



THE RIGHT OF SELF-DETERMINATION OF THE PALESTINIAN PEOPLE

Prepared for, and under the guidance of, the Committee on the
Exercise of the Inalienable Rights of the Palestinian People

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NOTE

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INTRODUCTORY NOTE

Previous studies in this series, "The Origins and Evolution of the Palestine Problem" and "The Right of Return of the Palestinian People" provide a background for the present study.

This study examines the right of self-determination for the Palestinian people in a broad context including the various resolutions adopted by the United Nations General Assembly on the subject.

I. THE RIGHT OF SELF DETERMINATION IN INTERNATIONAL LAW

The first article of the United Nations Charter reads:

"The purposes of the United Nations are:

"1. ...

"2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

"..."

The first article of the International Covenant on Civil and Political Rights, and of the International Covenant on Economic, Social and Cultural Rights reads:

"1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

"..."

It is beyond the scope of this study to analyse or adjudicate between the various arguments in academic and juridical circles as to whether the concept of self-determination constitutes a "principle" or a "right". This study is based on the axiom that the right of self-determination exists as a crucial element in contemporary international life and is recognized as such by the political world community. To an appreciable extent this situation is the product of the role of the United Nations itself in shaping concepts and practice in international law.*

* These developments are not examined in any detail here as they are dealt with exhaustively in two other UN studies prepared for the Commission on Human Rights:

- (a) Implementation of United Nations Resolutions relating to the right of peoples under colonial and alien domination to self-determination (by Mr. Hector Gros-Espiell, Special Rapporteur, document E/CN.4/Sub. 405 of 20 June 1978, in two volumes).
- (b) The historical and current development of the right of self-determination on the basis of the Charter of the United Nations and other instruments adopted by United Nations organs, with particular reference to the promotion and protection of human rights and fundamental freedoms (by Mr. Aureliu Cristescu, Special Rapporteur; under preparation).

Classical theories in international law evolving from the 16th century onward, when the principle of freedom for the individual was not applied to the community, appear to pay little attention to the principle of national self-determination. Advancing from the era where the systems of government of entities of varying nature and size were shaped by considerations of dynasty and power, the concept of self-determination as a principle in international relations was foreshadowed by the assertion in the French revolution of the doctrine of the sovereignty of the people - that government should rest on the will of the people and not on the will of the ruler.

The national revolutions in the Western Hemisphere against European colonialism were the classical historical manifestations of the still unformulated concept of self-determination. The American Revolution is the classical case of the assertion of the right to struggle for freedom, and the establishment of the independent states of South America foreshadowed the power of the modern concept.

It is only in the 20th century, after the end of the First World War, that the legitimization of certain fundamental and natural principles long recognized as essential to individual liberty, received concrete consideration in the context of the ordering of international relations. The principle of self-determination of peoples was postulated in its incipient form by President Woodrow Wilson in the following words:

"We believe these fundamental things:
First, that every people has a right to the sovereignty under which they shall live..." 1/

"No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were property." 2/

In the context of the Paris Conference the "Wilsonian concept was stated in the "Fourteen Points", asserting that colonized peoples had a claim to self-determination equal to the claims of established governments:

"A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined."

The future of the non-Turkish territories of the Ottoman Empire was one of the principal issues to be dealt with by the Allied Powers, and here too the Wilsonian idea of self-determination was expressed as follows:

"The Turkish portions of the present Ottoman Empire should be assured sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development..."

Ironically, the nascent principle of self-determination did not find a place in the Covenant of the League of Nations. Instead, responding to the still powerful compulsions of the colonial era, the dominant powers accommodated the demands of the new morality emerging in international relations, particularly concerning the rights of colonized peoples, by the innovation of the Mandates system.

Article 22 of the Covenant (text at annex I) established the Mandate system on the idea of placing colonized peoples under the "tutelage...of advanced nations". However, these colonies were not to be disposed of by the mandatory powers as they wished, but rather formed "a sacred trust of civilisation". The degree of tutelage was to depend on the state of political development of the territory concerned. The most advanced were to be Class "A" mandates, regarding which the Covenant declared:

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

All but one of the Class "A" mandates achieved independence, at the latest soon after the end of the Second World War. In juridical terms, however, the concept of the right of self-determination advanced little in the period between the wars. But powerful political forces demanding freedom from foreign rule had emerged among colonized peoples during this period and the advent of the United Nations at the beginning of the period of decolonization provided a strong impulsion in the legitimisation of the right of self-determination.

The recognition in 1945 by the United Nations, in the first article of the Charter, of the principle of self-determination has already been quoted. Article 55 also acknowledged this principle as follows:

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote..."

By 1952 the General Assembly had recognized the right of peoples and nations to self-determination as applicable particularly to former League of Nations mandates which still had not achieved independence and were being administered through the Trusteeship Council of the United Nations, as Non-Self-Governing and Trust Territories:

"Whereas the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights,

"Whereas the Charter of the United Nations, under Articles 1 and 55, aims to develop friendly relations among nations based on respect for the equal rights and self-determination of peoples in order to strengthen universal peace,

"...

"Whereas every Member of the United Nations, in conformity with the Charter, should respect the maintenance of the right of self-determination in other States,

"The General Assembly recommends that:

"1. The States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations;

"2. The States Members of the United Nations shall recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories who are under their administration and shall facilitate the exercise of this right by the peoples of such Territories according to the principles and spirit of the Charter of the United Nations...

"3. The States Members of the United Nations responsible for the administration of Non-Self-Governing and Trust Territories shall take practical steps, pending the realization of the right of self-determination and in preparation thereof, to ensure the direct participation of the indigenous populations in the legislative and executive organs of government of those Territories, and to prepare them for complete self-government or independence.

"..." 3/

Following consideration of various reports of the Human Rights Commission, presented through the Economic and Social Council, the General Assembly passed the Declaration on the Granting of Independence to Colonial Countries and Peoples which, inter alia, stated that the Assembly:

"Declares that:

"1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.

"2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

"3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

"4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected." 4/

The second paragraph quoted above formed part of the first article of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of December 1966.*

The Universal Declaration of Human Rights of 1948 had not dealt with the collective right of self-determination as it was concerned essentially with individual human rights. But it is relevant to note that the Declaration established the principle of equality from which the right of self-determination derives. Article 1 of the Declaration reads:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Having traced in outline the course of the development of the concept of the right of self-determination through the various international instruments, one may now survey juridical and academic opinions which assert the law-making force of these instruments and their effect in establishing the right of self-determination as a principle of international law. Many of these opinions encompass discussion of such issues as the status of UN resolutions in international law in general and, in particular, the effect of the resolutions asserting the right of self-determination on claims of domestic jurisdiction (based on Article 2 (7) of the Charter), rights of minorities and on the question of succession.

Professor William Ernest Hocking writes the following on the right of self-determination:

"All living things have an impulse to preserve themselves, and all conscious things, if they are capable of action at all, desire to act freely. Human groups like human individuals show these traits - a "will-to-live" and a "will-to-be-free". When we define a nation as a disposition to act together for political ends we imply that wherever there is a nation there is a striving for independent self-expression." 5/

Professor A. Rigo Sureda traces the evolution of the right of self-determination in the following fashion (after surveying certain political trends of the 19th century):

* P.1 supra.

"...self-determination did not come to the fore again until World War I. Indeed, in a war fought between empires, self-determination became a factor of great strategic value. The Central Powers were the first to realise it, and the Germans thought that, since the British empire was more heterogeneous than the German, a ruthless application of the principle of self-determination would produce a far more scattering explosion in the British territories than it would do in theirs.

"The Allies were at first reluctant to appeal to the principle of self-determination because they feared the effect that this would produce on the nationalities forming part of the Russian empire. This obstacle disappeared with the Russian Revolution, which itself affirmed the principle of self-determination. The other important factor in changing the Allies' policies in this respect was the fact that the United States entered the war, and by then (the summer of 1917) the standing of President Wilson on the issue of self-determination was already known. From then onwards it was the Allies who championed the principle of self-determination...

"When the moment arrived at the peace negotiations to fulfil the pledges of self-determination given by the Allies to the nationalities integrated into the Central Empires, the difficulties of applying self-determination, and the limitations to which such a principle must be subject, became apparent. Historical claims, economic needs and military and strategic arguments prevailed. The principle did not find a place in the Covenant supposed to constitute the framework within which international relations should be conducted after the war...

" ...

"Finally, the mandates system was devised as a compromise solution between the non-annexation policy to which the Allies subscribed and the interests of those powers which occupied the Ottoman and German empires. The system reflected the idea of self-determination in that, at an unspecified future date, Article 22 of the Covenant expected the territories concerned to have developed sufficiently to face "the strenuous conditions of the modern world". In the meantime the Mandated Territories were to be guided towards such status by "advanced nations", the kind of guidance varying from one territory to another according to its degree of development. In fact the mandates system meant to accord to the so-called backward peoples a certain standing in international law. It presupposed a break away from the positivist theories of some writers according to which international law only operated between European states or states of European culture. It started a process of international supervision of colonial administration, the swift development of which in the last two decades nobody could then have predicted.

"Thus, by a curious paradox, it was in those cases where full recognition of self-determination was not granted, i.e. where statehood was not achieved, that a form of partial recognition of self-determination developed...

"The juridical status of self-determination"

"We have seen how self-determination with its revolutionary character poses a threat to the established order and, since it can be considered as a form of self-assertion against any kind of domination, its content is as varied as

ways of domination are varied. Due to these circumstances, self-determination has been considered a concept of political rather than legal character. Indeed, its challenge to the established order is said to provoke anarchy, especially when the subjects of a right such as self-determination are as difficult to define as "peoples" and "nations". On the other hand, the variety of its content has been said to make it too vague and imprecise to be considered a legal right.

"Considering the first objection, the argument can be reversed, and it can be said instead that 'the pre-supposition of strife between nations is not of itself a consequence of the principle of self-determination but the reflection of a desire to resist it: in other words, if the states involved are prepared to accept a result based on self-determination, then there is no reason to presuppose violence will ensue'. As regards the second objection - vagueness of the term self-determination - it may have been a valid objection before the practice of the political organs of the UN gave it a definite and limited meaning but, as it will be seen in the chapters that follow, the concept has now achieved as much clarity as many other principles of international law.

"Thus, although there seems to be no reason to dismiss self-determination as a concept inappropriate for legal analysis, it is admitted that self-determination had no legal standing until fairly recent times. Up to World War II its application by states lacked sufficient consistency to provide a body of practice on which its status as a legal right under international law could be based. However, state attitudes, especially as evidenced in UN practice, have undeniably changed over the past twenty-five years and it is today difficult to deny the right of self-determination a true legal status consistent with a realistic interpretation of the practice of the political organs of the UN. This change of attitude is in part due to the gradual clarification of the content of the right, but in large part it is due to the sheer political pressure stemming from the decolonisation process. It is with this process, and with the way that it has helped to clarify the legal status of self-determination that we shall be concerned here." 6/

Professor Ian Brownlie writes the following regarding the legal status of the right of self-determination:

"The rights of important groups as such become particularly prominent in connexion with the principle, or right, of self-determination, viz., the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups. The choice may be independence as a state, association with other groups in a federal state, or autonomy or assimilation in a unitary state. Until recently the majority of Western jurists assumed or asserted that the principle had no legal content, being an ill-defined concept of policy and morality. Since 1945 developments in the United Nations, and the influence of Afro-Asian and Communist opinion, have changed the position, and some Western jurists now admit that self-determination is a legal principle. The generality and political aspect of the principle do not deprive it of legal content: in the South West Africa

cases (Preliminary Objections) the International Court regarded the terms of Article 2 of the Mandate Agreement concerned as disclosing a legal obligation, in spite of the political nature of the duty 'to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory'.

"
...

"The present position is that self-determination is a legal principle, and that United Nations organs do not permit Article 2, paragraph 7, to impede discussion and decision when the principle is in issue..." 7/

Professor Rosalyn Higgins, discussing the relationship between the right of self-determination and the claim of domestic jurisdiction, writes:

"The question has therefore arisen of how far these articles may be cited as authority for the taking of action of various kinds by the United Nations in the face of an objection based on Article 2 (7). In other words, does the existence of a 'self-determination' element in a situation otherwise internal give that situation the requisite international element to remove it from the domain of questions 'essentially within the domestic jurisdiction'? The answer to this problem must in turn depend on whether the self-determination provisions in the Charter give rise to international legal rights and obligations, or whether they are merely generalized aims."

After discussing the process leading to the 1952 General Assembly resolution on self-determination, she further states that:

"Thus the arguments that the manner in which a state applied the principle of self-determination fell essentially within the domestic jurisdiction failed to hold sway..."

"...

"It therefore seems inescapable that self-determination has developed into an international legal right, and is not an essentially domestic matter. The extent and scope of the right is still open to some debate. We would suggest that at the present stage of development of international law the matter has become an international one within the following conditions: the Assembly may not prescribe an exact time for the granting of independence to a particular territory, though it may urge that this occur speedily... Until the 1960 Declaration on the granting of independence international jurisdiction in matters of self-determination was never claimed without there being offered an alternative ground of international jurisdiction to rebut any contention of *domaine réservé*..."

After discussing the 1960 Declaration on the granting of independence, she goes on to say:

* p.4 supra.

"...that Declaration, taken together with seventeen years of evolving practice by United Nations organs, provides ample evidence that there now exists a legal right of self-determination. Moreover, within certain limits, it is a right which does not admit of the reservation of Article 2 (7). It should also be added that a denial of self-determination is now widely regarded as a denial of human rights, and as such a fitting subject for the United Nations." 8/

In other writings on the role of United Nations organs in contributing to international law, Professor Higgins states:

"But there are very real difficulties about the identification and scope of the lawmaking practices of UN political organs. The opinio juris problem is perhaps paramount. If a law-declaring resolution of the General Assembly is adopted by a very substantial majority, what guidance do we have as to whether they believed themselves legally bound so to do? They may, it is argued, have voted affirmatively purely out of political self-interest. Politically motivated state behaviour is accepted as evidence in bilateral diplomacy, and there is no reason why it should not be in institutionalized evidence. It becomes relevant only insofar as it suggests that opinio juris is lacking...

"...

"...notwithstanding a lack of opinio juris in respect of certain important nations who voted for General Assembly Resolution 1514 (XV), it had a certain legal effect in terms of what was likely to follow at the United Nations."

She regrets the argument that:

"...as Assembly resolutions are not binding, that nothing has changed, and that self-determination remains a mere 'principle' and Article 2 (7) is an effective defence against its implementation. To insist upon this interpretation is to fail to give any weight either to the doctrine of bona fides or to the practice of states as revealed by unanimous and consistent behaviour." 9/

As regards the power of United Nations organs to "make" international law, the dissenting opinion of Judge Tanaka in the 1966 judgement of the International Court of Justice in the South West Africa case may be quoted:

"According to traditional international law, a general practice is the result of the repetition of individual acts of States constituting consensus in regard to a certain content of a rule of law. Such repetition of acts is an historical process extending over a long period of time. The process of the formation of a customary law in this case may be described as individualistic. On the contrary, this process is going to change in adapting

itself to changes in the way of international life. The appearance of organizations such as the League of Nations and the United Nations, with their agencies and affiliated institutions, replacing an important part of the traditional individualistic method of international negotiation by the method of 'parliamentary diplomacy' (Judgement on the South West Africa cases, I.C.J. Reports 1962, p.346), is bound to influence the mode of generation of customary international law. A State, instead of pronouncing its view to a few States directly concerned, has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter. In former days, practice, repetition and opinio juris sive necessitatis, which are the ingredients of customary law might be combined together in a very long and slow process extending over centuries. In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organizations is greatly facilitated and accelerated; the establishment of such a custom would require no more than one generation or even far less than that. This is one of the examples of the transformation of law inevitably produced by change in the social substratum...

"Of course, we cannot admit that individual resolutions, declarations, judgements, decisions, etc., have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice: accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly.

"Parallel with such repetition, each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process. This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law." 10/

Judge Jessup, in another dissenting opinion in the same case, stated:

in regard to the law making role of United Nations organs:

"...since these international bodies lack a true legislative character, their resolutions alone cannot create law...

"...

"...But the accumulation of expressions of condemnation (of apartheid) especially as recorded in the resolutions of the General Assembly of the United Nations, are proof of the pertinent contemporary international community standard." 11/

Judge Lachs, before being appointed to the Hague Court, noting the General Assembly's consistent reiteration of the right of self-determination, wrote that the Declaration of 1960*, asserting the right of self-determination, should now be:

"...viewed as interpreting the principle of self-determination enunciated in Chapter I (of the Charter) ...What is the legal effect of such an interpretation? How far is it binding? ...under the circumstances there seems no doubt that the interpretation given by the General Assembly is authoritative and binding." 12/

There are, as already indicated, jurists and academics who differ from the view quoted, and take the view that organs of the United Nations cannot make international law, and that self-determination is not an established principle of international law, and some of these are quoted below:

Professor Alfred Cobban, writing after the Second World War, comments:

"The right of self-determination... if it means anything at all, cannot mean an absolute right to complete national sovereignty." 13/

Professor Leo Gross does not consider that self-determination is established as a legal principle. He asserts that:

"...subsequent 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 the human rights provisions have come to be interpreted as rights with corresponding obligations either generally or specifically with respect to the right to self-determination." 14/

Professor Rupert Emerson declares:

"...all people do not have the right of self-determination: they have never had it, and they will never have it.

"...

"An essential element in justifying the legitimacy of the present incarnation of self-determination is the conviction that colonialism is illegitimate under all and any circumstances. This is, to be sure, a premise which the colonial powers are not prepared to accept, but it nonetheless is the basic proposition on which the rest of the anti-colonial position rests." 15/

* General Assembly resolution 1514 (XV) of 14 December 1960.

Elsewhere, Professor Emerson writes:

"The difficulties of self-determination become most serious when the doctrine is brought down from abstraction to working reality and when an effort is made, as in the United Nations' covenants on human rights, to translate it from ethical and political precepts to binding legal norms. In the current temper of world opinion no one can in principle oppose what has come to be the almost self-evident right of peoples to dispose of their own destinies, but it is unfortunately equally impossible to formulate this right in such terms as to make it meaningfully applicable to reality. Who can say the nations nay, and yet who can say what nations are and when and how they may assert themselves

"...

"One of the difficulties in the situation is that, although the United Nations may help to make it so, self-determination is not a right which finds any place in international law." 16/

These views have been quoted to illustrate the variety of opinions on the issue of the juridical position in international law of the right of self-determination. However, as already indicated, from the standpoint of this study, the right of self-determination is taken as an established principle of international law in view of the consistent stand of the General Assembly which, as asserted by Judge Tanaka, reflects the will of the international community.

That the right of self-determination has achieved the nature of jus cogens is supported in the UN study mentioned earlier which states:

"In the view of the Special Rapporteur, even if it is accepted that the Declaration, which included desiderata as to the content of future international law, is heterogeneous, and thus not of the nature of jus cogens in every one of its propositions, the fundamental principles of the Charter embodied in it - and hence the principle of self-determination of peoples - as enunciated in General Assembly resolution 2625 (XXV), are nevertheless of the nature of jus cogens. The principles in question are described as 'basic' in the Declaration itself and are referred to in like terms in paragraph 3 of the Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations and in paragraphs 2 to 6 of the Declaration on the Strengthening of International Security; these are three fundamental documents adopted without opposition on the occasion of the twenty-fifth anniversary of the Organization. Leaving aside the supplementary formulations, the consequences and corollaries which are set out in a heterogeneous manner under each of these principles in the Declaration adopted in resolution 2625 (XXV), the principles themselves constitute contemporary manifestations of what in contemporary international law are rules of jus cogens.

"...

"...the International Law Commission has agreed that violation of the right of peoples to self-determination is a most serious offence, an international crime, and has thus tacitly admitted that this principle is one of the cases which in contemporary international law can be characterized as jus cogens.*" 17/

Another authority writes:

"...it might seem that it is only within the last generation that it has come to be admitted that there is a principle of self-determination of peoples that must underlie all international law. Yet... that principle has always underlain the system of international law" 18/

Within this frame of reference, one can examine the issue of the right of self-determination of the Palestinian people as it has evolved through the period of a League of Nations mandate and then in the United Nations.

*(1) International jus cogens - ... - means peremptory rules of general international law...

"(2) Individual parties may not contract out of such international jus cogens

"(3) Any treaty purporting to affect international jus cogens is void unless it contains new rules of international jus cogens." 19/

II. PALESTINE AND SELF-DETERMINATION

THE PEACE CONFERENCE*

Even before self-determination emerged as a principle in international relations in the context of the Covenant of the League of Nations, the Arab peoples subjects of the Ottoman Empire had received assurances from the British government of their independence after the end of the war. These assurances were contained in what is known as the "Hussain-McMahon correspondence" in 1915-1916 between Sherif Hussain, Emir of Mecca, acting as spokesman for the Arabs, and Sir Henry McMahon, British High Commissioner for Egypt. The Sherif categorically demanded "independence of the Arab countries", detailing the boundaries of the areas involved, and McMahon confirmed that "Great Britain is prepared to recognise and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca".

Subsequently there arose a divergence of views regarding whether the territory of Palestine was included in the areas to become independent. The British Government asserted that other letters in the correspondence had excluded Palestine; Arab spokesmen insisted this was not so.

This became a crucial point in the Palestine issue, for soon after these Anglo-Arab understandings, the British entered into conflicting commitments involving the territory of Palestine, through assurances given to the Zionist Organization regarding the establishment of a "Jewish national home" in Palestine. The "Balfour Declaration" of 2 November 1917, (carrying the name of the British Foreign Secretary) informed the Zionist Organization that:

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

To appease Arab misgivings aroused by this move, the British Government issued further assurances. On 4 January 1918, it sent a special message to Sherif Hussain stating that:

"The entente powers are determined that the Arab race shall be given full opportunity of once again forming a nation in the world... So far as Palestine is concerned, we are determined that no people shall be subject to another". 1/

* The course of the Palestine issue after the First World War and during the mandate period is traced in the first study in this series : The Origins and Evolution of the Palestine problem, Part I, 1917-1947; UN Publication ST/SR/SER.F/1.

Regarding the "Jewish national home", however, the message stated that :

"... as His Majesty's Government view with favour the realisation of this aspiration, His Majesty's Government are determined that in so far as is compatible with the freedom of the existing population both economic and political, no obstacle should be put in the way of the realisation of this ideal". 2/

On June 16, 1918, six months after the British occupation of Jerusalem, another British declaration addressed to the Arabs, referring to "areas formerly under Ottoman dominion, occupied by the Allied forces during the present war", stated:

"... the wish and desire of His Majesty's Government that the future government of these regions should be based upon the principle of the consent of the governed, and this policy has and will continue to have support of His Majesty's Government". 3/

An Anglo-French declaration followed on 7 November 1918, stating that :

"The object aimed at by France and Great Britain in prosecuting in the East the War let loose by the ambition of Germany is the complete and definite emancipation of the (Arab) peoples and the establishment of national governments and administration deriving their authority from the initiative and free choice of the indigenous populations". 4/

Notwithstanding these assurances of independence to the Arab peoples, based in spirit on the yet unphrased principle of self-determination, the British Government proceeded with the policy enunciated by the Balfour Declaration, and the critical question of the place of Palestine in the understandings of the Hussain-McMahon correspondence was addressed only over twenty years later after the correspondence was made public in 1939. A committee, consisting of Arab and British governments, was appointed to examine the question. Each side maintained its respective interpretation of the correspondence, but the conclusion of the Committee's report strongly implied that the British Government had not possessed the competence to alienate the territory of Palestine, stating:

"In the opinion of the Committee it is, however, evident from these statements that His Majesty's Government were not free to dispose of Palestine without regard to the wishes and interests of the inhabitants of Palestine, and that these statements must all be taken into account in any attempt to estimate the responsibilities which - upon any interpretation of the Correspondence - His Majesty's Government have incurred towards those inhabitants as a result of the Correspondence". 5/

While Great Britain administered Palestine from the end of 1917 as the occupying power, it moved, in collaboration with the Zionist Organization, to obtain sanction from the League of Nations, under the Mandates system, to implement the policy for the establishment of the "Jewish national home" under the Balfour Declaration. The legality of the Declaration itself has been strongly challenged by Palestinian and Arab spokesmen, and also has been questioned by other authorities. Professor Sol Linowitz may be quoted as an example:

"The most significant and incontrovertible fact is, however, that by itself the Declaration was legally impotent. For Great Britain had no sovereign rights over Palestine, it had no proprietary interest, it had not authority to dispose of the land. The Declaration was merely a statement of British intentions and no more". 6/

The legal status of the Declaration assumes special importance because, while under Article 22 of the Covenant of the League of Nations, the essence of the Mandates system was supposed to be the advancement of the political and other interests of the peoples of the territories concerned, in the case of Palestine the inclusion of the Balfour policy in the mandate opened the way for the establishment of a Jewish state in Palestine with consequent implications for the fundamental political rights of the majority of the indigenous people of Palestine. The Declaration (which had been drafted with the active participation of the Zionist Organization) only paid attention to their "civil and religious rights", referring to the Palestinians as "existing non-Jewish communities in Palestine" although they constituted over 90% of the population.

That the goal of the Zionist Organization was the establishment of a Jewish state in Palestine was known. In its first Congress held in Basle in 1897, it had declared that its aim was to "create for the Jewish people a home in Palestine secured by public law". The meaning of this resolution was given by the founder of the Zionist Organization, Dr. Theodor Herzl:

"Were I to sum up the Basle Congress in a word, -which I shall guard against pronouncing publicly - it would be this: at Basle I founded the Jewish state... Perhaps in five years and certainly in fifty everyone will know it". 7/

The goal was clear to high officials of the British Government which was drafting the terms of the proposed mandate. Lord Curzon, who had succeeded Balfour as Foreign Secretary, and who was opposed to the Balfour policy, wrote to Balfour:

"I feel tolerably sure therefore that while Weizmann may say one thing to you, or while you may mean one thing by a National Home, he is out for something quite different. He contemplates a Jewish State, a Jewish nation, a subordinate population of Arabs etc. ruled by Jews; the Jews in possession of the fat of the land, and directing the Administration.

"He is trying to effect this behind the screen and under the shelter of British trusteeship." 8/

At the Peace Conference, President Wilson was concerned about the implementation of the new principle of self-determination in the mandates negotiations. He stated that "one of the fundamental principles to which the United States of America adhered was the consent of the governed" and proposed the appointment of an international commission "...to elucidate the state of opinion in the soil to be worked on by any mandatory". Following the reluctance of the other Allied Powers to appoint members, the "King-Crance Commission" was composed of two Americans. The Commission's report stated in respect of Palestine, with reference to the Wilsonian principle of self-determination:

"If that principle is to rule, and so the wishes of Palestine's population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine - nearly nine-tenths of the whole - are emphatically against the entire Zionist programme. The tables show that there was no one thing upon which the population of Palestine were more agreed than upon this."

and recommended:

"... serious modification of the extreme Zionist programme for Palestine of unlimited immigration of Jews, looking finally to making Palestine distinctly a Jewish State..." 9/

Noting the strong opposition in Palestine to the Balfour policy and to the prospect of Great Britain and France as mandatory powers, the Commission proposed a United States mandate over Syria, including Palestine, but this was not given serious consideration by the Allied Powers. The policy being considered by them was the subject of a memorandum by Lord Balfour to Lord Curzon:

"The contradiction between the letters of the Covenant and the policy of the Allies is even more flagrant in the case of the 'independent nation' of Palestine than in that of the 'independent nation' of Syria. For in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country, though the American Commission has been going through the form of asking what they are.

"The Four Great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land.

"In my opinion that is right. What I have never been able to understand is how it can be harmonized with the (Anglo-French) declaration of November 1918, the Covenant, or the instructions to the Commission of Enquiry.

"I do not think that Zionism will hurt the Arabs, but they will never say they want it. Whatever be the future of Palestine, it is not now an 'independent nation', nor is it yet on the way to become one. Whatever deference should be paid to the view of those living there, the Powers in their selection of a mandatory do not propose, as I understand the matter, to consult them. In short, so far as Palestine is concerned, the Powers have made no statement of fact which is not admittedly wrong, and no declaration of policy which, at least in the letter, they have not always intended to violate..." 10/

Lord Balfour also wrote, separately, of the effects of the Anglo-French declaration of November 1918 on the Balfour policy for Palestine at a moment when the principle of self-determination was receiving attention:

"The situation is further complicated by an agreement made early in November by the British and French, and brought to the President's attention, telling the people of the East that their wishes would be consulted in the disposition of their future... Palestine should be excluded from the terms of reference because the Powers had committed themselves to the Zionist programme, which inevitably excluded numerical self-determination. Palestine presented a unique situation. We are dealing not with the wishes of an existing community but are consciously seeking to re-constitute a new community and definitely building for a numerical majority in the future..." 11/

It is thus evident that in 1919 the intention of the Allied Powers, with the exception of the United States, was not to secure the right of self-determination for the indigenous people of Palestine, but to ensure the establishment of a "Jewish national home" in Palestine. However, the United States was also to endorse the Palestine Mandate after it was formulated. The drafting of the mandate also was completed with active Zionist participation, and the Mandate for Palestine came into effect on 24 July 1922, its principal clauses reading as follows:

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

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

"Article 1: The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.

"Article 2: The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

"Article 4: An appropriate Jewish agency shall be recognized as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.

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

"...

"Article 6: The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes."

While some writers have maintained that the League was legally competent to include whatever terms it chose in the mandate, several authorities have pointed to the contradiction by the Palestine mandate of the source of the authority for the mandates system - Article 22 of the Covenant. They have also noted the consequent infringement of the right of self-determination of the indigenous people of Palestine. Two illustrative views may be quoted.

Professor William Hocking, in 1932, wrote :

"On the purely legal side, the Declaration is a mere flourish unless Great Britain has some right and competence to dispose of Palestine, a question to which I shall return. But, assuming this, the Declaration is still legally precarious. It is subject to the Treaty of Versailles, and especially to the Covenant of the League, whose Article XX expressly

cancels any other obligation or agreement which may be inconsistent with the Covenant. Now the Balfour Declaration is inconsistent with Article XXII of the Covenant. For this Article would bring Palestine under a typical A-Mandate, with a 'provisional independence' and a prospect of complete independence. But the Declaration makes such a mandate impossible. There can be no provisional independence in a land subject to a protected immigration. The A-mandate considers the welfare of the residents; whereas the Declaration considers also the welfare of a nation of non-residents, making the Jewish people of the world as a whole virtual or potential citizens of the state to be. Accordingly, Article 1 of the mandate, instead of announcing a régime of aid and advice, provides a régime of direct administration: 'The Mandatory shall have full powers of legislation and administration, save as they may be limited by the terms of this mandate'. As for the ultimate withdrawal of the mandatory, while Article 28 considers a time when the 'Administration of Palestine' will merge in a 'Government of Palestine', the constitution of this Government is left undetermined. Self-determination is thus at a minimum in Palestine... The legal logic of the Arab case against the present validity of the Balfour Declaration would seem unanswerable." 12/

Professor Rupert Emerson, writing in 1967, expresses this view :

"The acceptance of Zionist aspirations in Palestine was, however, a very different matter. Instead of working to correct itself, it grew always worse and more threatening from the standpoint of the Arabs who had from the outset lacked faith in the solemn assurance that their rights and position would not suffer. The conception of creating a Jewish national home in Palestine could not possibly be squared with the principle of self-determination, or, for that matter, of democracy, on the basis of any of the generally accepted criteria. Aside from the fact that many Jews wanted to establish themselves there, the only claim which had any conceivable status was that Palestine had been the ancient Jewish homeland many centuries ago; but to accept the legitimacy of claims to self-determination whose basis is possession broken off two thousand years earlier would be to stir up such a host of conflicting and unrealizable demands as totally to discredit the principle. It is, of course, true that some small number of Jews had continued to live in Palestine or had at some point returned there, but at the time of the Balfour Declaration and the introduction of the Mandate the Jewish community in Palestine was vastly outnumbered by the Arabs whose occupancy dated back to the remote past. If self-determination were to be applied in the customary fashion of seeking out what the people of the country wanted, there could be no doubt where the overwhelming majority lay nor of the rejection by that majority of both Balfour Declaration and Mandate. The Zionist program could be carried through as a decision of policy only if someone were prepared to enforce it in the face of bitter opposition.

"The Arabs were neither slow nor bashful in bringing these and similar points to the world's attention, and as early as August 1919, they received neutral support from the King-Crane Commission sent by President Wilson to ascertain the state of affairs in Syria and Palestine. Asserting that the Zionists looked to practically complete dispossession of the non-Jewish inhabitants of Palestine, this Commission found nearly nine-tenths of the population to be non-Jewish and emphatically opposed to the entire Zionist program. With specific reference to the Wilsonian principle of self-determination, the Commission held :

'To subject a people so minded to unlimited Jewish immigration, and to steady financial and social pressure to surrender the land, would be a gross violation of the principle just quoted, and of the people's rights, though it be kept within the forms of law'. " 13/

Thus it seems evident that, at the time that the principle of self-determination was being considered by the states that were to form the League of Nations, it was being denied to the people of Palestine.

III. PALESTINE AND SELF-DETERMINATION - THE MANDATE PERIOD

Shortly before the formal start of the mandate, the British government issued, on 1 July 1922, a White Paper reiterating the Balfour policy subordinating the interests of the indigenous people of Palestine, thus reiterating the infringement of the principle of self-determination. The White Paper (issued under the authority of Sir Winston Churchill, then Colonial Secretary) signalling the start of massive immigration into Palestine in order to expand the Jewish community and establish the "national home", declared that:

"...in order that this community should have the best prospect of free development and provide a full opportunity for the Jewish people to display its capacities, it is essential that it should know that it is in Palestine as of right and not on sufferance...

"For the fulfilment of this policy it is necessary that the Jewish community in Palestine should be able to increase its numbers by immigration. This immigration cannot be so great in volume as to exceed whatever may be the economic capacity of the country at the time to absorb new arrivals". 1/

Some years later, Churchill made clear that the British policy was not directed toward securing the advance of the people of Palestine toward independence and self-government. He stated that the aim of the 1922 White Paper was:

"...to make it clear that the establishment of self-governing institutions in Palestine was to be subordinated to the paramount pledge and obligation of establishing a Jewish National Home in Palestine". 2/

Under the mandate the British Government was faced with what was described as the "dual obligation" created by the Balfour Declaration, and the Churchill policy made clear which one was to dominate. The demographic composition of Palestine was transformed during thirty years of British administration, from 1917 to 1947. The Jewish community, which numbered 56,000 in 1917 and increased to 84,000 by 1922 at the start of the mandate, rose to 608,000 by 1946. 3/ During this period, the total population of Palestine mounted from 750,000 (in 1922) to 1,850,000. In proportionate terms, the Jewish population in this time increased less than a tenth to about a third. Much of this increase was due to large-scale immigration of European Jews fleeing Nazi persecution and terror, seeking refuge in Palestine.

The people of Palestine resisted the denial of the independence they had anticipated after the end of the war, and also the effect on their country of large-scale immigration. This resistance was manifested in a series of revolts. Commissions appointed to investigate the causes of these uprisings, while defending British policy and acknowledging the progress made by the Jewish Agency (representing the Zionist Organization) toward consolidating the "national home", consistently, but in varying language, pointed to the denial of self-determination as a fundamental cause of the uprisings.

On the first anniversary of the Balfour Declaration there were non-violent protests, but by April 1920, two years before the formalising of the mandate, protests had become violent. A military commission of inquiry found that the underlying causes of the riots were:

"(1) The Arabs' disappointment at the non-fulfilment of the promises of independence which they believed to have been given them in the War.

"(2) The Arabs' belief that the Balfour Declaration implied a denial of the right of self-determination and their fear that the establishment of a National Home would mean a great increase of Jewish immigration and would lead to their economic and political subjection to the Jews." h/

A serious outbreak of violence followed in May 1921, the Commission of

Inquiry commenting:

"The fundamental cause of the Jaffa riots and the subsequent acts of violence was a feeling among the Arabs of discontent with, and hostility to, the Jews, due to political and economic causes, and connected with Jewish immigration, and with their conception of Zionist policy as derived from Jewish exponents." 5/

After a period of relative calm, there was a major outbreak of violence in August 1929. The Commission of Inquiry's findings were as follows:

"... If there was in Palestine in August last a widespread feeling of resentment amongst the Arabs at the failure of His Majesty's Government to grant them some measure of self-government, it is at least probable that this resentment would show itself against the Jews, whose presence in Palestine would be regarded by the Arabs as the obstacle to the fulfilment of their aspirations".

That such a feeling existed among the leaders of the Arabs and the official and educated classes there can be no question...

"... The Arab people of Palestine are today united in their demand for representative government. This unity of purpose may weaken but it is liable to be revived in full force by any large issues which involve racial interests. It is our belief that a feeling of resentment among the Arab people of Palestine consequent upon their disappointment at the continued failure to obtain any measure of self-government... was a contributory cause to the recent outbreak and is a factor which cannot be ignored in the consideration of the steps to be taken to avoid such outbreaks in the future. 6/

In 1933 there were fresh uprisings, the following comments being made on the causes (in the context of the sudden influx of European Jewish refugees):

"The Arab reaction to this sudden and striking development was quite natural. All that the Arab leaders had felt in 1929 they now felt more bitterly... the greater the Jewish inflow, the greater the obstacle to their attainment of national independence. And now, for the first time, a worse fate seems to threaten them than the withholding of their freedom and the continuance of Mandatory rule. Hitherto, with the high rate of natural increase among the Arabs, it has seemed impossible that the Jews could become a majority in Palestine within measurable time. But what if the new flood of immigration were to rise still higher? That question gave a very different colour to the idea of self-government in Palestine as Arab nationalists had hitherto conceived it. It opened up the intolerable prospect of a Jewish State - of Palestinian Arabs being ruled by Jews. It is not surprising, therefore, to find... the old antagonism growing hotter and hotter, till it bursts again into flames."

...

"It was thus becoming clear that the crux of the situation in Palestine was not growing less formidable with the passing of time. On the contrary, the longer the Mandate operated, the stronger and more bitter Arab antagonism to it became." 7/

By 1936 there was an open rebellion in Palestine, involving the British Government in major military operations against the rebels, lasting until 1939. The Royal Commission appointed to investigate the "disturbances" reported inter alia as follows:

"... To foster Jewish immigration in the hope that it might ultimately lead to the creation of a Jewish majority and the establishment of a Jewish State with the consent or at least the acquiescence of the Arabs was one thing. It was quite another thing to contemplate, however remotely, the forcible conversion of Palestine into a Jewish State against the will of the Arabs. For that would clearly violate the spirit and intention of the Mandate System. It would mean that national self-determination had been withheld when the Arabs were a majority in Palestine and only conceded when the Jews were a majority. It would mean that the Arabs had been denied the opportunity of standing by themselves; that they had, in fact, after an interval of conflict, been bartered about from Turkish sovereignty to Jewish sovereignty.

"...the international recognition of the right of the Jews to return to their old homeland did not involve the recognition of the right of the Jews to govern the Arabs in it against their will.

"...the crux was plain enough to Arab eyes. It was the Balfour Declaration and its embodiment in the draft Mandate and nothing else which seemingly prevented their attaining a similar measure of independence to that which other Arab communities already enjoyed. And their reaction to this crux was logical. They repudiated the Balfour Declaration. They protested against its implementation in the draft Mandate. "The people of Palestine", they said, "cannot accept the creation of a National Home for the Jewish people in Palestine". And they refused to cooperate in any form of government other than a national government responsible to the Palestinian people.

...

"...Nowhere, as it happened, was the spirit of nationalism more acute after the War than in this area of the Near and Middle East. In all of its constituent territories, except Transjordan, there were serious disturbances, and in all of them, except Palestine, there was a marked advance towards self-government." 8/

The Royal Commission's findings on the causes of the rebellion were as follow

"...After examining this and other evidence and studying the course of events in Palestine since the War, we have no doubt as to what were "the underlying causes of the disturbances" of last year. They were:

- (i) The desire of the Arabs for national independence.
- (ii) Their hatred and fear of the establishment of the Jewish National Home.

"We make the following comments on these two causes:

- (i) They were the same underlying causes as those which brought about the "disturbances" of 1920, 1921, 1929 and 1933.
- (ii) They were, and always have been, inextricably linked together. The Balfour Declaration and the Mandate under which it was to be implemented involved the denial of national independence at the outset. The subsequent growth of the National Home created a practical obstacle, and the only serious one, to the concession later of national independence. It was believed that its further growth might mean the political as well as economic subjection of the Arabs to the Jews, so that if, ultimately, the Mandate should terminate and Palestine become independent, it would not be a national independence in the Arab sense but self-government by a Jewish majority.
- (iii) They were the only "underlying" causes. All the other factors were complementary or subsidiary, aggravating the two causes or helping to determine the time at which the disturbances broke out." 9/

The Commission commented in the following words on the demands of the indigenous people of Palestine for self-determination and independence:

"...When at last they came before us, headed by the Mufti of Jerusalem, the first words of the prepared statement he made to us, were these: "The Arab cause in Palestine is one which aims at national independence. In its essence it does not differ from similar movements amongst the , , , Arabs in all other Arab territories." And at the close of his statement he stated that the first cause of the "disturbances" was "the fact that the Arabs in Palestine were deprived of their natural and political rights"; and he summed up the Arab demands ...the solution of the Palestine problem on the same basis as that on which were solved the problems in Iraq, Syria and the Lebanon, namely by the termination of the Mandate and by the conclusion of a treaty between Great Britain and Palestine by virtue of which a national and independent government in constitutional form will be established.

"Thus it is clear that the standpoint of the Arab leaders has not shifted by an inch from that which they adopted when first they understood the implications of the Balfour Declaration. The events of 17 years have only served to stiffen and embitter their resistance and, as they argue, to strengthen their case...

"...Quite obviously, then, the problem of Palestine is political. It is, as elsewhere, the problem of insurgent nationalism. The only difference is that in Palestine Arab nationalism is inextricably interwoven with antagonism to the Jews. And the reasons for that, it is worth repeating, are equally obvious. In the first place, the establishment of the National Home involved at the outset a blank negation of the rights implied in the principle of national self-government. Secondly, it soon proved to be not merely an obstacle to the development of national self-government, but apparently the only serious obstacle. Thirdly, as the Home has grown, the fear has grown with it that, if and when self-government is conceded, it may not be national in the Arab sense, but government by a Jewish majority...

"...The story of the last seventeen years is proof that this Arab nationalism with its anti-Jewish spearhead is not a new or transient phenomenon. It was there at the beginning; its strength and range have steadily increased; and it seems evident to us from what we saw and heard that it has not yet reached its climax." 10/

The Royal Commission recommended the partition of Palestine into two States.

The Zionist Congress rejected the proposal as "unacceptable", declaring that:

"The Congress empowers the Executive to enter into negotiations with a view to ascertaining the precise terms of His Majesty's Government for the proposed establishment of a Jewish State." 11/

The people of Palestine also resisted the partition plan and, in the face of a resurgence of the rebellion, the British Government reversed its initial acceptance of the partition proposal. A round-table conference was held in London in 1939, where the British Government attempted, in separate discussions with representations of the Palestinians and the Zionist Organization, to find an agreed policy. The attempt foundered in the face of Zionist demands for the establishment of a Jewish state in Palestine, and the Palestinians' refusal to relinquish their natural rights of self-determination and independence.

The British Government then announced its intention to terminate the mandate by 1949 with the establishment of a unified state in Palestine. A White Paper issued in May 1939 stated:

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

"...

"...The objective of His Majesty's Government is the establishment within ten years of an independent Palestine State in...treaty relations with the United Kingdom.

"...the independent State should be one in which Arabs and Jews share in government in such a way as to ensure that the essential interests of each community are safeguarded..." 12/

This British policy could not be implemented. In May 1942 the Jewish Agency issued the following declaration:

"The Conference affirms its unalterable rejection of the White Paper of May 1939 and denies its moral or legal validity. The White Paper seeks to limit, and in fact to nullify Jewish rights to immigration and settlement in Palestine, and, as stated by Mr. Winston Churchill in the House of Commons in May 1939, constitutes "a breach and repudiation of the Balfour Declaration...

"The Conference urges that the gates of Palestine be opened; that the Jewish Agency be vested with control of immigration into Palestine and with the necessary authority for upbuilding the country, including the development of its unoccupied and uncultivated lands; and that Palestine be established as a Jewish Commonwealth integrated in the structure of the new democratic world..." 13/

In frustration, the British Government announced that it would turn the Palestine problem over to the United Nations. The initial step was the appointment of an Anglo-American Inquiry Committee. The Committee's report of April 1946 noting the assertion of the Jewish claim of historical connexion to Palestine, and the establishment by the Jewish Agency during the Mandate of "a state within a state", summed up the Palestinian Arab claim to self-determination as follows:

"...

"In issuing the Balfour Declaration, the Arabs maintain the British Government were giving away something that did not belong to Britain, and they have consistently argued that the Mandate conflicted with the Covenant of the League of Nations from which it derived its authority. The Arabs deny that the part played by the British in freeing them from the Turks gave Great Britain a right to dispose of their country. Indeed, they assert that Turkish was preferable to British rule if the latter involves their eventual subjection to the Jews. They consider the Mandate a violation of their right of self-determination since it is forcing upon them an immigration which they do not desire and will not tolerate - an invasion of Palestine by the Jews...

"The suggestion that self-government should be withheld from Palestine until the Jews have acquired a majority seems outrageous to the Arabs. They wish to be masters in their own house. The Arabs were opposed to the idea of a Jewish National Home even before the Biltmore Programme and the demand for a Jewish State." 14/

Another London Conference in 146 proved abortive and the British Government submitted the issue to the United Nations in 1947, the right of self-determination of the Palestinian people being unrealized after thirty years of mandatory rule.

Professor Hocking had made the following comment in 1932 on the Palestine Mandate:

"It is indeed a bitter thing to the sincere Zionist that his ideal community cannot have in that unique spot of earth its perfect body as well as its perfect soul. It is a bitter thing to me to have to assert this. For I went to Palestine a Zionist in faith, warmed by the ardor of Jewish friends to whom this vision is the breath of life, prepared to believe all things possible. And I came away sorrowful on this score, seeing that to strive for the perfect body, as things now are, can only mean the loss of soul and body alike. To pursue any campaign for a more vigorous fulfilment of "the British promise", to force cantonization on Palestine, repeating the standing grievance of divided Syria, to press for any further favor of the state, is to work blindly toward another bloody struggle involving first the new settlements, then Great Britain, then no one knows what wider area." 15/

IV. PALESTINE AND THE UNITED NATIONS

THE FIRST PHASE

At the time that it was taken up by the United Nations in 1947, the Palestine issue had become a case sui generis. The natural rights of the people of Palestine had come into conflict with the demands of a sizeable and powerful minority created as a result of the Mandate policy, accentuated by the flight of Jewish refugees from Europe, and violence ravaged Palestine.

Although the United Nations Charter recognised the principle of self-determination, this was not directly applied in the case of Palestine. The General Assembly, diverging from the final policy decision of the Mandatory Power that Palestine should remain a unified state, recommended the partition of Palestine in a form substantially different from those proposed after the Royal Commission's report ten years earlier. Thus the normal outcome of the implementation of the principle of self-determination, the implementation of the will of the majority, with strong guarantees for the rights of the minority, did not occur in the case of Palestine, although this principle was to provide the base of the subsequent liberation of a large number of colonies in Africa and Asia.

The First Special Session of the General Assembly had appointed a United Nations Special Committee on Palestine (UNSCOP) to investigate the situation in Palestine and present recommendations. UNSCOP made the following comment concerning the principle of self-determination in Palestine :

"With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories, at the time of the creation of the 'A' Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the sui generis Mandate for Palestine run counter to that principle". 1/

The recommendations of UNSCOP itself did not give importance to this fundamental principle, and the General Assembly resolution proposing the partition of Palestine was based on the majority recommendations of UNSCOP. Indeed there were members of UNSCOP who recommended a unified independent Palestine with guarantees for minority rights, but they had formed a minority, and their recommendations were not endorsed by the General Assembly. The majority proposals, termed "Plan of Partition with Economic Union" was based, inter alia, on the following justifications :

"1. The basic premise underlying the partition proposal is that the claims to Palestine of the Arabs and Jews, both possessing validity, are irreconcilable, and that among all of the solutions advanced, partition will provide the most realistic and practicable settlement, and is the most likely to afford a workable basis for meeting in part the claims and national aspirations of both parties.

"...

"4. Only by means of partition can these conflicting national aspirations find substantial expression and qualify both peoples to take their places as independent nations in the international community and in the United Nations.

"... " 2/

The majority partition proposals, envisaging a Jewish state, an Arab state and an internationalized zone for Jerusalem, as well as the minority proposals for a federal state, were closely scrutinized before the General Assembly voted on them. The sub-committee examining the minority plan dealt with the legal implications of the partition of Palestine, pointing out that this would be contravening the principle of self-determination, respect for which was required by the Charter as follows :

"The Sub-Committee considered the legal implications of the plan recommended by the majority of the Special Committee as enumerated above, and its views are summarized below.

"The question of the partition of Palestine has to be considered in the light both of the provisions of the Mandate for Palestine, as read with the general principles embodied in the Covenant of the League of Nations, and of the provisions of the Charter. The United Kingdom took over Palestine as a single unit. Under Article 5 of the Mandate, the Mandatory Power was responsible 'for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the government of any foreign power'. Article 28 of the Mandate further contemplated that at the termination of the Mandate the territory of Palestine would pass to the control of 'the Government of Palestine'. So also by virtue of Article 22 of the Covenant, the people of Palestine were to emerge as a fully independent nation as soon as the temporary limitation on their sovereignty imposed by the Mandate had ended.

"The above conclusion is by no means vitiated by the provisions for the establishment of a Jewish National Home in Palestine. It was not, and could not have been, the intention of the framers of the Mandate that the Jewish immigration to Palestine should result in breaking up the political, geographic and administrative economy of the country. Any other interpretation would amount to a violation of the principles of the Covenant and would nullify one of the main objectives of the Mandate.

"24. Consequently the proposal of the majority of the Special Committee that Palestine should be partitioned is, apart from other weighty political, economic and moral objections, contrary to the specific provisions of the Mandate and in direct violation of the principles and objectives of the Covenant. The proposal is also contrary to the principles of the Charter, and the United Nations has no power to give effect to it. The United Nations is bound by Article 1 of the Charter to act 'in conformity with the principles of justice and international law' and to respect 'the principle of equal rights and self-determination of peoples'. Under Article 73, concerning non-self-governing territories and mandated areas, the United Nations undertakes 'to promote to the utmost... the well-being of the inhabitants of these territories' and to 'take due account of the political aspirations of the peoples'. The imposition of partition on Palestine against the express wishes of the majority of its population can in no way be considered as respect for or compliance with any of the above-mentioned principles of the Charter".

"... " 3/

One of the aims of the General Assembly resolution 181 (II) of 29 November 1947 partitioning Palestine (map at annex II) was to ensure that the Arab and Jewish states would have Arab and Jewish majorities respectively. In actual fact, given the great disparities between the populations, this became virtually impossible, and the territories to be allotted to the Jewish state held a population that was roughly evenly divided between the Jews and the Palestinian Arabs, according to figures from the UNSCOP report:

	Jews	Arabs and others	Total
"The Jewish State	498,000	407,000	905,000
The Arab State	10,000	725,000	735,000
City of Jerusalem	100,000	105,000	205,000

"In addition there will be in the Jewish State about 90,000 (Arab) Bedouins..." 4/

The Partition resolution thus awarded over half the territory of Palestine to a third of its inhabitants who, in the words of their representative, "... in a way... are all from outside; they are practically all immigrants..." 5/

During the proceeding in the United Nations, the representatives of the indigenous people of Palestine had already voiced their opposition to the partition plan and the denial of the right of self-determination. The partition of Palestine was also rejected by the Arab states bordering Palestine. With British withdrawal imminent, and armed hostilities between Jewish forces and Palestinian and Arab irregulars already in progress, the Arab states sent forces into Palestine as the British withdrawal was completed.

It is beyond the scope of this study to examine in detail the events that accompanied the ending of the Mandate in 1948. It need only be noted that although the partition plan was not formally implemented by the United Nations, the state of Israel was established and, in the course of the hostilities that took place, its territorial control expanded far beyond the territories allotted by the partition resolution until it occupied over three quarters of the territory of Palestine, and the western part of Jerusalem (map at annex III). The remainder was occupied by Jordan (including East Jerusalem) and Egypt until 1967, when in another war Israeli control again expanded to occupy all of Palestine (and other Arab territories in addition) map at annex IV).

Over this period more than half of the indigenous people of Palestine were made refugees, and the only other major resolution passed by the General Assembly (194 (III) of 11 December 1946) became the basis of treating the Palestine issue as a "refugee problem" for twenty years, with the international community paying little heed to the right of self-determination lost by the people of Palestine.

V. THE AFFIRMATION BY THE UNITED NATIONS
OF THE RIGHT OF SELF-DETERMINATION OF
THE PALESTINIAN PEOPLE

For the first time since the United Nations became involved in the Palestine issue the General Assembly in 1969 recognized and reaffirmed "the inalienable rights of the people of Palestine". 1/ The developments leading to this act again are beyond the scope of this study. It may, however, be noted that, following the 1967 Middle East war, Security Council Resolution 242 (1967) was intended, from the United Nations standpoint, to establish a framework for peace in the Middle East. Yet this resolution did not address the issue of Palestine, which lay at the root of the Middle East dispute, and referred only to "the refugee problem".

Once the General Assembly concerned itself with the problem, however, it consistently and repeatedly reasserted the right of self-determination of the Palestinian people.

In 1970, the General Assembly, reasserting previous demands for Israeli withdrawal from territories occupied in 1967, for the observance of the right of return of the refugees, and for the cessation of violations of human rights, underlined the central position of the Palestine issue in the Middle East situation, declaring that it :

"Recognizes that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations:

"Declares that full respect for the inalienable rights of the people of Palestine is an indispensable element in the establishment of a just and lasting peace in the Middle East". 2/

Similarly worded resolutions were passed by the General Assembly in 1971 and 1972.

A year after the Middle East war of October 1973, the cause of self-determination for the Palestinian people began a rapid advance. In September 1974 a large number of Member States of the United Nations moved to restore, for the first time since 1952, the item "Question of Palestine" on the General Assembly agenda. The following month, Arab heads of state and government meeting at Rabat affirmed "the right of the Arab Palestinian people to the return of its homeland and its right of self-determination", and recognized the Palestine Liberation Organization (PLO) as "the sole legitimate representative of the Palestinian people", and the General Assembly invited the PLO to participate in its proceedings 3/.

Some weeks later the Assembly passed, by 87 votes to 8, with 37 abstentions, resolution 3236 (XXIX) of 22 November 1974, which is a major instrument of reassertion of the fundamental rights of the Palestinian people.

The resolution read :

"The General Assembly,

Deeply concerned that no just solution to the problem of Palestine has yet been achieved and recognizing that the problem of Palestine continues to endanger international peace and security,

Recognizing that the Palestinian people is entitled to self-determination in accordance with the Charter of the United Nations,

Expressing its grave concern that the Palestinian people has been prevented from enjoying its inalienable rights, in particular its right to self-determination,

Guided by the purposes and principles of the Charter,

Recalling its relevant resolutions which affirm the right of the Palestinian people to self-determination,

1. Reaffirms the inalienable rights of the Palestinian people in Palestine including:
 - (a) The right to self-determination without external interference;
 - (b) The right to national independence and sovereignty;
2. Reaffirms also the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return;
3. Emphasizes that full respect for and the realization of these inalienable rights of the Palestinian people are indispensable for the solution of the question of Palestine;
4. Recognizes that the Palestinian people is a principal party in the establishment of a just and lasting peace in the Middle East;
5. Further recognizes the right of the Palestinian people to regain its rights by all means in accordance with the purposes and principles of the Charter of the United Nations;
6. Appeals to all States and international organizations to extend their support to the Palestinian people in its struggle to restore its rights, in accordance with the Charter;
7. Requests the Secretary-General to establish contacts with the Palestine Liberation Organization on all matters concerning the question of Palestine.

The Assembly also conferred on the Palestine Liberation Organization the status of observer in the Assembly and in other international conferences held under United Nations auspices. 4/

In 1975, the General Assembly requested the Security Council to take action to enable the Palestinian people to exercise their rights, and called for the participation of the PLO, on an equal footing with other parties, in all negotiations on the Middle East held under UN auspices.

The General Assembly in 1975 also again expressed its concern that :

"... no just solution to the problem of Palestine has yet been achieved,

"... the problem of Palestine continues to endanger international peace and security,

"... no progress has been achieved towards:

(a) The exercise by the Palestinian people of its inalienable rights in Palestine, including the right to self-determination without external interference and the right to national independence and sovereignty;

(b) The exercise by Palestinians of their inalienable right to return to their homes and property from which they have been displaced and uprooted..." 5/

The rights of self-determination for the people of Palestine was also consistently reaffirmed in a series of resolutions passed since 1970 by the General Assembly, entitled "Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights." These resolutions affirmed that armed struggle was a legitimate means for a liberation movement. Illustrative of this series is the resolution passed by an overwhelming majority in 1977, which read:

"The General Assembly

"...

"Reaffirming its faith in General Assembly resolution 1514 (XV) of 14 December 1960, containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the importance of its implementation,

"Reaffirming the importance of the universal realization of the right of peoples to self-determination, national sovereignty and territorial integrity and of the speedy granting of independence to colonial countries and peoples as imperatives for the enjoyment of human rights,

"...

"Indignant at the continued violations of the human rights of the peoples still under colonial and foreign domination and alien subjugation, the continuation of the illegal occupation of Namibia and South Africa's attempts to dismember its territory, the perpetuation of the racist minority régimes in Zimbabwe and South Africa and the denial to the Palestinian people of their inalienable national rights,

"1. Calls upon all States to implement fully and faithfully the resolutions of the United Nations regarding the exercise of the right to self-determination by peoples under colonial and alien domination;

"2. Reaffirms the legitimacy of the people's struggle for independence, territorial integrity, national unity and liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle;

"3. Reaffirms the inalienable right of the peoples of Namibia and Zimbabwe, of the Palestinian people and of all peoples under alien and colonial domination to self-determination, national independence, territorial integrity, national unity and sovereignty without external interference;

"...

"8. Strongly condemns all Governments which do not recognize the right to self-determination and independence of all peoples still under colonial and foreign domination and alien subjugation, notably the peoples of Africa and the Palestinian people;

"... " 6/

The General Assembly in 1975 established the Committee on the Exercise of the Inalienable Rights of the Palestinian People with a mandate to prepare recommendations for a programme of implementation designed to enable the Palestinian people to exercise their inalienable rights including:

- (a) The right to self-determination without external interference;
- (b) The right to national independence and sovereignty.

The Committee presented its first report in 1976 7/, the following excerpts dealing with the right of self-determination :

'33. It was maintained that the right of the Palestinian people to self-determination could be implemented only if Israel evacuated the Palestinian territory it had occupied by force contrary to the Charter of the United Nations and its resolutions and if Israel permitted the refugees and the displaced Palestinians who had been uprooted or expelled or had fled during and after the hostilities of 1948 and 1967 to return to their homes and property.

"34. It was stressed that the establishment of an independent Palestinian State, in accordance with the principles of the Charter of the United Nations, was a prerequisite for peace in the Middle East. Upon the Israeli vacating of the occupied areas and the establishment of an independent Palestinian administration, the Palestinian people would be able to exercise its right to self-determination and to decide its form of government through democratic means. The role of the United Nations in that regard could only be advisory. Once the Palestinian State was established, it could participate, on a basis of equality, in the negotiations for a peace settlement in the Middle East, which would cover the question of secure and recognized boundaries for all States in the region.

"35. The opinion was shared that it was up to the Palestinian people, in the exercise of its right to self-determination, to decide when and how its national independence should be expressed within an independent entity of its own and in its territory, Palestine. No other party had the right to dictate to the Palestinian people the form, status or system of its entity or claim the authority to permit or to prevent the establishment of an independent Palestinian entity. The Palestinian people had the right freely to choose its own representatives and form of government. The Palestine Liberation Organization, which had been recognized by the Palestinian people, the United Nations, the League of Arab States, the Organization of African Unity and the overwhelming majority of world nations as the sole representative of the Palestinian people, was a guardian of the inalienable rights of this people. The Palestine Liberation Organization, consequently, was entitled to participate as a principal party in all peace efforts to resolve the Middle East problem."

The Committee's report and recommendations came before the Security Council in 1976, when a draft resolution was presented declaring that the Council :

"Affirms the inalienable rights of the Palestinian people to self-determination, including the right of return and the right to national independence and sovereignty in Palestine, in accordance with the Charter of the United Nations".

The resolution failed due to the negative vote of a permanent member of the council (the United States).

The Security Council again considered the Committee's report in October 1977, but adjourned discussion without taking any action, the item still remaining on its agenda.

Thus it will be seen that the right of self-determination of the Palestinian people, denied for three decades during the Mandate, ignored for two decades in the United Nations, has over almost the last decade received consistent recognition and strong assertion by a preponderant majority of Member States of the United Nations* acting principally through the same organ, the General Assembly, which recommended the partition of Palestine over thirty years ago.

*Here Judge Tanaka's opinion (pp. 9-10 supra) regarding the effects of consistently reiterated resolutions of the General Assembly assumes particular relevance.

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ANNEXES

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ANNEX I

Article 22 of the Covenant of the League of Nations, 28 June 1919

Article 22. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the formance of this trust should be embodied in this Covenant.

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

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

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

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




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

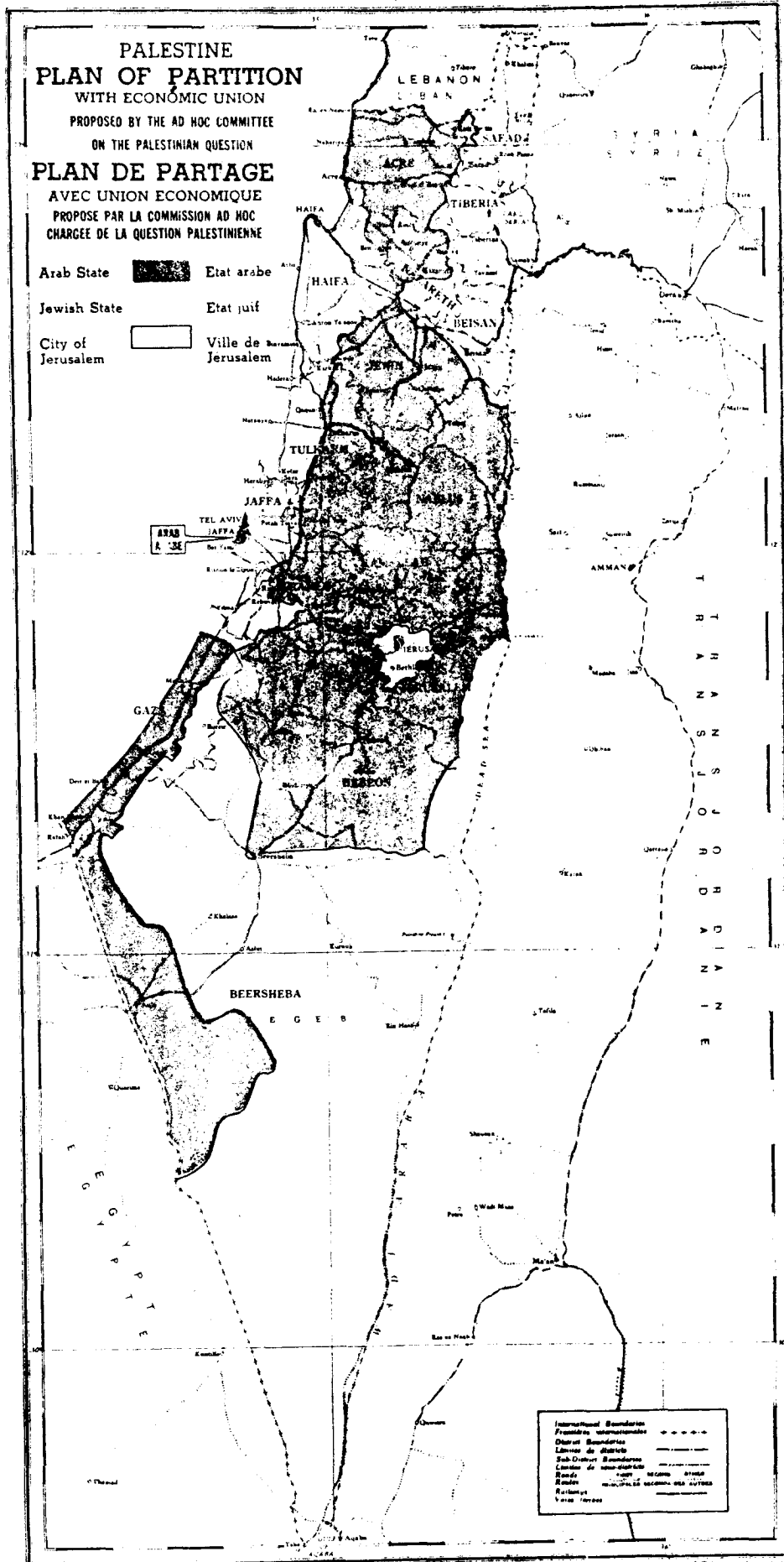
In every case of Mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

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

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

PALESTINE
PLAN OF PARTITION
 WITH ECONOMIC UNION
 PROPOSED BY THE AD HOC COMMITTEE
 ON THE PALESTINIAN QUESTION
PLAN DE PARTAGE
 AVEC UNION ECONOMIQUE
 PROPOSE PAR LA COMMISSION AD HOC
 CHARGEE DE LA QUESTION PALESTINIENNE

Arab State  Etat arabe
 Jewish State  Etat juif
 City of Jerusalem  Ville de Jerusalem

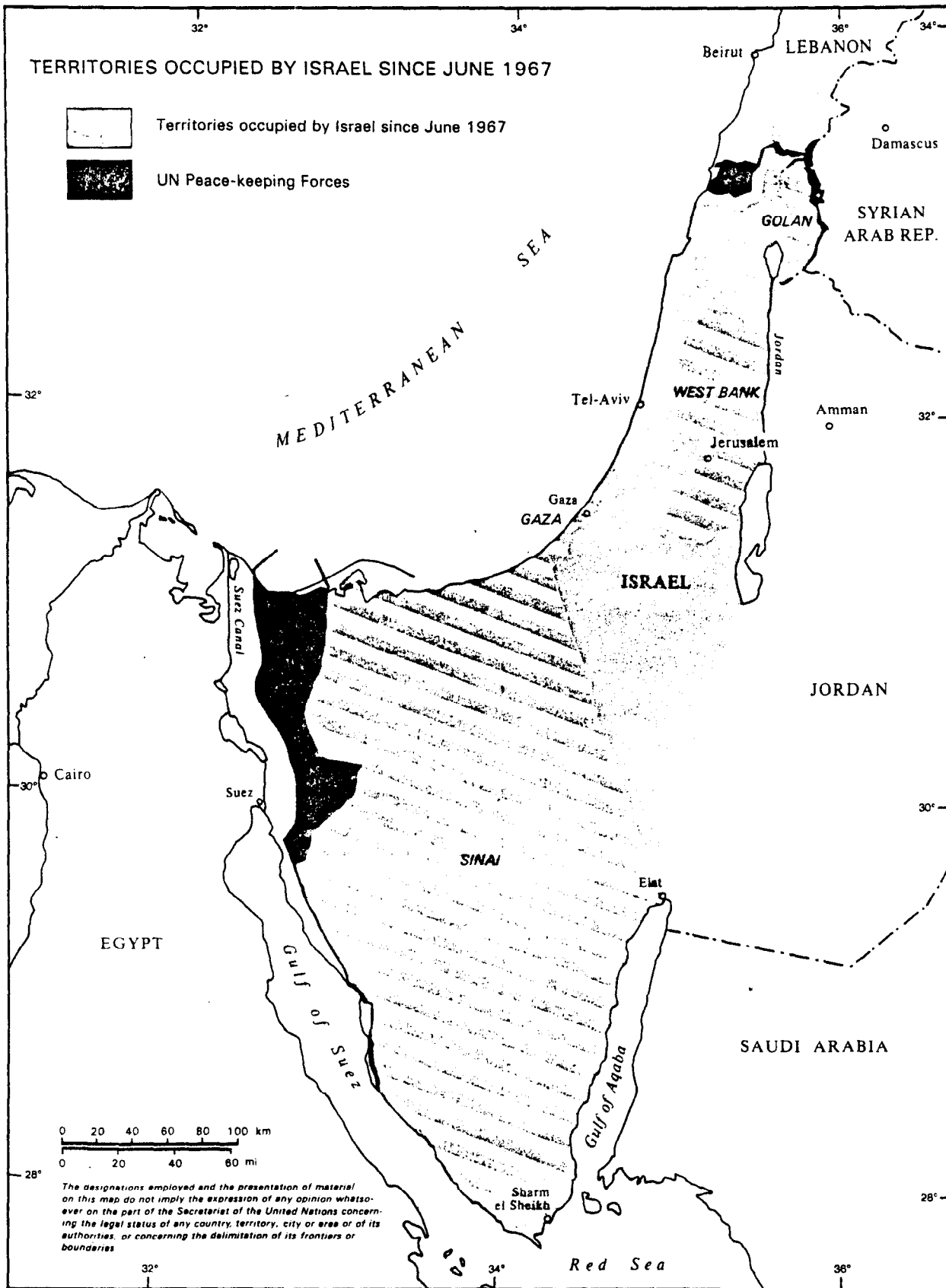


ANNEX II

THE ARMISTICE LINES OF 1949



ANNEX IV



كيفية الحصول على منشورات الأمم المتحدة

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