that Israel return to its positions of June 4, 1967, because those positions were undesirable and artificial.⁷⁷

Eugene V. Rostow, U.S. Undersecretary of State for Political Affairs in 1967 and one of the drafters of the Resolution, stated in 1990 that it and subsequent Security Council Resolution 338:

...rest on two principles, Israel may administer the territory until its Arab neighbors make peace; and when peace is made, Israel should withdraw to ‘secure and recognized borders,’ which need not be the same as the Armistice Demarcation Lines of 1949.⁷⁸

Even the “Road Map”,⁷⁹ initiated by the “Quartet” (the European Union, the United Nations the Russian Federation and the United States) in 2003 refers to *the still outstanding need to negotiate permanent borders*. This document not only puts off the “borders” question until the second and third phases of implementation (and only then if a responsible Arab Palestinian leadership has been elected) but it calls initially for only “provisional borders” pending a permanent settlement with “final status” borders in the third stage, and requiring international recognition.

In a word, the 1967 lines are *not* “borders” at all, and this word should not be used to create and perpetuate the impression that Israel has illegally transgressed the borders of another State, when this is clearly not the case.

6. The Disputed Territories

Any discussion of the so-called “occupied territories” has become all but politically ‘taboo’. Nonetheless, one or two points need to be borne in mind in the ongoing debate. Suffice it to say that the sentiment and political and even legal rhetoric is very strong here. Positions taken on both sides are adamant. But it must be acknowledged that the widespread use of the words “occupied territory” with an implied sense of “*belligerent* occupation” rather than simply “disputed territory” (which in fact it is) has a major psychological impact that can result in real and even legal ramifications.

Furthermore, this language and what it (falsely) tends to connote (i.e. “belligerent occupation”) totally ignores the international treaty language of “reconstituted”, as contained in the Mandate for Palestine. *Reconstituted* territory *precludes* “belligerent occupation”, even if permanent national borders have yet to be negotiated. A State cannot, by definition, be a “belligerent occupying power” in a territory that is being “reconstituted” in its name, according to the provisions of a legally binding instrument of international law. The territory in question is occupied *Israeli* territory, *not* occupied *Palestinian* territory. This is a perfectly acceptable status under international law and brings with it certain legal responsibilities, on the part of the occupier, toward the inhabitants of the occupied territory.

⁷⁶ Ayalon, *supra* note 74.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ “Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict” of 30 April 2003.

The definition of “occupied territory” in international law is given in Article 42 of the Hague Regulations:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.⁸⁰

It could be argued that Israel’s “occupation” of the disputed territories does not fall under the classic definition of military occupation at all, in that such “occupation occurs when a belligerent State invades the territory of another State with the intention of holding the territory at least temporarily.”⁸¹ The territory that Israel reclaimed in 1967 was never rightfully “the territory of another State”, nor did Israel obtain it by war of aggression, as noted above. Indeed, it was territory that had been specifically designated for a *Jewish* national home, under the legally binding League of Nations Mandate for Palestine in 1922. Despite the *eastern* three quarters of the territory then known as “Palestine” being partitioned off (from territory originally designated in 1920 by the San Remo resolution for the Jewish national home, with borders to be determined), in order to form the Arab territory of Trans-Jordan, nothing has altered the final 1922 League-approved Mandate *west* of the Jordan or assigned that territory to any State other than Israel.

Under international law, the applicability of the legal regime on “*belligerent* occupation” (often popularly but erroneously assumed to be the meaning here) enters into effect “as soon as the armed forces of a *foreign* power have secured effective control over a territory that is *not its own*.”⁸² Again, the territory in question here – with exact borders still to be delineated – is that which was set apart for the national home of the Jewish people by the Supreme Council of the Principal Allied Powers at San Remo in 1920.

It is the Regulations of the Hague Conventions of 1907 together with the 1949 Fourth Geneva Convention⁸³ that form the international legal regime relating to military occupation. Under these Conventions, the occupying power assumes, for a limited period, responsibility for the security and well-being of the occupied territory’s inhabitants. The military authorities have the obligation under international law to maintain public order, respect private property, and honour individual liberties. Particularly with regard to the maintenance of public order, armed forces are the normal enforcement requisite. In the language of Article 4 of the Geneva Convention (IV), all civilians in occupied territories are the “protected persons” whose rights are to be safeguarded.

Under the current circumstances, it is the responsibility of the Israel Defense Forces (IDF) to maintain peace and order and to assure the safety and security of both the Jewish and non-Jewish populations, the 1949 armistice lines serving as *temporary* “borders” having proved to be insecure and indefensible.

Article 43 of the Hague Regulations states that:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure,

⁸⁰ Hague Convention Number IV Respecting the Laws and Customs of War on Land, 18 October 1907, Regulations, Art. 42.

⁸¹ West’s Encyclopedia of American Law, 2nd edn., c. 2008, The Gale Group, Inc.

⁸² Amnesty International (AI), <http://web.amnesty.org/library/index/eng.....> While this definition of “belligerent occupation” as articulated by AI refers to “Iraq: Responsibilities of the occupying powers,” it is of some interest to note that when referring to Israel and “Occupied Palestinian Territories” in a number of position papers, AI has no regard to this definition.

⁸³ Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (International Committee of the Red Cross, Geneva).

as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁸⁴

Note that occupation takes place when “*the authority of the legitimate power [has] in fact passed into the hands of the occupant.*” It is quite clear that there was no “legitimate power” in the ‘West Bank’ from 1949 to 1967, since this territory was illegally annexed by Jordan, with no international recognition (other than Britain and, possibly, Pakistan) and with no recognition even from other Arab countries.⁸⁵

The Deputy Foreign Minister of Israel, Danny Ayalon, points out that the land now known as the “West Bank” cannot be considered “occupied” in the legal sense of the word, as it had not attained recognized sovereignty before Israel’s conquest. He goes on to recall that, contrary to some beliefs, there has never been a Palestinian State, and no other nation has ever established Jerusalem as its capital, despite it being under Islamic control for hundreds of years.⁸⁶

While clear ‘title’ to the “West Bank” is adamantly contested on both sides, referring to it as “[belligerent] occupied territory” overtly prejudices the just resolution of the conflict.

7. The Settlements Question

Of course an immediate corollary to the issue of claims to the disputed territory is that of “settlements”. The issue of the legality of the Israeli policy on settlements is arguably the most high-profile and contentious issue calling for resolution in the overall Israeli-Palestinian debate. There are as many opinions as there are sides to the issue, and – as in all areas of the delicate questions surrounding this highly valued land – there is no ‘cut and dried’ legal solution.

Beginning after the 1967 war, when Jews started returning to their historic heartland in the “West Bank” – or Judea and Samaria as the territory had been known around the world for 2,000 years prior to its renaming by the Jordanians – the issue of settlements arose. U.S. Undersecretary of State Rostow found no legal impediment to Jewish settlement in these territories, maintaining that the original Mandate for Palestine still applies to the “West Bank”. He said:

[T]he Jewish right of settlement in Palestine west of the Jordan River, that is, in Israel, the West Bank, Jerusalem, was made unassailable. That right has never been terminated and cannot be terminated except by a recognized peace between Israel and its neighbors. There is no subsequent legally binding instrument pertaining to the territory at issue that has nullified this right of Jewish settlement.⁸⁷

The sensitivities surrounding this question are exacerbated by the very fact that the legality/illegality of such settlements is based on factors that may not follow prescribed international law norms but rather are complicated by the unique nature of the Israeli settlements in particular.

For example, while it is often claimed that such settlements violate Article 49 of the Geneva Convention (IV), the inclusion of this article in the Convention had a different purpose altogether than to govern circumstances such as those existing in present-day Israel. Specifically, the intent of the drafters was to prevent belligerent occupying powers from deporting civilian populations, against their will and for political purposes, into a territory they were belligerently occupying.

⁸⁴ Hague Convention, *supra* note 80, Art. 43.

⁸⁵ Appreciation to Salomon Benzimra, P.Eng. for this observation, e-mail of 15 June 2011.

⁸⁶ This and the following para. are excerpted from Ayalon, *supra* note 74.

⁸⁷ See Ayalon, *supra* note 74.

According to the International Committee of the Red Cross:

It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.

Thus the drafters' intent was that of *protecting vulnerable civilians in times of armed conflict* by creating an international legal instrument that would declare as unlawful all *coerced deportation* such as that suffered by over forty million Germans, Soviets, Poles, Ukrainians, Hungarians and others, immediately after the Second World war.

The exact wording of the relevant paragraph (6) of Article 49 reads:

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

In the case of Israel, under international law as embodied in the Mandate for Palestine, Jews were *permitted* and even *encouraged* to settle in *every part* of Palestine, but they were *not* deported or forcibly transferred by the Government. Accordingly, calling the “East Jerusalem”, Judea and Samaria Israeli settlements “illegal” is not an apt application of the Fourth Geneva Convention.

The fact that the original intent of Article 49 of the Convention was not applicable to the Israeli case for settlements is demonstrated by the insertion into the text of the article – at the initiation of the Arab States, during the negotiations of the 1988 Rome Statute of the International Criminal Court – of the language “*directly or indirectly*” (making into a war crime the “transfer, *directly or indirectly*, by the Occupying Power of parts of its own civilian population into the territory it occupies [emphasis added]).”⁸⁸ Yet the continued reference to the Geneva Convention (IV) by the international community, when it comes to judging the legal status of the Israeli settlements under international law, ignores the history, legal framework and negotiating environment surrounding Judea and Samaria (the “West Bank”).

In 2010, Palestinian delegates at the United Nations drafted a resolution declaring that Israeli settlements are “illegal and constitute a major obstacle to the achievement of peace.” The very fact that it was deemed necessary to articulate this in a resolution, itself implies that this fact is not clearly established under the conventional international legal order.

This sensitive and highly contentious question of settlements is specifically among those slated for the ‘*permanent status*’ negotiations called for in the Interim Agreement concluded at Oslo on the 28th of September 1995⁸⁹ and still to be held between Israelis and Arab Palestinians. Such negotiations on this all-important item should not be circumvented by transferring them to the arena of UN General Assembly resolutions, or by bypassing all organizational channels to directly engage the public forum and the international community at large, thus evading and ignoring international legal responsibility.

⁸⁸ Article 8, para. 2(b)(viii).

⁸⁹ The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995, known variously as the “Interim Agreement”, or “Oslo II”, or the “Taba accord”, was the second phase of the process that had begun with the establishment of the Palestinian Authority in Gaza and Jericho in May 1994, setting the stage for the permanent status talks to begin by May 1996.

8. The Question of Jerusalem

In considering the implications of a possible unilateral declaration of a Palestinian State with “East Jerusalem” as its capital, of utmost significance is the fact that, to the Jewish people, “East Jerusalem” *is* Jerusalem. The walls of Jerusalem in 100 AD, in Crusader times and in the mid-19th century are virtually the same as the boundaries of the Old City (“East Jerusalem”) today. This means that if “East Jerusalem” were to be partitioned off to become the capital of a Palestinian State, the Jewish people would actually lose their eternal capital and sovereign control over their eternally sacred holy sites, including their most holy Temple.

Under Israeli control, every area of the country, including the Temple Mount, is open to all “races, religions or languages”. If Jerusalem were to be incorporated into a Palestinian State, the large Jewish majority in “East Jerusalem” (read: The Old City) existing since the mid-19th century would be forced to leave their homes, reminiscent of 1948 when, upon the collective Arab invasion, 25,000 Jews were forced to flee Jerusalem. That, at the time, represented 25 per cent of the Jewish population living in Jerusalem. Today there are reportedly some 225,000 Jews living in the Old City of eastern Jerusalem. The apartheid policy of a new Palestinian State with “East Jerusalem” (read: the Old City) as its capital would force all Jews to flee.

This is not unprecedented. Jews have not been allowed to buy land or even to live in Jordan, a land originally carved out of the Palestine that was designated by the Principal Allied Powers in 1920 to provide a national home for the stateless Jewish people. Moreover, the current stated policy in the bid for an additional State for Arab Palestinians within the legally founded Jewish mandated territory west of the river Jordan likewise vehemently excludes Jewish inhabitants – even those who are already well-established there. This is in direct contravention to Article 15 of the Mandate for Palestine, still in effect to this day in these relevant parts. Furthermore, any such discrimination/persecution and outright expulsion would make true Jewish refugees out of legitimate homeland inhabitants by replacing them with the Arab “refugee” descendants, whose “refugee” status is quite overtly perpetuated for this very purpose, as outlined above.

Throughout history, whenever Jerusalem has been under Jewish or Christian control, it has *always* been the capital for the Jewish people. Conversely, whenever Jerusalem has *not* been under Jewish or Christian control, Jerusalem has *never* been the capital (for the foreign occupants). *Other* cities have *always* been named the capital under Islamic control. Indeed, when Muslims kneel to pray, they turn their backsides to Jerusalem and, if in Jerusalem, to the Temple Mount, irrespective even of the presence there of the Al-Aqsa Mosque and the Dome of the Rock.

There are many differing opinions – even among international lawyers – on the legal status, or proposed legal status, of the city of Jerusalem.⁹⁰ It is arguably the most desired piece of ‘real estate’ on the face of the earth, owing to the sanctity of its Holy Places and to age-old rivalries for control. This situation is further complicated by the fact that it is frequently exploited for political objectives.

It is of some note that neither the Balfour Declaration nor the Mandate for Palestine made separate reference to Jerusalem. This in itself would indicate that the Mandate does not single out this City for special treatment, other than for the “Holy Places”. It is in fact the universally recognized sanctity and ‘common heritage’ of the Holy Places that gave rise to Part III of Resolution 181(II) of 29 November 1947 (the “Partition Resolution”), as concerns Jerusalem. This Resolution recommended in the relevant provisions that a “governor” be appointed by the United Nations to administer the Holy City as a *corpus separatum*. This recommendation was accepted by the national leadership of the Jewish community of Palestine but categorically rejected by the Arabs, who responded by initiating attacks on Jewish towns and villages, including the Jewish communities in Jerusalem.⁹¹

⁹⁰ See e.g. Lapidoth, *supra* note 1, from which the following factual details are also largely derived.

⁹¹ See *Ibid.*

In 1949, following renewed debate in the UN General Assembly on the question of Jerusalem, Israeli Prime Minister David Ben-Gurion announced in the Knesset that Jerusalem was an “*inseparable part of the State of Israel*” and its “*Eternal Capital*”.⁹² His pronouncement was approved by the Israeli Parliament. Similarly, following the Camp David conference, Israeli Prime Minister Menachim Begin pronounced that “*Jerusalem is one city, indivisible, the Capital of the State of Israel*”, while Egyptian President Anwar Sadat proclaimed that “*Arab Jerusalem is an integral part of the West Bank...and should be under Arab sovereignty*.” Note that, for the sovereign State of Israel, Jerusalem is the indivisible Capital of the State of Israel, whereas in the counter statement with reference to the “West Bank”, which is *not* sovereign territory belonging to the Arabs, it is not a case of “*is*” but a concept of “*should be*”. There is no valid or justifiable legal claim to separating this portion of Jerusalem from Israeli territory granted under the Mandate for Palestine. (Every nation has the right to designate its own national Capital within its own sovereign territory.)

While Jerusalem was mentioned in several declarations/agreements in 1993-1995,⁹³ it was not on the agenda of the 1991 Madrid Middle East Peace Conference, nor was it mentioned in the controversial UN Security Council Resolution 242 of 22 November 1967 calling for the withdrawal of Israeli armed forces from territories occupied in June 1967, *conditional on Arab belligerence coming to an end*. Nor was it named in the Framework for Peace in the Middle East, agreed in the 1978 Camp David Accords between Israel and Egypt. In the latter case, Jerusalem was indeed on the agenda, but was left out of the actual Accords, owing to the inability of the two parties to resolve their fundamental differences on the highly loaded issue.

In 1980, a new law concerning Jerusalem was adopted by the Knesset: the Basic Law: Jerusalem, Capital of Israel.⁹⁴ The Basic Law in fact contains no new principles; it only codifies the situation as it has long existed and has persistently been declared and effectuated: (1) that “Jerusalem, complete and united, is the capital of Israel” (sect. 1); (2) that it is “the seat of the President of the State, the Knesset, the Government, and the Supreme Court” (sect. 2); and (3) that the Holy Places shall be protected (sect.3). It additionally commits to the “development” and “prosperity” of the City (sect. 4). There is nothing in this language, content or actuality that runs contrary to the international legal rights of a sovereign State.

Finally, as expressed by Jerusalem expert Dr. Jacques Gauthier, “the failure of the Camp David Summit of July 2000 very much underlined the significance of the question of Jerusalem and its Old City. It was evident that the positions of Israel and the Palestinians regarding the Old City were irreconcilable.”⁹⁵

Pending a resolution of this volatile issue, the non-Jewish residents of the eastern part of Jerusalem (so-called “East Jerusalem”) have, since the birth of the State of Israel, enjoyed the status of *permanent residents of Israel*, guaranteeing the protection of their existing rights and endowing them with social and cultural benefits, consistent with the Mandate for Palestine that provided for the safeguarding of civil and religious rights of non-Jews in all of the territory designated at that time as “Palestine”, but with ongoing application. Upon achieving statehood, Israeli citizenship was also made available to such residents, through the normal legal process of “naturalization”.

⁹² See *Record of Knesset Proceedings*, December 1949, Vol. 3, at pp. 220-226 and 281-287.

⁹³ See e.g. the 1993 Declaration of Principles on Interim Self-Government Arrangements (“Declaration of Principles”), the 1995 Interim Agreement [*supra* note 89], and the 1994 Israel-Jordan Peace Treaty.

⁹⁴ Passed by the Knesset on the 17th Av, 5740 (30 July 1980), published in Sefer Ha-Chukim No. 980 of the 23rd Av, 5740 (5 August 1980), at p. 186.

⁹⁵ See Gauthier, *supra* note 12, at p. 848; see also *ibid.*, Chapter XIII, Section I.

9. Commitments to “Permanent Status” Negotiations

After the Six-Day War, as noted above, UN Security Council Resolution 242 affirmed the *right* to “secure and recognized boundaries”.⁹⁶ Although there was *no provision calling for a return to the 1949 armistice demarcation lines*, the intention was that a peace settlement would follow that would include the negotiation of recognized and defensible national borders to supplant the old provisional armistice lines.

While this was not realized at the time, the basic reciprocal undertaking by the Palestinian and Israeli leaderships to negotiate borders between their respective territories was given formal confirmation by Yasser Arafat, by his deputy and later replacement Mahmoud Abbas, and by Sa’eb Erekat, during the groundbreaking Declaration of Principles on Interim Self-Government Arrangements (signed *inter alia* by Abbas) of 13 September 1993, in which the Palestine Liberation Organization (PLO) and the Government of Israel acknowledged that the negotiations on the “permanent status” of the relationship between them would cover:

...remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.⁹⁷

In a word, the PLO leadership pledged in 1993 to commit virtually *all* the important issues of permanent status to resolution by *negotiations only*. On the eve of the signature of the above declaration, Arafat made the [following] solemn commitment in a letter to Israeli Prime Minister Yitzhak Rabin:

The PLO commits itself to the Middle East peace process, and to a peaceful resolution of the conflict between the two sides and declares that *all* outstanding issues relating to permanent status *will be resolved through negotiations* [emphasis added].⁹⁸

References to “permanent status negotiations” on borders were contained in a series of agreements concluded between the PLO and the Israeli Government over the period of 1993 to 1999. Particularly significant in this respect is the 1995 Interim Agreement (Oslo II)⁹⁹ by which the parties undertook *to not act unilaterally* to alter the status of the territories prior to the results of permanent status negotiations:

... *neither side* shall initiate or take *any step* that will *change the status* of the West Bank and the Gaza strip pending the outcome of *the permanent status negotiations* [emphasis added].¹⁰⁰

This language was repeated in the 1999 Sharm el Sheikh Memorandum¹⁰¹ (Article 9).

⁹⁶ UN Security Council Resolution 242, 22 November 1967, para. 1.(ii).

⁹⁷ Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, Article V, para. 3, Jewish Virtual Library, <http://www.jewishvirtuallibrary.org/jsource/Peace/dop.html>

⁹⁸ Exchange of letters between Yasser Arafat and Yitzhak Rabin, 9 July 1993, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israel-PLO+Recognition+-+Exchange+of+Letters+betwe.htm>.

⁹⁹ The Interim Agreement, *supra* note 89.

¹⁰⁰ *Ibid.*, Article XXXI (7)

¹⁰¹ The Sharm el Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, 4 September 1999, Jewish Virtual Library, <http://www.jewishvirtuallibrary.org/jsource/Peace/sharm0999.html>. The aim of this Memorandum was the implementation of the Interim Agreement (*supra* note 89) and of all other agreements between the PLO and Israel since September 1993.

The 1995 Interim Agreement also stipulates that:

...the [Palestinian] Council *will not have powers and responsibilities in the sphere of foreign relations*, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions [emphasis added].¹⁰²

A unilaterally declared Palestinian State would therefore be in breach of commitments embodied in an international legal instrument as well as in publicly declared and published official statements and documents.

Moreover, there must be a formal peace treaty between two legally empowered negotiating partners who mutually recognize one another's existence as legitimate States or international legal entities with all the powers required to exercise diplomatic functions. Accordingly, the members of the Quartet (the EU, Russia, the UN and the U.S.) insist that Israel's negotiating partner meet three basic undertakings prior to statehood talks: (1) to recognize the State of Israel, (2) to renounce the use of terrorism and violence, and (3) to recognize the validity of previously negotiated Israeli-Palestinian agreements.

The two major rival Arab ruling factions, Fatah and Hamas, would have to come into a viable and lasting unity government that could effectively represent the Arab Palestinians. Were it not for the above pre-conditions set by the Quartet, Israel negotiators would find themselves sitting across the negotiating table in the shadow of two extreme antagonists committed to their ultimate if not hasty demise. The (Fatah) Charter for the Palestinian Authority¹⁰³ (PA) calls for the "total liberation" of Palestine and declares that "the struggle will not end until the elimination of the Zionist entity and the [total] liberation of Palestine." (For "total liberation" read: "taking complete control".) The "liberation" of "Palestine" (including the mandated Jewish territory of the State of Israel) is mentioned 27 times in the 33 articles of the PA Charter/Covenant.

In addition, Article 20 of the Charter reads:

The Balfour Declaration, the Mandate for Palestine, and everything that has been based upon them, are deemed null and void.

The (Hamas) Charter of the Islamic Resistance Movement¹⁰⁴ states that "Israel will exist and will continue to exist until Islam will obliterate it..."¹⁰⁵ Thus it would appear that, 'rhetorically', Fatah 'recognizes' a "Zionist entity" and 'rhetorically' Hamas 'recognizes' the "existence" of Israel. But the rhetoric is not a civil one. Neither of these pronouncements bodes well for amicable bilateral negotiations leading to territorially contiguous States living peaceably behind shared national borders.

As recently as 26 August 2011, on the occasion of the Iranian "international Quds Day" an annual show of support for the Palestinian Authority, Iranian President Mahmoud Ahmadinejad, restating the position he outlined after taking office in 2005, proclaimed that Israel was a "tumor" to be wiped off the map and urged Arabs in PA-administered areas not to accept a two-State solution, but to strive for a complete "return" of "Palestine". Ahmadinejad declared to worshippers: "***Recognizing the***

¹⁰² *Ibid.*, Article IX (5(a)).

¹⁰³ The Palestinian National Charter: Resolutions of the Palestine National Council, 1-17 July 1968, as *translated and reproduced* in "The Avalon Project: Documents in Law, History and Diplomacy", Yale Law School, Lillian Goldman Law Library, online: http://avalon.law.yale.edu/20th_century/plcov.asp.

¹⁰⁴ The Covenant of the Islamic Resistance Movement, 18 August 1988, as *translated and reproduced* in *ibid.*

¹⁰⁵ *Ibid.*, Preamble.

Palestinian State is not the ultimate goal. It is only one step forward towards liberating the whole of Palestine. “*A ‘Palestinian State’ is only the first step in the destruction of Israel.*”¹⁰⁶

Not only this, but while the Israeli Government has even offered citizenship to all eligible non-Jewish inhabitants, in addition to the safeguards to the “civil and religious rights of the non-Jewish communities” living in former Palestine, as guaranteed by the Mandate for Palestine, the reverse is not the case. It has been openly declared by Arab leaders that a Palestinian State would countenance *no Jewish inhabitants whatsoever*. This reflects what has become a totally apartheid policy nurtured by such statement as that of Mahmoud Abbas, President of the Palestinian Authority, who has declared: “*I will never allow a single Israeli to live among us on Palestinian land.*”¹⁰⁷ Not only is such a declaration in flagrant violation of this same international treaty (the Mandate) governing all the territory formerly known as Palestine – and perhaps most particularly that which was ultimately designated as the Jewish national home, west of the Jordan River, now challenged by the prospect of a yet further reduction of territory – but the Jews would once again become refugees from their own Land.

10. The Role of the United Nations in the Current Debate

Approaching the convening of the 66th Session of the United Nations General Assembly in New York, opening on 13 September 2011, Palestinian President Mahmoud Abbas has expressed plans to formally request that a UN resolution be presented to the assembled delegations to “recognize” a unilaterally declared Palestinian State, with “East Jerusalem” as its capital, and perhaps UN membership. It should be pointed out that, were there to be such “recognition” of the “Palestinians” as a political/statal entity, this would not, in and of itself, constitute the creation of a State of Palestine under international law, any more than the 1947 Resolution 181 (II) (the UN Partition Plan) created the State of Israel.¹⁰⁸

Neither does membership in the United Nations *per se* create, confer or confirm statehood. UN membership requires nomination by the UN Security Council, with the unanimous support of the five Permanent Members (China, France, the Russian Federation, the United Kingdom and the United States). A contemporary example is that of Kosovo, which is recognized by at least 75 sovereign nations, yet its membership in the UN is precluded by the absence of the support of only one Permanent Member of the Security Council, namely, the Russian Federation.

According to the UN Charter, the General Assembly (GA) does not have the power to create legally binding decisions. It has only the power to recommend. UNGA resolutions are therefore not legally binding and the General Assembly lacks any and all competence to enact international law. In fact, the Charter does not authorize even the International Court of Justice (I.C.J.) – the principal judicial organ of the UN – to create, enact or amend international law.

According to one illustrious former President of the International Court, Professor Judge Schwebel:

The General Assembly of the United Nations can only, in principle, issue ‘recommendations’ which are not of a binding character, according to Article 10 of the Charter of the United Nations.¹⁰⁹

The venerable Judges Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice similarly confirmed the lack of “legislative effect” or “legal power to legislate or bind its members by way of recommendation.”

¹⁰⁶ *Virtual Jerusalem*, <http://www.virtualjerusalem.com/news.php?Itemid=4588>; posted: 26 August 2011.

¹⁰⁷ Mahmoud Abbas, speaking to Egyptian media on 28 July 2010.

¹⁰⁸ See Part I, section 10 and Part II, section 1, *supra*.

¹⁰⁹ See Eli E. Hertz, “ICJ – Bypassing the UN Security Council”, *Myth and Fact*, 5 April 2011.

Professor Arangio-Ruiz, who wrote what was considered “perhaps the most comprehensive” treatise ever compiled on the normative role of the UN General Assembly, went so far as to conclude that:

the General Assembly lacks legal authority either to ‘enact’ or to ‘declare’ or ‘determine’ or ‘interpret’ international law so as legally to bind states by such acts, whether these states be members of the United Nations or not, and whether these states voted for or against or abstained from the relevant vote or did not take part in it.¹¹⁰

At least on one point, then – that of the non-binding character of UNGA resolutions – there is no room for interpretation.

In the final analysis, there is categorically no practicable solution other than two legitimate governing entities that recognize and respect one another’s rightful and legal existence, coming to the negotiating table and discussing all unresolved outstanding issues on permanent status, as per the relevant international legal commitments and binding instruments, with the aim of achieving a durable peace with secure and defensible borders.

¹¹⁰

See *ibid.*

CONCLUSION

It is widely assumed that the State of Israel was born as a result of UN Resolution 181 (the UN Partition Plan) of 1947. The truth is that the legal rights of the Jewish people and Israel as a nation find their foundations solidly embedded in international law well before the very existence of the United Nations, dating back to international legal instruments agreed by the Principal Allied Powers of World War I, meeting in San Remo in April of 1920 as a follow-up to the 1919 Paris Peace Conference.

It was at this place and time that the *historical* claim of the Jewish delegation to a “national home”, as presented to the Supreme Council of the Principal Allied and Associated Powers in Paris, became “*essentially legal in character*”.¹¹¹ This legal character was codified in a binding international legal instrument in the form of the San Remo Resolution of April 1920, as reconfirmed and strengthened in July 1922 by the adoption of the Mandate for Palestine by the League of Nations.

Despite the fulfilment in May of 1948 of one of the Mandate’s fundamental objectives, namely, the reconstitution of the Jewish national home, the Mandate’s relevant provisions remain valid and legally binding to this day. Such provisions are, for example, applicable to the determination of the “core issues” to be negotiated between the two parties on the “permanent status” (or “final status”) of Jerusalem and remaining disputed territory. Certain clauses regarding Jerusalem are even explicitly stated to be secured “in perpetuity”.¹¹²

In sum, the conflict is not essentially a dispute over “borders” *per se*; that is not even really the issue, as demonstrated by the fact that national boundaries have gone so long undetermined. It is a dispute rather over *control* of “*disputed territory*”, in the near term, and permanent sovereignty over legitimate territorial jurisdictions, including the Old City of Jerusalem, in the long term. The sovereign jurisdiction rests with Israel, in the absence of some legally defensible cause for abrogating the Mandate for Palestine which contains no provisions for further carving up the territory designated in 1920/1922 by the Supreme Council of the Principal Allied Powers as the sole and unique national home for the Jewish people worldwide.

Geneva
September 2011

¹¹¹ *Ibid*, with reference to the classification of territorial claims elaborated by Professor Norman Hill.

¹¹² See Mandate for Palestine, Appendix IV, Article 28.

Appendix I: The Balfour Declaration

Foreign Office,
November 2nd, 1917.

Dear Lord Rothschild,

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet

"His Majesty's Government view 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"

I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation.

Y. in
Arthur Balfour

Appendix II: Article 22 of the Covenant of the League of Nations

ARTICLE 22

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 civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

Appendix III: The San Remo Resolution

It was agreed –

(a) 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 Power that this would not involve the surrender of the rights hitherto enjoyed by the non-Jewish communities in Palestine; this undertaking not to refer to the question of the religious protectorate of France, which had been settled earlier in the previous afternoon by the undertaking given by the French Government that they recognized this protectorate as being at an end.

(b) that the terms of the Mandates Article should be as follows:

The High Contracting Parties agree that Syria and Mesopotamia shall, in accordance with the fourth paragraph of Article 22, Part I (Covenant of the League of Nations), be provisionally recognized as independent States, subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone. The boundaries of the said States will be determined, and the selection of the Mandatories made, by the Principal Allied Powers.

The High Contracting Parties agree to entrust, by application of the provisions of Article 22, the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory, to be selected by the said Powers. The Mandatory will be responsible for putting into effect the declaration originally made on November 8, 1917, by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people, 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.

La Puissance mandataire s'engage à nommer dans le plus bref délai une Commission spéciale pour étudier toute question et toute réclamation concernant les différentes communautés religieuses et en établir le règlement. Il sera tenu compte dans la composition de cette Commission des intérêts religieux en jeu. Le Président de la Commission sera nommé par le Conseil de la Société des Nations.

The terms of the mandates in respect of the above territories will be formulated by the Principal Allied Powers and submitted to the Council of the League of Nations for approval.

Turkey hereby undertakes, in accordance with the provisions of Article [132 of the Treaty of Sèvres] to accept any decisions which may be taken in this connection.

(c) Les mandataires choisis par les principales Puissances alliés sont: la France pour la Syrie, et la Grand Bretagne pour la Mésopotamie, et la Palestine.

In reference to the above decision the Supreme Council took note of the following reservation of the Italian Delegation:

La Délégation Italienne en considération des grands intérêts économiques que l'Italie en tant que puissance exclusivement méditerranéenne possède en Asie Mineure, réserve son approbation à la présente résolution, jusqu'au règlement des intérêts italiens en Turquie d'Asie.

Appendix IV: The Mandate for Palestine

The Council of the League of Nations

Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 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 ; and

Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country; and

Whereas the Principal Allied Powers have selected His Britannic Majesty as the Mandatory for Palestine; and

Whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and

Whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and

Whereas by the afore-mentioned Article 22 (paragraph 8), it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations;
Confirming the said mandate, defines its terms as follows:

Article 1.

The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.

Article 2.

The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self -governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

Article 3.

The Mandatory shall, so far as circumstances permit, encourage local autonomy.

Article 4.

An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.

The Zionist organisation, so long as its organisation and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency. It shall take steps in consultation with His Britannic Majesty's Government to secure the cooperation of all Jews who are willing to assist in the establishment of the Jewish national home.

Article 5.

The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.

Article 6.

The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency, referred to in Article 4, close settlement by Jews, on the land, including State lands and waste lands not required for public purposes.

Article 7.

The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.

Article 8.

The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by Capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine.

Unless the Powers whose nationals enjoyed the afore-mentioned privileges and immunities on August 1st, 1914, shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned.

Article 9.

The Mandatory shall be responsible for seeing that the judicial system established in Palestine shall assure to foreigners, as well as to natives, a complete guarantee of their rights.

Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular, the control and administration of Wakfs shall be exercised in accordance with religious law and the dispositions of the founders.

Article 10.

Pending the making of special extradition agreements relating to Palestine, the extradition treaties in force between the Mandatory and other foreign Powers shall apply to Palestine.

Article 11.

The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard, among other things, to the desirability of promoting the close settlement and intensive cultivation of the land.

The Administration may arrange with the Jewish agency mentioned in Article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration. Any such arrangements shall provide that no profits distributed by such agency, directly or indirectly, shall exceed a reasonable rate of interest on the capital, and any further profits shall be utilised by it for the benefit of the country in a manner approved by the Administration.

Article 12.

The Mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue exequaturs to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits.

Article 13.

All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory, who shall be responsible solely to the League of Nations. in all matters connected herewith, provided that nothing in this article shall prevent the Mandatory from entering into such arrangements as he may deem reasonable with the Administration for the purpose of carrying the provisions of this article into effect; and provided also that nothing in this mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed.

Article 14.

A special Commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine.

The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.

Article 15.

The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief.

The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the Administration may impose, shall not be denied or impaired.

Article 16.

The Mandatory shall be responsible for exercising such supervision over religious or eleemosynary bodies of all faiths in Palestine as may be required for the maintenance of public order and good government. Subject to such supervision, no measures shall be taken in Palestine to obstruct or interfere with the enterprise of such bodies or to discriminate against any representative or member of them on the ground of his religion or nationality.

Article 17.

The Administration of Palestine may organise on a voluntary basis the forces necessary for the preservation of peace and order, and also for the defence of the country, subject, however, to the supervision of the Mandatory, but shall not use them for purposes other than those above specified save with the consent of the Mandatory, Except for such purposes, no military, naval or air forces shall be raised or maintained by the Administration of Palestine. Nothing in this article shall preclude the Administration of Palestine from contributing to the cost of the maintenance of the forces of the Mandatory in Palestine.

The Mandatory shall be entitled at all times to use the roads, railways and ports of Palestine for the movement of armed forces and the carriage of fuel and supplies.

Article 18.

The Mandatory shall see that there is no discrimination in Palestine against the nationals of any State Member of the League of Nations (including companies incorporated under its laws) as compared with those of the Mandatory or

of any foreign State in matters concerning taxation, commerce or navigation, the exercise of industries or professions, or in the treatment of merchant vessels or civil aircraft. Similarly, there shall be no discrimination in Palestine against goods originating in or destined for any of the said States, and there shall be freedom of transit under equitable conditions across the mandated area.

Subject as aforesaid and to the other provisions of this mandate, the Administration of Palestine may, on the advice of the Mandatory, impose such taxes and customs duties as it may consider necessary, and take such steps as it may think best to promote the development of the natural resources of the country and to safeguard the interests of the population. It may also, on the advice of the Mandatory, conclude a special customs agreement with any State the territory of which in 1914 was wholly included in Asiatic Turkey or Arabia.

Article 19.

The Mandatory shall adhere on behalf of the Administration of Palestine to any general international conventions already existing, or which may be concluded hereafter with the approval of the League of Nations, respecting the slave traffic, the traffic in arms and ammunition, or the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation and postal, telegraphic and wireless communication or literary, artistic or industrial property.

Article 20.

The Mandatory shall co-operate on behalf of the Administration of Palestine, so far as religious, social and other conditions may permit, in the execution of any common policy adopted by the League of Nations for preventing and combating disease, including diseases of plants and animals.

Article 21.

The Mandatory shall secure the enactment within twelve months from this date, and shall ensure the execution of a Law of Antiquities based on the following rules. This law shall ensure equality of treatment in the matter of excavations and archaeological research to the nations of all States Members of the League of Nations.

- (1) 'Antiquity' means any construction or any product of human activity earlier than the year A.D. 1700.
- (2) The law for the protection of antiquities shall proceed by encouragement rather than by threat. Any person who, having discovered an antiquity without being furnished with the authorisation referred to in paragraph 5, reports the same to an official of the competent Department, shall be rewarded according to the value of the discovery.
- (3) No antiquity may be disposed of except to the competent Department, unless this Department renounces the acquisition of any such antiquity. No antiquity may leave the country without an export licence from the said Department.
- (4) Any person who maliciously or negligently destroys or damages an antiquity shall be liable to a penalty to be fixed.
- (5) No clearing of ground or digging with the object of finding antiquities shall be permitted, under penalty of fine, except to persons authorised by the competent Department.
- (6) Equitable terms shall be fixed for expropriation, temporary or permanent, of lands which might be of historical or archaeological interest.
- (7) Authorisation to excavate shall only be granted to persons who show sufficient guarantees of archaeological experience. The Administration of Palestine shall not, in granting these authorisations, act in such a way as to exclude scholars of any nation without good grounds.
- (8) The proceeds of excavations may be divided between the excavator and the competent Department in a proportion fixed by that Department. If division seems impossible for scientific reasons, the excavator shall receive a fair indemnity in lieu of a part of the find.

Article 22.

English, Arabic and Hebrew shall be the official languages of Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew, and any statement or inscription in Hebrew shall be repeated in Arabic.

Article 23.

The Administration of Palestine shall recognise the holy days of the respective communities in Palestine as legal days of rest for the members of such communities.

Article 24.

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council as to the measures taken during the year to carry out the provisions of the mandate. Copies of all laws and regulations promulgated or issued during the year shall be communicated with the report.

Article 25.

In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18.

Article 26.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

Article 27.

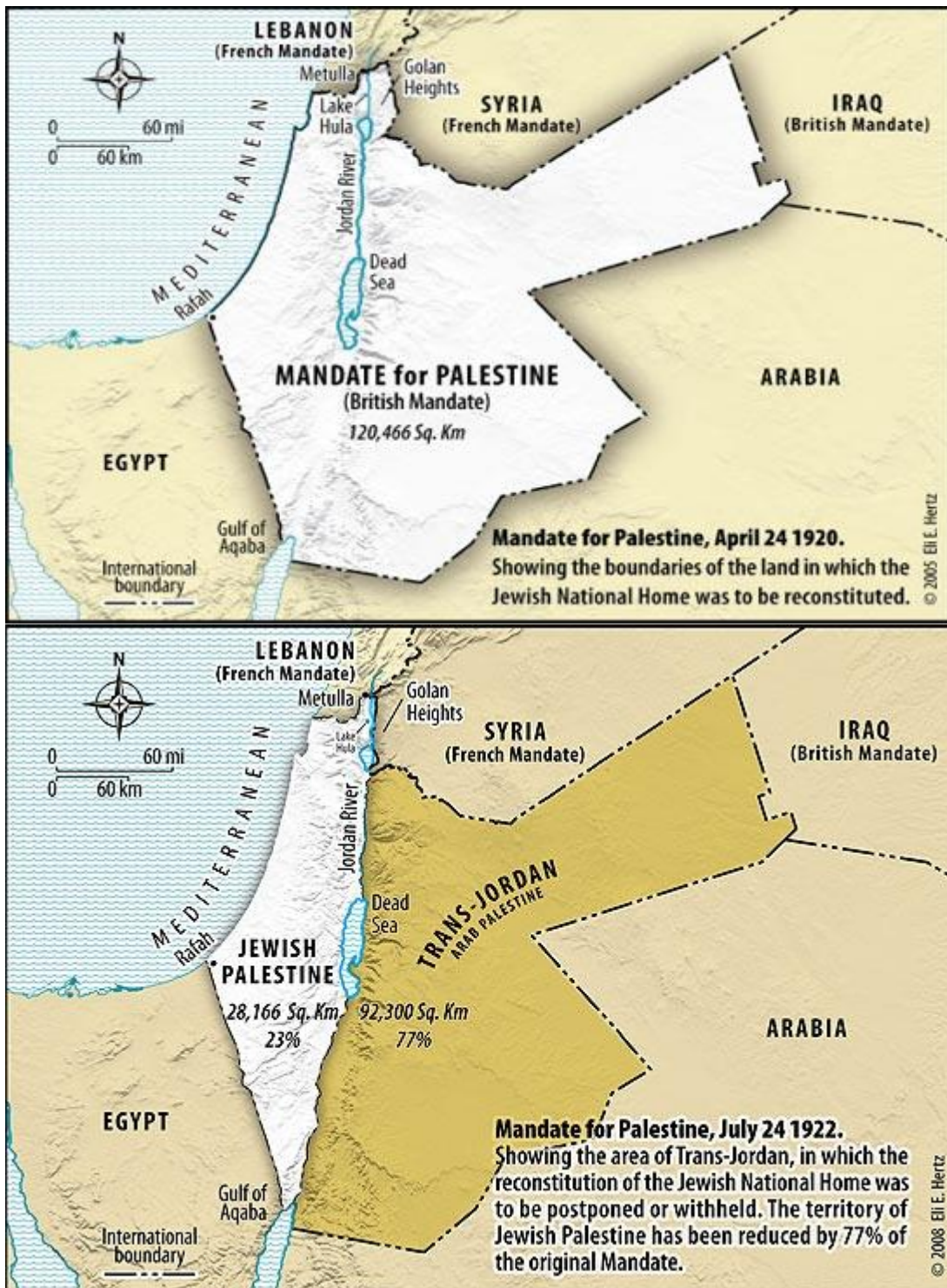
The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.

Article 28.

In the event of the termination of the mandate hereby conferred upon the Mandatory, the Council of the League of Nations shall make such arrangements as may be deemed necessary for safeguarding in perpetuity, under guarantee of the League, the rights secured by Articles 13 and 14, and shall use its influence for securing, under the guarantee of the League, that the Government of Palestine will fully honour the financial obligations legitimately incurred by the Administration of Palestine during the period of the mandate, including the rights of public servants, to pensions or gratuities.

The present instrument shall be deposited in original in the archives of the League of Nations and certified copies shall be forwarded by the Secretary-General of the League of Nations to all Members of the League.

Appendix V: Geographical maps of the territory of Palestine¹¹³



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Source: www.mythandfacts.org.