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NATIONALISM AND THE RIGHT TO SELF-DETERMINATION: THE ARAB-ISRAELI CONFLICT

MALVINA HALBERSTAM*

Self-determination is a slogan that has captured the imagination of people throughout the world. Numerous U.N. General Assembly resolutions have exalted self-determination, often above the fundamental rights specifically provided for in the U.N. Charter. Notwithstanding these resolutions, in practice, self-determination generally has been applied only to the dismemberment of colonial empires. Its universal application is neither possible nor desirable.

In the Arab-Israeli conflict, self-determination was never truly the issue. The conflict has been deliberately transformed into a claim for self-determination as a political tactic designed to gain the support of third world countries in the United Nations. The issues in the Arab-Israeli conflict are (1) territory, and (2) the existence of a non-Muslim state in the Middle East.

I. GENERAL ASSEMBLY RESOLUTIONS

The U.N. Charter does not provide for a "right to self-determination." Among the purposes of the United Nations are, first, the maintenance of "international peace and security"¹ and, second, the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination."² Yet, numerous General Assembly resolutions affirm "a right" to self-determination, often exalting that right over fundamental provisions of the Charter. For example, The Declaration on the Granting of Independence to Colonial Countries and Peoples³ states: "All peoples

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1. U.N. CHARTER art. 1, para. 1.

2. *Id.* art. 1, para. 2.

3. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

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."⁴ The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States⁵ provides that peoples entitled to self-determination have a right to "the establishment of a sovereign and independent State,"⁶ as one mode of implementing the right to self-determination, if they so choose.⁷

Later U.N. resolutions suggest that the use of force to realize these goals is permissible. Article 1 of The Resolution on the Definition of Aggression⁸ defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition."⁹ Article 3 lists a series of acts which "qualify as [] act[s] of aggression."¹⁰ Article 4 states that that enumeration is "not exhaustive,"¹¹ and Article 5 states, "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."¹² Yet, Article 7 states that "nothing in this definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, . . . of peoples forcibly deprived of that right."¹³ Contrast this with Article 2(4) of the U.N. Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."¹⁴ Article 2(4) makes no exception for self-determination.

4. *Id.*

5. G.A. Res. 2625, U.N. GAOR, 26th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1971).

6. *Id.*

7. *Id.*

8. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975).

9. *Id.* art. 1.

10. *Id.* art. 3.

11. *Id.* art. 4.

12. *Id.* art. 5.

13. *Id.* art. 7.

14. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political indepen-

Other U.N. resolutions imply that even acts of violence against a civilian population may be acceptable when committed in the name of self-determination. For example, every General Assembly resolution condemning terrorism includes a paragraph reaffirming the right of peoples to self-determination.¹⁵ The implication is that terrorist acts under the banner of self-determination are not to be condemned. Similarly, when the draft of the International Convention Against the Taking of Hostages¹⁶ was first introduced, a number of states insisted on an exclusion from the prohibition on hostage-taking for persons fighting for self-determination.¹⁷ Yet, it has long been a rule of international law that the taking of civilian hostages is illegal. That rule applied even in time of war and even at a time when war itself was not considered illegal.¹⁸

II. IMPLEMENTATION OF SELF-DETERMINATION

Despite broad resolutions and strong rhetoric in the United Nations, self-determination, as a right to establish an independent sovereign state, was generally applied in practice only to former colonies, which were geographically distant from the empires that controlled them.¹⁹ No state has recognized a right to self-determination for a group within its own territory. Although extolling "the right to self-determination," the Soviet Union did not grant self-determination to the numerous ethnic minorities within its borders, nor has the United States granted self-determination to the Native Americans, nor the United Kingdom to Northern Ireland. While

dence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

15. For a further discussion, see Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 905-06 (1986). See also Malvina Halberstam, *Challenges to International Law: Terrorism*, 9 GEO. MASON U. L. REV. 12, 18 (1986).

16. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, at 4, G.A. Res. 146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979).

17. Sofaer, *supra* note 15, at 916; Halberstam, *supra* note 15, at 19; see also Robert Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 DENV. J. INT'L L. POL'Y 169, 173 (1980).

18. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3(1)(b), 6 U.S.T. 3516, 75 U.N.T.S. 287.

19. See Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 462-63 (1971).

Iraq repeatedly condemned Israel for denying self-determination to the Palestinians, it did not grant self-determination to the Kurds.²⁰

Nevertheless, one may ask, whether self-determination is an ideal that should be implemented now that the Cold War is over. After the dissolution of the Soviet Union, Yelena Bonner, wife of Andrei Sakharov and a great human rights activist in her own right, stated in an address at the New York City Bar Association that there are some sixty million people in the republics of the former Soviet Union whose human rights are threatened because they are ethnic minorities in the states in which they live. Asked whether they should be granted self-determination, she responded with an emphatic "no." The disastrous effects of the struggle for self-determination by competing claimants in the same territory is unfortunately all too evident in the former Yugoslavia.

Throughout the world, there are different ethnic, religious, racial, and cultural groups living in the same territory. In some cases, they are so intermixed that creating separate states would be impossible. In others, it would lead to the establishment of numerous tiny states, rendering the newly created states—or the states from whose territory they are carved out—economically, politically, and militarily unviable.

What then is the solution? There is probably no completely satisfactory solution. However, the establishment of freely-elected governments, whose function it is to protect individual human rights, as provided for in the Copenhagen Document,²¹ and the adoption of international human rights standards, binding on all states, with international monitoring and enforcement mechanisms, would be steps in the right direction. Suggestions have also been made to develop new

20. John Brown, *Kurds Stranded in a Zone of Uncertainty*, FIN. TIMES, July 12, 1991, at I:17.

21. Conference on Security and Cooperation in Europe (CSCE), *Document of the Copenhagen Meeting of the Conference on the Human Dimension*, June 29, 1990, reprinted in 29 I.L.M. 1305 (1990) [hereinafter Copenhagen Document]. For a discussion of the Copenhagen Document, see Thomas Burgerthal, *The CSCE Rights System*, 25 GEO. WASH. J. INT'L L. & ECON. 333, 336 (1991). See also Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163 (1993).

legal concepts that would permit different peoples to share rights in the same territory.²²

The rhetoric of the last few decades has created a perception that every group, regardless of its distinguishing characteristics or location, has a right to establish an independent sovereign state, if it so chooses. This perception is incorrect and dangerous. The right to establish an independent state in territory that is part of an existing state—with a correlative duty by the state from whose territory it is to be established to permit such establishment—will have to be limited, if recognized as a right under international law at all. Such a right will depend on a number of factors, including: the size of the group seeking statehood; whether it is truly racially, religiously, or ethnically distinct from existing states; whether it has historically been a distinct group; whether the members of the group reside in one geographic area; whether a state created in that area would be economically, politically, and militarily viable; and whether its creation would undermine the security or political and economic viability of the state that gives up territory. It should be recalled that the U.N. Charter does not provide for “a right” to self-determination. Rather, it lists as one of the purposes of the United Nations “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”²³

While other international agreements provide for a right to self-determination, those provisions have not been interpreted as granting a right to establish an independent sovereign state. For example, the International Covenant on Civil and Political Rights provides: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic,

22. See GIDON GOTTLIEB, *NATION AGAINST STATE: A NEW APPROACH TO ETHNIC CONFLICTS AND THE DECLINE OF SOVEREIGNTY* (1993). See also C. TOMUSCHAT, *MODERN LAW OF SELF-DETERMINATION* 16-17 (1993) (“International Law cannot and should not promote secessionist moves, . . . Instead, the aim should be to accommodate the legitimate claims of peoples—or even of minorities—by creating adequate political structures, giving them a say over what are essentially their own matters, without destroying the over-arching institutions of governments”).

23. U.N. CHARTER art. 1, para. 2.

social and cultural development.”²⁴ Although the language is almost identical to that contained in The Declaration on the Granting of Independence to Colonial Countries,²⁵ prominent publicists and human rights advocates do not interpret the self-determination clause in the Covenant as providing a right to establish an independent sovereign state.²⁶ For example, in discussing the compatibility of U.S. policy to accord Native Americans only limited self-government under the self-determination clause of the Covenant, a recently published book states: “Given the limited nature of the right to self-determination currently recognized by international law and State practice, that policy does not appear to be inconsistent with international norms.”²⁷ That is, the right to self-determination provided for in the Covenant on Civil and Political Rights is satisfied by the limited self-government accorded to Indians in the United States and does not entitle Indians to establish an independent sovereign state.

III. THE ARAB-ISRAELI CONFLICT

The Arab-Israeli conflict is not about self-determination. The Arabs who live in Palestine are not racially, religiously, or culturally distinct from the Arabs in the surrounding countries; they are of the same race, speak the same language, and practice the same religion as the Arabs in Syria, Jordan, Saudi Arabia, Iraq, or Kuwait. Indeed, the Palestinian National Charter declares that “the Palestinian people are an integral part of the Arab nation.”²⁸ From 1948 to 1967, when the territories currently in dispute were in Arab hands, no Palestinian-

24. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 1, para. 1.

25. See *supra* text accompanying note 4.

26. See, e.g., David Filvaroff et al., *The Substantive Rights and United States Law*, in U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 83 (Hurst Hannum & Dana D. Fischer eds., 1993).

27. *Id.*

28. The Palestine National Charter, art. 1, reprinted in *THE MIDDLE EAST AND NORTH AFRICA* 1989, at 89, 89-90 (Europa Publications Ltd. 35th ed. 1988).

Arab state was established or even suggested.²⁹ No independent Arab state has *ever* existed in Palestine.³⁰

The Arab-Israeli conflict is primarily about the existence of a non-Muslim state in that region. The conflict is also about territory—who should have control over the Golan Heights, Gaza, and the West Bank, or Judea and Samaria, as the territory was known for some two thousand years, and still referred to in League of Nations documents and U.N. documents up to 1948.³¹ The Arab states have been adamant in their refusal to accept the existence of Israel, which they consider a Western state, in the Middle East.³² Although it is often asserted that Israel's failure to relinquish these territories is the cause of the Arab-Israeli conflict, not a single Arab state signed a peace treaty with Israel from 1948 to 1967 while the disputed territories were not held by Israel.³³ Hopefully, the Arab states' re-

29. *See Jordan: Past and Present, in THE MIDDLE EAST CONFRONTATION STATES: THE HASHEMITE KINGDOM OF JORDAN AND THE WEST BANK, A HANDBOOK* 17, 26 (Anne Sinai & Allen Pollack eds., 1977).

30. For a discussion regarding the beginning of Palestinian nationalism, see Daniel Pipes, *The Year the Arabs Discovered Palestine*, 21 *MIDDLE E. REV.* 37 (1989). Pipes writes:

Palestinians abandoned Pan-Syrianism and replaced it with Palestinian separatism for tactical reasons, not out of heartfelt sentiment Ultimately, Palestinian nationalism originated in Zionism; were it not for the existence of another people who saw British Palestine as their national home, the Arabs would have continued to view this area as a province of Greater Syria.

Id. at 41-42.

31. Judea and Samaria are not only the Biblical names, as is frequently stated, *see, e.g.*, Allan Gerson, *THE KIRKPATRICK MISSION, DIPLOMACY WITHOUT APOLOGY: AMERICA AND THE UNITED NATIONS 1981-1985*, at 58 (1991), but are also the historical names, which were used in League of Nations and British Mandatory documents until 1948. *See, e.g.*, 2 *A SURVEY OF PALESTINE* 948 (reprinted 1991) (1927); *PALESTINE ROYAL COMMISSION REPORT* 383, 1937, CMND. 5479, *cited in* 3 *THE ARAB-ISRAELI CONFLICT: DOCUMENTS* 170 (John Norton Moore ed., 1974). Julius Stone states, "It is incorrect to assume that the names 'Judea' and 'Samaria' are archaic revivals by Israeli authorities," and points out that Sir John Glubb ("Glubb Pasha"), the Commander of the Arab Legion and the individual responsible for Jordan's capture of those territories in 1948, used the terms Judea and Samaria in his book *SIR JOHN GLUBB, A SOLDIER WITH THE ARABS* (1957), when referring to this area. JULIUS STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* 188 n.29 (1981).

32. *See* STONE, *supra* note 31, at 141.

33. *See, e.g.*, Eugene Rostow, *The Peace-Making Process: U.N. Resolutions 242 and 338*, 1993 *CENTER FOR NEAR EAST POLICY RESEARCH* 27.

fusal to recognize Israel's right to exist as an independent sovereign state is changing. However, a speech recently delivered to a Jewish audience by the Jordanian Ambassador to the United Nations illustrates that there is still a long way to go. Envisioning an "idyllic time,"³⁴ Ambassador Adnan Abu Odeh noted that every Arab country once had a Jewish Quarter and said, "Let Israel be a larger Jewish Quarter in the Arab world."³⁵

The territorial problem involved is also not simple. Israel has historical, religious, and legal claims to the disputed territory. Judea and Samaria were the heart of ancient Israel. Nearly every site that has religious or historical importance to Jews is in Judea and Samaria.³⁶ The League of Nations Mandate, directing Britain to establish a Jewish national home in Palestine, had included this territory.³⁷ Professor Eugene V. Rostow has noted that the International Court of Justice held in the *Southwest Africa* cases³⁸ that a mandate, like a treaty, is binding,³⁹ thereby giving Israel a legal claim to the territo-

34. See Gary Rosenblatt, *After the Euphoria Fades*, JEWISH WEEK, Oct. 29-Nov. 4, 1993, at 5, 5.

35. *Id.* at 5. For a discussion of the second class status that Jews had in Arab countries, see Bat Ye'or, *THE DHIMMI, JEWS AND CHRISTIANS UNDER ISLAM* (David Maisel et al. trans., 1985).

36. As Professor Stone notes:

The Enquiry Commission, established by President Wilson [following World War II] to draft a map of the world based on the Fourteen Points, affirmed the right of the Jewish people "that Palestine should become a Jewish State" clearly on this ground. Palestine, the commission said, was "the cradle and home of their vital race," the basis of the Jewish spiritual contribution, and the Jews were the only people whose only home was in Palestine.

Stone, *supra* note 31, at 15.

37. It is somewhat ironic that the British justification for removal of about three-quarters of the territory, which later became Jordan, from the original mandate for Palestine was that it would be needed to resettle the Arabs who did not want to live in a Jewish state once the Jewish national home became a reality. See SIR ALEC SEATH KIRKBRIDE, *A CRACKLE OF THORNS* 19 (1956).

38. *Southwest Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1962 I.C.J. 319 (Dec. 21), 1966 I.C.J. 6 (Judgment of July 18; second phase).

39. Eugene V. Rostow, "Palestinian Self-Determination": *Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. WORLD PUB. ORD. 147, 157 (1979).

ries.⁴⁰ Relinquishing these territories could pose a serious military danger to Israel. A memorandum by the U.S. Joint Chiefs of Staff to then Secretary of Defense Robert McNamara concluded that Israeli control of Gaza, the Golan Heights, East Jerusalem, and a substantial part of the West Bank is vital to Israeli defense.⁴¹ Finally, a topographical map of the area

40. For a discussion of Israel's legal rights to these territories, see STONE, *supra* note 31, at 132; Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); Malvina Halberstam, *The Myth that Israel's Presence in Judea and Samaria is Comparable to Iraq's Presence in Kuwait*, 19 SYRACUSE J. INT'L L. & COM. 101, 107 (1993); Rostow, *supra* note 39, at 153; Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344 (1970).

41. The memorandum, from Earle G. Wheeler, Chairman, Joint Chiefs of Staff, to the Secretary of Defense, dated June 29, 1967, provides in relevant part as follows:

1. Reference is made to your memorandum, dated 19 June 1967, subject as above, which requested the views of the Joint Chiefs of Staff, without regard to political factors, on the minimum territory, in addition to that held on 4 June 1967, Israel might be justified in retaining in order to permit a more effective defense against possible conventional Arab attack and terrorist raids.

2. From a strictly military point of view, Israel would require the retention of some captured territory in order to provide militarily defensible borders. Determination of territory to be retained should be based on accepted tactical principles such as control of commanding terrain, use of natural obstacles, elimination of enemy-held salients, and provisions of defense in-depth for important facilities and installations. More detailed discussions of the key border areas mentioned in the reference are contained in the Appendix hereto. In summary, the views of the Joint Chiefs of Staff regarding those areas are as follows:

a. *The Jordanian West Bank.* Control of the prominent high ground running north-south through the middle of West Jordan generally east of the main north-south highway along the axis Jenin-Nablus-Bira-Jerusalem and then southeast to a junction with the Dead Sea at the Wadi el Daraja would provide Israel with a militarily defensible border

b. *Syrian Territory Contiguous to Israel.* Israel is particularly sensitive to the prevalence of terrorist raids and border incidents in this area. The presently occupied territory, the high ground running north-south on a line with the Qnaitra about 15 miles inside the Syrian border, would give Israel control of the terrain which Syria has used effectively in harassing the border area

d. *The Gaza Strip.* By occupying the Gaza Strip, Israel would trade approximately 45 miles of hostile border for eight. Configured as it is, the strip serves as a salient for introduction of Arab

shows that a significant portion of Israel's water comes from rain that flows down the mountains of the West Bank.⁴² Thus, non-Israeli control of the area could block the flow of water essential to Israel.⁴³

On the other hand, many Arabs live in the disputed territories. They too are entitled to live in peace and dignity and to enjoy the human rights provided for by international law. A lasting resolution of the Arab-Israeli conflict must be responsive to all these needs. Perhaps the solution to the Arab-Israeli conflict and to conflicts in other parts of the world, where people of different ethnicity live in the same territory, and where neither group is willing to leave, will be to develop new legal concepts, giving different peoples different rights in the same territory, as suggested by Gidon Gottlieb in his new book, *Nation Against State*.⁴⁴

subversion and terrorism, and its retention would be to Israel's military advantage.

3. *It is emphasized that the above conclusions, in accordance with your terms of reference, are based solely on military considerations from the Israeli point of view.*

Memorandum from Earle G. Wheeler, Chairman Joint Chiefs of Staff to Robert S. McNamara, Secretary of Defense (June 29, 1967), reprinted in *JINSA SECURITY AFFAIRS*, July-Aug. 1987, at 4 (emphasis added). The Memorandum included the map attached as appendix A.

42. Stephen Budansky et al., *Another Obstacle to Peace*, U.S. NEWS & WORLD REP., Dec. 16, 1991, at 60, 60; Julie Epstein, *Langfan on Security and Water Rights*, JEWISH POST OF N.Y., Oct.-Nov. 1993, at 3; Clyde Haberman, *Report Cites Way to Guard Water Assets*, N.Y. TIMES, Oct. 10, 1993, at A10.

43. See Alan Cowell, *Hurdle to Peace: Parting the Mideast's Waters*, N.Y. TIMES, Oct. 10, 1993, at A1.

44. See GOTTLIB, *supra* note 22, at 145.

APPENDIX A

