

1 of 1 DOCUMENT

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A Mandate for Israel

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Has a conflict evolved into peace when fighting between the opposing armies has ceased? In one sense, yes; but a cease-fire, or even a formal armistice, falls short of true peace. Should the description "true peace" be reserved until the antagonists have signed treaties requiring exchanges of ambassadors and other visible signs of "normal" relations? Perhaps, but again the essence of peace is not paper. Neither is it embassies, business deals or tourism. Vicious wars--including World Wars I and II--have erupted between countries actively engaged with each other in diplomacy, trade and cultural exchanges.

True peace, as opposed to a mere cease-fire or a balance of power, is bound up with concepts of justice--that is, law and morality. It describes, for example, relations now between the United States and Canada, but not relations during the Cold War between the United States and the Soviet Union. It has to do with attitudes of mind--with a mutual belief that each state has sovereign rights and a shared conviction that no party should take what belongs to another. The ultimate success of the current Arab-Israeli negotiations, therefore, will hinge on how they deal with the legal and moral essence of the conflict: the longstanding Arab legal and moral arguments used to oppose Zionism and Israel.

The negotiations known as the Madrid Process have been under way fitfully since October 1991. There are high expectations for new peace agreements, thought to be attainable as a result of recent global traumas, principally the demise of communist regimes in Europe and the Soviet Union and the Desert Shield/Storm coalition action against Iraq. Though not the first negotiations between the parties, the current talks are the first that have been open (that is, not conducted secretly) and direct, and that purport to seek a final settlement. U.S. officials attribute much importance to these new elements. They are said to signify that the Arab parties want peace with Israel, are willing to conclude peace treaties, and intend to abide by them.

It is devoutly to be wished that this reading is correct. But, while negotiations have on occasion ended conflicts, they have also sometimes served as the continuation of war by other means. Has the Arab-Israeli conflict truly changed from an existential quarrel not susceptible to diplomatic resolution into a simpler, non-philosophical dispute over subjects like boundary lines, water rights and security arrangements--or not? Have the relevant Arab powers transcended their ideological objections to Zionism and permanently resigned themselves to deal with Israel as a legitimate state? Or is there a calculation at work that negotiating, at a time when other good options are lacking, is the only realistic means of getting from Israel territorial concessions that may be exploitable in the future?

Statesmen and states beg such questions at their peril. The American "full partner" in the Madrid Process needs the capability to gauge the parties' actual intentions and evaluate the legitimacy of their claims, requests and actions. This requires, if the job is taken seriously, a plunge into the conflict's political and legal history.

Late in 1917, Allied forces under British General Edmund Allenby fought hard in their advance on Jerusalem through the hilly region of central Palestine designated on their maps as "Judea." On December 9, they reached the goal. The city's surrender ended a period of Turkish dominion of precisely 400 years, one which had begun with the Ottoman Empire's conquest of Palestine from the Mamluks in the year 1517. Immediately after the war, British officers at the headquarters of the Egyptian Expeditionary Force published an account of the Ottomans' retreat from Jerusalem:

"On this same day 2,082 years before, another race of conquerors...were looking their last on the city which they could not hold, and inasmuch as the liberation of Jerusalem in 1917 will probably ameliorate the lot of the Jews more than that of any other community in Palestine, it was fitting that [it] should have coincided with the national festival of

the Hanukah, which commemorates the recapture of the Temple from the heathen Seleucids by Judas Maccabaeus in 165 B.C."

The Bible-reading British were conscious of Palestine's ancient history. David Lloyd George, Britain's wartime prime minister, said that as a result of his childhood religious instruction he was more familiar with the place names figuring in Allenby's reports from Palestine than those in the military dispatches from Europe. The British associated Palestine with the Bible and with the Jews. These associations inspired the Balfour Declaration, which led to the Palestine Mandate, which created the legal framework within which (and against which) Jews and Arabs have conducted diplomacy and war from 1920 to the present day. Though one can listen for years without hearing a U.S. official even mention the Mandate, the fact remains that nothing rigorous can be said about the rights or duties of the parties to the Palestine conflict without reference to that fundamental document.

Towards the Balfour Declaration

The government that sent Allenby into Palestine was well briefed on Jewish settlement activities there. These had burgeoned with the influx of Jews who fled Russia following the pogroms of the early 1880s. The founding of new Jewish agricultural settlements in Palestine, however, began even earlier, in the 1870s. Diplomacy to facilitate the restoration of Jews to Zion had been attempted by Jewish leaders and British officials as far back as the 1830s. Even before that, the yearning of Jews for their homeland evoked sympathy and fired imaginations among British statesmen and people of letters. Lord Byron's "Hebrew Melodies," published in 1815, lamented:

"Tribes of the wandering foot and weary breast,

How shall ye flee away and be at rest!

The wild-dove hath her nest, the fox his cave,

Mankind their country--Israel but the grave!"

Byron's era saw a blossoming of hope in Europe that enlightenment, political liberalism and social assimilation would provide a happy answer to the so-called Jewish Question. A century later, however, in the early 1900s, antisemitism was intensifying, not disappearing, throughout Europe. Eminent academic, ecclesiastical, cultural, and social figures wrote books and gave speeches justifying not only hostility toward the Jews, but legal disabilities and even violence. And their words were heeded. Mobs attacked Jews, often fatally, and Jewish property was destroyed. Especially disillusioning was that these outrages occurred not only in the politically primitive empire of Czarist Russia, but in advanced societies such as France and Germany. Hundreds of thousands of Jewish refugees fled from the more antisemitic countries to relatively hospitable lands, especially the United States and Britain. Some became Zionist pioneers in Palestine.

The Zionist movement, formally organized by Theodor Herzl in 1897, argued that the Jewish problem necessitated a state for the Jews in their ancient homeland, the Land of Israel being the one place where a Jew could deal with the nations of the world as a host and not a perpetual and often unwelcome guest. Zionist theorists reasoned that such a state would provide the Jewish people with a refuge and a dignified existence. The gentile powers should welcome it for taking unwanted Jews off their hands. Also, to the extent that it would normalize the status and raise the moral stature of all Jews, even those remaining in the diaspora, every country with a Jewish population would gain from its existence. Finally, the Zionists envisioned that a Jewish state in Palestine would benefit the Arabs, there and in the surrounding territory, because it would bring to these technologically undeveloped, politically repressed and economically poor people the benefits of Western science, the opportunity to share in the fruits of Jewish commerce and capital, and an example--and perhaps a model--of national liberation and self-determination.

For nearly a hundred years before World War I, Palestine received innumerable visitors from abroad, especially from Britain. Nearly all, it seems, wrote books, and these testified in unison to the land's desolation, sparse population, and poverty. When the Zionist settlers arrived, they farmed and developed Palestine far more productively than the Arabs had, exceeding common expectations of what was possible. But, it was widely believed that Palestine's neglect over the centuries had ruined the land permanently, precluding substantial population increases. This led some important men in Britain to dismiss Zionism as an unrealistic cause.

Nonetheless, certain British political leaders, including Arthur Balfour, David Lloyd George, and Winston Churchill, developed enthusiasm for Zionism. All three of those men became acquainted with political Zionism during the movement's infancy. In 1902, Balfour, then prime minister, grappled with the consequences of Russian pogroms and

Jewish statelessness as Parliament debated immigration legislation, a debate Herzl entered personally through his testimony before a Royal Commission. While in Britain, Herzl initiated talks with His Majesty's Government on what became a series of proposals for a Jewish refuge within the British Empire--respectively, in Cyprus, the Sinai, and Uganda. In those discussions, Lloyd George served as the Zionists' lawyer. Responding to a question on these talks, Churchill, as under-secretary for the Colonial Office in 1906, endorsed Jewish aspirations: "I recognise the supreme attraction to a scattered & persecuted people of a safe & settled home under the flag of tolerance & freedom." In the view of such men, the Jewish nationalist cause combined morality, justice, economic practicability, and strategic advantage for Britain. This conviction gained intensity after the Great War put Britain and the Ottoman Empire on opposite sides, and especially after Lloyd George became prime minister late in 1916.

During the Great War, British officials were impressed by the contributions of leading Zionists to the Allied war effort, contributions that included Chaim Weizmann's scientific breakthrough in aid of British munitions production; the efforts of Joseph Trumpler and Vladimir Jabotinsky to organize Jewish military units; and the Aaronsohn family's valuable espionage work in Palestine. As intelligence developed by the Zionists was molding Allenby's strategy for an inland thrust through Beersheba to Jerusalem, the Arabs of Palestine were fighting for the enemy and evincing no support for Britain's vision of an Arab nationalist revolt against the Turks. The British War Cabinet appreciated that support for the Zionists could serve its interests against the Ottoman Empire in the war, and against French imperial ambitions after the war. Moreover, the British government in 1917 believed the Allies urgently required the political support of the reputedly influential Jewish communities in the United States and in Russia. The Americans had entered the conflict only in April of that year, and with considerable misgivings. Meanwhile the Russians, stunned by the overthrow of the Czar in the February revolution, appeared about to drop out. All of this gave impetus to the Zionists' proposal that Britain formally declare support for their cause, an idea rendered pressing by Britain's fear that Germany might issue a pro-Zionist declaration first.

Thus, what the British foreign minister described as "sympathy with Jewish Zionist aspirations" combined with pragmatic, strategic considerations to bring about the Balfour Declaration of November 2, 1917:

"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 non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country."

The vision underlying the Declaration was that Palestine would be the land in which the Jewish people could exercise self-determination, while the Arab people, who had at the time no independent states of their own, would be given generous opportunities to exercise self-determination in the vast territories that Britain and her Allies were liberating from the Ottoman Empire in Syria, Lebanon, Mesopotamia, and Arabia. This explains the distinction, reflected in the Declaration, between civil and religious rights on the one hand and political rights on the other. While protecting everyone's civil and religious rights, the Declaration made no reference to any collective political rights for Palestine's non-Jewish communities.

The term "national home" as opposed to "state" or "commonwealth" appeared in the original (July 1917) Zionist Organization draft of the Declaration. It echoed the venerated First Zionist Congress (1897), convened by Herzl: "The aim of Zionism is to create for the Jewish people a home in Palestine secured by public law." Though Herzl's intention to create a Jewish state was a matter of record, a resolution in favor of a "home" was deemed less likely to antagonize the Ottoman rulers of Palestine. Similarly, the Zionists during World War I knew that a flexible neologism like "national home" would be more palatable to the British government than a precise term like "state."

British officials did not want to commit themselves to a state if the Zionists proved unable to attract enough Jews to Palestine to govern by majority rule. The promulgators of the Balfour Declaration made it clear, however, that they intended the Zionists to establish a Jewish state or commonwealth in Palestine if Jewish immigration there were ample and economically successful. According to the minutes of the War Cabinet meeting that considered the Declaration:

"As to the meaning of the words 'national home,' to which the Zionists attach so much importance, [Balfour] understood it to mean some form of British, American, or other protectorate, under which full facilities would be given to the Jews to work out their own salvation and to build up, by means of education, agriculture, and industry, a real centre of national culture and focus of national life. It did not necessarily involve the early establishment of an independent Jewish State, which was a matter for gradual development in accordance with the ordinary laws of political evolution [emphasis added]."

In testimony before the 1937 Palestine Royal Commission, Lloyd George stated:

"There could be no doubt as to what the cabinet then had in their minds. It was not their idea that a Jewish State should be set up immediately by the peace treaty...On the other hand, it was contemplated that, when the time arrived for according representative institutions to Palestine, if the Jews had meanwhile responded to the opportunity afforded them...and had become a definite majority of the inhabitants, then Palestine would thus become a Jewish commonwealth.

The notion that Jewish immigration would have to be artificially restricted in order to ensure that the Jews should be a permanent minority never entered into the head of anyone engaged in framing the policy. That would have been regarded as unjust and as a fraud on the people to whom we were appealing."

When the Balfour Declaration spoke of "Palestine," to what territory was it referring? This question has no simple answer because Palestine had never been the name of any country. It was a region within the Ottoman Empire, but was not an administrative unit. The 1911 edition of the Encyclopedia Britannica, in its entry on "Palestine," said that "the limit of this territory cannot be laid down on the map as a definite line." It added: "The River Jordan, it is true, marks a line of delimitation between Western and Eastern Palestine; but it is practically impossible to say where [Eastern Palestine] ends and the Arabian desert begins." It was standard in the geographical literature of the period to employ the terms "Western Palestine" and "Eastern Palestine," the latter referring to what was later called Trans-Jordan and is now the Kingdom of Jordan.

Of what relevance is the Balfour Declaration today? It is not, after all, a legal instrument. When issued, it was merely a statement of British government policy. But it achieved the status of international law through the Palestine Mandate.

The Palestine Mandate

The mandate system was a legal innovation of the Versailles Peace Conference. Its proponents, led by President Wilson, intended to do away with the ancient practice of victors asserting ownership over conquered foreign lands. The victorious Allies of World War I agreed, at Wilson's insistence, to limit their own authority with respect to such lands. This limitation was embodied in Article 22 of the League of Nations Covenant, which says that territorial conquests should be administered by states acting not as owners, but as trustees under mandates, supervised by the League, which would form "sacred trust[s] of civilization."

On this foundation, the Allies created the Palestine Mandate.

When World War I ended, the Arab world (a term that then referred only to lands east of Egypt) was mostly under British control. This included Palestine, on both sides of the Jordan River, Mesopotamia (that is, present-day Iraq) and much of the Arabian peninsula. France controlled Syria and Lebanon. Sovereignty remained with the Ottoman Empire, however, pending conclusion of a peace treaty.

The Allies met in San Remo, Italy in April 1920 to draft the peace treaty they wished to impose on Turkey. There they agreed that France would receive the mandate to administer Syria (including Lebanon), while Britain would receive two mandates, one for Mesopotamia and one for Palestine.

The preamble of the Palestine Mandate begins as follows:

"[T]he Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire...."

Note that the creator of the trust--the settlor or grantor, in legal parlance--is not the League of Nations, but the Principal Allied Powers. And it is those Powers, and not the League, which selected Britain to serve as Mandatory (i.e., trustee).

The second clause of the preamble reads:

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

A Mandate for Israel The National Interest 1993/1993 FALL

Hence, the Mandate explicitly adopted the Balfour Declaration and quoted its essence in full. In other words, what the Mandate mandated was implementation of Britain's pro-Zionist wartime pledge. When presenting the Mandate to the League of Nations, the British representative, Balfour, declared:

"Remember that a mandate is a self-imposed limitation by the conquerors on the sovereignty which they obtained over conquered territories. It is imposed by the Allied and Associated Powers on themselves in the interests of what they conceived to be the general welfare of mankind....[T]he League of Nations is not the author of the policy, but its instrument..

Now, it is clear from this statement, that both those who hope and those who fear that what, I believe, has been called the Balfour Declaration is going to suffer substantial modifications, are in error. The fears are not justified; the hopes are not justified....The general lines of policy stand and must stand."

The third clause of the preamble is especially significant:

"[R]ecognition has thereby been given to the historical connection of the Jewish people with Palestine and the grounds for reconstituting their national home in that country..."

Here the drafters highlight, as the grounds or source of the Jewish people's rights in Palestine, "the historical connection of the Jewish people with Palestine." The Mandate contains no granting clause by which the Allies or the League say they are giving the Jews a right to a state or homeland in Palestine. Instead the Mandate recognizes pre-existing Jewish rights, rights that flow from Jewish history. The drafters pointedly used the word "reconstituting" to describe the building of the Jewish national home in Palestine. As we have seen, the British government stressed that the Allies obtained certain rights based on conquest, but it did not assert that the Jewish people's rights in Palestine derived from those of the Allies.

Traditional international law would have supported the Allies' right, as victors, to dispose of Palestine as they saw fit. It is noteworthy, however, that Britain and the League took pains to ensure that their "legislative" decision in favor of the Jewish national home was associated harmoniously with the Jews' claims of historical ties to the Land of Israel. They wanted to make clear that the new positive law on Palestine had a definite moral and historical foundation. In this era of Wilsonian idealism, there were those who believed that Zionism legitimated the British administration of Palestine more than the other way around. As Elizabeth Monroe, a British historian with little sympathy for Zionism, put it: "the British climbed on the shoulders of the Zionists in order to get a British Palestine." Moreover, British officials believed that the practical success of the Jewish national home policy hinged on the Jews' confidence that their rights in Palestine were not a gift from anyone. The British government's 1922 White Paper on Palestine made this point:

"[I]n order that [Palestine's Jewish] 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. That is the reason why it is necessary that the existence of a Jewish National Home in Palestine should be internationally guaranteed, and that it should be formally recognised to rest upon ancient historic connection."

The first articles of the Mandate state that Britain is to use its full administrative powers in Palestine to "plac[e] the country under such...conditions as will secure the establishment of a Jewish national home," to encourage "local autonomy" and to recognize the Zionist Organization as the Jewish agency to serve as interlocutor with the Mandatory Administration on matters "as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine." There is no provision for the creation of an Arab agency for Palestine, which reflects the original conception that the Arabs would set up their state or states elsewhere, making Arab administrative bodies in Palestine unnecessary.

Article 6 says:

"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, close settlement by Jews on the land, including State lands and waste lands not required for public purposes."

Facilitating Jewish immigration and encouraging "close settlement by Jews on the land" are set forth as the administration's express duties, thereby recognizing the corresponding rights of the Jews in their national home. "Under

suitable conditions," the phrase qualifying the former duty, was originally understood as a reference to the land's so-called economic absorptive capacity.

The Mandate does not use the words "Arab" or "Arabs," though Article 22, as a means of protecting the civic rights of all the communities, does state that English, Arabic, and Hebrew shall be official languages in the territory.

Which brings us to Article 25--the focus of a great controversy. But before parsing it, we must return to our chronology.

Churchill's Intervention

In the months following the April 1920 San Remo Conference, at which the Middle Eastern mandates were drafted, Britain faced difficult problems in the region. First among these was: How to cut the cost of its postwar military deployments there? Second was: How to protect its various, delicate diplomatic and legal arrangements with France--strained as a result of Anglo-French differences in Europe as well as the Middle East--from further damage at the hands of Britain's Arab clients, the Hashemite family, who were asserting claims to French mandate territory in Syria.

The Hashemites, descendants of the Prophet Mohammed and the guardians of the Moslem Holy Cities, Mecca and Medina, had declared their region of western Arabia, known as the Hedjaz, an independent kingdom in 1916. Britain granted recognition. The king's sons, Feisal and Abdullah, led the small Arab force that fought the Turks in World War I alongside the brilliant, if bizarre, British Colonel T.E. Lawrence ("of Arabia"). On the basis of some exquisitely indefinite British wartime promises, the Hashemites believed themselves entitled to a new kingdom comprising most of the Middle East. To win his own state, the Hashemite Emir Feisal was willing to welcome the creation of a Jewish state in Palestine.

In January 1919, Feisal, acting on behalf of the Arab Kingdom of the Hedjaz, entered into a formal written agreement with Chaim Weizmann, leader of the Zionist Organization. The Arab side pledged to support all necessary measures for implementing the Balfour Declaration and "to encourage and stimulate immigration of Jews into Palestine on a large scale, and as quickly as possible to settle Jewish immigrants upon the land through closer settlement and intensive cultivation of the soil." In return, the Jewish side pledged to support "the closest possible collaboration in the development of the Arab State," in harmony with the aspirations of the Arab national movement, and to provide Zionist "experts" to help the Arab state develop its economy. Feisal conditioned the agreement on the prompt establishment of an independent Arab state reaching from Turkey to the Indian Ocean.

Alas, this early land-for-peace deal with the Arab leader came to naught. The notables from around the Arab world who gathered in Damascus after the war were willing to accept Feisal's leadership, but not an accommodation with the Zionists. Furthermore, in the summer of 1920, French forces expelled Feisal from Syria, thus aborting the Kingdom of Syria and negating Feisal's agreement with the Zionists. The French held Britain responsible for keeping its Arab friends out of French hair in the future. The opportunity to rule a vast Arab kingdom from Damascus had induced Feisal to pledge peace with a Jewish Palestinian state. But the pledge proved anathema to his constituents, the moment passed, and the offer, once off the table, disappeared beyond retrieval.

It became the job of Winston Churchill, recently appointed colonial secretary, to find a way out of Britain's Middle Eastern dilemmas. Early in 1921, Churchill developed a plan. The key was to transfer to Arab powers the responsibility for maintaining order in the vast, undeveloped and generally inhospitable territories of Mesopotamia and Eastern Palestine. He aimed to satisfy the Hashemites by having Feisal elected king in Mesopotamia and allowing Feisal's brother, the less well-regarded Abdullah, to try his hand as ruling Emir of Eastern Palestine. Thus came into being both the Hashemite Kingdom of Iraq, which lasted until the revolution of 1958, and the Hashemite Emirate of Trans-Jordan, which in 1946 gained independence as the Kingdom of Trans-Jordan.

Churchill's inclination to put Eastern Palestine under Arab administration--to lop off around 80 percent of the territory originally available for the Jewish national home--caused consternation among the Jews. It moved Chaim Weizmann to write Churchill that a Jewish national home confined to Western Palestine was altogether inadequate:

"The economic progress of Cis-Jordania [that is, Western Palestine] itself is dependent upon the development of these Trans-Jordanian plains, for they form the natural granary of all Palestine and without them Palestine can never become a self-sustaining economic unit and a real National Home... It is fully realized that His Majesty's Government must consider their pledges to the Arab people and the means of satisfying their legitimate aspirations. But the taking from Palestine of a few thousand square miles, scarcely inhabited and long derelict would be scant satisfaction to Arab

Nationalism while it would go far to frustrate the entire policy of His Majesty's Government regarding the Jewish National Home."

Meanwhile, representatives of the leading Arab families of Palestine sent Churchill a memorandum of their own. Though they rejected the notion that the Arabs of Palestine are a nationality different from that of the Arab people in general, they organized themselves politically to fit within the "imperialist" boundaries they hoped to erase. Hence, it was in the name of the Palestinian Arab Congress that they wrote to Churchill declaring the Balfour Declaration invalid, stating that "Palestine belongs legally to the Arabs" and contending not only that the Jews have no rights in the land, but that they have no rights at all as a national group: "[T]hey have no separate political or lingual existence." The Arab leaders creatively used the phenomenon of antisemitism as an argument against Zionism:

"If Russia and Poland, with their spacious countries, were unable to tolerate them, how could Europe expect Palestine to welcome them...[W]ill the Jew, on coming to Palestine, change his skin and lose all those qualities which have hitherto made him an object of dislike to the nations?"

The memorandum invoked the forged Protocols of the Elders of Zion as evidence of Jewish "pernicious motives." Finally, it denied that Palestine is a distinct national homeland and insisted on independence for a single national entity for the Arabs: "[T]he Arabs are convinced that this unnatural partitioning of their lands must one day disappear....Palestine should not be separated from her sister States."

Notwithstanding the pleas of his various correspondents, Churchill met with Abdullah in Jerusalem and, without the participation of the Zionists, the two men struck a deal by which Eastern Palestine was, at least temporarily, closed to Jewish settlement, excluded from the Mandate's Jewish national home provisions, and put under an administration to be headed by Abdullah, subject to supervision by the British High Commissioner for Palestine. Churchill took pains to clarify that his government was "constituting Trans-Jordania an Arab province of Palestine." In return, Abdullah pledged to keep his hands off French Syria and to support the Mandate, which meant suppressing anti-Zionist activity: another land-for-peace deal that failed to produce peace.

The agreement with Abdullah raised legal problems because Trans-Jordan is in Palestine. The Mandate required, in Palestine, the encouragement of "close settlement by Jews" and the establishment of a Jewish national home. Churchill recognized that Trans-Jordan could not legally be transformed into an Arab emirate closed to the Jews unless the Mandate were amended. His staff urged him to finesse the problem by asserting that the necessary authority inhered in the famous Balfour Declaration proviso about protecting the "civil and religious rights" of the non-Jewish communities. But Churchill rejected the ploy and insisted on a formal amendment. Thus, in the Spring of 1921, came into being Article 25 of the Palestine Mandate, which declares:

"In the territories lying between the Jordan [River] and the eastern boundary of Palestine...the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions"

Article 25 emphasizes that the Palestine Mandate extends both west and east of the Jordan River: "in the territories lying between the Jordan and the eastern boundary of Palestine." Its purpose was to allow Britain to "postpone or withhold" the Mandate's Jewish national home provisions with respect to Eastern Palestine. In his autobiography, Sir Alec Kirkbride, a British military officer and diplomat who played a central role in the history of Trans-Jordan, reported sardonically on the creation of Article 25: "In due course the remarkable discovery was made that the clauses of the mandate relating to the establishment of a National Home for the Jews had never been intended to apply to mandated territory east of the river."

In the aftermath of the Great War, in Europe, Asia, Africa, and the Middle East, borders were being drawn or redrawn, states created or dismantled and territories transferred from one state to another--all, naturally, to the advantage of the victorious Allies and their friends and the disadvantage of the defeated powers and theirs. From the victors' viewpoint, the Arab people were set to benefit from the Allied triumph far beyond their contribution to it. As for the Arabs of Palestine in particular, their complaints lacked weight relative to the claims of the Zionists. They rang hollow also in absolute terms, given that the Palestinian Arab community (as opposed to the Hashemite forces) fought against Britain. In his *Memoirs of the Peace Conference*, Lloyd George commented:

"No race has done better out of the fidelity with which the Allies redeemed their promises to the oppressed races than the Arabs. Owing to the tremendous sacrifices of the Allied Nations, and more particularly of Britain and her Empire, the Arabs have already won independence in Iraq, Arabia, Syria, and Trans-Jordania, although most of the Arab races fought [for Turkey]....The Palestinian Arabs fought for Turkish rule."

When, in 1922, the final amended draft of the Palestine Mandate came before the League Council, Balfour said very much the same thing, concluding: "[T]hat we should be charged...with having taken a mean advantage of the course of international negotiations [with the Arabs], seems to me not only unjust to the policy of this country, but almost fantastic in its extravagance." Even before Britain had decided to shrink the Jewish national home, Balfour, speaking of the entire Mandate territory on both sides of the Jordan, expressed the hope that the Arabs "will not grudge that small notch...in what are now Arab territories being given to the [Jewish] people who for all these hundreds of years have been separated from it." Though nearly 80 percent of that "small notch" was soon made off limits to the Jews, the Arab powers continued to "grudge" a Jewish state in Palestine.

The League Council confirmed the Mandate in July 1922. It then approved a British resolution that listed all the mandate provisions mentioning Jews and the Jewish national home and declared them "not applicable to the territory known as Trans-Jordan." The resolution stated that the administration of Trans-Jordan would be under the general supervision of the Palestine Mandatory. From this point forward, British officials sharpened the distinction between their separate administrations in Western Palestine and Trans-Jordan (both under the Palestine Mandate) by referring to the latter only as Trans-Jordan, not as Eastern Palestine. It became the practice to refer to Western Palestine simply as Palestine. Trans-Jordan remained under the Palestine Mandate until 1946, when, as noted, it achieved independence. As a matter of geographical fact, it has never ceased to be Eastern Palestine. In 1949, after Trans-Jordan conquered the territory it dubbed "the West Bank," the country changed its name to Jordan. It is now governed by King Hussein, grandson of the Emir (later King) Abdullah.

Law, History, and Current Diplomacy

American policymakers show a powerful disinclination to enter into the kind of legal and historical issues raised here. They dismiss them as academic--disconnected from the practical realities of war and diplomacy. Yet these same policymakers attribute enormous value to negotiations and peace agreements. The inconsistency can be dangerous.

One can say that international law is cant, lacking real world significance. History does offer some support for that proposition. But one can hardly then contend that peace agreements are important. They are, after all, but a sub-species of international law. To devalue international law--to treat it non-rigorously or not at all, to reject the relevance of old laws, mandates, agreements, and the like--is to foreshadow the lack of respect that will be shown to the treaties now under negotiation, if they materialize at all.

The fact is that international law, including arms control agreements and peace treaties, has often proven impotent. Violators have often escaped not only sanctions, but even criticism. Solemn pledges to guarantee treaty compliance have been shirked on numerous occasions. Political leaders around the world show much greater interest in the conclusion of new treaties than in compliance with those already on the books. Perhaps this reflects the immutable nature of international affairs. In that case, however, it cannot be assumed, for example, that an effort by Syria's President Assad to recover militarily valuable territory from Israel in return for a peace treaty necessarily has anything to do with true peace.

International law, of which the Mandate is a part, specifically validates Jewish claims in Palestine and recognizes those claims as arising from "the historical connection of the Jewish people with Palestine." Arab opponents of Zionism have, from the beginning, opposed this view.

The legal case against Israel's legitimacy is built on two major arguments. The first is that Arab "natural rights," rooted in the Arabs' majority status in the land in recent centuries, superseded any Jewish historical rights and precluded Britain, the League of Nations, or anyone else from lawfully establishing a Jewish state (or "national home") on this "Arab" land. This natural rights concept is promoted nowadays at the United Nations by means of resolutions that refer pointedly to the West Bank and Gaza Strip as "occupied Arab territories" instead of simply "occupied territories."

The issue of whether history or nature provides the Jews or the Arabs the better case for controlling Palestine raises fascinating metaphysical questions. As a matter of law, however, it was mooted by the fact that the international community, acting through the League, legislated in the Mandate in favor of a Jewish national home in Palestine. The international community, furthermore, has, in a series of UN Security Council resolutions over decades, consistently reaffirmed Israel's rights as a sovereign state and the general obligation to respect those rights and live with the Jewish State peaceably and without threats. The Arab natural rights argument says that the Palestine Mandate was unfair, impolitic, and impractical. It asserts, in effect, that the Allies legislated unwisely on Palestine. But even if that were true, it would not mean that the Allies had no legal right to legislate as they did.

A Mandate for Israel The National Interest 1993/1993 FALL

It bears reiterating that traditional international law would have supported Palestine's annexation by the powers that conquered it from the Ottomans. The Great War Allies, however, chose to eschew rights of subjugation and annexation. One can contend that the Allies or the League made a bad decision in creating the Palestine Mandate. And one can regret that traditional international law gave victors rights over conquered territories. But one cannot accurately say that the Allies and the League violated international law by acting to dispose of Palestine (in Balfour's words) "in the interests of what they conceived to be the general welfare of mankind."

Unlike the natural rights argument, the second major Arab argument against Israel's legal validity is made from within the established framework of international law. It posits that the Mandate violated the League of Nations Covenant because the Jewish national home policy was inconsistent with Article 22 of the Covenant and especially with the principle of self-determination as enunciated in that article. Article 22 states, however, that each mandate "must differ" according to the circumstances of the beneficiary people and that the terms of certain mandates may be defined on a case-by-case basis. The promulgators of Article 22 applied these provisions to Palestine by effectively designating the Jewish people as a whole as a principal beneficiary of the trust and focusing that mandate on the establishment of a Jewish national home. The same powers that drew up Article 22 drew up the Palestine Mandate, the general outlines of which were developed before Article 22. The Balfour Declaration, after all, antedated the League Covenant. Given the sequence of events, it is not credible to argue that the Mandate's drafters unlawfully transgressed the concepts, plans, and flexible authority that these very same parties built into Article 22 a few months before.

The United Nations Special Committee on Palestine (UNSCOP), created in 1947 to propose a solution to the Palestine problem, addressed the Arabs' self-determination argument. It highlighted that self-determination, though a principle of international law, is not necessarily a right:

"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 [i.e., Syria and Mesopotamia], at the time of the creation of the [Middle Eastern] Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there..."

There would seem to be no grounds for questioning the validity of the Mandate for the reason advanced by the Arab States. The terms of the Mandate for Palestine, formulated by the Supreme Council of the Principal Allied Powers as a part of the settlement of the First World War, were subsequently approved and confirmed by the Council of the League of Nations."

The Mandate secured Jewish rights to a homeland and to "close settlement" in Palestine. In doing so, it distinguished between Eastern and Western Palestine, but it did not distinguish between the region of Judea and Samaria and the rest of Western Palestine. No event and no armistice or other international agreement has terminated the Mandate-recognized rights of the Jewish people, including settlement rights, in those portions of the Mandate territory that have not yet come under the sovereignty of any state.

Those rights did not expire upon the demise of the League of Nations, the creation of the United Nations, or the UN General Assembly's adoption of the 1947 UNSCOP partition plan for Western Palestine. Article 80 of the UN Charter expressly preserves such "rights of peoples" as existed under League mandates. UN General Assembly Resolution 181 of November 1947, which endorsed the UNSCOP plan, never won the Security Council endorsement necessary to render it a legally binding action. Nor was the plan ever implemented. The position of the U.S. State Department on the legal status of Resolution 181 appears in a Near East Bureau memorandum dated January 27, 1948: "The growing tendency to refer to the recommendation of the General Assembly as a decision which must be carried out must not be allowed to divert our attention from the fact that the action of the General Assembly was only a recommendation"[emphasis in original]. Never having achieved the status of law or even a reality on the ground, Resolution 181 cannot be deemed to have invalidated legal rights expressly recognized in the Palestine Mandate.

The acquisition of duly recognized sovereignty over Judea and Samaria by Jordan or Israel could perhaps have superseded any prior collective rights, including the right of the Jewish people to "close settlement" there. Since May 1948, however, neither the United States nor the international community has recognized any state as sovereign in Judea and Samaria. Each of the armistice agreements Israel signed with its neighbors in 1949 provided (at the insistence of the Arab parties) that neither party renounces any rights it may have regarding territories on the other side of the armistice lines. The agreement between Israel and Jordan, for example, states that the armistice lines "are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto." Furthermore, in 1988, the Kingdom of Jordan officially severed its legal and administrative ties to Judea and Samaria.

Eugene V. Rostow, who as undersecretary of state during the Johnson administration helped draft UN Security Council Resolution 242, has written that Judea, Samaria and the Gaza Strip constitute portions of the Palestine Mandate trust territory that have not yet been allocated to a sovereign. Rostow, a former dean of Yale Law School, concludes that the Mandate remains in force for those regions, just as the corpus of an ordinary trust remains trust property until it is lawfully disbursed or allocated, notwithstanding the trustee's death, resignation or removal. It is not necessary, however, to decide whether the Mandate and all its institutions remain in full effect for these territories in order to conclude that, since Britain's resignation as Mandatory, no event has legally terminated or superseded the right of Jews to settle there, as derived from the "historical connection of the Jewish people with Palestine" recognized in the Mandate.

Contrary to the refrain of various United Nations resolutions, the 1949 Fourth Geneva Convention does not render Jewish settlement in these territories unlawful. First of all, the Convention, by its own terms, may not apply at all to Judea, Samaria, and the Gaza Strip, for that land is not (and since 1949 has never been) "the territory of a High Contracting Party" within the meaning of Article 2, which delimits the Convention's applicability. Egypt administered the Gaza Strip as occupied territory, under a military governor, from 1948 forward and never annexed or incorporated it into the Egyptian state. And, as noted, Jordan's purported annexation of Judea and Samaria, effectively renounced by Jordan itself in 1988, did not win international recognition. It can also be argued that Article 49 of the Convention, which provides that an occupying power "shall not deport or transfer parts of its own civilian population into the territory it occupies," is not applicable to the case at hand. The Convention's official Commentary makes clear that Article 49 was drafted with reference to the massive, forcible population transfers effected by Nazi Germany during World War II. Some legal authorities have concluded that it does not apply to Israeli settlement activity in the territories, which is voluntary and has entailed no substantial displacement of the local Arab population.

Even if one assumes Article 49's applicability to Israel's authority as military occupant, however, the Jewish people do not thereby lose their Mandate-recognized rights in Judea, Samaria, and the Gaza Strip. If the Fourth Geneva Convention applies, Israel is constrained solely in its capacity as an occupying power. The Convention does not address or affect the rights or authority of the Jewish people in their capacity as beneficiaries of the Mandate. In other words, Jewish rights there do not derive from Israel's capture of the territories in 1967. So any limitations imposed by the laws of war on Israel with respect to the military occupation of the territories cannot negate those independent, pre-existing rights.

Five months after the Arab-Israeli "six day war" of June 1967, the UN Security Council adopted Resolution 242, which states general principles on which "a just and lasting peace in the Middle East" should be established. Though frequently misread as requiring Israel's relinquishment of all the land lost by Arab states in the 1967 war, it in fact leaves the issue of territorial rights open for resolution by agreement among the parties. It does not call for anyone's relinquishment of any territorial rights before the conclusion of peace. Moreover, by stressing the importance of security, highlighting the right of all states to live "within secure and recognized boundaries" and refraining from calling for withdrawal from all the newly acquired territories, Resolution 242 envisions that peace talks will produce borders different from the 1949 armistice lines. If the Security Council had intended that Israel withdraw its forces to a definite line, it could have said so. Thus, pending the peace contemplated in Resolution 242, the Jewish people retain whatever rights of "close settlement" or territorial claims belonged to them before the Resolution. And after any such peace, the rights of all parties will be as set forth in the negotiated legal instruments.

It must be emphasized that the issue of Jewish rights of "close settlement" throughout Western Palestine is a completely different matter from whether Israel should trade those rights for something else, such as a peace treaty. The point here is simply that the argument that the Jews have no legal right to settle in Samaria and Judea tends inevitably, even if unintentionally, to undermine the Jewish people's right to sovereignty in pre-1967 Israel, for all such rights flow from the same source--the Palestine Mandate recognizing the Jewish people's historical connection with Palestine.

The Real Issue

Recognition of Jewish claims does not require denial that the Arabs have claims there too. Even the more militant Zionist leaders, like Vladimir Jabotinsky, acknowledged that the Arabs have claims that must be balanced against those of the Jews. In 1937, as the Nazi campaign against the Jews intensified, Jabotinsky told the Palestine Royal Commission:

"[W]hen we hear the Arab claim confronted with the Jewish claim; I fully understand that any minority would prefer to be a majority, it is quite understandable that the Arabs of Palestine would also prefer Palestine to be the Arab State No. 4, No. 5, or No. 6--that I quite understand; but when the Arab claim is confronted with our Jewish demand to

be saved, it is like the claims of appetite versus the claims of starvation. No tribunal has ever had the luck of trying a case where all the justice was on the side of one Party and the other Party had no case whatsoever."

Arab opponents of Zionism have opposed any such balancing of claims. They have rejected Zionism, the Balfour Declaration, the Palestine Mandate, and the State of Israel as a matter of principle, not because they thought the Jews should get a little less land and the Arabs a little more.

Western statesmen have failed to do justice to the intensity and ideological steadfastness of the anti-Zionist cause when they thought they could buy the Arabs off with territorial concessions that leave a Jewish state in the picture. Recall that Britain's original land-for-peace concept was that the Arab people would get Syria, Lebanon, Iraq and Arabia and the Jews would get Palestine. Then, under the Churchill plan, Arabs received almost 80 percent of Palestine in return for consenting to a Jewish national home in the 20 percent west of the Jordan River. During the 1930s and 1940s, Arab leaders were offered a series of plans for the partition of Western Palestine. They unanimously rejected all of them, even those leaving only a few slivers of land under Jewish control. The Arabs insisted that Palestine belongs to them, Zionism is illegitimate and the issue is one of principle. Western policymakers persisted in assuming that such hostile statements were insincere, a device for obtaining a better deal.

Having for years disbelieved the pledges of eternal hostility to Zionism, many of our policymakers were quick to accept at face value the post-Gulf-War decision of various Arab leaders to negotiate peace. Under the circumstances, a student of history must at least raise the question whether this decision to negotiate represents an actual change of heart or merely a means of retrieving land and gaining advantage for future assaults. History, after all, knows of cases where parties talked peace without intending peace.

Underlying the current negotiations is the notion that the essence of the Arab-Israeli conflict is the amount of territory controlled by the Jewish state. There are better grounds for believing, however, that the conflict's essence, as Arab spokesmen have asserted since World War I, is the issue of legitimacy: Do the Jewish people have a right to a state anywhere in Palestine? If the parties to the current negotiations are divided on this issue, their diplomacy is likely to prove as fruitless as most of the Palestine-related diplomacy throughout history. If the Arab parties have truly abandoned the conviction that the Arabs alone have national rights in Palestine, as Anwar Sadat certified for Egypt, then diplomacy may accomplish something constructive.

It came to be conventional wisdom in recent years that the key to resolving the Palestine conflict is satisfaction of the Palestinian Arabs' unfulfilled national aspirations. But there are problems with this view. First of all, the conflict antedates the claim that the Palestinian Arabs are a national group as such. As we saw, the Palestinian Arab leadership expressly disclaimed that status, and did so until quite recently. Secondly, there exists a sovereign Arab state already in Eastern Palestine. Even if one credits the idea that the Arabs of Palestine are a distinct people entitled to self-determination as such, it is a stretch to conclude that the Arabs of Western Palestine are an ethnically, religiously, culturally, or linguistically distinct people entitled, on the principle of self-determination, to their own state.

Perhaps more important, however, are the practical objections to focussing on the purported statelessness of the Palestinian Arabs. Western Palestine is small. The distance from the Sea to the Jordan River is around 45 to 50 miles; from Lebanon to Eilat is less than 300 miles. The practical difficulties of satisfying within this tiny strip of land both the national aspirations of all the Arabs there and Israel's need to safeguard its physical security and national rights have long proven insurmountable. This may be because they are insurmountable.

It is obvious why an antagonist of Israel would want to assert that the Arabs of Palestine are stateless. The effect is to put Israel on the moral defensive and damage its standing. But if one aims to promote peace, it is constructive, perhaps indispensable, to acknowledge that there are already two states in Mandate Palestine, one Arab (Jordan) and one Jewish (Israel). Though there does not seem to be enough land in Western Palestine to satisfy the requirements of both the Jews and the Arabs, there should be enough if all of Mandate Palestine is taken into account and if the relevant Arab powers are willing to live with Israel in peace.

True peace will not result automatically from peace treaties. New treaties, if complied with long enough, may help stimulate the rethinking in the Arab world necessary to lay to rest the issue of Israel's legitimacy. That is the essential condition of true peace, the kind that exists without reference to any military balance. In the meantime, however, with or without new treaties, the region's peace will continue to depend on Israel's ability to defeat any military opponents. The value of a new treaty will depend on whether it effectively fosters acceptance of Israel's sovereign rights--helps bring about a pacific change of heart among the traditional opponents of Zionism--and whether it preserves for Israel the

military assets that will deter war pending this hoped-for change of heart. If it does, it will deserve the title "peace treaty." If not, it will join the long list of international agreements that have done more harm than good.

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