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Palestinian Arab Self-Determination and Israeli Settlements on the West Bank: An Analysis of Their Legality Under International Law

I. INTRODUCTION

The “right of self-determination,”¹ which has played a pivotal role in reshaping the map of the post-World War II world, is repeatedly asserted on behalf of the Palestinian² Arabs in the West Bank³ and Gaza Strip (Gaza). This comment focuses on the development of the concept of self-determination, its interpretation by the United Na-

1. Defined as “the right of a nation to constitute an independent state and determine its own government for itself.” A. COBBAN, *THE NATION STATE AND NATIONAL SELF-DETERMINATION* 104 (rev. ed. 1970). See Emerson, *Self-Determination*, 65 AM. J. INT’L L. 459, 459 (1971). According to Professor Emerson:

[A]ny examination of self-determination runs promptly into the difficulty that while the concept lends itself to simple formulation in words which have a ring of universal applicability and perhaps of revolutionary slogans, when the time comes to put it into operation it turns out to be a complex matter hedged in by limitations and caveats.

Id.; see also Schoenberg, *Limits of Self-Determination*, 6 ISRAEL Y.B. HUM. RTS. 91 (1976) (describing self-determination as “the right of a group to choose its own destiny”).

2. According to Eugene Rostow, “[t]he term ‘Palestinian’ applies to all the peoples who live or have a right to live in the territory—Jews, Christians and Muslims alike.” Rostow, “*Palestinian Self-Determination*”: *Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. WORLD PUB. ORD. 147, 153 (1979).

3. See S. AVERICK & S. ROSEN, *THE IMPORTANCE OF THE “WEST BANK” AND GAZA TO ISRAEL’S SECURITY*, at 1, n*. (AIPAC Papers on U.S.-Israel Relations: No. 11 (1985)). The partition of the British Mandate of Palestine into two states, Jewish and Arab, was approved by the United Nations on November 29, 1947. *Id.* As a result of Arab rejection of the plan and invasion of the Jewish state, Jordan occupied the western side of the Jordan River. *Id.* During the 19 years of Jordanian rule, this area came to be called the West Bank in order to distinguish it from the east bank of the river. After the Arabs went to war against Israel in June, 1967, those areas came under Israel’s control, which designated the area by its geographical names, Judea and Samaria. *Id.*

The continued use of the term West Bank is problematical because it is neither a geographical nor historical term. Further, it is legally insignificant, as only two countries recognized Jordan’s annexation, the United Kingdom and Pakistan. *Id.* The area, however, was known as Judea and Samaria from Biblical times through the British mandatory period. The United Nations also used the terms Judea and Samaria in its deliberations on partition. *Id.*; see also *infra* note 186 and accompanying text.

Thus, Averick and Rosen contend that it is misleading to call the disputed territory, whose status is subject to negotiations, the West Bank. S. AVERICK & S. ROSEN, *supra*, at 1. However, that term is used to refer to the geographical areas of Judea and Samaria because it is the one used by American policy makers and Middle East analysts. *Id.*

tions, and its relevance to the Palestinian Arabs living on the West Bank and Gaza. While strategic, political, and moral factors are involved,⁴ this comment is limited to an analysis of the legal aspects of Israel's presence on the West Bank, the validity of Israeli settlements on the West Bank, and the extent to which those settlements affect the future of the Palestinian Arabs in the West Bank.

II. SELF-DETERMINATION

A. *The Aftermath of World War I and the League of Nations*

The concept of self-determination, as a goal of national independence, was a powerful element in the political development of the nineteenth century.⁵ Two world wars and the events of the twentieth century brought the seeds of this concept to fruition.⁶ However, the modern view of self-determination steps away from the national sovereignty aspect and focuses on the right of a people to determine its own future.⁷ The destruction and death that took place during World War I presented world leaders with a clear view of the danger of nationalism.⁸ Thus, after the first World War, Woodrow Wilson introduced the concept of self-determination⁹ to the Paris Peace

4. Zafren, *The Israeli Settlements on the West Bank: Valid Under International Law?*, CONG. RESEARCH SERV. 3 (Apr. 9, 1980).

5. Blum, *Reflections on the Changing Concept of Self-Determination*, 10 ISRAEL L. REV. 509, 510 (1975) [hereinafter cited as Blum I]. See Schoenberg, *supra* note 1, at 91-92. Prior to World War I:

[S]elf-determination was restricted . . . to Europeans and European settlers and their descendants on other continents. The latter achieved self-determination . . . in a territory defined by the limits of colonial authority

Then, with the relative decline of the European imperial powers, the third world states, working with the communist countries, switched the application of self-determination from European . . . [ethnic groups] to the European dependencies in Asia and Africa, returning to the territorial administrative framework in defining the peoples involved.

Id. at 91-92; see also R. EMERSON, SELF-DETERMINATION REVISITED IN THE ERA OF DECOLONIZATION 3 (Occasional Papers in Inter. Affairs No. 9 Dec. 1964).

6. See Note, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 139 (1980).

7. *Id.* at 138.

8. *Id.* at 139. "The threat and danger of a 'world' war, then as now, advanced the acceptance of modern self-determination principles as international law." *Id.*

9. See Pomerane, *Self-Determination Today: The Metamorphosis of an Ideal*, 10 ISRAEL L. REV. 310 (1984). According to Pomerance, President Wilson's composite concept of self-determination included the "right of a people to be free from alien rule, and to choose the sovereignty under which it will live; . . . the right of a people to select its own form of government; . . . and continuous consent of the governed in the form of representative democratic

Conference, which "treated it as 'a purely political factor and not as a legal principle applicable to all peoples whose fate has to be determined.'" ¹⁰ Although the Wilsonian concept of self-determination was applied to Europe and the Ottoman Empire by the Allies and the League of Nations, ¹¹ opinions are divided on the question of whether this principle has, in the course of time, become a guiding norm of international law. ¹²

The League of Nations created a mandate system ¹³ for colonies

government." *Id.* at 314-15. See also A. COBBAN, *supra* note 1, at 62 (quoting R. LANSING, THE PEACE NEGOTIATIONS, A PERSONAL NARRATIVE 97-98 (1921)). Wilson did not realize the explosiveness of the principle he had set in motion. The "phrase [is] 'loaded with dynamite,' and . . . 'will raise hopes which can never be realized.'" *Id.*

10. N. FEINBERG, *THE ARAB-ISRAEL CONFLICT IN INTERNATIONAL LAW* 44-45 (1970) (quoting C. Dupuis, *Règles générales du droit de la paix*, 32 R.A.D.I. 38 (1931)).

11. See *Note, supra* note 6, at 139. Two non-sovereign territories before World War I, Poland and Czechoslovakia, declared their independence in 1918 on grounds of nationality. *Id.* See also Blum I, *supra* note 5, at 510. Self-determination was only selectively applied at the end of World War I. For example, Austria-Hungary and Turkey—the defeated powers—were dismembered, as were Russia and Germany to a lesser extent. *Id.*

12. N. FEINBERG, *supra* note 10, at 44-45. See A. COBBAN, *supra* note 1, at 65. According to Cobban, Wilson failed to realize "how indeterminate a criterion nationality might be . . ." Cobban asserts that "[a]lthough [Wilson] had spoken of self-determination as though it were an absolute principle of international right, from the very beginning he perforce allowed competing principles to influence his decisions and derogate from its claims." *Id.* See also Ramazani, *Self-Determination and the Settlement of the Arab-Israeli Conflict*, 65 AM. SOC'Y INT'L L. PROC. 51, 51 (1971). According to Professor Ramazini, "to a significant extent . . . the principle of self-determination as a moral, not as a legal, principle has gained considerable influence in the international community." *Id.* Ramazani further notes that in his "review of the principle of self-determination in terms of the changing international system it would seem to suggest that it has been a principle of political adjustment as well as moral adjustment." *Id.* at 52; but see Bassiouni, "Self-Determination" and the Palestinians, 65 AM. SOC'Y INT'L L. PROC. 31, 33 (1971) [hereinafter cited as Bassiouni I]. Bassiouni concedes that "'self-determination' is not part of customary international law, since the custom and usage of member states of the world community do not evidence it by their practice." *Id.* However, Bassiouni asserts that in light of "the law and practice of the United Nations and the previous history of 'self-determination,' as a right to exercise collective behavioral freedom of choice, the conclusion is warranted that it is a general principle of international law recognized by the world community even though not always applied." *Id.*; Blum I, *supra* note 5, at 512. Blum notes that self-determination was basically restricted to the minority peoples within the defeated nations. *Id.* Blum asserts that the drafters of the Covenant recognized that the principle of self-determination, if consistently applied, would "clash with . . . the cardinal principle of international law, that is, the sovereignty of states." *Id.* at 510.

13. LEAGUE OF NATIONS COVENANT, art. 22, para. 1, Report to the General Assembly of the United Nations Special Committee on Palestine, Vol. II Annexes, Appendix and Maps 22, U.N. Doc. A/364 Add. 1 (Sept. 9, 1947), reprinted in THE ARAB-ISRAELI CONFLICT 889 (J. Moore ed. 1977) [hereinafter cited as LEAGUE COVENANT]. See also Rostow, *supra* note 2, at 154-55. According to Rostow, the international law of mandates is the foundation underlying the Security Council Resolutions which purport to govern the peace process between Israel and its Arab neighbors. *Id.* at 154. After World War I, the Allies did not annex the territory

and territories unable "to stand by themselves under the strenuous conditions of the modern world" ¹⁴ However, the mandatory power, that is, the nation who assumed administration over the territory of the mandate at the direction of the League, did not gain sovereignty over that territory. ¹⁵ Rather, "[m]ost of the mandates were trusts for the benefit of the inhabitants." ¹⁶ The omission of the principle of self-determination from the League's Covenant represented the drafters' recognition of the inherent conflict between state sovereignty, which aims at the preservation of territorial integrity, and self-determination which "implies the right of every people to political independence, in essence the right of secession" ¹⁷

B. The United Nations Charter

After World War II, for a variety of political reasons, ¹⁸ the principle of self-determination could not be omitted from the United Nations Charter as it similarly was from the League Covenant. ¹⁹ However, the principle of state sovereignty was retained as the domi-

of the vanquished on a large scale. *Id.* "Instead, . . . they restored Poland, and established several new states in Europe . . . [in the name of self-determination]. Outside Europe, the Allies took over the administration of a number of territories, which had been "parts of the Turkish and German empires as mandates of the League of Nations." *Id.* at 154-55. The Mandate system preceded the Trusteeship provisions of the United Nations Charter. The League founders established the Mandate system to "liberate peoples who had lived in the colonies and protectorates of empire, and to launch their new states on a footing of dignity and equality." *Id.*

14. LEAGUE COVENANT, *supra* note 13, art. 22, para. 1; *see also* Rostow, *supra* note 2, at 154.

15. Rostow, *supra* note 2, at 155.

16. *Id.*

17. Blum I, *supra* note 5, at 510. Self-determination was omitted from the League Covenant because the internal conflict could not be reconciled. Blum argues that theoretically, it may be possible to reconcile the two concepts.

If sovereignty is interpreted not as the unlimited power of a state to act as it pleases but rather as the residuum of power which it possesses within the confines laid down by international law (and it is this latter meaning that must nowadays be regarded as the correct one), then it is possible to suggest that both sovereignty and self-determination be incorporated within the same legal system.

Id.

However, Blum asserts that in reality, what is involved is the conflict between legitimacy, representing sovereignty, and revolution representing self-determination. *Id.* Thus, any attempt to recognize self-determination as a "legally recognized right amounts to an attempt to legitimize revolution and to absorb it into the existing legal system." *Id.* at 511.

18. *See* A. COBBAN, *supra* note 1, *passim*.

19. Blum I, *supra* note 5, at 511. *See* A. COBBAN, *supra* note 1, at 75. Cobban posits that "the forces antagonistic to the principle of self-determination [at the time of the peace conference] were strong enough to hold it in check." *Id.* However, after World War I, "[n]ational feeling [was] now so strong an element in the political consciousness of the world that no

nant concept in Article 2 of the Charter, the "Principles" section.²⁰ Article 2 includes the principle of "sovereign equality of states,"²¹ the abstention from "the threat or use of force against the territorial integrity or political independence of any state,"²² and the non-intervention into the domestic affairs of member states.²³

By contrast, self-determination, as referred to in the "Purposes" section of the Charter, articulates the development of friendly relations among states based on the principle of equal rights and self-determination of peoples.²⁴ Thus, sovereignty was conceived of "as an *operative* principle of the Charter . . . [whereas self-determination] was one of the *desiderata* of the Charter rather than a legal right that could be invoked as such."²⁵ Additionally, Article 55 associates self-determination with the achievement of goals within the areas of education, employment, and economic and social progress.²⁶

Furthermore, a number of resolutions adopted by the United Nations after 1948 have affected the fragile balance between sovereignty and self-determination as reflected in the United Nations Charter.²⁷ These declarations purport to elevate self-determination to an internationally recognized legal right.²⁸ Although the Charter avoids men-

settlement which [did] violence on an extensive scale to this feeling [was] likely to be accepted" *Id.* at 293-94. Furthermore, Cobban notes that:

[N]ations have learnt that military conquest and annexation are not as successful as the bases of empire as they formerly were. Political consciousness has become a fact of world-wide significance. . . . Even the strongest alien power can only keep a small people in subjection, as the USSR does its satellite states in Europe, with the aid of a party inside the state.

Id. at 306.

Further, Cobban asserts that a different, though allied set of ideals were substituted in the 1919 negotiations for that of self-determination, i.e., a belief in small states, the equality of states, and absolute national sovereignty. *Id.* at 76-82. However, because of circumstances, limitations were placed on the practical realization of self-determination at the Peace Conference. *Id.* at 104.

20. Blum I, *supra* note 5, at 511.

21. UNITED NATIONS CHARTER art. 2, para. 1 [hereinafter cited as U.N. CHARTER]. See also Blum I, *supra* note 5, at 511; Pomerance, *supra* note 9, at 316.

22. U.N. CHARTER, *supra* note 21, art. 2, para. 4.

23. U.N. CHARTER, *supra* note 21, art. 1(2). See also Blum I, *supra* note 5, at 511; Pomerance, *supra* note 9, at 316-17.

24. Blum I, *supra* note 5, at 511.

25. *Id.* (emphasis in original). The term "desiderata" has been defined as "something desired as essential or needed." WEBSTER'S INTERNATIONAL DICTIONARY 611 (3d ed. 1961).

26. Blum I, *supra* note 5, at 511.

27. See *infra* notes 30, 32 and accompanying text.

28. Blum I, *supra* note 5, at 511. See also N. FEINBERG, *supra* note 10, at 47-48 (quoting M. BEDJAQUI, LAW AND THE ALGERIAN REVOLUTION 242 (1961)). The principle of self-determination should be incorporated in the Charter, but only as a "fundamental principle of

tion of the term self-determination in connection with colonially dependent peoples, the United Nations has become pre-eminent in espousing the "demand for an end to alien subjugation from abroad, based on a doctrine of racial inequality."²⁹

Enlarged with numerous new African states, the General Assembly, in 1960, adopted its well-known Declaration on the Granting of Independence to Colonial Countries and Peoples,³⁰ which proclaimed the right of "all peoples . . . to self-determination," i.e., the right to "freely determine their political status and pursue their economic, social and cultural developments."³¹ Moreover, in two 1966 Covenants on Human Rights,³² which state that peoples may pursue their economic, social, cultural, and political development, self-determination is enumerated as a human right.³³ Additionally, the 1970 Declaration

international morality . . . Little by little the United Nations sought to go beyond the purely moral limits of this principle into a precise rule of law with clearly defined methods of enforcement." *Id.* Emerson, *supra* note 1, at 461 (quoting Gross, *The Right of Self-Determination in International Law*, in *NEW STATES IN THE MODERN WORLD* (M. Kilson ed. 1975)). Professor Leo Gross argues that:

[S]ubsequent practice as an element of interpretation does not support the proposition that the *principle* of self-determination is to be interpreted as a *right* or that human rights provisions have come to be interpreted as rights with corresponding obligations either generally or specifically with respect to the right of self-determination.

Id. (emphasis in original); *but see* Note, *supra* note 6, at 142 n.30. According to the author, self-determination has matured into a full-fledged, recognized right in international law. *Id.* at 142. Dr. Higgins finds inescapable the conclusion that self-determination has developed into an international legal right. "To insist [that self-determination remains a mere principle] is to fail to give any weight . . . to the practice of states as revealed by unanimous and consistent behavior." Emerson, *supra* note 1, at 460-61 (quoting R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 101-02 (1963)).

29. Schoenberg, *supra* note 1, at 93.

30. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960).

31. *Id.* See Pomerance, *supra* note 9, at 317; Rostow, *supra* note 2, at 153. As for the term "all peoples," Rostow asserts that:

[D]espite its great political appeal, the idea of 'self-determination' for 'all peoples' is a puzzling and complex factor in the political life of an international system based on the existence and sanctity of states, because [m]ost states include more than one people: Spain has Basque and Catalans; France, Bretons; Belgium, Walloons and Flemish; Canada, a considerable French-speaking population. The Soviet Union is . . . a combination of many peoples, widely different in language, religion, and culture. Almost all the African states include a number of tribes.

Id.; *see also* Pomerance, *supra* note 9, at 313; and *infra* note 58 and accompanying text.

32. G.A. Res. 2200, 21 U.N. Doc. A/6316 (1966) (International Covenant on Economic, Social, and Cultural Rights); G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 53, U.N. Doc. A/6316 (1966) (International Covenant on Civil and Political Rights) [hereinafter cited as Covenants on Human Rights].

33. *See* Bassiouni I, *supra* note 12, at 32 (at the time of the League of Nations, the principle of self-determination was applied to nationalities as a question of minorities' rights. Subse-

on Friendly Relations³⁴ assigns to every member state the duty to promote self-determination and to refrain from deprivation of this right through the use of force.³⁵

Thus, self-determination in the 1950's and 1960's became synonymous with de-colonization,³⁶ where " '[t]he subjection of peoples to alien subjugation, domination and exploitation . . . constitutes a denial of fundamental rights,' violates the Charter, and impedes world peace."³⁷ Moreover, according to United Nations Resolution 1514, colonialism was to be ended speedily and abruptly, and armed force proscribed against "dependent peoples" who were entitled to "complete independence" and respect for the "integrity of their national territory."³⁸ These postulates of United Nations Resolution 1514 set up a working formula which imposed an overall pattern implementing self-determination within the context of de-colonization.³⁹

However, the aforementioned pronouncements are legally questionable.⁴⁰ For example, the General Assembly resolutions declare that "all peoples have the right of self-determination," but there is no mention of such a right in the Charter.⁴¹ In other words, which particular groups will be allowed self-determination is decided by the rel-

quently, the United Nations pursued this theme as one of human rights). See Green, *Self-Determination and the Arab-Israeli Conflict*, 65 AM. SOC'Y INT'L L. PROC. 4945 (1971) (discussing Covenants on Human Rights, *supra* note 32). These resolutions affirm that the rights to which they refer "derive from the inherent dignity of the human person." *Id.*

34. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) (Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations).

35. *Id.* See also Blum, *supra* note 5, at 512.

36. De-colonization has been described as the terminating of colonial rule of the European powers in Africa and Asia. Blum I, *supra* note 5, at 512.

37. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960), quoted in Pomerance, *supra* note 9, at 317-18.

38. *Id.*

39. R. EMERSON, *supra* note 5, at 27-28. As stated by Professor Rostow:

- (1) All dependent peoples are entitled to freedom;
- (2) The people so entitled are defined in terms of the existing colonial territories, each of which contains a nation;
- (3) Once such a people has come to independence, no residual right of self-determination remains with any group within it or cutting across its frontiers.

Id. See also Schoenberg, *supra* note 1, at 100. According to the Burmese representative at the special U.N. committee that formulated the Declaration on Friendly Relations the "sum total of the experience gained by the United Nations in the implementation of [self-determination is] . . . that it was relevant only to colonialism . . ." *Id.* According to Schoenberg, Asians and Africans, dreading separatist movements, opposed any further extension of self-determination. *Id.*; see also Blum I, *supra* note 5, at 513.

40. Pomerance, *supra* note 9, at 318.

41. *Id.* (" 'all peoples' can never have the right [of self-determination], if that right is synonymous with the right to full independence").

ative power possessed by the dominant and oppressed groups as well as by the competing states, not because of any legal right.⁴² The Charter also does not require the preservation of the territorial integrity of a colonial unit where a geographical division is a better way to preserve self-government.⁴³

On a practical level, self-determination is relatively uncomplicated when applied to colonial subjects and their masters.⁴⁴ The basic principle is that alien rule should give way to rule by the people of the country concerned.⁴⁵ However, the issue is more complex when centered upon the relationships between local populations within a single territory, or between neighbors in adjoining territories.⁴⁶

Moreover, the maintenance of law and order in a territory administered by a colonial power may require the use of force. Article 2(4) of the Charter only precludes the force used against the territorial integrity or political independence of member states.⁴⁷ Thus, "now only certain states are enjoined from using force, while other 'peoples' and states are permitted and even encouraged to do so."⁴⁸ The Declaration on Colonialism is legally objectionable because its mandatory language suggests that the General Assembly is competent to amend the Charter without adhering to the proper amendment process.⁴⁹ Additionally, in referring to the "territorial integrity of a country," paragraph 6 of the Declaration on Colonialism incorporates

42. *Id.*

43. *Id.*

44. R. EMERSON, *supra* note 5, at 25.

45. *Id.*

46. *Id.* See Green, *supra* note 33, at 40. According to Green, "[i]n any case, not every multi-national state is considered as being ripe for a full exercise of self-determination if the consequence of such an exercise would be to break up the state into its alleged constituent parts, each measured by its tribal, religious, ethnic, or racial composition." *Id.* at 47.

47. Pomerance, *supra* note 9, at 318 and 334.

48. *Id.* at 334.

49. *Id.* at 318. See also R. EMERSON, *supra* note 5, at 25; Slonim, Book Review, 6 JERUSALEM J. INT'L REL. (1982-83) (reprint) (reviewing J. STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS (1981)). According to Slonim, Stone believes that to delegitimize Israel, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, established in 1977, contended on the one hand, that the 1947 Partition Resolution adopted by the Assembly was without force and, therefore, is illegal. It thus branded "Israel as an outlaw legally obliged to surrender territory and status to the Palestinians," and justified the Arab invasion of Palestine in 1948. *Id.* at 1. On the other hand, the Committee wished to bind Israel to certain aspects of the Partition Resolution and to impart a mandatory quality to post-1967 General Assembly resolutions dealing with Palestine, although the General Assembly only has power to bind member states on such issues as the United Nations budget and administrative matters. *Id.* at 2, 3. "Resolutions of the General Assembly remain mere recommendations no matter how frequently adopted and no matter with what majority. It is

two contradictory principles, self-determination and territorial integrity, in one document.⁵⁰ More importantly, no answers are given in the Declaration or subsequent documents as to which principle is to be applied.⁵¹ As a result, a double standard intrudes because a selective process is used in applying either one or the other principle.⁵²

precisely because all states realize the non-binding nature of Assembly resolutions that [they] . . . are adopted with such lopsided majorities. They obligate no one" *Id.* at 3.

According to Professor Green, General Assembly resolutions are "nothing more than recommendations, even though they enjoy some measure of moral force." *Id.* Green notes that:

To the extent that [the General Assembly resolutions] may have been regularly voted for by the same states may indicate that these states considered themselves to be obliged to recognize such rights, while a consistent practice over a period of years might indicate the development of a new rule of customary law to this effect, although it is doubtful how far this would bind any Member which had voted negatively or had consistently abstained, and there would be even less legal effect insofar as non-Members of the United Nations are concerned. Moreover, the fact that there may have developed such a rule of international law with regard to the right of self-determination does not mean that it always existed, and it is perhaps doubtful whether the recognition of such a right could operate retroactively.

Green, *supra* note 33, at 45; *see also infra* note 137 and accompanying text; *see also* Zafren, *supra* note 4, at 13. Zafren, referring to the International Court of Justice (ICJ) Opinion of 6/21/71, *infra* note 121, notes that "the Court, . . . while indicating that each Security Council Resolution and its surrounding history would have to be examined to determine whether it imposes any legal duty on or affects legally the right of any state, states that such resolutions can and do have legal effect." *Id.*; *see* Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2 (7) of the United Nations Charter*, 71 AM. J. INT'L L. 60 (1977). According to Watson, Security Council resolutions do not create international law because the "power to make authoritarian interpretations of Article 2(7) [of the Charter] has not been yielded by the states to the political organs of the United Nations and that the power of autointerpretation thus still rests with the member states." *Id.*; *see also* Yost, 65 AM. SOC'Y INT'L L. PROC. 52 (1971). According to Yost, summarizing Professor Green's comments, U.N. resolutions

are only recommendatory, [in] that they are almost invariably limited to former colonial territories and that U.N. Members are on the whole extremely cautious about applying the principle of self-determination to the metropolitan territory of Member States, [because] . . . if this principle should be sweepingly and indiscriminately applied there, it could easily effect the break-up of most of the Members.

Id. at 52; Emerson, *supra* note 1, at 460. *But see* Higgins, *The United Nations and Lawmaking: the Political Organs*, 64 AM. SOC'Y INT'L L. PROC. 37, 43 (1970). Higgins asserts that "[w]hat is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general [legal opinion], has created the norm in question." *Id.* at 43. Thus, the key issue in the cumulative effect of such resolutions is to determine the "emergence of rules of general customary law" rather than the non-binding character of Assembly resolutions. Emerson, *supra* note 1, at 460.

50. Pomerance, *supra* note 9, at 318-19.

51. *Id.* at 319.

52. Blum I, *supra* note 5, at 512. According to Blum, after World War I, self-determination was basically restricted to minorities within the defeated nations. In the 1950's and 1960's, self-determination became synonymous with the de-colonization of Africa and Asia. However, "mere substitution of independence for colonial rule does not of itself ensure self-

For example, the restriction of self-determination to colonial peoples has not been followed by the United Nations in the case of the Palestinian Arabs.⁵³

C. Problems Associated with the Concept of Self-Determination

Although there is neither a precise definition of self-determination, nor a definite, single standard which may be applied under certain specified conditions, self-determination essentially posits that a group defined by its common history, tradition, language, and ethnic background has a right to "choose its own destiny."⁵⁴ To Woodrow Wilson, self-determination was another word for popular sovereignty.⁵⁵ Yet, although "self-determination has been a major force during most of this century,"⁵⁶ no adequate definition of what constitutes a people or a group exists.⁵⁷ Therefore, it is essential to establish who bears the right of self-determination.⁵⁸ The problem of defining self-determination, however, extends beyond the territorial or ethnic criteria of a "race, a territorial area, or a community."⁵⁹

It is necessary to determine what methods are permissible to ef-

determination. . . ." *Id.* The ethnic and national absurdities carved out by the Congress of Berlin 100 years ago are now sacrosanct boundaries of independent African States. The boundaries which group nations and tribes together have little in common except their colonial masters. *Id.* The people who were not subjected to the rule of colonial power, i.e., "Lithuanians, Latvians, Estonians, Basques and Catalonians are apparently denied the right to demand secession from the Soviet Union and Spain, respectively." *Id.* at 513.

53. Schoenberg, *supra* note 1, at 102-03. Noting the striking parallel between Israel and Czechoslovakia, Schoenberg describes how both were accused of endangering world peace by denying Palestinian Arab and Sudeten German self-determination. Nazi Germany used self-determination to disguise and justify territorial expansion at Czechoslovakia's expense, and the Arab States also use self-determination at Israel's expense by accusing Israel of "endangering world peace by denying . . . Palestinian Arabs the 'legitimate rights' they insist upon." *Id.* at 103.

54. *Id.* at 91.

55. A. COBBAN, *supra* note 1, at 63 (asserting that "the idealization of democracy was an essential part of Wilsonian ideology").

56. Freidlander, *The PLO and the Rule of Law*, 10 DENVER J. INT'L L. & POL'Y 221, 229 (1981).

57. *Id.* at 229-30.

58. Pomerance, *supra* note 9, at 312.

59. *Id.* (quoting Lansing, *Self-Determination*, SATURDAY EVENING POST, Apr. 9, 1921, at 7). See also R. EMERSON, *supra* note 5, at 27. The question also arises as to whether or not self-determination should be recognized as a universal and continuing right for all people or as a right which is extinguished after a one-time exercise. *Id.* Emerson asserts that self-determination "once exercised [has] no justification for a reappearance on the scene. It represents no continuing process, but has only the function of bringing independence to people under alien rule." *Id.* at 29; see also Blum I, *supra* note 5, at 513. Pomerance queries, "[w]hat happens when new demands for secession arise? Is a limit to be set to the process of self-determination,

fectuate self-determination,⁶⁰ such as who may participate, what is the status of former residents and new immigrants, who determines which options are placed before the electorate, and who within the community speaks for and binds the community.⁶¹ Additional problems to be resolved include defining the boundaries, the inhabitants, the members of a race or community, and the critical time period involved.⁶² Thus, any definition of self-determination involves a complex interplay between territorial boundaries, group affiliation, and time.⁶³ Moreover, self-determination claims may also clash with opposing self-determination claims.⁶⁴ If so, the recognition of the rights of one claim often entails the denial of rights to a competing claim.⁶⁵

or should the process be seen as continuing and open-ended?" Pomerance, *supra* note 9, at 314.

60. These methods may include, independence, free association, merger and federation, or any other freely determined status which, while providing self-government, also provided the "benefits of association with a larger state and presumably representation by it in the world at large." Emerson, *supra* note 1, at 470. See Note, *supra* note 6, at 153-55; see also Pomerance, *supra* note 9, at 327; Meron, *Settlement in the Middle East: What Would It Look Like And Can We Get There From Here?*, 77 AM. SOC'Y INT'L L. PROC. 271, 275-76 (1985). According to Meron, Professor of Law at New York University, "[a]nything that would be acceptable to the 'self' . . . through an exercise of free will, such as plebiscite or a referendum, is an expression of self-determination." *Id.* According to Meron, "[h]istory shows that there is a wide range of procedures that work when they are freely accepted by all the principal actors . . . [f]or example, autonomy, which when agreed upon may be an adequate expression of self-determination." *Id.* at 276.

61. See, e.g., Pomerance, *supra* note 9, at 315-16; R. EMERSON, *supra* note 5, at 27.

62. See Pomerance, *supra* note 9, at 313. Pomerance asks "[w]hich is the critical point in the seamless web of history for determining the population to be deemed 'indigenous?'" *Id.* at 323. For example, "are the present inhabitants of the Falklands 'indigenous' after 150 years or are they alien intruders into Argentina's domain? After 250 years of settlement in Gibraltar, is the population still to be deemed, as Spain argues, a non-indigenous population . . . ?" *Id.* at 313.

63. Pomerance, *supra* note 9, at 312.

64. *Id.* at 313.

65. *Id.*

(a) The demand for secession or *separate self-determination*, by one 'self' clashes with the claim to *territorial integrity* or political independence put forward by the unit of which the first 'self' is felt to be a part.

(b) 'Self-determination' by the smaller unit conflicts with the 'self-determination' to which the larger unit claims to be entitled.

(c) There is an opposition between *two claims to territorial integrity*—that of the larger as against that of the smaller unit.

There may also be competing claims by different ethnic groups—Arabs and Jews, immigrant Indians and native Fijians, whites and blacks in South Africa—to the same territorial area.

Inherently, self-determination, in the sense of full independence and sovereignty, cannot be given to *all* peoples, unless the 'self' is reduced to the individual 'self' of the term's metaphysical origin. For the very act of fulfilling one claimant's right of

The problems of defining self-determination have not been resolved by the United Nations in a satisfactory or principled way.⁶⁶ United Nations Declaration 1514⁶⁷ neither gives precision to the concept nor defines the frequently utilized term "peoples."⁶⁸ Moreover, the Annex to United Nations General Assembly Resolution 1541, dealing with dependent territories, defines free association but does not specify to whom the categories of association and self-government apply.⁶⁹

However, the United Nations has opted for a territorial standard in defining self-determination (i.e., every colonial territory is entitled to self-determination, regardless of size),⁷⁰ but this standard has not been universally applied. For example, colonies have been split on ethnic grounds.⁷¹ Additionally, the territorial criterion has not been applied to areas annexed by powerful neighbors, even though they were not formerly a part of the colonial boundaries.⁷²

The United Nations is also silent as to what conditions trigger the transformation of the principle of self-determination into an operative right.⁷³ Whether a neighbor's claim is legitimate may depend on who that neighbor is (i.e., a powerful neighbor coveting a small colony), and whether the General Assembly perceives the neighbor's act

self-determination will generally constitute the denial of the claim of another contender to the right.

Id.

66. *Id.* at 327 (asserting that, "unlike most self-determination cases which reach the UN, in this instance the sovereign equality and continued existence of a member state are at issue and not merely the claims of states to recover sovereignty over contiguous territory"). See also Blum I, *supra* note 5, at 514 (Blum cannot "refrain from noting that what stands out here is the utter insincerity with which the principle of self-determination has been manipulated by the international community to suit changing political needs"). *Id.* Blum further notes that "[i]n this sad picture of double-talk and inconsistency there are probably only two constant factors that enable rival concepts of sovereignty and self-determination to coexist peacefully side by side: . . . the ability of [any given people] to implement its right to self-determination . . . [and the] support [of] sovereignty at home and self-determination abroad" *Id.*

67. Pomerance, *supra* note 9, at 327.

68. Freidlander, *supra* note 56, at 230.

69. *Id.*

70. Pomerance, *supra* note 9, at 322.

71. For example, "Ruanda-Urundi emerged as Rwanda and Burundi . . . the British Cameroons were divided into north and south for the purposes of holding referenda, and each section opted for a different political status: the north acceded to Nigeria, the south to the state of Cameroon." The emergence from the Pacific Trust territory has proceeded on the basis of the fragmentation, rather than the unity of territory. See *id.* at 322.

72. "India, for example, annexed Hyderabad, Sikkim, part of Kashmir, and Goa . . . West Irian and East Timor were incorporated into Indonesia, . . . and Ifni into Morocco." *Id.*

73. R. EMERSON, *supra* note 5, at 462-63.

of incorporation as a "colonial" or "non-colonial" act.⁷⁴ Thus, the objective territorial criterion in defining what constitutes a "colonial" relationship becomes a subjective exercise as perceived by the General Assembly.⁷⁵

The most obvious use of the subjective criterion, as opposed to the territorial criterion, is apparent in situations where the ethnic makeup of a territory has changed significantly over time.⁷⁶ Forced and voluntary population movements are constant features of international relations, particularly during and following wars and periods of instability.⁷⁷ Thus, the question arises as to which population is to be considered the majority to whom self-determination attaches.⁷⁸

In the Middle East,⁷⁹ the question of which of the present populations is indigenous to Jordan, Israel, and Lebanon has been the subject of heated debate by the principals involved, as well as others.⁸⁰ Subjective criteria have been used by the United Nations to determine which population is indigenous to the area.⁸¹ Third World States increasingly perceive Israel as a European, Western, "non-indigenous" settler population.⁸² However, this perception overlooks, by ignorance or design, not only the historic connection of the Jewish people with Israel, but also the fact that the present Jewish population of Israel is predominantly Middle Eastern in origin.⁸³ Unlike most situations in which the self-determination claims concern the recovery of sovereignty over contiguous territory, in this instance, the sovereign equality and continued existence of a member state are at issue.⁸⁴

74. Pomerance, *supra* note 9, at 323.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Israel is bounded on the west by the Mediterranean Sea, on the north by Lebanon, on the northeast by Syria, on the east by Jordan, on the south by Aqaba, and on the southwest by Sinai and Egypt. See L. DAVIS, MYTHS AND FACTS 42 (1984).

80. See Pomerance, *supra* note 9, at 326.

81. *Id.* at 326.

82. *Id.*

83. *Id.*

84. Schoenberg, *supra* note 1, at 101 (quoting U Thant, U.N. Press Release 5 G/SM/1201 of Jan. 19, 1970). U Thant stressed that "[w]hen a state applied to be a Member of the United Nations, and when the United Nations accepts that Member, then the implication is that the rest of the membership of the United Nations recognized the territorial integrity, independence and sovereignty of that particular Member State." *Id.*

D. Self-Determination and the Palestinian Arabs

Separating the "intertwined territorial, ethnic and time factors"⁸⁵ is an acute problem in the demand for Palestinian⁸⁶ self-determination and the General Assembly's repeated assertions of the "right of return" under international law for Palestinian refugees.⁸⁷ These pronouncements raise many unanswered questions, such as the following: to which territorial unit does this "right" attach; which Palestinians are included;⁸⁸ whether security considerations are to be set aside and

85. Pomerance, *supra* note 9, at 325.

86. See *supra* note 2.

87. Pomerance, *supra* note 9, at 325-26. See generally Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 586 (quoting G.A. Res. 3236, 29 U.N. GAOR, Supp. (No. 31) at 4, U.N. Doc. A/9631 (1974)) ("among the rights affirmed . . . is 'the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted' . . .").

Radley notes that Resolution 3236 is the first Assembly resolution to "eschew the term 'refugee,'" thus viewing the problem of displaced Palestinians as one of a people denied its national rights, rather than a refugee problem. *Id.* at 606. According to Radley, G.A. Res. 3236 appears to reaffirm a previous resolution that displaced Palestinians not only have the right to return to the area they fled in Israel, but have the right to do so within the overall context of self-determination. *Id.* at 606 (discussing G.A. Res. 3089D, 28 U.N. GAOR, Supp. (No. 30) at 27, U.N. Doc. A/9030 (1973)). Radley asserts that Resolution 3236 not only renders meaningless the concept of sovereign equality of states by giving the Palestinians the absolute right of return to Israeli territory despite any objections Israel might have, but also endows the displaced Palestinians with the right to return to preserve a separate national identity. *Id.* at 607. Radley notes that it is "difficult to imagine how much closer the General Assembly could have come to endorsing the destruction, in part or whole, of a member state." *Id.*

88. According to Joan Peters, journalist and author, the most widely held assumption regarding the Arab-Jewish Conflict is not true. Reich, *Population and Politics* (Book Review), ATLANTIC, July 1984, at 110 (reviewing J. PETERS, FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE (1984)). That assumption conceives of a "native" Palestinian population settled in Palestine "from time immemorial" until late-coming Zionists, backed by colonial powers, created the State of Israel, thus usurping the Palestinian homeland and forcing a Palestinian exodus. Reich, *supra*, at 110; see also Bassiouni I, *supra* note 12, at 34.

Peters conducted a study of the Arab refugees in the course of preparing a documentary on effects of the 1973 Yom Kippur War. In a complex demographic analysis of the Jewish and Arab populations in various parts of Palestine, Peters shows that, from approximately 1893 to the eve of the 1948 War, there was a substantial Arab migration in the parts of Palestine settled by Jews. The sparse population along the Palestine coast included a variety of ethnic people many of whom were not Arab. Peters, *supra*, at 261. Hence, rather than having been a people settled in its native land from time immemorial, a large part of the pre-1948 Arab population had migrated into areas of Jewish settlement either from outside the area or from other parts of Palestine. Sanders, *Demography and Destiny* (Book Review), THE NEW REPUBLIC, Apr. 23, 1984, at 38-39 (reviewing J. PETERS, FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE (1984)). This explains why the definition of a refugee from Palestine in 1948 is a person who lived there for just two years because many Arab residents in 1948 had immigrated so recently. Pipes, *Refugees?* (Book Review), COM-

a hostile population admitted; and whether the "right of return" is meant to insure self-determination for the Palestinians even at the expense of Israeli self-determination and existence.⁸⁹

Professor Julius Stone, an acclaimed international legal scholar,⁹⁰ argues that there is no "right of return" under international law for Palestinian Arabs.⁹¹ The underlying assumption of this "right" is that the "Israel-Arab" question arises from an encroachment by the state of Israel on some international law right of self-determination of a Palestinian Arab nation.⁹² Stone asserts that "[t]his assumption

MENTARY, July 1984, at 60, (reviewing J. PETERS, FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE (1984)). The usual definition would have cut out a substantial portion of the persons who later claimed to be refugees from Palestine. *Id.* Thus, contrary to the standard myth of Jewish immigrants having "displaced" an indigenous Arab peasantry, this immigration was created by the Jewish redevelopment which attracted large numbers of Arab people. Sanders, *supra*, at 39. See also Stone, *Peace and the Palestinians*, in THE ARAB-ISRAELI CONFLICT, *supra* note 13, at 136.

The assertion that Israel came into existence on the basis of injustice to the Palestinian people distorts historical fact. The Arab claimant after World War I included Arabs throughout the entire area. The Palestinian Arabs were merely peripheral rather than a distinctive segment whose interests as such were taken into account. Consequently, to present a Palestinian "entity" and people, presumably emergent in the 1960's, as a claimant against Israel now, is an unwarranted and dubious game with history.

Id. at 139; see also Peretz, *Arab Palestine: Phoenix or Phantom*, in THE ARAB-ISRAELI CONFLICT, *supra* note 13, at 73. Peretz asserts that "[t]he national identity of the Palestine Arabs has gone through a cycle of: discovery in the 1920's, political failure in the 1930s, near abandonment in the 1940's, disillusionment in the 1950's and 1960's, and rebirth, rediscovery and new expectations since 1967." *Id.* at 74. Further, Peretz notes that "[p]rior to establishment of the British Mandate at the end of World War I, there was no distinctive Palestinian people nor political entity . . ." *Id.* Peretz contends that "[o]nly after the establishment of the British Mandate in 1920, and the rise of Jewish nationalism in the country did a distinctive Palestinian Arab consciousness emerge in response to the challenge of these two forms of European intrusion." *Id.*; cf. Cattán, *Sovereignty over Palestine*, in THE ARAB-ISRAELI CONFLICT, *supra* note 13, at 11. Cattán argues that the "title of the Palestinian Arabs to Palestine . . . rests upon their ownership of the country from time immemorial. . . . The Arabs, including the Palestinians are pre-Islamic people. They lived in Palestine and other parts of the Middle East before the advent of Islam and the Moslem conquest." *Id.* at 13-14.

89. Pomerance, *supra* note 9, at 326-27. See also Radley, *supra* note 87, at 604-05 (General Assembly resolutions passed in 1969 "raise not only the issue of Palestinian repatriation but also that of Palestinian self-determination, in terms such as to raise in the minds of many observers the question whether these resolutions were consistent with Israeli sovereignty and independence and even Israel's right to exist.").

90. Noted jurist, author, and professor of law at the University of California, Hastings College of Law.

91. Slonim, *supra* note 49, at 1. See generally Radley, *supra* note 87, at 586-614.

92. Peretz, *Arab Palestine: Phoenix or Phantom?*, in THE ARAB-ISRAELI CONFLICT, *supra* note 13, at 73. Peretz asserts that "there is no distinctive Palestinian people, nor political entity." *Id.* at 74. Furthermore, "[t]he land and its inhabitants were considered backward regions of the less-developed Ottoman Syrian provinces." *Id.*

. . . is based on the historical fallacy that the contending claims in the crucial period 1917-1919 were those of the Jews against those of the Palestinians."⁹³ Rather, Stone points out that the two contenders for self-determination in the Middle East at that time were the Arab and Jewish peoples.⁹⁴ The United Nations Partition Resolution, in response to their claims, apportioned the overwhelming share of territory and resources to the Arabs.⁹⁵ Palestine alone, however, was designated for the Jewish people.⁹⁶ Even that small allotment was dramatically reduced when Palestine was divided into two parts: the west bank of the Jordan river extending to the Mediterranean was earmarked for Jewish development, ultimately to become the state of Israel, while the east bank was reserved for Arab development, ultimately to become the Palestinian state of Transjordan (today Jordan).⁹⁷

Stone posits that "the principle of self-determination was thus more than satisfied in relation to the Arab nations, and that any claims which the Palestinians now seek to raise should be directed to the vast territory of the Arab States."⁹⁸

III. THE HISTORICAL LEGAL CHARACTER OF ISRAEL'S PRESENCE ON THE WEST BANK

Understanding the debate concerning the legality of Israel's sta-

93. Slonim, *supra* note 49, at 1. See also *supra* notes 2 and 87 and accompanying text.

94. Slonim, *supra* note 49 at 1. See also Stone, *Peace and Palestine*, in *THE ARAB-ISRAEL CONFLICT*, *supra* note 13, at 147. Stone asserts that "[a]s a matter of historical fact, the principal claimants in the distribution of the vast, formerly Turkish territories embracing the whole of the Near and Middle East were the Arab and Jewish peoples." *Id.* at 138.

Furthermore, the territory designated for the Jewish people comprised Cisjordan and Transjordan, an area situated on both sides of the Jordan River and within the mandate granted by the League of Nations in 1922. *Id.* at 147. Despite Jewish protests, the lands east of the Jordan were separated from the "Jewish National Home" as provided for in the mandate and allocated to the creation in Palestine of an independent Arab State—Jordan. *Id.* Thus, Jordan constituted the Arab state within Palestine. *Id.* The West Bank, Gaza, and Jerusalem remained within the area provided for the "Jewish National Home" until the establishment in 1948 of the state of Israel. Jordan, in the subsequent Arab attack, seized the West Bank and East Jerusalem. *Id.* Stone further observes that "the real question of self-determination centers on the *raison d'être* of the Kingdom of Jordan if not as the Palestine Arab State." *Id.* at 149.

95. See *id.*

96. Slonim, *supra* note 49, at 1.

97. *Id.*

98. *Id.*

tus on the West Bank, requires a review of the history of the area.⁹⁹ The problems inherent in the West Bank controversy can be traced to unresolved issues left by the Palestine mandate and the 1948-49 War.¹⁰⁰

A. *The League of Nations Mandate*

The historical dimension of the inseparable bond of the Jewish people with the land of Israel is an integral part of world history.¹⁰¹ There has been a continuous Jewish presence in the land of Israel since ancient times.¹⁰² Furthermore, the League of Nations Mandate for Palestine emphasized "the historical connection of the Jewish people with Palestine and . . . the grounds for reconstituting their national home in that country."¹⁰³ Thus, the mandatory power had the duty of encouraging "close settlement by Jews" in Palestine.¹⁰⁴

Unlike other mandates, the Palestine mandate was established under Article 22(8) of the League Covenant "which authorized the League Council explicitly to define the terms of a Mandate when the broad general statements of paragraph I was insufficient."¹⁰⁵ The

99. A. GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 40 (1978). See also Zafren, *supra* note 4, at 4.

100. *Id.* at 40-41.

101. Blum, *Judea, Samaria and Gaza—The Israeli Record* 3 (statements in the Security Council, March 13 and 19, 1979, abridged version) (quoting J. PARKES, *WHOSE LAND?* 10 (1971)) [hereinafter cited as Blum II].

The Land of Israel is intertwined far more intimately into the religious and historical memories of the Jewish people: for their connection with the country has been of much longer duration—in fact, it has been continuous from the second millenium B.C.E. up to modern times—and their religious literature is more intimately connected with its history, its climate and its soil. The Land, therefore, has provided an emotional centre which has endured through the whole of their period of 'exile' and has led to constant returns or attempted returns culminating in our own day in the Zionist Movement

Id. at 4.

Moreover, Judaism is tied "to the history of a single people and the geographical actuality of a single land." *Id.* at 3 (quoting J. PARKES, *supra*); cf. H. CATTAN, *PALESTINE AND INTERNATIONAL LAW* 3 (1973). Cattan claims a presence of Palestinians in Palestine since earliest recorded history. According to Cattan, Palestinians are descendants of the Canaanites who were the earliest known inhabitants of Palestine. *Id.* at 3, 7.

102. Blum II, *supra* note 101, at 4.

103. The Mandate for Palestine Confirmed by the Council of the League of Nations on July 24, 1922, and the Memorandum by the British Government Relating to its Application to Transjordan Approved by the Council of the League on Sept. 16, 1922: Report to the General Assembly of the United Nations Special Committee on Palestine, Vol. II, Annexes, Appendix and Maps 18-22, U.N. Doc. A/364 Add. 1 (Sept. 9, 1947).

104. *Id.* at 893. See also Rostow, *supra* note 2, at 155.

105. Rostow, *supra* note 2, at 155. According to Rostow, the administration of territories which had been part of the Turkish and German empires and certain territories in South West

Preamble to the Palestine mandate incorporated the Balfour Declaration, which called for the "establishment of a national home for the Jewish people in Palestine."¹⁰⁶ The mandate gave priority to the national aspirations of a non-inhabitant people—the dispersed Jewish people—over the current indigenous population,¹⁰⁷ making it unique among mandated territories.¹⁰⁸ Thus, Palestine had two beneficiaries, the indigenous Arab population and the Jewish people throughout the world.¹⁰⁹

Moreover, the mandatory power was specifically instructed to facilitate Jewish immigration and settlement in Palestine and could "postpone or withhold" the application of Articles to the mandate in the area east of Jordan.¹¹⁰ This proviso, however, did not apply to Jewish rights of immigration and close settlement in the West Bank and Gaza.¹¹¹

Regarding the validity and binding nature of the Palestine mandate on the parties concerned, two general schools of thought exist.

Africa, were taken over by the Allies as mandates. *Id.* at 154, 156-58. The administration of the Palestine Mandate, however, was assumed under art. 22(8). *Id.* at 155. Article 22(8) of the League Covenant provides that "[t]he 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." LEAGUE COVENANT, *supra* note 13, art. 22; *see also supra* text accompanying notes 13-17; *see* CRESCENT AND STAR 217 (N. Kittrie & Y. Alexander eds. 1973) which states:

The Jews lived in Palestine from about 1200 B.C. until the Roman destruction of the Jerusalem Temple in 70 A.D. Palestine then became a Roman province until it was conquered by the invading Arabs in 637 A.D. In the next thirteen centuries the area changed hands from one domination to another. Since 1071 Palestine was ruled by Seljuk Turks, the Crusaders, the Kurds, the Mamelukes, and from 1516 by the Ottoman Turks who, after the First World War, renounced their rights to the land. The British Mandate in Palestine, which followed, lasted until May 14, 1948.

Id. at 217.

106. A. GERSON, *supra* note 99, at 43.

107. *Id.*

108. *Id.* "The fact that the Palestine mandate was '*sui generis*' in the Mandate System in no way detracts from its legality." *Id.* Article I extended the mandatory's role from administrative advice and assistance to administration and legislation; article 4 required the mandatory power to seek the advice of the Jewish Agency in matters affecting the Jewish National Home and interests of the Jews in Palestine; article 7 required the mandatory to assist Jews permanently residing in Palestine to acquire Palestinian citizenship; article 22 made Hebrew a national language. *Id.* at 85 n.18.

109. *Id.* at 43. *See also* Rostow, *supra* note 2, at 155. Rostow asserts that the case for treating the West Bank and the Gaza Strip as "Arab" territory is not helped by contending that the existing population of the area is largely Arab. That was true for all of Palestine, except Jerusalem, when the mandate was established. Jewish settlement in a land then populated mainly by Arabs is what the mandate specifically authorizes. *Id.* at 161.

110. *See* Rostow, *supra* note 2, at 156.

111. *See* Mandate for Palestine, *supra* note 103 art. 25; Rostow, *supra* note 2, at 156.

On the one hand, Professor Eugene Rostow, Professor of Law and Public Affairs at Yale University,¹¹² argues that the states of Jordan and Israel already exist in Palestine and only Gaza and the West Bank remain as unallocated parts of the mandate.¹¹³ As such, they remain subject to the original mandate, including the right of Jewish settlement and development in those mandate areas.¹¹⁴ Rostow bases his contention on the ruling of the Permanent Court of International Justice, and its successor, the International Court of Justice (ICJ).¹¹⁵ These rulings have confirmed the status of the mandates, in general, and of the Palestine mandate in particular, even after the demise of the League of Nations.¹¹⁶

In connection with the mandate for German Southwest Africa (now called Namibia), the ICJ has ruled that a League mandate is a binding international instrument, having the character of a treaty or convention, and that the international community is obligated to ensure that its terms are fulfilled.¹¹⁷ The ICJ noted that Article 80 of the United Nations Charter "presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations. It obviously was the intention to safeguard the rights of states and peoples under all circumstances and in all respects."¹¹⁸ Article 25 of the United Nations Charter authorizes the Security Council to make binding decisions with regard to the future of all mandates.¹¹⁹

In the case of Namibia, the ICJ upheld the Security Council's ruling that South Africa had abandoned its rights as the mandatory power.¹²⁰ Nevertheless, the mandate survived as a trust, based on Article 80 of the Charter.¹²¹ The Namibia Mandate parallels the Pales-

112. Rostow, *supra* note 2, at 112.

113. *Id.* at 159.

114. *Id.* at 156, 159.

115. *Id.* at 156-59.

116. See A. GERSON, *supra* note 99, at 85 n.20; Rostow, *supra* note 2, at 156.

117. See Rosenne, *Directions for a Middle East Settlement—Some Underlying Legal Problems*, in THE ARAB-ISRAELI CONFLICT, *supra* note 13, at 670.

118. *Id.* at 670 (quoting Advisory Opinion on the International Status of South West Africa, 1950 I.C.J. 128, 134).

119. Rostow, *supra* note 2, at 157.

120. *Id.* (citing SCOR Res. 276, 25 U.N. SCOR, Resolutions and Decisions 1, U.N. Doc. S/INF/25 (1971) *aff'd* G.A. Res. 2145, 21 U.N. GAOR, Supp. (No. 16) at 2, U.N. Doc. A/6316 (1966)).

121. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 33-36, 39-40; Advisory Opinion on the International Status of South West Africa, 1950 I.C.J. 128, 131-38.

tinian Mandate despite the different manner in which each was terminated. The ICJ ruled that South Africa had ceased to be the legitimate mandatory power, and the future of the mandated territory is to be settled according to mandate principles.¹²² In the case of Palestine, Great Britain withdrew from Palestine as the mandatory power, thereby terminating its administration of the territory.¹²³ Nevertheless, both the South West Africa Mandate and the Palestine Mandate survived the termination of the mandate administration as trusts under Article 80 of the United Nations Charter.¹²⁴

Professor Stone, on the other hand, disputes the Rostow "argument that the territory in question may still be considered unallocated areas of the mandate."¹²⁵ Stone argues that, in addition to ruling that a mandate continues even after the League's demise, the ICJ has also ruled that the mandatory power, together with the General Assembly, can modify the status of the mandate.¹²⁶ Britain, in concert with the United Nations, effectively terminated the mandate on May 14, 1948.¹²⁷ After that date, only the inhabitants of Palestine had anything to say concerning the disposition or status of Palestinian territory.¹²⁸ Israel declared statehood in part of the mandated territory and invading Arab armies from Egypt, Syria, Transjordan, Iraq, and Lebanon occupied the rest.¹²⁹ Thus, Stone argues, rather than refer-

122. Rostow, *supra* note 2, at 158. The mandatory power administering the territories under the mandate was to continue "to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed [upon] between the United Nations and the respective mandatory Powers [i.e., peaceful international agreements]." Advisory Opinion on the International Status of South West Africa, 1950 I.C.J. at 134 (quoting the Resolution of the League of Nations of Apr. 18, 1946).

123. Rostow, *supra* note 2, at 158.

124. *Id.*

125. Slonim, *supra* note 49, at 4. See also Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 344-47 (1970). Professor Schwebel opines that "[w]here the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title." *Id.* at 346.

126. Slonim, *supra* note 49, at 4.

127. *Id.*

128. *Id.*

129. *Id.* See also Green, *supra* note 33, at 47. Professor Green contends that:

With the establishment of Israel, large numbers of Arab inhabitants of the territory which constitutes that state left, and it would indeed be a new interpretation even of the right of self-determination to allow such non-residents to participate in any exercise of franchise directed at deciding whether or not a recognized member of the international society was entitled to continue in existence. Insofar as the Arab inhabitants of Israel are concerned, they already enjoy . . . the suffrage and equal political rights with the other inhabitants of Israel. From the point of view of international law they are Israelis, even though they may be of Arab ethnic origin.

ring to the West Bank and Gaza as "unallocated areas of the mandate," the status of these territories should be determined in accordance with international law principles.¹³⁰

Futhermore, Professor Stone posits that as long as the Arab States do not negotiate peace with Israel, Israel is justified in holding on to territory acquired in a war of self-defense.¹³¹ According to Stone, Israel's presence is, at least, as valid as Jordan's.¹³² In other words, Jordan violated international laws and specific United Nations resolutions when it invaded the West Bank in 1948, whereas Israel gained control of the area in 1967 as a consequence of a war of self-defense.¹³³ Only the state of Israel arose in former mandatory Palestine and, thus, Israel's claim may in fact be superior to that of Jordan.¹³⁴

B. Partition and Wars

In 1947, Great Britain withdrew as the mandatory power in Palestine. Subsequently, the United Nations General Assembly voted in favor of the Palestine Partition Resolution.¹³⁵ Professor Stone claims

Id. at 47.

130. Slonim, *supra* note 49, at 4. According to Stone, Security Council Resolution 242 should serve as the vehicle by which Israel and the *de facto* Palestinian State of Jordan reach agreement "on a regime accommodating the political, economic, and strategic concerns of both states, the rights of entry of Jews under the mandate, as well as the entitlement of the inhabitants under the Camp David Agreements to 'full autonomy.'" J. STONE, *supra* note 49, at 122.

131. Slonim, *supra* note 49, at 4.

132. *Id.*

133. See Schwebel, *supra* note 125, at 346-47. Professor Schwebel asserts that "having regard to the consideration that Israel acted defensively in 1948 and 1967, Israel has better title in Palestine than do Jordan and Egypt." *Id.* at 347. See also Zafren, *supra* note 4, at 27 (quoting *The Colonization of the West Bank Territories by Israel: Hearings Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 16 (1977) (statement of Yehuda Zvi Blum, Professor of International Law, Hebrew University)) [hereinafter cited as Blum III]. Professor Schwebel's assertion "that Israel can show better title than Jordan or Egypt to any territory that lives [sic] within the boundaries of the former Palestinian mandate rests on solid legal foundations." *Id.* at 27. Furthermore, "[t]itle to territory is normally based not on a claim of absolute validity—few such claims could be substantiated, not even those of the United States of America to the territory which it holds—but rather on one of relative validity." *Id.* at 27. Thus, the relative superiority of Israel's claim under international law cannot be equalled. *Id.* at 27A.

134. Slonim, *supra* note 49, at 3.

135. G.A. Res. 181 II, U.N. GAOR 131-32 (1947). See also Slonim, *supra* note 49, at 2. According to Slonim's interpretation of Stone, the Arabs steadfastly maintain the illegality of the Resolution, thus not only delegitimizing Israel, but also justifying the Arab invasion in 1948. At the same time, they wish to bind Israel to certain features of the Plan and to impart a mandatory quality to post-1967 resolutions regarding Palestine. *Id.*; A. GERSON, *supra* note

that the United Nations is empowered under Article 10 of the Charter to adopt the Partition Resolution.¹³⁶ However, since the General Assembly is limited to making recommendations, the resolution was not binding and, therefore, could not vest rights in the Arabs or the Jews.¹³⁷ The resolution would bind parties only to the extent they wished to be bound. As a result, the partition plan was aborted because no agreement was reached.¹³⁸

By contrast, Professor Rostow, citing the ICJ's 1950 advisory opinion regarding Namibia,¹³⁹ argues that the Partition Resolution was valid and binding when adopted because the mandatory power, together with the General Assembly, could modify the mandate's terms.¹⁴⁰ In fact, Britain and the General Assembly did modify the mandate in 1947 when the General Assembly adopted the Partition Resolution.¹⁴¹

However, Israel's existence as a sovereign state under either interpretation does not derive from the Partition Resolution because, regardless of the original binding nature of the Resolution when adopted, it ceased to obligate the parties concerned when the Arabs violently rejected the resolution in May of 1948 by declaring invalid the newly declared state of Israel.¹⁴² The Resolution could not bind

99, at 49. According to Gerson, partition was the best option to reconcile Jewish and Arab national interests without war and without continued supervision of the Mandate. *Id.*

136. See Slonim, *supra* note 49, at 2.

137. *Id.* See also Zafren, *supra* note 4, at 24 (quoting Professor Alah Hulatapa of Cambridge University) ("[R]esolutions of the General Assembly do not normally create legal obligations for the members of the [United Nations] . . . and the partition resolution did not have a legislative character.'").

138. Slonim, *supra* note 49, at 2.

139. *Id.*

140. *Id.* Slonim notes that "in the matter of mandates the Assembly was empowered to act in conjunction with the mandatory power (Great Britain) to modify the terms of the mandate." *Id.* at 2.

141. *Id.*

142. The League of Arab States, in a cablegram to the Secretary General of the United Nations, reprinted in *THE ARAB-ISRAELI CONFLICT*, *supra* note 13, at 938-44, argued that the "Mandate . . . was illegal," the "Partition plan was a nullity," the "inchoate sovereignty of the Palestinian people in the territory had to be" achieved upon Great Britain's withdrawal from Palestine, and "the establishment of Israel [constituted] 'an armed attack' on the territorial integrity and political independence of the emerging state of Palestine, which the people of Palestine and their neighbors had a right to resist . . . according to Article 51 of the Charter." Rostow, *supra* note 2, at 163 n.41. See also *PALESTINE NATIONAL CHARTER*, arts. 19, 29, reprinted in *CRESCENT AND STAR*, *supra* note 105, at 449-50; cf. Slonim, *supra* note 49, at 2. Slonim asserts that Professors Feinberg and Stone have effectively rebutted the Arab position. "Israel's statehood, like that of any other state, is premised on the fact of its being—and not on any external factor" *Id.* at 2 (emphasis in original). See also Green, *supra* note 33, at

one party only.¹⁴³ Stone argues that since the United Nations remained silent in the face of Arab belligerency, Israel could no longer be bound to the Partition Resolution.¹⁴⁴ Hence, according to Stone, the partition plan was a moot issue.¹⁴⁵ In the face of the Arabs' commitment to a single Arab state in all of Palestine, war became inevitable.¹⁴⁶

The war of 1948-49 culminated in armistice agreements between Israel on the one hand and Egypt, Jordan, Lebanon, and Syria on the other.¹⁴⁷ The wars of 1956, 1967, 1973, and the 1969-70 War of Attrition followed.¹⁴⁸ Under Article III of the Egyptian-Israeli Armistice Agreement, following the 1948-49 War, Egypt committed itself

57 ("The state of Israel was born, as so many other states have been born, by the recognition of the existing states of the world, no more difficult, no more simple than that."). Professor Green argues that:

[W]hatever may be the view today of the rights or wrongs of the Jewish National Home as envisaged by the Mandate, it cannot be ignored that, in the first place, historical *ex post* reasoning has little significance in the eyes of the law. If it did, interesting problems might arise in connection with every state which has been established by immigrants and of which the descendants of the aboriginal population are now claiming reversionary rights as "the original people." Moreover, the Mandate and its purpose were recognized by the Members of the League of Nations and such non-Members as the United States, that is to say, the bulk of those who made up international society at the time and whose practice has always been viewed as either creating, or as evidence, of international law. The fact that what has been created in this way may now be open to criticism by some or even be generally unpopular, would not in any way alter the legal validity of the situation thus created

Id. Professor Green further argues that since then the United Nations has itself played a part in the legal evolution of the territory with its Partition Resolution, the establishment of Israel and its admission to the United Nations which meant recognition of the state by all Members.

Id.

143. Slonim, *supra* note 49, at 2.

144. *Id.*

145. *Id.*

146. A. GERSON, *supra* note 99, at 49.

147. General Armistice Agreement, Feb. 24, 1949, Israel-Egypt, 1 Kitve' Amanah (Israel) 3, 42 U.N.T.S. 251; General Armistice Agreement, Mar. 23, 1949, Israel-Lebanon, 1 Kitve' Amanah (Israel) 23, 42 U.N.T.S. 287; General Armistice Agreement, Apr. 3, 1949, Israel-Jordan, 1 Kitve' Amanah (Israel) 49, 42 U.N.T.S. 327; General Armistice Agreement, July 20, 1949, Israel-Syria, 1 Kitve' Amanah (Israel) 37, 42 U.N.T.S. 303.

148. Rostow, *supra* note 2, at 164. See also CRESCENT AND STAR, *supra* note 105, at 217-18:

Responding to alleged Egyptian provocations, Israel in October, 1956, after a lightning victory, occupied the Gaza Strip and Sinai from Egypt. The 1949 Armistice Agreement was, however, reinstated when arrangements were made early in 1957 to evacuate Israeli troops and to introduce a United Nations Emergency Force (UNEF) into the area in order to secure tranquility on the Egypt-Israeli border and freedom of navigation in the Suez Canal and the Gulf of Aqaba. The withdrawal of UNEF ten years later, in connection with increased military and political tensions, led to the 1967 Six Days War and the suspension of the 1949 Armistice Agreements between the Arab states and Israel. Cease fire arrangements were set up by the U.N. and the

to withdraw its armed forces to the west of the Egyptian-Palestinian border.¹⁴⁹ Gaza was retained within Palestine.¹⁵⁰ However, Egypt violated the 1949 Armistice Agreement by occupying Gaza until displaced by Israel in 1967.¹⁵¹ Egypt was, therefore, a belligerent occupant in violation of the Egyptian-Israeli Armistice Agreement, as well as Article 2(4) of the United Nations Charter, which proscribes the use of force in international relations.¹⁵²

Jordan, by forcibly and unlawfully occupying the West Bank during the 1948-49 War and remaining there, violated Article 2(2) of the Israel-Jordan Armistice Agreement of 1949.¹⁵³ The purpose of the Agreement was to freeze the legal situation present at the time, pending the conclusion of a peace treaty between the countries.¹⁵⁴ Jordan's subsequent annexation of that territory was, therefore, legally invalid:¹⁵⁵ "[t]erritorial change cannot properly take place as a result of the *unlawful* use of force."¹⁵⁶

C. United Nations Resolutions 242 and 338

The 1967 War was followed by U.N. Security Council Resolution 242.¹⁵⁷ The resolution called not only for peace, but also for an end to all claims on the part of the Arabs that a state of belligerence existed between Israel and its neighbors.¹⁵⁸ Further, Israel would be

antagonists after Israel captured the Gaza Strip and Sinai from Egypt, the West Bank and East Jerusalem from Jordan, and the Golan Heights from Syria.

[T]he 1967 ceasefire has not produced a peaceful settlement. . . . The Arabs view [Israel's presence in the West Bank and Gaza] as a classical illustration of Zionism's 'expansionism' and 'imperialism.' Israel, on the other hand, insists that it is entitled to determine what are her vital security interests, and therefore, it intends to never return to the pre-Six-Days War frontiers.

149. Brinton, *Israel: What is Occupied Territory? A Reply to the Legal Advisor*, 2 HARV. J.L. & PUB. POL'Y 207, 209 (1979).

150. *Id.*

151. *Id.*

152. *Id.*

153. Art. 2(2) provides that "[n]o provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party. . . ; the provisions of this Agreement being dictated exclusively by military considerations." General Armistice Agreement, Apr. 3, 1949, Israel-Jordan, 1 Kitve' Amanah (Israel) 37, 42 U.N.T.S. 327. See also Zafren, *supra* note 4, at 24-25.

154. Brinton, *supra* note 149, at 211. See also Zafren, *supra* note 4, at 24.

155. *Id.*

156. *Id.* (quoting Lauterpacht, *Jerusalem and the Holy Places*, Anglo-Israel Association Pamphlet No. 19 (1968)) (emphasis in original).

157. S.C. Res. 242, 22 U.N. SCOR (1382d mtg. (1967)), reprinted in 17 INT'L LEGAL MATERIALS 1469 (1978).

158. *Id.*

under no obligation to withdraw from any occupied territories until the Arab States concerned made peace.¹⁵⁹ Additionally, the resolution provided that Israel should withdraw to "secure and recognized boundaries" to be reached by agreement.¹⁶⁰ Considerations of security, guarantees of maritime rights through all the international waterways, and the respective legal claims of the parties to the territory in question were among the issues to be negotiated.¹⁶¹ However, the Arab States responded to Resolution 242 with the three "noes" of Khartoum.¹⁶²

The 1973 War resulted in Security Council Resolution 338,¹⁶³ which ordered the nations involved in the dispute to negotiate "immediately and concurrently with [a] cease fire" the establishment of a "just and durable peace" in accordance with Security Council Resolution 242 "in all its parts."¹⁶⁴ Resolution 338 is the strongest in a long series of resolutions calling upon or ordering the Arab nations to negotiate peace with Israel.¹⁶⁵ Hence, Resolution 338, according to Professor Rostow, has the legal effect of definitively rejecting the Arab and Palestine Liberation Organization (PLO) thesis that the existence of Israel is an "armed attack" on the sovereignty of Palestine.¹⁶⁶

159. *Id.*

160. *Id.*

161. *Id.* See Rostow, *supra* note 2, at 165-66.

162. Arab Heads of State affirmed the "main principles by which the Arab States abide, namely, no peace with Israel, no recognition of Israel, [and] no negotiations with it, and insistence on the rights of the Palestinians in their own country." Arab Summit Conference on Khartoum, 29 Aug. to 1 Sept. 1967, reprinted in CRESCENT AND STAR, *supra* note 105, at 428. See also THE ARAB-ISRAELI CONFLICT, *supra* note 13, at 1082; Bassiouni I, *supra* note 12, at 35 (Professor Bassiouni objects that in Resolution 242, the Palestinian people were only referred to in one sentence, which characterized them as "refugees" without recognizing the Palestinian people as a fact).

163. S.C. Res. 338, U.N. Doc. S/RES/338 (1973), reprinted in 17 INT'L LEGAL MATERIAL 1470 (1978).

164. *Id.*

165. Rostow, *supra* note 2, at 166-67. Recent history has witnessed the signing of the Camp David Peace Agreements between Israel and Egypt which provide for the establishment of peace between Israel and Egypt and requires negotiations to establish "autonomy" in the West Bank and Gaza. *Id.* at 167; see Comment, *A Framework for Peace in the Middle East*, 17 INT'L LEGAL MATERIALS 1466 (1978), and *Framework for the Conclusion of A Peace Treaty Between Egypt and Israel*, 17 INT'L LEGAL MATERIAL 1470 (1978) (Camp David Agreements).

166. Rostow, *supra* note 2, at 167.

D. The Validity of Israel's Presence on the West Bank under International Law

During the 1967 War,¹⁶⁷ Israel took control of certain areas, among them the West Bank.¹⁶⁸ Subsequently, Israel established settlements there. The United States, the United Nations, and others have opined that the Israeli settlements on the West Bank contravene international law.¹⁶⁹ For example, in 1978, the Legal Advisor to the State Department viewed Israel's presence on the West Bank as that of a belligerent occupant under the Hague and Geneva Conventions.¹⁷⁰ The State Department argued that Article 49 of the Geneva Convention of 1949¹⁷¹ prohibits a state, administering the territory of another state as a belligerent occupant, from displacing the inhabitants of the territory and establishing its own citizens in their place, unless necessitated by security or governmental requirements.¹⁷² Specifically, Article 49 provides that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."¹⁷³

The Israelis, on the other hand, maintain that the settlements are legal.¹⁷⁴ The Israelis contend that even if the Fourth Geneva Convention applies to Israel's presence on the West Bank, Article 49 would not cover the settlements.¹⁷⁵ They argue that Article 49 bans forcible

167. See Bassiouni, "The Middle East: The Misunderstood Conflict," in THE ARAB-ISRAELI CONFLICT, *supra* note 13, at 327 [hereinafter cited as Bassiouni II]. Bassiouni notes that:

Israel claims that Egypt's closing of the Gulf of Aqaba, its request for withdrawal of the UNEF forces from the Sinai, and the massing of 60,000 to 80,000 men on that border constituted with respect to the closing of the Gulf a *casus belli* and with respect to the troops' movement coupled with public speeches made by political leaders an imminent threat of "armed attack" that justified its preventive strike act of self-defense.

Id. at 349; see Hargrove, *Abating the Middle East Crisis Through the United Nations (and Vice Versa)*, in THE ARAB-ISRAELI CONFLICT, *supra* note 13, at 361, 362.

168. See S. AVERICK & S. ROSEN, *supra* note 3, at 1 (The Arabs refer to the area as "occupied territories"; Israelis refer to them as "administered territories.").

169. See Zafren, *supra* note 4, at 3.

170. Comment, 17 INT'L LEGAL MATERIAL 777-79 (1978). This opinion was signed by H. Hansell, Legal Advisor, Department of State; see also 126 CONG. REC. H2342-43 (daily ed. Mar. 28, 1980) (statement of Sec. of State Cyrus R. Vance).

171. Article 49 of the Geneva Convention states that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Geneva Convention of 1949, art. 49.

172. Rostow, *supra* note 2, at 159-60.

173. Geneva Convention of 1949, art. 49.

174. See Zafren, *supra* note 4, at 21.

175. Blum III, *supra* note 133, at 25 (emphasis in original).

transfers, not voluntary acts of individuals taking up residence in the areas under consideration.¹⁷⁶ The Fourth Geneva Convention was drafted at a time when the prohibited activity envisaged was "individual or mass forcible transfer of population,"¹⁷⁷ such as those carried out by Nazi Germany in occupied territories in order to make room for the settlement of Germans in those areas.¹⁷⁸ The Israelis contend, however, that the establishment of the West Bank settlements does not result in the expulsion of the local population from its homes and land.¹⁷⁹ Thus, it is argued, Article 49 of the Geneva Convention does not apply here.¹⁸⁰

Furthermore, Professor Yehuda Blum, a recognized international law expert and former Israeli Ambassador to the United Nations, argues that Israel cannot be considered an occupying power under international law, because the terms "occupying power" and "occupied territory" are terms of art and have a specific meaning in international law.¹⁸¹ The terms refer to a situation in which one state seizes control of the sovereign territory of another as a result of hostilities between the two.¹⁸² The state which controls the territory thus becomes the occupying power and assumes the rights and obligations

176. Blum II, *supra* note 101.

177. *Id.*

178. *Id.*

179. *Id.* See also *Middle East Strategic Problems: Hearings Before the Subcomm. on Near Eastern and South Asian Affairs of the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 45 (1977) (statement of Rita E. Hauser, Esq.). Hauser argues that "the relevant issue is whether or not the local population has been displaced in the course of establishing the settlement." *Id.* at 49.

180. See *id.* See also 2 L. OPPENHEIM, INTERNATIONAL LAW TREATISE 452 (H. Lauterpacht ed. 7th ed.). According to the Oppenheim Treatise, article 49 was intended to prohibit a transfer of the occupier's nationals "for the purpose of displacing the population of the occupied territory." *Id.* See also Gerson, 72 AM. SOC'Y INT'L L. PROC. 131, 134 (1978). Gerson agrees with Israel's position concerning the applicability of the Geneva Convention. Gerson notes that "serious questions arise regarding the legal applicability of the Geneva Convention. . . . However, assuming in the alternative that the Geneva Convention is *de jure* applicable, it remains, at best, questionable whether Israel's settlement activity, to the extent that it has continued to date, can be deemed unlawful." *Id.* See also Blum II, *supra* note 101. According to Professor Blum, Israel, although not required to do so by the Fourth Geneva Convention, goes beyond the requirements of its principles. *Id.* For example, Israel provides access for the local population to Israel's courts, facilitates movement of the local population in both directions, including to Arab countries who consider themselves at war with Israel, and has never applied the death penalty, despite egregious crimes in the territories. *Id.* But see CRESCENT AND STAR, *supra* note 105, at 132 (the Arab states charge that "Israel intimidates and terrorizes the Arab population on the West Bank and Gaza by the imposition of curfews, demolitions of houses, arrests and expulsions.").

181. Blum III, *supra* note 133, at 26.

182. *Id.*

inherent in that status.¹⁸³

The West Bank case differs from the traditional notion of the belligerent occupant, because the West Bank is not the sovereign territory of Jordan.¹⁸⁴ Jordan's seizure of the area in 1948, in defiance of the Partition Plan and in violation of the Jordan-Israel Armistice Agreement, has not been internationally recognized.¹⁸⁵ For example, only two countries recognized this extension of Jordan's territory, Britain and Pakistan.¹⁸⁶ Moreover, the Arab States have never recognized Jordan's claims.¹⁸⁷ According to Professor Blum, the rules protecting the reversionary rights of a legitimate sovereign do not apply when no such sovereign exists.¹⁸⁸ Professor Blum concludes that:

The legal standing of Israel in the territories in question is thus that of a State which is lawfully in control of territory in re-

183. *Id.*

184. Rostow, note 2, at 160. "[N]either Jordan on the West Bank nor Egypt in the Gaza Strip could claim, after 1967, that its prior administration was that of the legitimate sovereign whose rights were temporarily displaced by the fortunes of war" See Blum, *The Missing Reversioner*, 3 ISRAEL L. REV. 279, 279 (1968) [hereinafter cited as Blum IV] (As Professor Blum notes, "the reversioner was missing.").

185. Blum IV, *supra* note 184, at 289.

186. *Id.* at 290. See also Miller, *Focus: Overdue Correction*, Jewish Week, Dec. 27, 1985, at 4, col. 1. Dr. Lewis M. Alexander, director of the State Department's Office of the Geographer, "conceded . . . that only Britain and Pakistan had ever acknowledged Jordanian sovereignty over the so-called West Bank. Indeed the United States had not endorsed Jordan's 1948 invasion of the area which had been counter to the United Nations 1947 plan for partition of Palestine." *Id.*; see also A. GERSON, *supra* note 99, at 235. According to Gerson, "Jordan itself acknowledged that its administration of the area was without prejudice to the ultimate settlement of the Palestinian problem." *Id.*

187. Blum IV, *supra* note 184, at 290-91.

188. *Id.* at 294. See also Blum III, *supra* note 133, at 26. Professor Blum argues that sovereignty over such areas is not transferred by one state to another as a result of the change of physical control over them. The legitimate sovereign, i.e., "the state whose forces have been driven out of the occupied territory, retains its sovereignty over this territory even after its physical removal from [the territory] and annexation of such occupied territory by the occupant is absolutely prohibited." *Id.* Thus, the rights of the sovereign are protected from the occupant. *Id.* However, according to Professor Blum, the circumstances envisaged by the Fourth Geneva Convention do not apply to the West Bank and Gaza because the situation there is not one of an occupying power confronting a legitimate sovereign. *Id.* See also Radley, *supra* note 87, at 597-98. According to Radley:

[T]he traditional rules of international law governing belligerent occupation were grounded in the assumption that it was the legitimate sovereign that was ousted from the territory in question. Since neither Palestinian Jews nor Palestinian Arabs had, prior to the conflict itself, established a sovereign presence in the disputed territory, the question whether the legitimate sovereign was ousted is not here even reached. . . . The obstacle to adapting the notion of belligerent recognition to Palestine in 1948, or internal conflicts in general, is the absence of mutually recognized sovereignty.

Id. (citations omitted).

spect of which no other States can show better title. Or if it is preferred to state the matter in terms of belligerent occupant, than the legal standing of Israel in the territories in question is at the very least that of a belligerent occupant of territory in respect of which Jordan is *not* entitled to the reversionary rights of a legitimate sovereign.¹⁸⁹

As Professor Blum notes, title to territory is based on a claim of relative validity, rather than absolute validity. Thus, since Israel's claim is unequalled, "this relative superiority of Israel[']s claim] may be sufficient, under international law, to make possession of Judea and Samaria virtually indistinguishable from an absolute title, to be valid "ergo omnes."¹⁹⁰ Therefore, Israel is not subject to international law limitations imposed on a belligerent occupant.¹⁹¹ Noted author Allan Gerson advocates a new standard of military occupancy, "trustee-occupant;" that is, a status greater than a belligerent occupant, but less than a legitimate sovereign.¹⁹² According to Gerson, "[t]he occupying power would, insofar as not directly injurious to his security, permit and further the development of autonomous institutions."¹⁹³ Thus, he characterizes Jordan's legal status before the 1967 War in this manner and suggests its applicability for Israel's legal status today vis-a-vis the West Bank.¹⁹⁴ Israel, however, has not assumed this role.¹⁹⁵ Instead it continues to comply *de facto* with the Geneva Convention while leaving open the question of its *de jure* application.¹⁹⁶

The Hague and Geneva Conventions view belligerent occupation as temporary, to be followed by the ending of the state of war and the beginning of peace negotiations.¹⁹⁷ The provisions of the Conventions thus shielded the inhabitants from the frequent radical changes in their lives as a result of territory changing hands after battle.¹⁹⁸ However, although a state of war may persist, eighteen years have passed since the last battle for possession of the West Bank.¹⁹⁹ According to

189. Blum IV, *supra* note 184, at 294 (emphasis in original).

190. *Id.* at 294-95 n.60. The term "ergo" is defined as "therefore" and the term "omne" is defined as "anyone." BALLENTINE'S LAW DICTIONARY 414, 884 (3d ed. 1969).

191. Zafren, *supra* note 4, at 23 (quoting Blum III, *supra* note 133).

192. A. GERSON, *supra* note 99, at 78-79; see also Zafren, *supra* note 4, at 31.

193. A. GERSON, *supra* note 99, at 238.

194. *Id.*

195. *Id.*

196. *Id.*

197. O'Brien, *Israel, the West Bank and International Law*, Washington Star, Nov. 26, 1978, at D1, col. 5.

198. *Id.*

199. *Id.*

Professor William O'Brien, author and international law scholar, the passage of time has taken the West Bank situation out of the normal time frame of "belligerent occupancy" because there is currently no shooting war that would change the status of the West Bank.²⁰⁰ Furthermore, the Arab States, with the exception of Egypt, refuse to negotiate peace with Israel.²⁰¹ Thus, O'Brien contends, it is legally questionable to characterize the Israeli occupation as that of a normal wartime belligerent requiring the full application of the Hague and Geneva Conventions.²⁰²

Moreover, the United States position, that the settlements contravene international law, has been eroded by the development of international law since 1967 in connection with Namibia and the Camp David Agreements.²⁰³ The ICJ, in its decision regarding Namibia, has opined that the League Mandate is a binding international instrument,²⁰⁴ and that Article 25 authorizes the Security Council to make binding decisions with regard to the future of the remaining mandates.²⁰⁵ Therefore, the West Bank may be viewed as an integral part of the Palestine Mandate in which a Jewish national home was to be established; the territory "must be considered today to be unallocated territory,"²⁰⁶ and the future of the West Bank and Gaza must be "arranged by peaceful international agreement in ways which fulfill the policies of the Mandate."²⁰⁷

Furthermore, the State Department Legal Advisor's opinion, concluding that the settlements are against international law, has been criticized by legal scholars²⁰⁸ for a lack of objective analysis.²⁰⁹ William Brinton, an international lawyer, asserts that the Legal Advisor to the State Department plays a partisan role in favor of the Arabs.²¹⁰ According to Brinton, the State Department is not the

repository of enlightened dispassionate wisdom about international

200. *Id.*

201. *Id.*

202. *Id.*

203. *See supra* notes 115-23 and accompanying text.

204. *See Rostow, supra* note 2, at 155.

205. *See supra* notes 115-22 and accompanying text.

206. *See O'Brien, supra* note 197.

207. Rostow, *supra* note 2, at 159.

208. *See generally* Brinton, *supra* note 149; A. GERSON, *supra* note 99; Gerson, *supra* note 180.

209. Zafren, *supra* note 4, at 28 (quoting Gerson, *supra* note 180, at 137). For the administration "to condemn, while acting as mediator, one party's conduct as unlawful, when the legality of such conduct is debatable, is to engage in the politics of confrontation." *Id.*

210. *See* Brinton, *supra* note 149, at 207-14.

law. Yet the public and the press often attach mythical proportions to the State Department announcements about international law, treating them as objectively determinable fact and as fully dispositive of the issue. Thus . . . foreign policy decision-making can be easily cloaked from the public eye by facile unsubstantiated assertions of international law.²¹¹

On the one hand, the United States supports the proposition that Israel is a "belligerent occupant" and its settlements are illegal.²¹² The United States contends that the settlements are neither "intended to be of limited duration nor . . . appear to be required to meet military needs during the occupation."²¹³ Israel, on the other hand, argues that it has "as good a legal title to the area as any other contending nation . . ."²¹⁴ Hence, Israel is not subject to any of the limitations international law imposes on a belligerent occupant.²¹⁵ Despite a majority view and official expressions by most nations that the settlements are illegal, from a strictly legal perspective the issue of the legality of the settlements has not been resolved.²¹⁶

IV. EFFECTS OF THE ISRAELI SETTLEMENTS ON THE FUTURE OF THE PALESTINIAN ARABS

A. *Evolution of the Settlements*

A familiarity with the evolution of the Israeli settlements on the West Bank is helpful to appreciate the conflicting views regarding the effects of those settlements on the future of the Palestinian Arabs living in those areas.

211. Zafren, *supra* note 4, at 29. Zafren notes that Brinton has specifically criticized the State Department Legal Advisor's opinion as incorrect. *Id.* at 29-30. According to Brinton, for the Legal Advisor to state that "[d]uring the June, 1967 war, Israeli forces occupied Gaza, the Sinai Peninsula, the West Bank and the Golan Heights,' . . . is a conclusory statement. . . ." Brinton, *supra* note 149, at 212 (quoting an opinion of the State Department Legal Advisor) (emphasis in original). The Legal Advisor offers no rational basis for this assertion. *Id.* Rather, "Israel has a rational, legally sound basis for stating that it is not obligated to withdraw from the West Bank since Israel did not occupy the West Bank during the 1967 War. *Id.* at 214. Both Jordan and Egypt were unlawful aggressor occupants and were displaced by Israel. *Id.*

212. Zafren, *supra* note 4, at 34.

213. *Id.* (quoting letter from Herbert J. Hansell, Legal Advisor, Department of State, to Donald M. Fraser, Chairman of House Subcommittee on International Organizations and Lee H. Hamilton, Chairman of the House Subcommittee on Europe and the Middle East, 17 INT'L LEGAL MATERIALS 777 (1978)).

214. *Id.*

215. *Id.*

216. *Id.*

Israeli settlement in occupied territories can be divided into three phases.²¹⁷ Initially, Israeli settlement adhered to the unofficial "Allon Plan,"²¹⁸ which embodied strategic and political concerns.²¹⁹ One commentator has said that Allon's goal was that:

[T]he permanent borders of Israel must be defensible from a strategic point of view and must depend on permanent topographical obstacles that can withstand the onslaught of modern land armies and lend themselves to large-scale retaliatory attacks. Such security borders must . . . be political borders; the border would be political only if Jewish settlement existed along its length.²²⁰

Although the plan's stated purpose was to obtain "secure and recognized borders,"²²¹ the plan essentially precluded the establishment of a separate Palestinian State on the West Bank.²²² Rather, the Allon Plan contemplated a form of union with Jordan.²²³ Thus, between 1967-77, approximately twenty-four settlements were established on the West Bank by Israel under a Labor Party administration.²²⁴

The second phase of the Israeli settlement process was temporarily halted by the trauma of the 1973 Yom Kippur War, the subsequent negotiations with Syria and Egypt, and the internal Israeli political upheaval.²²⁵ The settlement process, however, received new impetus from the Gush Emunim, a movement founded in 1974, which advocated the creation of a "Greater Israel" in "Judea and Sama-

217. See M. BENVENISTI, *THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL'S POLICIES* 51 (1984). See also Friedman, *Report Puts Total of West Bank Settlers at 42,500*, N.Y. Times, Feb. 10, 1985, at 17, col. 1. ("Mr. Benvenisti's West Bank Data Project has been considered, by many proponents and opponents of Jewish settlement on the 'West Bank,' to be one of the most authoritative sources of demographics in the region.")

218. M. BENVENISTI, *supra* note 217, at 51-52. See Olmert, in *Prophets of the Holy Land*, HARPER'S, Dec. 1984, at 33, 46. According to Olmert, the Allon Plan, articulated in 1967 by Yigal Allon, then Foreign Minister of Israel, was the official policy of the Israeli government from 1967-77. *Id.* at 46. The plan envisaged "territorial compromise" in the West Bank and Gaza wherein "Israel would withdraw from the heavily populated parts of the West Bank, retaining military installations only in strategic positions along the Jordan River." *Id.*

219. M. BENVENISTI, *supra* note 217, at 51; see O'Brien in *Prophets of the Holy Land*, HARPER'S, Dec. 1984, at 33, 42. According to O'Brien, under the Allon Plan, "Israel would keep Jerusalem as its united capital, retain its line of defenses and Jewish settlements along the western bank of the river Jordan, and reserve the right of military access across the territory of the 'West Bank.'" *Id.*

220. M. BENVENISTI, *supra* note 217, at 51.

221. Gendzier, *Settlements Deeply Implanted*, THE NATION, Feb. 25, 1978, at 201.

222. Kaufmann, *Israel's Flexible Voters*, FOREIGN POL'Y, Winter 1985-86, at 109, 110.

223. *Id.*

224. *Id.*

225. M. BENVENISTI, *supra* note 217, at 52-55. See also Kaufmann, *supra* note 222, at 110-15.

ria.”²²⁶ The Gush Emunim Plan called for a dense chain of approximately sixty settlements, thus providing a defensive wall to a possible strong, united Arab Eastern front, and to effectively preclude the development of another Arab state in that area.²²⁷

With the advent of a new Likud government in 1977, Labor’s “bureaucratic-strategic” approach to West Bank settlement, as outlined in the Allon Plan, was replaced with the “ideological-strategic” approach of the Gush Emunim, whose objective is settlement in all parts of “Greater Israel.”²²⁸ Likud’s policy emphasized the right of Jews to settle and control all of the historical land of Israel,²²⁹ and, therefore, followed comprehensive regionwide land use planning.²³⁰

The Likud thus reasoned that only by “creating facts” (i.e., permanent settlements and other economic and social factors) could Israel’s security be guaranteed and the possibility of a Palestinian State precluded.²³¹ Forty-four settlements were established under Likud’s first government,²³² and under a second Likud government, elected in June, 1981, the “settlement program intensified.”²³³

However, a chain of events, from 1981-84, including the Lebanon War, the Sabra and Shatila massacres, Prime Minister Begin’s resignation in 1983, the deteriorating economy and the galloping inflation rate deeply affected Israeli public opinion,²³⁴ resulting in a weakening of support for West Bank policies.²³⁵ Factors underlying the view that territorial compromise is not possible include: the drift to the right of Israeli politics;²³⁶ the strong support given to Likud by Sephardic Jews, Israel’s fastest growing population group; and the suburbanizing trend which draws strength from low apartment prices and economic incentives from the government.²³⁷ Thus, the third

226. M. BENVENISTI, *supra* note 217, at 52. “Judea” and “Samaria” are the Biblical terms used by Israel to describe the West Bank. *Id.* at 52. *See supra* note 3.

227. M. BENVENISTI, *supra* note 217, at 52.

228. Kaufmann, *supra* note 222, at 111.

229. *Id.*

230. M. BENVENISTI, *supra* note 217, at 26-27.

231. Kaufmann, *supra* note 222, at 111.

232. *Id.* at 112.

233. *Id.*

234. *Id.* at 113.

235. *Id.* at 114.

236. *Id.* at 115.

237. M. BENVENISTI, *supra* note 217, at 64-65. *See also* Temko, *West Bank’s Changing Face*, *Christian Science Monitor*, Oct. 18, 1985, at 9, col. 1 (asserting that the “new breed of West Bank settlers [is] doing more in their quiet way to deter the future of the disputed territory than the first, ideologically motivated wave of Jews . . .”).

phase of Israeli settlement changed the focus of settlement activity from subsidized rural villages to settlement in metropolitan areas. Consequently, Israel, in the early 1980's, entered the "suburban era."²³⁸ According to Meron Benvenisti, Israeli urbanologist and former Deputy Mayor of Jerusalem, "the typical settler of the 1980's is a figure well-known throughout the Western World: the suburbanite."²³⁹

B. *The Future of the Settlements*

In his recent population study, produced by the West Bank Data Project,²⁴⁰ Benvenisti concludes that the *de facto* annexation of the West Bank and Gaza has passed the "critical point" of no return and is now irreversible.²⁴¹ Thus, on the one hand, Benvenisti, a critic of Jewish settlement activities, contends that the socio-economic and demographic situation and other "facts" created by Israel on the West Bank preclude any sovereignty other than Israel's in those territories.²⁴² He argues that the government has gained absolute control over fifty-two percent of the West Bank land,²⁴³ and predicts that the Jewish settlers which currently number 42,500²⁴⁴ will reach 100,000

238. M. BENVENISTI, *supra* note 217, at 57 (asserting that by 1983, 106 settlements had been established in the West Bank and Gaza).

Israeli settlements are officially grouped in two broad categories: . . . urban-suburban and rural-semiurban. Urban settlements include the following types:

1. The city[,] . . . a strong urban community serving as regional, industrial, services and cultural center. Its population consists of more than 10,000 families
2. The . . . town[,] . . . an urban center of 3,000-5,000 families . . . and a subregional service center, with low-density housing. . . .
3. The . . . suburb[,] . . . a satellite neighborhood serving as a commuter dormitory with minimum local services but with good access to major metropolitan areas [consisting of 500-2,000 families]. . . .

Rural-semiurban settlements include . . . :

1. The . . . non-agricultural cooperative settlement . . . which provides infrastructure, housing, and basic industry Employment is mainly outside the settlement 'Clusters' of [these cooperative settlements] are planned to form a [town]. The planned population size is 200-300 families This cooperative settlement is affiliated with the Gush Emunim settlement movement.

3. The settlement center . . . is an undefined housing estate planned to form the nucleus of a settlement. When sufficient settlers are gathered, they decide on the type of permanent settlement.

Id. at 49-50. See *supra* text and accompanying notes 226-27.

239. M. BENVENISTI, *supra* note 217, at 64.

240. M. BENVENISTI, *supra* note 217 and accompanying text.

241. M. BENVENISTI, *supra* note 217, at 69.

242. *Id.* at 30-35.

243. *Id.*

244. See Friedman, *supra* note 217, at 17 ("the number of settlers [on the 'West Bank'] has not exceeded 53,000").

by the end of the decade.²⁴⁵ Therefore, Benvenisti concludes that although theoretically the process of *de facto* annexation might be reversible, "a realistic estimate of the forces at work for annexation as against those that oppose it invites the conclusion that for the foreseeable future all of Palestine will be ruled by an Israeli government."²⁴⁶

On the other hand, not all commentators agree with Benvenisti's conclusion that the annexation is irreversible.²⁴⁷ Yadin Kaufmann, an Israeli Supreme Court law clerk with degrees in law and Middle Eastern studies from Harvard University, asserts

that the 'irreversibility' theory [to the extent it] relies on such measurements as the number of settlements or settlers, the relative strengths of political parties and growing support for the policies of the right-wing Likud coalition by Israelis of North Africa and Asian descent, . . . overstates the extent and tenacity for support for annexation.²⁴⁸

Moreover, Kaufmann indicates that, at least from the standpoint of the Israeli public, territorial compromise²⁴⁹ on the West Bank remains a viable policy option.²⁵⁰ He posits that the "irreversibility theory fails to account for the War in Lebanon and the deepening economic crisis," in which an important shift in Israel's attitude has occurred.²⁵¹ These developments "have shaken . . . the beliefs that the

245. M. BENVENISTI, *supra* note 217, at 60.

246. *Id.*

247. Eban, in *Prophets of the Holy Land*, HARPER'S, Dec. 1984, at 33, 39. Abba Eban, former Foreign Minister of Israel and chairman of the Knesset's Security and Foreign Affairs Committee, does not accept the theory of "irreversibility," that is, the "irreversible process of integration arising from the settlements already established in the heart of Arab-populated areas. . . ." *Id.* at 38-39. Eban asserts that "the attempt to deny the Arab character of the West Bank and Gaza by demographic and other changes has failed. A territorial compromise leading to demilitarized territories under Arab rule is not only feasible but inevitable." *Id.* at 39. Furthermore, optimal conditions for increased settlements no longer exist because of financial constraints and a "visible disquiet on the question of more settlements." *Id.*; see also Magarik, *Giving Up Too Soon: The West Bank's Future*, JEWISH CURRENTS, May 1985, at 7. According to Magarik, although there is no doubt that Israel intends to annex the West Bank: "Benvenisti does not prove that this annexationist process is factually irreversible." *Id.* at 8 (emphasis in original); see also Gendzier, *supra* note 221, at 204. Gendzier argues that "withdrawal is not impossible—other nations have surrendered their colonies—but for it to occur in this case would require a profound political change in Israel." *Id.*

248. Kaufmann, *supra* note 222, at 109-10.

249. See *supra* note 213 and accompanying text.

250. Kaufman, *supra* note 222, at 118.

251. *Id.* According to Kaufmann, prior to the Lebanon War, the percentage of Israelis opposing any territorial compromise ranged from 47% to 58%. However, during and after the Lebanon War, this figure dropped to 40%. *Id.*

land belongs to Israel for religious and strategic reasons."²⁵²

While opponents to territorial compromise argue that retaining the territories not only ensures peace and Israel's survival, but also prevents the establishment of a Palestinian State in the West Bank and Gaza,²⁵³ proponents of territorial compromise, that is, relinquishing part of the West Bank in exchange for a peace agreement with Jordan,²⁵⁴ argue that by destroying the military and political infrastructure of the PLO,²⁵⁵ the Lebanon War made the possibility of a Palestinian State more remote.²⁵⁶ Furthermore, the high cost in lives led many Israelis to question the utility of using force to settle the Arab-Israeli conflict.²⁵⁷ Therefore, it is argued that the settlement process on the West Bank is not irreversible.²⁵⁸

C. *The Israeli Government View*

The Armistice Agreements of 1949 did not "determine legally settled and recognized boundaries between Israel and its Arab neighbors."²⁵⁹ According to the Israeli government, its administration of territories occupied in the Six Days War accords with international law and Israel has consistently maintained that secure and recognized borders are a prerequisite to withdrawal.²⁶⁰ However, Israeli insists it will never return to pre-1967 borders because of vital security interests.²⁶¹ Thus, the occupation has acquired permanent characteristics.²⁶² The Arabs, however, view Israel's determination to continue the occupation as "expansionism."²⁶³

The Likud Party stand on the status and future of the Israeli

252. *Id.* at 110.

253. *Id.* at 123.

254. *Id.* at 112.

255. An organization committed to the destruction of the State of Israel. See Ajami, in *Prophets of the Holy Land*, HARPER'S, Dec. 1984, at 33, 34. Ajami, Director of Middle Eastern Studies at Johns Hopkins University School of Advanced International Studies, asserts that "[t]oday Arafat and his lieutenants banished from the power and corruption of Beirut and southern Lebanon, . . . have lost their final possession—a border with an enemy they could see and hope to fight. Their political venture has ended in the banal isolation of a Tunis hotel." *Id.*

256. Kaufmann, *supra* note 222, at 123.

257. *Id.* at 123.

258. *Id.* at 117-20.

259. CRESCENT AND STAR, *supra* note 105, at 228.

260. *Id.* at 235.

261. *Id.* at 218.

262. *Id.*

263. See Hadawi, *Israeli Expansionism*, in CRESCENT AND STAR, *supra* note 105, at 219, 223.

settlements is that “[t]he right to settle in all parts of the land of Israel (Mandatory Palestine) [is] . . . axiomatic and non-negotiable.”²⁶⁴ Even Labor Party leaders maintain that “Jewish settlements should remain under Israeli control.”²⁶⁵ Furthermore, Benvenisti asserts that the “[s]ettlements, military presence, and ultimate jurisdiction were meant to be permanent.”²⁶⁶

Moreover, William O’Brien asserts that the settlements do not constitute “an unnatural intrusion of people with no roots in the area.”²⁶⁷ Generally, Judea and Samaria are “considered homeland by the Jews and there are good reasons for them to settle” in the West Bank.²⁶⁸ For example, many Jews have direct family relationships with locations in the area,²⁶⁹ such as the Etzion Bloc of settlements which is comprised of the children and grandchildren of Jews killed or displaced by the Arabs in the 1948 War.²⁷⁰ Many areas, such as Hebron, had and continue to have profound religious and historical significance to Jews.²⁷¹ Furthermore, as a matter of policy, the settlements on the West Bank are, for the most part, “located in uninhabited or sparsely populated regions.”²⁷² Israel has acquired land in the territories for settlements through direct seizure (i.e., declaring land to be State Land or by seizing land for military purposes), by purchase, and by expropriation of ownerless property or private property owned by absentee landlords.²⁷³ When owners could be located, they were given the choice of cash compensation or alternative land,

264. M. BENVENISTI, *supra* note 217, at 39.

265. *Id.*

266. *Id.* at 39.

267. O’Brien, *supra* note 197.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. MYTHS AND FACTS, *supra* note 79, at 67-68. Nearly all the settlements “have been placed along the sparsely inhabited Jordan Valley or along the ‘green line,’ the pre-1967 armistice lines—a further indication of the defense-oriented nature of many of the settlements.” *Id.*

273. O’Brien, *supra* note 197. Benvenisti contends that the “[t]he legal basis quoted by the Israelis is Article 52 of the Hague regulations, which reads: ‘Requisitions in kind and services shall not be demanded from local authorities or inhabitants *except for the need of the army of occupation.*’ ” M. BENVENISTI, *supra* note 217, at 31 (emphasis in original). According to Benvenisti, “[r]equisition ‘for military purposes’ has been the method used until 1980 to secure land for Israeli settlements.” *Id.* After Likud came to power, the requisition method was no longer used. Rather “national security needs in the broad sense” was the *raison d’être* for land acquisition as approved as “immediate and urgent military needs.” *Id.* Furthermore, after the Elon Moreh decision of the Israel High Court of Justice, *see infra* note 274, the Likud seized land by declaring it “State Land.” *Id.* at 31-32.

and any owner who is dissatisfied with the compensation or procedures of acquisition has the right of access to the Supreme Court of Israel.²⁷⁴ Therefore, the manner in which the lands for settlement have been acquired is neither violative of international law, of human rights, nor affects the rights or the future of the Palestinian Arabs.²⁷⁵

D. The Arab View

The Arab position "demand[s] the elimination or dismemberment of Israel, either by 'the liquidation of all traces of aggression' of 1948 and 1967" or by "the establishment of a 'Palestinian State' where Moslems, Christians, and Jews will live in peace."²⁷⁶ Advocates of Palestinian self-determination believe that a single secular state over the entire mandate territory would eliminate the only bone of contention between the Arabs and the West (i.e., Palestine).²⁷⁷

274. See Zafren, *supra* note 4, at 18, 33, referring to HCJ 390/79 (22.10.79) 19 INT'L LEGAL MATERIALS 148 (the "Elon Moreh" case). The Court holding, that a particular settlement was contrary to customary international law, deserves a narrow reading. *Id.* There are sufficient pronouncements in that case to indicate that all settlements in Judea and Samaria could be held by the "court as having been legally established based on some security reason." *Id.* at 33-34. In an earlier case the Court held the establishment of two settlements was not illegal under international law as they were established for military purposes. Zafren, *supra* note 4, at 33-34. In an earlier case the Court held the establishment of two settlements were not illegal under international law as they were established for military purposes. Zafren, *supra* note 4, at 33-34. Thus, reading the two cases together, it would seem that a civilian settlement would be held valid if established at the initiation of the military, needed for regional defense and premised on solid military reasons for safeguarding public order and security. *Id.* at 34.

275. O'Brien, *supra* note 197.

276. CRESCENT AND STAR, *supra* note 105, at 398. See also Cattan, *supra* note 101, at 164 (Cattan's solution reflects the hard-line Palestinian position: "justice requires the dismantling of the Zionist racist political structure set up in Palestine, the return of the Palestine refugees to their home, and the restoration of the human rights and fundamental freedoms of the Palestinians."). One author argues that direct negotiations with Israel would involve "basically a recognition of Israel, i.e. a guarantee for it to continue enjoying its gains." Al-Abid, *Israel and Negotiations*, in CRESCENT AND STAR, *supra* note 105, at 399. According to Al-Abid, Israel, "[b]y calling for immediate negotiations, . . . desires to invest with legality these acts, which have been realized through the use of force." *Id.* at 400. Thus, Al-Abid contends, "Israel intends by its plea, to legalize and perpetuate its act of forcibly uprooting and dispossessing the Palestinian people." *Id.* Furthermore, "[t]he only solution in which Arab Palestinian people have faith is the liberation of Palestine from Zionist colonialism in alliance with world imperialism, and the establishment of a democratic state in Palestine which shall guarantee for all, Muslims, Christians and Jews, equal rights and duties." *Id.*

277. Persico, 65 AM. SOC'Y INT'L L. PROC. 67, 67-68 (1971). According to Persico, assuming "that there is a principle of self-determination and, . . . [it was] granted to the Palestinians" and the Palestinians and Israelis arrived at an agreement, the hostilities in the Middle East would still not be terminated. *Id.* Persico contends that the "Palestinians have been used in a sense, as an international scapegoat in the Arab-Israeli situation and that while actually

This policy is consistent with the Palestine National Charter and recent Arab resolutions, such as the Khartoum Resolution.²⁷⁸ They fail, however, to take cognizance of the reality that the objective of most proponents of a Palestinian State is the destruction of the State of Israel.²⁷⁹

Israel, on the other hand, believes that with the exception of Egypt, the Arabs' refusal to negotiate with her directly reflects the Arabs' unreadiness to coexist in the area with Israel.²⁸⁰ The Israelis assert that the chances for peace are remote without a direct dialogue between the parties concerned.²⁸¹ Nevertheless, Jordan and Israel are the Palestinian states and only they can solve the problem.²⁸²

E. Proposed Solutions to the Problem of the West Bank and Gaza

A variety of viable alternatives to either annexation of the West Bank, a single secular state, or territorial compromise have been proposed. On the one hand, Yoram Dinstein, rector of Tel Aviv University, professor and former diplomat, proposes that Israeli settlers stay

the Palestinian problem is a very real one, it is only a very small part of the total picture, which is that there are definite clashes of interests existing between the states of Syria, Jordan, and Egypt which will not be resolved by means of the settlement of the Palestinian question." *Id.* at 68; *but see* Bassiouni I, *supra* note 12, at 69 (arguing "that the central issue in what is called the Arab-Israeli conflict, is the Palestinian conflict").

278. See Khartoum Resolution, *supra* note 162. See also Palestine National Charter, reprinted in CRESCENT AND STAR, *supra* note 105, at 1089. Article 19 of the Palestine National Charter reads:

The Partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations, particularly the right of self-determination.

CRESCENT AND STAR, *supra* note 105, at 447. Article 29 of the Palestine National Charter reads:

The Palestinian people possess the fundamental and generic legal right to liberate and retrieve their homeland. The Palestinian people determine their attitude towards all states and forces on the basis of the stands they adopt vis-a-vis the Palestinian case and the extent of the support they offer to the Palestinian revolution to fulfill the aims of the Palestinian people.

Id. at 450-51.

279. Rostow, *supra* note 2, at 171. See van den Haag, *Many Years Off*, N.Y. Times, Nov. 13, 1985, at 27, col. 3.

280. CRESCENT AND STAR, *supra* note 105, at 398.

281. *Id.*

282. Lewis, *Israel's Bitter Harvest*, N.Y. Times, July 22, 1985, § 6 (magazine), at 32, 42. Lewis argues that "[t]he fate of the West Bank is not going to be decided by American intervention or any other magic from the sky. It depends largely on the two peoples concerned, Israelis and Palestinians." *Id.* at 45.

where they are while the territory reverts from Israeli to Jordanian control.²⁸³ He "rules out the possibility of a Palestinian Arab State and sees Jordanian control as the sole alternative to Israeli rule."²⁸⁴

On the other hand, Ehud Olmert, a Likud foreign policy expert, articulates a functional, rather than territorial compromise.²⁸⁵ He proposes a solution based on a division of governmental functions between Jordan and Israel, rather than a division of the territory or a shift in sovereignty.²⁸⁶ Olmert bases his proposal on the Camp David Accords, but envisages a greater role for Jordan.²⁸⁷ He contends that failure to grasp the opportunity "to start a process that would reduce the tensions in the area and give Palestinian Arabs a political identity . . . might eventually force Israel to annex the West Bank."²⁸⁸

By contrast, Ernest van den Haag,²⁸⁹ asserts that "the national

283. Bienstock, *Israeli Abroad: Could Jews Live as Foreigners in a Peaceful Jordanian West Bank?*, Jewish Week, Jan. 11, 1985, at 23, col. 1.

284. *Id.* See Bailey, *If There's To Be a State for the Palestinians, It Must Be the Already-Palestinian Jordan*, N.Y. Times, Oct. 25, 1985, at 27, col. 4 (asserting that "there is little reason for Jordan not to represent the Palestinians."). Furthermore, two-thirds of all Palestinians are citizens of Jordan, and two-thirds of all Jordanians are Palestinians. *Id.* The capital city of Jordan, Amman, is composed of eighty percent Palestinians. *Id.* Moreover, "Palestinians are integrated fully into most aspects of national life." *Id.*; see also Kwart, *West Bank: A New Solution for a New Reality*, L.A. Times, Mar. 6, 1984, at 5, col. 1 (Kwart advocates a "confederation of Israel, Jordan and the West Bank with the [West Bank] being a binational state. Thus, by avoiding annexation, the democratic character of Israel would be preserved."); Perlmutter, *How Close Is Middle Eastern Peace? It's Up to Peres, Hussein*, N.Y. Times, Nov. 13, 1985, at 27, col. 1 (contending that only an eventual Israeli-Jordanian confederation would leave out "extremists-Israeli annexationists, Arab rejectionists, and those who yearn for a Palestinian state."); Avineri, *West Bank Options*, Jerusalem Post, Jan. 18, 1986, at 10, col. 1. Avineri, a professor of political science at the Hebrew University and a former director-general of the Foreign Ministry, sees "very few chances in the immediate future for meaningful negotiations between Israel and a Jordanian-Palestinian delegation, . . . [because of] King Hussein's strategy [which has] put an effective veto power on such negotiations in the hands of PLO Chairman Yasser Arafat, . . . Hussein's recent rapprochement with Syria, . . . [and] the PLO's utter refusal to endorse UN Security Council Resolutions 242 and 338. . . ." *Id.* Thus, Avineri questions whether the "Jordanian option" is viable at present. Instead, Avineri argues for a set of policy options affecting the quality of life on the West Bank and Gaza. *Id.* Avineri suggests the "restoration of effective local control on the municipal level, incorporation of villages into regional councils, the appointment of Palestinian Arabs to head the various administrative departments on the West Bank to replace current Israeli military personnel, the introduction of an effective banking system and economic investment in the West Bank. *Id.*

285. Olmert, *supra* note 218, at 47.

286. *Id.* According to Olmert, Jordan would supervise the civilian interests of the West Bank. Arab inhabitants and Israel would be responsible for the security and defense of the West Bank. *Id.*

287. *Id.*

288. *Id.*

289. van den Haag, *supra* note 279.

aspirations of the Palestinians, however reasonable they may sound, are all too likely to pave the way for the annihilation of Israel . . . [as stated in the PLO Charter, thus] it would be suicidal to give up [the] territories."²⁹⁰ Van den Haag further contends that the only solution, therefore, is "to wait and hope that Arab ideology will change . . . [because] premature diplomacy, . . . puts pressure on Israel to do what it clearly cannot do."²⁹¹

V. CONCLUSION

The conflicting national aspirations of both the Palestinian Arabs and most Israelis and diaspora Jews are focused on the West Bank.²⁹² On the one hand, the Palestinian Arabs view the area as the remnant of historic Palestine, and the location for the establishment of a Palestinian State.²⁹³ On the other hand, many Israelis and diaspora Jews either cite national, historic or legal justifications for their return to Judea and Samaria,²⁹⁴ or seek the retention of that territory by Israel for vital security interests.²⁹⁵

According to one commentator, "legally, politically, and strategically, the . . . solution for the Palestinian problem is peace between Israel and Jordan in accordance with Resolutions 242 and 338."²⁹⁶ Such a settlement is the only way to resolve the problem of Palestine in a manner fulfilling the terms of the mandate and of the Security Council resolutions.²⁹⁷ The concept of "self-determination," in the sense of an independent national state, does not apply to the Palestinian Arabs.²⁹⁸ The principle of self-determination bears a direct relationship to other principles, such as territorial integrity, security and

290. *Id.*

291. *Id.*

292. Friedman, Norden, Moulton & Bandler, *Looking For Peaceful Solutions*, PRESENT TENSE, Spring 1985, at 7.

293. *Id.*

294. *Id.*

295. Kaufmann, *supra* note 222, at 110.

296. Rostow, *supra* note 2, at 168. "Unfreezing the deadlock affecting the West Bank and Gaza is impossible without active Jordanian participation in the peace process . . ." *supra* note 247, at 39.

297. See Rostow, *supra* note 2, at 168. See also Olmert, *supra* note 218, at 47.

298. See Weiler, *Israel and the Creation of a Palestinian State: The Art of the Impossible and the Possible*, 17 TEX. INT'L L.J. 287, 326-27 (1982) ("[p]rogress toward peace in the Middle East . . . would not be significantly advanced by suggesting as a solution to the conflict the creation of a Palestinian state led by the PLO, even if that state would recognize and accept Israel.").

peace.²⁹⁹ Unless there is a binding recognition by Arab States of Israel's right to exist within secure and recognized boundaries, and until the PLO and related groups, the so-called "sole representatives" of the Palestinians, accept a form of self-determination which is consonant with Israel's security, self-determination, in the sense of deciding one's ultimate destiny, will not apply to the Palestinians. Perhaps, as Professor Meron of the New York University Law School suggests, any future exercise of self-determination by the Palestinians would be part of a "package of principles" which would provide the Palestinians with a measure of free expression in relation to the interests and requirements of all the parties in the area.³⁰⁰

Recently, hopeful signs that negotiations between Israel and Jordan would materialize under the umbrella of international auspices evaporated after King Hussein ended efforts to work out a joint strategy with the PLO for peace talks.³⁰¹ Nevertheless, Israeli Prime Minister Shimon Peres, while agreeing with King Hussein "that a period of 'reflection' is in order after the rupture of talks between the PLO and Jordan" emphasized the necessity to "consider interim solutions to provide more autonomy for the Palestinians"³⁰² Thus, Peres is considering implementing measures to foster self-rule among the Palestinians in the West Bank and Gaza.³⁰³ The Palestinians, however, are the only ones who can take control of their own future. Meanwhile Jewish settlement is inexorably increasing and time is not standing still. And only time will tell whether a period of reflection will lead to peace negotiations or whether the possibility for a peaceful solution to the Israeli-Arab conflict is illusory.

Marilyn J. Berliner

299. Meron, *supra* note 60, at 276.

300. *Id.*

301. See *The Mideast Mirage*, N.Y. Times, Feb. 9, 1986, at 26, col. 1. According to the New York Times, "[l]ost somewhere in the desert air is King Hussein's much-heralded vow to finally start negotiating with Israel." *Id.* King Hussein asserted that "[i]f given the cover of an international conference and the reassurance of more American arms . . . he would engage the Israelis at last, with Palestinians at his side. And if Arafat refused to approve, the King would show up anyway. . . . [However] Jordan . . . reneged again" *Id.*

302. Miller, *Peres Says He'll Foster Palestinian Self-Rule*, N.Y. Times, Feb. 27, 1986, at 17, col. 1.

303. *Id.* For example, Peres is considering nominating mayors for key towns in the West Bank, promoting freedom of movement between Jordan and the occupied territories, and coordinating appointments to local posts with Jordan. *Id.*