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Robert P. Barnidge, Jr.

**The Evolution of Palestinian Arab Proto-Self-Determi-  
nation and “Peoplehood” During the  
Mandate for Palestine**

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ISSN 2161-0320  
Copy Editor: Danielle Leeds Kim  
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New York University School of Law  
New York, NY 10011  
USA

<p>Publications in the Series should be cited as: AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]</p>
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# **THE EVOLUTION OF PALESTINIAN ARAB PROTO-SELF-DETERMINATION AND “PEOPLEHOOD” DURING THE MANDATE FOR PALESTINE**

By Robert P. Barnidge, Jr.\*

## **Abstract**

This paper traces the evolution of Palestinian Arab proto-self-determination and “peoplehood” during the Mandate for Palestine. In doing so, it seeks to clarify what are two of the most controversial and emotive concepts in international legal discourse and popular imagination today, “Palestine” and “Palestinian,” concepts that were understood quite differently during the time of the Mandate between the First and Second World Wars and until the 1948 War than they are understood today. This paper begins by describing the Mandate system and the territorial dispensation for Palestine that was secured within it. Taking the view that the Mandate system sought to secure some permutation of what one might understand as a type of proto-self-determination, it then assesses the extent to which one can reasonably conclude that a specifically Palestinian Arab “people” existed at the time in a juridical sense. This paper’s final substantive section draws upon evidence that States gave to the United Nations Special Committee on Palestine in 1947 and the United Nations’ work on the question of Palestine up to the 1948 War. This paper shows that rediscovering the evolution of Palestinian Arab proto-self-determination and “peoplehood” during the Palestine Mandate reveals the malleability of these concepts, something that remains the case, at least to a certain extent, to the present.

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\* Lecturer and Coordinator of International Relations, Department of History, Politics, and International Relations, Webster University. Email: [robertbarnidge62@webster.edu](mailto:robertbarnidge62@webster.edu) The author is grateful for feedback that he received on earlier versions of this paper at the 2015 Legalities and Legacies: The Past, Present, and Future of the Palestine Mandate in International Law Conference in Jerusalem, which was co-sponsored by the Hebrew University Faculty of Law and Columbia Law School, the 2013 annual conference of the Association for the Study of the Middle East and Africa, and the Second Annual Junior Faculty Forum for International Law at the University of Nottingham. This paper will appear as a chapter in the author’s forthcoming monograph, *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine*, Hart Publishing, an imprint of Bloomsbury Publishing Plc.

# *The Evolution of Palestinian Arab Proto-Self-Determination and “Peoplehood” During the Mandate for Palestine*

## **I.) Introduction**

In an interview that she gave to the *Sunday Times* in 1969, two years after the 1967 War, Israeli Prime Minister Golda Meir was famously quoted as saying that “[t]here was no such thing as Palestinians [. . .] It was not as though there was a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them. They did not exist.”<sup>1</sup> Prime Minister Meir went on to note that Palestine had in recent memory either been geographically southern Syria or the larger part of a geographical expanse including Transjordan and that there had never been, as she put it, an “independent Palestinian people with a Palestinian State.”<sup>2</sup> Although later years would see Prime Minister Meir seek to clarify her remarks,<sup>3</sup> the sentiments expressed in the original quotation raise two important issues that have hindered rapprochement between Jews and Arabs since the beginning of the Zionist project in Palestine: the question of what it means to be a “people” and the geographical spaces within which “peoples” can legitimately express their national aspirations.<sup>4</sup>

One reading of Prime Minister Meir’s words would be that a non-Jewish, and specifically Arab, population did not exist in the physical sense when Jews began making *aliyah* to Palestine in large numbers during the late-nineteenth century. On this view, Zionist pioneers would have essentially been unfettered and free to have realized Herzl’s dream of a Jewish State and to have done so, conveniently, on a *tabula rasa*.<sup>5</sup> While many at the time did comment upon the sparsely-populated nature of the land,<sup>6</sup>

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<sup>1</sup> Golda Meir, “*Who Can Blame Israel?*,” *SUN. TIMES*, June 15, 1969.

<sup>2</sup> *Id.* See Golda Meir, *Israel in Search of Lasting Peace*, 51(3) *FOREIGN AFF.* 447, 450 (1973) (noting the absence of a specifically Palestinian Arab nationalism at the time of the Mandate for Palestine).

<sup>3</sup> See Golda Meir, *On the Palestinians*, *N.Y. TIMES*, Jan. 14, 1976 (in which she states, regarding this view, “[m]y actual words were: ‘There is no Palestine people. There are Palestinian refugees’”).

<sup>4</sup> The phrase “for a people without a land, a land without a people” raises almost identical issues as Prime Minister Meir’s remarks. On this phrase and its origin, meaning, and uses and abuses, see Adam M. Garfinkle, *On the Origin, Meaning, Use and Abuse of a Phrase*, 27(4) *MID. E. STUD.* 539 (1991). On Prime Minister Meir’s remarks, see *id.* at 541.

<sup>5</sup> See THEODOR HERZL, *THE JEWISH STATE* (2010).

<sup>6</sup> Mark Twain’s account in *The Innocents Abroad* is a classic one. Reflecting on his journey to Palestine, he wrote of part of its expanse: “[t]here is not a solitary village throughout its whole extent -- not for thirty miles in either direction. There are two or three small clusters of Bedouin tents, but not a single permanent habitation. One may ride ten miles, hereabouts, and not see ten human beings.” MARK TWAIN, *THE INNOCENTS ABROAD* 362 (2002). See Felix Frankfurter, *The Palestine Situation Restated*, 9(3)

the reality of an Arab population was well-known to the *yishuv*. To take but one example, consider that Zionist intellectual Ahad Ha'am's seminal 1891 essay "Truth from Eretz Yisrael" clearly recognized, and made something of a premonition about, the Arab population in the following language: "if the time comes when the life of our people in Eretz Israel develops to the point of encroaching upon the native population [i.e., the Arabs of Palestine], they will not easily yield their place."<sup>7</sup> Increasing friction between Jews and Arabs during the final years of the Ottoman Empire and as the Palestine Mandate unfolded between the First and Second World Wars, particularly with the unrest of the late-1930s, would make it difficult to reasonably deny the physical presence of an Arab population whose numbers were both significant and increasingly hostile to the Zionist project of national redemption in *Eretz Israel*, the land of Israel.

This paper traces the evolution of Palestinian Arab proto-self-determination and "peoplehood" during the Mandate for Palestine through what Skouteris calls a "positioned engagement with the past."<sup>8</sup> In doing so, it seeks to clarify what are two of the most controversial and emotive concepts in international legal discourse and popular imagination today, "Palestine" and "Palestinian," concepts that were understood quite differently during the time of the Mandate between the First and Second World Wars and until the 1948 War than they are understood today. This paper begins by describing the Mandate system and the territorial dispensation for Palestine that was secured within it. Taking the view that the Mandate system sought to secure

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FOREIGN AFF. 409, 409-11 (1931). See also S. Ilan Troen, *Israeli Views of the Land of Israel/Palestine*, 18(2) ISR. STUD. 100, 106-08 (2013). "It is obvious to every passing traveller, and well-known to every European resident, that the country was before the War [i.e., World War I], and is now, undeveloped and under-populated." An Interim Report on the Civil Administration of Palestine, During the Period 1st July 1920-30th June 1921, in PALESTINE AND TRANSJORDAN ADMINISTRATION REPORTS: 1918-1948: VOLUME I: 1918-1924 169, 172 (1995).

<sup>7</sup> Alan Dowty, *Much Ado About Little: Ahad Ha'am's "Truth from Eretz Yisrael," Zionism, and the Arabs*, 5(2) ISR. STUD. 154, 162 (2000). See Alan Dowty, "A Question That Outweighs All Others": Yitzhak Epstein and Zionist Recognition of the Arab Issue, 6(1) ISR. STUD. 34 (2001). See also JACOB LASSNER & S. ILAN TROEN, *JEWS AND MUSLIMS IN THE ARAB WORLD: HAUNTED BY PASTS REAL AND IMAGINED* 325-26 (2007); Israel Kolatt, *The Zionist Movement and the Arabs*, in ESSENTIAL PAPERS ON ZIONISM 617 (Jehuda Reinharz & Anita Shapira eds., 1996). Jabotinsky was also under no illusions as to the physical presence of an Arab population in Palestine. Writing in 1923, he noted that the Arabs of Palestine were "not a rabble, but a living people. [A]nd when a living people yields in matters of such a vital character it is only when there is no longer any hope of getting rid of us, because they can make no breach in the iron wall." Zeev Jabotinsky, *The Ethics of the Iron Wall*, Jabotinsky Institute, at 7, A1-7/14 (Nov. 4-Dec. 31, 1923).

<sup>8</sup> Thomas Skouteris, *Engaging History in International Law*, in NEW APPROACHES TO INTERNATIONAL LAW 99, 101 (J.M. Beneyto & D. Kennedy eds., 2012).

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some permutation of what one might understand as a type of proto-self-determination, it then assesses the extent to which one can reasonably conclude that a specifically Palestinian Arab “people” existed at the time in a juridical sense. This paper’s final substantive section draws upon evidence that States gave to the United Nations Special Committee on Palestine (UNSCOP) in 1947 and the United Nations’ work on the question of Palestine up to the 1948 War. This paper shows that rediscovering the evolution of Palestinian Arab proto-self-determination and “peoplehood” during the Palestine Mandate reveals the malleability of these concepts, something that remains the case, at least to a certain extent, to the present.

### **II.) The Mandate System**

The First World War was a war of empires, of great powers aligned against one another. Some of these empires would survive the war largely intact; others would not. The administrative core of the Ottoman Empire in Anatolia, for example, would remain together, but its outer territories would be placed on a track to eventual independence that would complete a process of secession and cession that had been taking place in the Ottoman Empire for decades.<sup>9</sup> As Attorney-General of the Palestine Government Norman Bentwich put it in 1929, “conditions in those areas [detached from what was to become the Turkish Republic] precluded immediate independence; principle precluded annexation; experience precluded internationalization.”<sup>10</sup> It was the Mandate system that would channel the dispensation of these territories.<sup>11</sup>

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<sup>9</sup> See, e.g., Treaty of Peace with Turkey, Lausanne, July 24, 1923, art. 16. On this process, see Patrick Dumberry, *Is Turkey the “Continuing” State of the Ottoman Empire Under International Law?*, 59(2) NETH. INT’L L. REV. 235, 238-42 (2012). See also Peter Sluglett, *An Improvement on Colonialism? The “A” Mandates and Their Legacy in the Middle East*, 90(2) INT’L AFF. 413 (2014). United States President Woodrow Wilson’s “Fourteen Points” envisaged that the Turkish core of the Ottoman Empire would retain its sovereignty but that 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.” Woodrow Wilson, *Fourteen Points*, Jan. 8, 1918.

<sup>10</sup> Norman Bentwich, *The Mandate for Palestine*, 10 BRIT. Y.B. INT’L L. 137, 143 (1929).

<sup>11</sup> On the particulars of the A Mandates for Mesopotamia, Syria, and Palestine, with discussion of Lebanon and Transjordan, see JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 42-51 (2010). On Mandates and Trust Territories and Trusteeships, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 565-601 (2d ed. 2007).



Article 22 of the 1919 Covenant of the League of Nations (Covenant) set up the Mandate system and acted as the “supreme constitutional authority under which the mandates function[ed].”<sup>12</sup> Although it represented a striking break from the law that had for centuries permitted victor States to annex conquered territories,<sup>13</sup> it is important to recognize that article 22 also reflected a number of Eurocentric and racist assumptions. At the time, it will be recalled, large parts of Africa and Asia were colonies of the West, from (much of) Cape to Cairo and from the Atlas Mountains in the west through much of south and Southeast Asia and onward to Oceania in the east. It should come as no surprise, then, that the States Parties to the Covenant were largely Western and that the treaty that established the League of Nations would have reflected certain of their prerogatives and interests.

The Covenant does not expressly state that the Mandate territories of the old German and Ottoman Empires were not sovereign, but this is article 22’s clear implication. The territories are described as having “ceased to be under the sovereignty of the States which formerly governed them,”<sup>14</sup> and at no point can it be said that these territories had somehow (re)captured their sovereignty. Article 22, furthermore, describes these territories as being “inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world.”<sup>15</sup> The position, then, is that the peoples in the Mandate territories were not modern, were perhaps pre-modern; certainly, they were not (yet) fit for modernity. As Anghie has put it, the view was that “the native’s deficiency must in some way be remedied.”<sup>16</sup>

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<sup>12</sup> Benjamin Akzin, *The Palestine Mandate in Practice*, 25(1) IOWA L. REV. 32, 48 (1939). On the San Remo Conference that would essentially operationalize article 22 in the Middle East, see GEORGE ANTONIUS, *THE ARAB AWAKENING: THE STORY OF THE ARAB NATIONAL MOVEMENT* 302-06 (1938).

<sup>13</sup> See *International Status of South-West Africa*, Advisory Opinion, 1950 I.C.J. 128, 131 (July 11) (noting that the two principles that were of “paramount importance” to the Mandate system were “the principle of non-annexation and the principle that the well-being and development of such peoples form ‘a sacred trust of civilization’”).

<sup>14</sup> Covenant of the League of Nations Adopted by the Peace Conference at Plenary Session, Apr. 28, 1919, 13(2) AM. J. INT’L L. SUPP. 128, 137, art. 22(1) (1919).

<sup>15</sup> *Id.*

<sup>16</sup> ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 156 (2007). See R.P. ANAND, *CONFRONTATION OR COOPERATION? INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES* 31-32 (2d rev. ed. 2011) (making a similar point).

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The use of the passive voice in article 22(1), territories “which are inhabited by,” suggests that the peoples in the Mandate territories were peoples who were acted upon from forces external to them, and indeed, from a juridical point of view, they were. This is confirmed by the subsequent use of the active voice in article 22(1): “there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization.”<sup>17</sup> In other words, the Mandatories were to be the subjects, the peoples of the Mandate territories the objects. Bentwich, writing at the time in the *British Yearbook of International Law*, described the Mandates as “infant nations, and a new relation is set up in international law, like that in private law of tutor to ward.”<sup>18</sup> Although clearly paternalistic, Bentwich’s language accurately reflected the Western view at the time of the Mandate system in general and article 22 of the Covenant in particular.<sup>19</sup>

Article 22(2) of the Covenant reflects Bentwich’s tutor/ward characterization of the Mandate system in that it describes it as “tutelage,”<sup>20</sup> of “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.”<sup>21</sup> It was the advanced that were charged with taking care of the interests of the not (yet) advanced. Each Mandate was to be tailored to, *inter alia*, the “stage of the development of the people,”<sup>22</sup> and from this one can conclude that the peoples under Mandate were not (yet) wholly developed either. Rather, they were at various stages of development.<sup>23</sup>

Article 22(1)-(3) reflects the general framework of the Mandate system, but the Covenant placed those peoples of the Ottoman Empire who were not in what was to

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<sup>17</sup> Covenant, *supra* note 14, at 137, art. 22(1).

<sup>18</sup> Norman Bentwich, *Mandated Territories: Palestine and Mesopotamia (Iraq)*, 2 BRIT. Y.B. INT’L L. 48, 48 (1921) (continuing two sentences later by stating that “[t]he League delegates the care of the minor to a Power who is termed the Mandatory; and lays down the terms of his charge in a Mandate; and the Mandatory is then responsible to the League as to a Court for the carrying out of the trust”). *Cf.* Akzin, *supra* note 12, at 33 (describing the Mandate system in similar terms).

<sup>19</sup> See ANGHIE, *supra* note 16, at 144-46.

<sup>20</sup> Covenant, *supra* note 14, at 137, art. 22(2).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 137, art. 22(3).

<sup>23</sup> The precise difference between “advanced” (in article 22(2)) and “develop[ed]” (in article 22(3)) is unclear.

become the Turkish Republic in a special category. According to article 22(4), these peoples were at such a stage of development that their independence could be “provisionally recognized.”<sup>24</sup> Although there is no sense in this that these peoples could at the time that the Covenant was adopted claim an entitlement to sovereign State status as such, it was hoped that this would be achieved in time. This was less the case, or at least not as obviously the case, for B and C Mandates.<sup>25</sup> The peoples of A Mandates were still in need of the advice and assistance of a Mandatory, however: this much is clear, “until such time as they are able to stand alone.”<sup>26</sup> In the understanding of the Covenant, to “stand alone” meant, presumably, to be sovereign, and article 22(4)’s express language can lead to no other conclusion than that these peoples were not, in the view of the drafters, (yet) able to do so.<sup>27</sup> Certainly, in no sense could it be said that the peoples of what would become known as the A Mandates were sovereign in the Huberian sense, which was the abiding sense at the time, of having “[i]ndependence in regard to a portion of the globe[, . . .] the right to exercise therein, to the exclusion of any other State, the functions of a State.”<sup>28</sup>

Apart from the system of A Mandates in article 22(4), there were also B and C Mandates. As with A Mandates, special regimes applied to these Mandates that built

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<sup>24</sup> *Id.* at 137, art. 22(4).

<sup>25</sup> See QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 530 (1930) (also noting that it was envisaged that B and C Mandates would move toward independence at a slower pace than A Mandates).

<sup>26</sup> Covenant, *supra* note 14, at 137, art. 22(4).

<sup>27</sup> See Quincy Wright, *Sovereignty of the Mandates*, 17(4) AM. J. INT’L L. 691 (1923). See also International Status, *supra* note 13, at 150 (McNair, J., separate) (famously describing sovereignty as being “in abeyance” in the Mandate system). On the Mandate system and the sovereignty question, with particular focus on South West Africa/Namibia, see JOHN DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* 75-82 (1973). See also RALPH WILDE, *INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY* 161-67 (2008).

<sup>28</sup> *Island of Palmas (Neth. v. U.S.)* (1928), 2 R. Int’l Arb. Awards 829, 838 (1949). See *Customs Regime Between Germany and Austria, Advisory Opinion*, 1931 P.C.I.J. (ser. A/B) No. 41, at 46 (Sept. 5) (describing sovereignty in opposition to “any voluntary act [. . .] which would cause it [i.e., a State] to lose its independence or which would modify its independence in that its sovereign will would be subordinated to the will of another Power or particular group of Powers, or would even be replaced by such will”). But see QUIGLEY, *supra* note 11, at 24-27 (arguing that Class A Mandates were indeed States). Anghie views the focus on formal (political) sovereignty within the context of the Mandate system as a distraction from the reification of colonialism in the guise of neo-colonialism. See ANGHIE, *supra* note 16, at 115-95. On neocolonialism and international law, see Robert P. Barnidge, Jr., *Neocolonialism and International Law, With Specific Reference to Customary Counterterrorism Obligations and the Principle of Self-Defence*, 49(1) INDIAN J. INT’L L. 21 (2009).

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upon the general framework for the Mandate system in article 22(1)-(3). The territories of B Mandates were to be administered with a general view to securing freedom of religion and conscience, prohibiting the slave trade and the trafficking of arms and intoxicating liquor, ensuring trading opportunities for all Members of the League of Nations on a non-discriminatory basis, and ensuring that the peoples of the B Mandates were kept in a militarily disadvantaged position vis-à-vis the Mandatory.<sup>29</sup> In many respects, the special regime for C Mandates in article 22(5) resembled annexation in that these territories could “be best administered under the laws of the Mandatory as integral portions of its territory,”<sup>30</sup> though this was “subject to the safeguards above mentioned in the interests of the indigenous population.”<sup>31</sup> C Mandates could be distinguished from A and B Mandates on account of their small size and population, geographical contiguity to the Mandatory’s territory, and “remoteness from the centers of civilization.”<sup>32</sup> In summary, article 22 of the Covenant set forth the general framework of the Mandate system and distinguished between A, B, and C Mandates.<sup>33</sup>

In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia)*, the International Court of Justice (ICJ) had an opportunity to interpret article 22 of the Covenant and concluded that the “ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.”<sup>34</sup> The ICJ delivered its advisory opinion in 1971, barely two years after the adoption of the Vienna Convention on the Law of Treaties (VCLT) and almost ten years prior to its entry into force. Since the terms of the VCLT precluded the ICJ from retroactively applying it to

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<sup>29</sup> See Covenant, *supra* note 14, at 137, art. 22(5).

<sup>30</sup> *Id.* at 138, art. 22(6).

<sup>31</sup> *Id.* at 138, art. 22(6). Although C Mandates resembled annexation in many respects, the Mandate system precluded annexation. See International Status, *supra* note 13, at 131.

<sup>32</sup> Covenant, *supra* note 14, at 137, art. 22(6). All of the Mandates were subject to certain reporting and oversight requirements. See *id.* at 138, art. 22(7)-(9).

<sup>33</sup> See *generally* NORMAN BENTWICH, THE MANDATES SYSTEM 1-20 (1930). For an overview of British State practice as Mandatory, with particular focus on Palestine, see WRIGHT, *supra* note 25, at 405-21.

<sup>34</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21). See Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), 2008 I.C.J. 12, 128-29 (May 23) (Bennouna, J., declaration).

article 22,<sup>35</sup> the ICJ focused its interpretation on article 22's "object and purpose."<sup>36</sup> Its application of this means of interpretation, however, was confused. On the one hand, the ICJ professed a "[m]indful[ness . . .] of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion"<sup>37</sup>; on the other hand, it read a half century of legal developments into article 22, a provision that the ICJ stated was not static but, rather, evolutionary in nature, and asserted that the States Parties to the Covenant had intended this, though without delving into the Covenant's *travaux préparatoires* to explain exactly how or why this was so.<sup>38</sup>

Although the ICJ's conclusion that one of article 22's "ultimate objective[s]" was self-determination can be defended as applied to the contemporary context of 1971, this conclusion should not be confused as somehow reflecting how article 22 was understood at the time that the Covenant was adopted in 1919, or for some not insignificant time thereafter. To begin with, and at the most basic level, nowhere in article 22 does the language "self-determination" appear. Quite simply, this is because the concept that features so markedly in the Charter of the United Nations (Charter) and that adheres to "peoples"<sup>39</sup> had not juridically crystallized by the time that the Covenant was adopted, a point that Vice President Ammoun made in his separate opinion appended to *Namibia*.<sup>40</sup> The principle of self-determination was, to be sure, *in statu nascendi* at the

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<sup>35</sup> See Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, art. 4.

<sup>36</sup> See, e.g., *Namibia*, *supra* note 34, at 30. The ICJ presumably did this because such an approach to treaty interpretation reflected customary international law at the time. Cf. VCLT, *supra* note 35, at art. 31(1) (stating that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

<sup>37</sup> *Namibia*, *supra* note 34, at 31.

<sup>38</sup> See *id.* at 31-32. The ICJ could be criticized on this count for having succumbed to what it had referred to in an earlier case as the temptation of the "process of after-knowledge." *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)* (Second Phase), 1966 I.C.J. 6, 47 (July 18). It is worth noting, however, that "[s]ubsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time." Text of the Draft Conclusions and Commentaries Thereto Provisionally Adopted by the Commission at Its Sixty-Fifth Session, *in* Report of the International Law Commission, 65th Sess., May 6-June 7, July 8-Aug. 9, 2013, at 12, 24, draft concl. 3, U.N. Doc. A/68/10; GAOR, 68th Sess., Supp. No. 10 (2013).

<sup>39</sup> See U.N. Charter arts. 1(2), 55.

<sup>40</sup> See *Namibia*, *supra* note 34, at 69 (Ammoun, V. Pres., separate). Indeed, as Weitz relates, the powerful States at the Paris Peace Conference "drew back from the term [self-determination], fearful of the popular demands that Wilson and Lenin had unleashed and the political fragmentation that might ensue if every

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time and did feature in the argumentative strategies of aggrieved groups,<sup>41</sup> but it did not (yet) exist as *lex lata*.<sup>42</sup> Furthermore, article 22 does not have the terminological precision that one would expect in the articulation of such a consequential legal norm: “communit[y],” “nation[.],” “people,” and “population” are used quite with abandon, certainly with very little care for or sensitivity to the nuances in and differences between such concepts.

More broadly, it is doubtful that the principle of self-determination existed in general international law at the time that the Covenant was adopted. An International Commission of Jurists that the Council of the League of Nations established with Finnish and Swedish consent in the Aaland Islands Question was quite clear on the matter in its report of September 5, 1920 (First Aaland Islands Report): “Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish,

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self-proclaimed people, or at least the parties and movements that professed to embody them, actually achieved its own state.” Eric D. Weitz, *Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right*, 120(2) AM. HIST. REV. 462, 486 (2015).

<sup>41</sup> See, e.g., LALA LAJPAT RAI, *Self-Determination for India*, in 7 THE COLLECTED WORKS OF LALA LAJPAT RAI 239 (B.R. Nanda ed., 2005); MARCUS GARVEY, *Declaration of the Rights of the Negro Peoples of the World*, in SELECTED WRITINGS AND SPEECHES OF MARCUS GARVEY 16 (Bob Blaisdell ed., 2004). On the “pre-history” of self-determination, see Arnulf Becker Lorca, *Petitioning the International: A “Pre-History” of Self-Determination*, 25(2) EUR. J. INT’L L. 497 (2014). See also Weitz, *supra* note 40.

<sup>42</sup> Cassese refers to it as then being a “political postulate.” See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11-33 (2008). See also DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 197 (2002) (describing the principle of self-determination during the interwar years as being in the nature of a “gift or a favour. At the very most it was a political principle”); B.C. NIRMAL, THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW 46 (1999) (contending that, “[d]espite initial invocations, self-determination had very little legal significance during [the] inter-war period[]”); THE RIGHT OF SELF-DETERMINATION OF THE PALESTINIAN PEOPLE, at 3, U.N. Doc. ST/SG/SER.F/3 (1979) (stating that the principle of self-determination was part of a “new morality emerging in international relations” during the interwar years and that, “[i]n juridical terms, [. . .] the concept of the right of self-determination advanced little in the period between the wars”). Whelan argues that the principle of self-determination did not “reach[] full maturity, and the new power legal validity at the expense of the old, before the Second World War. But it is suggested that the peace settlement after the first great global war was largely responsible for this development, which formed part of a general (if limited) revolution in international relations in this century.” Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43(1) INT’L & COMP. L.Q. 99, 108 (1994). “[S]elf-determination as a general principle did not form part of the Covenant of the League of Nations and therefore was, for the duration of the League of Nations, a political rather than a legal concept.” Daniel Thürer & Thomas Burri, *Self-Determination*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 4 (last updated Dec. 2008). See *Single German Nationality (Teso) Case* (Case No. 2 BvR 373/83), 91 I.L.R. 211, 230 (1987) (1993) (stating that the principle of self-determination crystallized in law after the Second World War).

any more than it recognises the right of other States to claim such a separation.”<sup>43</sup> To recognize international legal regulation in this context, the report went on, would amount to an unlawful interference in each State’s domestic jurisdiction and risk destabilizing the international system.<sup>44</sup> The First Aaland Islands Report denied as a general proposition that international law regulated the “rights of peoples to determine their political fate,”<sup>45</sup> but it made clear that this was only the case in *de jure* situations, or “under normal conditions,”<sup>46</sup> and that in *de facto* situations, that is, in situations in which it could not be said that the State at issue was “definitively constituted as a sovereign State and an independent member of the international community, and [. . .] continue[d] to possess these characteristics,”<sup>47</sup> account would have to be taken of the principle of self-determination in conjunction with the protection of minorities.<sup>48</sup>

This view was in line with the prevalent concern of international law at the time to accept, begrudgingly, accommodations for minority populations but not to acknowledge self-determination rights for peoples as such. While the examples of *de facto* situations that the First Aaland Islands Report gave, in particular those in which revolutions and war affect the functioning and constitution of a State,<sup>49</sup> might be said to describe a considerable number of States depending upon how one interprets these criteria, what is clear is that the First Aaland Islands Report reflects a general reluctance to view the

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<sup>43</sup> Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, L.N.O.J. 3, 5 (Special Supp. No. 3 1920). *Cf.* CHARLES HOMER HASKINS & ROBERT HOWARD LORD, SOME PROBLEMS OF THE PEACE CONFERENCE 10-21 (1920) (putting forth some of the considerations that went into self-determination at this time). A subsequent report on the Aaland Islands Question stated that the principle of self-determination was “not, [sic] properly speaking a rule of international law [. . .] It is a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion.” Report Presented to the Council of the League of Nations by the Commission of Rapporteurs, L.N. Doc. B7 21/68/106 (1921).

<sup>44</sup> *See* First Aaland Islands Report, *supra* note 43, at 5. The subsequent League of Nations Commission of Rapporteurs on the Aaland Islands Question was even more blunt: “To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.” Second Aaland Islands Report, *supra* note 43.

<sup>45</sup> First Aaland Islands Report, *supra* note 43, at 6.

<sup>46</sup> *Id.* at 5.

<sup>47</sup> *Id.* at 5-6.

<sup>48</sup> *See id.* at 6.

<sup>49</sup> *See id.*

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principle of self-determination as anything but exceptional. Qureshi makes the point, in fact, that self-determination at the time was “not meant to challenge the predominant state centred legal order that had achieved universal status through the mystical violent foundations of [ . . . ] international law but rather was permissible only as long as it remained commensurate to it.”<sup>50</sup>

Still, it would be correct to see article 22 of the Covenant as reflective of a type of proto-self-determination in that it foresaw what would later crystallize as *lex lata*, represented an important example of State practice, and would be frequently referred to in later years as one of the building blocks of self-determination as a legal norm.<sup>51</sup> Even as reflective of a type of proto-self-determination, however, the Mandate system in no way foresaw anything more than political self-government for the concerned populations, or, as Wright would describe it, self-determination as a “doctrine closely associated with the democratic thesis that government can only be justified by the consent of the governed.”<sup>52</sup> More sweeping understandings of self-determination would develop in international legal discourse in the decades following the Second World War -- Lenin had already begun to articulate an even more radical understanding of self-determination as the Bolsheviks took power in Russia<sup>53</sup> -- with many of these

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<sup>50</sup> Zainab Qureshi, *Self Determination, International Law & the Indigenous*, 1(3-4) PAK. J. INT’L L. 121, 123 (2011) (continuing by contending that “[t]he ‘state’ was thus the predominant and often the only repository of legal rights under international law; entities or populations including indigenous within the nation-state did not possess any claim that could in any way challenge national sovereignty”). On the Aaland Islands Question and self-determination, see CASSESE, *supra* note 42, at 27-31; CRAWFORD, *supra* note 11, at 108-12; RAIČ, *supra* note 42, at 198-99; M.K. Nawaz, *The Meaning and Range of the Principle of Self-Determination*, 14(1) DUKE L.J. 82, 86-88 (1965); Philip Marshall Brown, The Aaland Islands Question, 15(2) AM J. INT’L L. 268 (1921).

<sup>51</sup> Cf. Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43(2) INT’L & COMP. L.Q. 241, 241 n.1 (1994) (referring to self-determination’s “minimal version” in the Mandate system).

<sup>52</sup> *Recognition and Self-Determination*, 48 AM. SOC’Y INT’L L. PROC. 23, 27 (1954) (Quincy Wright). Cf. ROBERT LANSING, THE PEACE NEGOTIATIONS: A PERSONAL NARRATIVE 96 (1921).

<sup>53</sup> See, e.g., V.I. LENIN, *Socialism and War*, in LENIN ON WAR AND PEACE: THREE ARTICLES 1, 26-27 (1966). On Lenin and self-determination, see CASSESE, *supra* note 42, at 14-19. As Lenin saw it, “[c]omplete equality of rights for all nations; the right of nations to self-determination; the unity of the workers of all nations -- such is the national programme that Marxism, the experience of the whole world, and the experience of Russia, teach the workers.” V.I. LENIN, *The Right of Nations to Self-Determination*, in THE LENIN ANTHOLOGY 153, 180 (Robert C. Tucker ed., 1975). See also G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 7-14 (William E. Butler ed. & trans., 2003); GRIGORI TUNKIN, LAW AND FORCE IN THE INTERNATIONAL SYSTEM 220-25 (1985); G.I. Tunkin, *Coexistence and International Law*, in 95 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 67 (1958).



discussions taking place in the United Nations General Assembly and among the socialist bloc and newly-independent States of the developing world.<sup>54</sup>

### III.) The Mandate for Palestine

The Council of the League of Nations adopted the Palestine Mandate, an A Mandate, on July 24, 1922, and “Palestine” thus came for the first time to denote a distinct territory since the early Middle Ages.<sup>55</sup> In doing so, the League Council effectively operationalized the Balfour Declaration in international law. The Balfour Declaration, which British Secretary of State for Foreign Affairs Lord Arthur Balfour conveyed to Zionist leader Lord Rothschild in 1917, stated that “His Majesty’s Government view[ed] with favour the establishment in Palestine of a national home for the Jewish people, and will use

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<sup>54</sup> See KATHLEEN GALLAGHER CUNNINGHAM, *INSIDE THE POLITICS OF SELF-DETERMINATION* 11-12 (2014); KATJA L.H. SAMUEL, *THE OIC, THE UN, AND COUNTER-TERRORISM LAW-MAKING: CONFLICTING OR COOPERATIVE LEGAL ORDERS?* 338-45 (2013); Robert McCorquodale & Kristin Hausler, *Caucuses in the Caucasus: The Application of the Right of Self-Determination*, in *CONFLICT IN THE CAUCASUS: IMPLICATIONS FOR INTERNATIONAL LEGAL ORDER* 26, 27-34 (James A. Green & Christopher P.M. Waters eds., 2010); *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.*, 2010 7 S.C.C. 1, 102 (India); W. Ofuatey-Kodjoe, *Self-Determination*, in 1 *UNITED NATIONS LEGAL ORDER* 349 (Oscar Schachter & Christopher C. Joyner eds., 1995); S. Chowdhury, *The Status and Norms of Self-Determination in Contemporary International Law*, in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW: AN INTRODUCTION* 87 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987); AURELIU CRISTESCU, *THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS INSTRUMENTS*, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981); U.O. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* 131-33 (1979); TUNKIN, *LAW AND FORCE*, *supra* note 53, at 103-06; Manfred Lachs, *The Law in and of the United Nations (Some Reflections on the Principle of Self-Determination)*, 1 *INDIAN J. INT’L L.* 429 (1960); Milena Srnská, *On the Principle of Equal Rights and Self-Determination of Nations*, in *THE LEGAL PRINCIPLES GOVERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN THE SPIRIT OF THE UNITED NATIONS CHARTER* 115 (1966); R.L. Bobrov, *Basic Principles of Present-Day International Law*, in *CONTEMPORARY INTERNATIONAL LAW* 36, 51-55 (Grigory Tunkin ed., G. Ivanov-Mumjiev trans., 1969); Satpal Kaur, *Self-Determination in International Law*, 10 *INDIAN J. INT’L L.* 479 (1970); Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law*, in 230 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 9, 154-74 (1991); Abdulqawi A. Yusuf, *The Role that Equal Rights and Self-Determination of Peoples Can Play in the Current World Community*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 375 (Antonio Cassese ed., 2012); IJAZ HUSSAIN, *KASHMIR DISPUTE: AN INTERNATIONAL LAW PERSPECTIVE* 141-52 (2d ed. 2004). For a critical Third World perspective on internal self-determination, see Kalana Senaratne, *Internal Self-Determination in International Law: A Critical Third-World Perspective*, 3(2) *ASIAN J. INT’L L.* 305 (2013).

<sup>55</sup> See Bernard Lewis, *Palestine: On the History and Geography of a Name*, 2(1) *INT’L HIST. REV.* 1, 7 (1980). On the geography of Palestine from antiquity to the present, see LASSNER & TROEN, *supra* note 7, at 43-63. See also Moshe Sharon, *Palestine in the Islamic and Ottoman Period*, in *THE PALESTINIANS: PEOPLE, HISTORY, POLITICS* 9 (Michael Curtis et al. eds., 1975). Technically, the Palestine Mandate entered into force on September 29, 1923. See *British Mandate for Palestine*, Minutes of Meeting of Council Held at Geneva on September 29th, 1923, Oct. 13, 1923, <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/554d2d5ebe5313d6052565f50053999b?OpenDocument>.

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their best endeavours to facilitate the achievement of this object,”<sup>56</sup> with the caveat that it was to be “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.”<sup>57</sup> With the adoption of the Palestine Mandate, the League of Nations tasked the Mandatory, in this case, the United Kingdom, with putting the Balfour Declaration into effect. This involved positive obligations for the United Kingdom to create the political, administrative, and economic conditions that were best suited to establishing the Jewish national home in Palestine,<sup>58</sup> with the Jewish Agency to be a proto-State body that would assist it in this task.<sup>59</sup> Although, in practice, the United Kingdom took a number of steps that undermined the Palestine Mandate’s primary concern to establish the Jewish national home in Palestine,<sup>60</sup> there can be no doubt that the Palestine Mandate sought a “dynamic regime aiming at large-scale colonization by a distinct national group, thus changing the ethnical character of the country.”<sup>61</sup>

Read as a whole, it can be argued that the Mandate’s concern to establish the Jewish national home in Palestine was its primary focus and that the Mandate’s other obligations had to complement this. In other words, they had to be read so as to conform with the establishment of the Jewish national home. One example of this would be article 6, which required the “facilitat[ion of] Jewish immigration under suitable conditions and [. . . the] encourage[ment], in co-operation with the Jewish agency referred to in Article 4, [of] close settlement by Jews on the land, including State lands and waste lands not required for public purposes,” though this had to be done “while ensuring that the rights and position of other sections of the population are not prejudiced.” Another would be article 2 and the United Kingdom’s obligation to also “safeguard[] the civil and religious rights of all inhabitants of Palestine, irrespective of race and religion.” Where, without undue difficulty, it was possible to read these

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<sup>56</sup> Balfour Declaration, Foreign Office, Nov. 2, 1917.

<sup>57</sup> *Id.*

<sup>58</sup> See British Mandate for Palestine, 17(3) AM. J. INT’L L. SUPP. 164, 165, art. 2 (1922) (1923).

<sup>59</sup> See *id.* at 165, art. 4. See also Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2, at 21 (Aug. 30).

<sup>60</sup> See Akzin, *supra* note 12.

<sup>61</sup> *Id.* at 35.

secondary obligations in conformity with the primary Jewish national home focus of the Mandate, then the Mandatory could easily comply with both obligations. In situations in which this would be difficult, then the United Kingdom, while continuing to be obliged to comply with both obligations as a formal matter, would have to interpret these obligations in a way that recognized the prevailing emphasis that the terms of the Mandate gave to realizing the Jewish national home, which, again, was the Mandate's primary focus.

Crucially, the Palestine Mandate's preamble recognized the Jewish people's "historical connection" with the land of Palestine and accepted the Zionist case for reestablishing the "[Jewish] national home in that country." In recognizing Zionism's "grounds for reconstituting their [i.e., the Jewish people's] national home in that country [i.e., Palestine],"<sup>62</sup> the Council of the League of Nations effectively endorsed the Zionist project in Palestine and reaffirmed the ancient Jewish connection to the land. Although the Council's reaffirmation of the Balfour Declaration and call to facilitate the "close settlement by Jews on the land, including state lands and waste lands not required for public purposes,"<sup>63</sup> were by far the most significant aspects of the Palestine Mandate, the Palestine Mandate also dealt with such matters as citizenship, antiquities, and rights of access to Holy Places.<sup>64</sup> It was an endorsement, in other words, of the merits and legitimacy of Zionism.

Understandably, Zionists celebrated the terms of the Palestine Mandate; by contrast, Arabs opposed it. The Mandate's reach remained largely in flux, however, on account of article 25.<sup>65</sup> Through the Privy Council's adoption of the Palestine Order in Council on August 10, 1922, the United Kingdom accepted the Mandate, though the Order in Council also empowered the High Commissioner for Palestine to disapply certain

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<sup>62</sup> British Mandate for Palestine, *supra* note 58, at 164, pmbl.

<sup>63</sup> *Id.* at 165-66, art. 6.

<sup>64</sup> *See id.* at 166, art. 7, 167, arts. 12-14, 169-70, art. 21.

<sup>65</sup> "In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18." *Id.* at 170, art. 25.

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provisions of the Mandate to those parts of Palestine east of the Jordan River.<sup>66</sup> High Commissioner Herbert Samuel took advantage of this language less than a month later, on September 1, when he ordered the disapplication of the Jewish national home provisions to those parts of Palestine east of the Jordan.<sup>67</sup> While the Palestine Order in Council and Samuel’s order were creatures of British municipal law, the Council of the League of Nations would shortly thereafter ratify this radical repositioning of the Mandate, that is, the exclusion of the Jewish national home provisions to the larger part of Palestine.<sup>68</sup> This was despite the fact that, as then British Secretary of State for the Colonies the Duke of Devonshire put it to Samuel in a confidential dispatch of late-1923, the Balfour Declaration’s promise of a Jewish national home in Palestine “formed an essential part of the conditions on which Great Britain accepted the mandate for Palestine, and thus constitute[d] an international obligation from which there can be no question of receding.”<sup>69</sup> This vesting of governance responsibilities in an Arab Emir in those parts of Palestine east of the Jordan took place despite the fact that the Mandate expressly prohibited any part of Palestine from being transferred in any way to a foreign power.<sup>70</sup> Might the exclusion of the Jewish national home provisions east of the Jordan

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<sup>66</sup> See Palestine Order in Council, Aug. 10, 1922, § 86.

<sup>67</sup> See Order of the High Commissioner for Palestine, Sept. 1, 1922.

<sup>68</sup> See Article 25 of the Palestine Mandate, Territory Known as Trans-Jordan, Note by the Secretary-General, Geneva, Sept. 23, 1922, 17(3) AM. J. INT’L L. SUPP. 171 (1922) (1923); Memorandum by the British Representative, 17(3) AM. J. INT’L L. SUPP. 172 (1922) (1923); Declaration Approved by the Council of the League of Nations, London, July 24, 1922, 17(3) AM. J. INT’L L. SUPP. 193 (1922) (1923). See also QUIGLEY, *supra* note 11, at 46-48; GIDEON BIGER, THE BOUNDARIES OF MODERN PALESTINE, 1840-1947 159-89 (2005); The Jewish National Home in Palestine, Committee on Foreign Affairs, U.S. House of Representatives, 78th Congress, 2d Sess., H. Res. 418 and H. Res. 419 1 (1944); Akzin, *supra* note 12, at 39-40; BENTWICH, *supra* note 33, at 43-46; Leonard Stein, *The Jews in Palestine*, 4(3) FOREIGN AFF. 415 (1926).

<sup>69</sup> Despatch from Secretary of State for the Colonies to High Commissioner, Palestine, No. 1223, Oct. 4, 1923, in FUTURE OF PALESTINE, app. 1 at 2, 2, No. CAB/24/162 (1923).

<sup>70</sup> See British Mandate for Palestine, *supra* note 58, at 165, art. 5. Ironically, the 1928 Agreement Between His Britannic Majesty and His Highness the Amir of Trans-Jordan contained a non-alienation clause worded almost exactly the same as the non-alienation clause in the Palestine Mandate. See Agreement Between His Britannic Majesty and His Highness the Amir of Trans-Jordan, in LEGISLATION OF TRANSJORDAN: 1918-1930, app. I. at 703, 708, art. 18 (C.R.W. Seton ed., 1931) (stating that “[n]o territory in Transjordan shall be ceded or leased or in any way placed under the control of any foreign power; this shall not prevent His Highness the Amir from making such arrangements as may be necessary for the accommodation of foreign representatives and for the fulfilment of the provisions of the preceding Articles”). On British policy with respect to the “Jewish national home” between November 1917 and July 1922, see Martin Gilbert, “An Overwhelmingly Jewish State” -- *From the Balfour Declaration to the Palestine Mandate*, in ISRAEL’S RIGHTS AS A NATION-STATE IN INTERNATIONAL DIPLOMACY 23 (Alan Baker ed., 2011).

and the creation of an Arab governing authority there that had an alien pedigree be seen as a constructive transfer of a part of Palestine to a foreign power?

The effect of this combination of events in mid-1922 was dramatic. The Jewish national home was truncated and, as one commentator would put it, “handed [. . .] to some foreign Arabs for a private pasturage.”<sup>71</sup> While what was Transjordan, then to become Jordan, was, of course, not bereft of indigenous Arabs, the Hashemites, the “foreign Arabs” to which Ziff alludes in his critique, were neither from the area nor had any roots there. The British looked to the Sherifian clan, with its historic connection to Muhammad and central role in the uprising against the Ottomans from its base in the Hijaz, as an obvious source of leadership for their Mandates in the Middle East and, along with the Council of the League of Nations, jettisoned the Jewish national project in the larger part of Palestine based upon these geopolitical considerations.<sup>72</sup> Many Zionists, particularly the revisionists, would see this as a gross betrayal and continue to insist, as Jabotinsky did before the Palestine Royal Commission (Peel Commission) in 1937, that “the idea is that Palestine on both sides of the Jordan should hold the Arabs, their progeny, *and* many millions of Jews.”<sup>73</sup>

This truncation of the Jewish national home in Palestine, while an obvious disappointment to many Zionists and a coup for the Hashemites, should not be seen as altogether surprising when one considers what had transpired at the Middle East Conference in Cairo and Jerusalem in March 1921.<sup>74</sup> Over the course of just over two weeks, it was here that the British sought out the views of relevant stakeholders in the region about its policies in Aden and Somaliland, Mesopotamia, and Palestine. Specifically, then British Secretary of State for the Colonies Winston S. Churchill suggested that an Arab Emir should rule Palestine east of the Jordan under the supervision of the British High Commissioner for Palestine, with this Arab province

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<sup>71</sup> WILLIAM B. ZIFF, *THE RAPE OF PALESTINE* 105 (1948).

<sup>72</sup> *See id.* at 105-08.

<sup>73</sup> Vladimir Jabotinsky, *Evidence Submitted to the Palestine Royal Commission (1937)*, in *THE ZIONIST IDEA: A HISTORICAL ANALYSIS AND READER* 559, 562 (Arthur Hertzberg ed., 1997).

<sup>74</sup> For the full report of the conference, with appendices, see *REPORT ON MIDDLE EAST CONFERENCE HELD IN CAIRO AND JERUSALEM, MARCH 12TH TO 30TH, 1921, WITH APPENDICES*, No. CAB/24/126 (1921). *See also* Efraim Karsh, *Israel, the Hashemites and the Palestinians: The Fateful Triangle*, 9(3) *ISR. AFF.* 1, 2-3 (2003); ANTONIUS, *supra* note 12, at 316-19.

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remaining formally part of Palestine.<sup>75</sup> Emir Abdullah opposed this and proposed to Churchill that an Arab Emir should rule Palestine as a whole (under the supervision of the British High Commissioner for Palestine) just as an Arab Emir of the Hashemite dynasty, Feisal, would rule Mesopotamia (under the supervision of the British High Commissioner for Mesopotamia).<sup>76</sup> Alternatively, Abdullah suggested that Palestine east of the Jordan should be combined with Mesopotamia, thus ensuring Hashemite control over all of present day Jordan and Iraq.<sup>77</sup> Churchill stressed to Abdullah, as a way of convincing the latter, that the former’s suggestion of an Arab province in the larger part of Palestine under the supervision of the High Commissioner for Palestine would be hostile, so to speak, to Jews. Specifically, Churchill’s offer to Abdullah of the disapplication of the Balfour Declaration to Palestine east of the Jordan would mean that, “therefore[,] the Zionist clauses of the mandate would not apply. Hebrew would not be made an official language in Trans-Jordania, and the local Government would not be expected to adopt any measures to promote Jewish immigration and colonization.”<sup>78</sup>

One point that should be highlighted at this juncture is the prevalent sense among Arabs at the time that Zion, for the Jews, was not simply Palestine in its pre- or post-mid-1922 incarnations but, rather, that it expanded, or would be pushed to expand, considerably further afield. Writing in 1949, for example, the prominent Palestinian Arab lawyer Musa Alami claimed that the Zionist understanding was that “Palestine includes present-day Palestine, Transjordan, and large portions of Syria, Lebanon, and Egypt. They [i.e., the Zionists] dream of ‘a greater Jewish state between the Nile and Euphrates.’”<sup>79</sup> Although there is biblical support for the idea of a geographically much

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<sup>75</sup> See *Trans-Jordania*, in REPORT ON MIDDLE EAST CONFERENCE, *supra* note 74, at app. 19 at 107, 109.

<sup>76</sup> See *id.* Abdullah reiterated his proposal to the Woodhead Commission in May 1938. See Amir Abdallah, Proposal for the Solution of the Palestine Problem Submitted to the Woodhead Commission, May 1938, in 1 DOCUMENTS ON PALESTINE 357 (Mahdi Abdul Hadi ed., 2007).

<sup>77</sup> See *Trans-Jordania*, *supra* note 75, at 109.

<sup>78</sup> *Id.* at 110.

<sup>79</sup> Musa Alami, *The Lesson of Palestine*, 3(4) MID. E. J. 373, 387 (1949). Cf. ADOLPH HITLER, MEIN KAMPF 295 (2013); HAJ AMIN AL-HUSAYNI, *The Goal of the Zionist Movement: To Establish a Jewish State in Palestine and in the Neighbouring Arab Countries and to Build a Jewish Temple in Place of the Dome of the Rock at the al-Aqsa Mosque*, in THROUGH THE EYES OF THE MUFTI 98 (Zvi Elpeleg ed., Rachel Kessel trans., 2009).

more expansive Jewish polity,<sup>80</sup> this has never been recognized by international law. From an international law perspective, in other words, the Jewish national home was always to be limited to Palestine, truncated or not. There was simply no convincing legal case to the contrary.

The events of mid-1922 would see the formal realization of Churchill's vision in law, with the British remaining obliged to put into effect the Jewish national home provisions in Palestine west of the Jordan but with those same provisions being disappplied to the larger part of the Palestine Mandate.

#### **IV.) The Concept of a Palestinian Arab “People” During the Mandate for Palestine**

Given that the (first) partition of Palestine in mid-1922 was the last structural change to the Mandate for well over two decades,<sup>81</sup> it is useful at this point to put all of this in a broader regional context. The United Kingdom and France were at the time administering their respective A Mandates at the periphery of Palestine, and these Mandates would emerge, in time, as the independent States of Iraq, Syria, and Lebanon. Of course, these Mandates were majority Arab, and mostly Muslim, with the most notable exception to this being the Maronites of the Eastern Rite and Orthodox Christians in what was to become the Republic of Lebanon. To a large extent, the borders between the A Mandates were arbitrary, which is to say, they were agreed upon by the Western powers, and confirmed by the League of Nations, primarily with geopolitical considerations in mind rather than out of a sense that the borders were somehow, or should somehow be, “natural” or that each of the Arab populations in each of the Mandates shared, or should share, an identity that marked it off as unique from Arab populations in surrounding Mandates.<sup>82</sup> Reflecting upon what he referred to as the “dismemberment of the Arab World” in the first half of the twentieth-century, Arab

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<sup>80</sup> See *Genesis* 15:18-21 (“On that day the Lord made a covenant with Abram, saying, ‘To your descendants I give this land, from the river of Egypt to the great river, the river Euphra’tes, the land of the Ken’ites, the Ken’izzites, the Kad’mmites, the Hittites, the Per’izzites, the Reph’aim, the Amorites, the Canaanites, the Gir’gashites and the Jeb’usites”).

<sup>81</sup> See also Agreement, *supra* note 70.

<sup>82</sup> See LASSNER & TROEN, *supra* note 7, at 16 (writing that the “potpourri of Arab nation-states created by colonial mapmakers has neither geographic nor demographic coherence”).

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scholar Fayeze A. Sayegh would make the following lament in 1958: “the one nation [i.e., the Arab nation] was condemned to living separate lives in separate compartments.”<sup>83</sup> Just a few years earlier, King Abdullah warned in his memoirs that “[t]o accept this division is to submit to an idea which the Arab nation has rejected and which exposes it to the ambitions of the Jews and their supporters in Palestine.”<sup>84</sup>

On the identity issue, the position of Palestinian Arabs was particularly problematic, and it would remain so for the duration of the Mandate. The summarized remarks of then Secretary of State for the Colonies W.G.A. Ormsby-Gore before the League of Nations Permanent Mandates Commission in mid-1937 relay the following point: “these people [i.e., Palestinian Arabs] had not hitherto regarded themselves as ‘Palestinians’, but as part of Syria as a whole, as part of the Arab world.”<sup>85</sup> In other words, the view conveyed is that the Arabs of Palestine did not view themselves as possessing a separate identity that set them off as a people distinct from Arabs elsewhere in the Levant.

The question of identity, of course, is a most intimate one, and it operates at the group level in addition to at the level of the individual. Given its complexity, it must be approached with care. How one defines oneself and identifies as part of a larger group, if one does, and how that larger group relates to international law generally and is regulated by it, if it is, can be consequential matters indeed. Although, as noted above, self-determination as *lex lata* did not exist during the interwar years, the proto-self-determination that did exist at the time required, first of all, the identification of

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<sup>83</sup> FAYEZE A. SAYEGH, ARAB UNITY: HOPE AND FULFILLMENT 42 (1958).

<sup>84</sup> *A Review of the Present Position of the Arab Countries*, in MEMOIRS OF KING ABDULLAH OF TRANSJORDAN, app. 1 at 243, 248-49 (Philip P. Graves ed., 1950).

<sup>85</sup> League of Nations, Permanent Mandates Commission, Minutes of the 32d (Extraordinary) Sess. (Aug. 13, 1937), <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/fd05535118aef0de052565ed0065ddf7?OpenDocument> (continuing by stating that “[t]hey[, if transferred,] would be going literally only a comparatively few miles away to a people with the same language, the same civilisation, the same religion; and therefore the problem of transfer geographically and practically was easier even than the interchanges of Greeks and Turks between Asia Minor and the Balkans”).



beneficiaries. These beneficiaries were “peoples,” though legal practice has been to use “peoples” and “nations” interchangeably.<sup>86</sup>

At the time of the Mandate, “peoplehood” was famously difficult to define, and this has remained the case to the present.<sup>87</sup> “What is a nation?” Renan famously asked himself at the Sorbonne in March 1882, and his answer was that it is a “large-scale solidarity, constituted by the feeling of the sacrifices that one has made in the past and of those that one is prepared to make in the future”;<sup>88</sup> in Anderson’s understanding, the nation is an “imagined political community -- and imagined as both inherently limited and sovereign.”<sup>89</sup> Recognizing the contested nature of “peoplehood” in 2010 in his separate opinion in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Judge Cançado Trindade stated that “[t]here is in fact no terminological precision as to what constitutes a ‘people’ in international law, despite the large experience on the matter.”<sup>90</sup> As in 2010, there was certainly

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<sup>86</sup> See JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW: HOW NATIONALISM AND SELF-DETERMINATION SHAPE A CONTEMPORARY LAW OF NATIONS 1-3 (2007).

<sup>87</sup> For some of the debates in the academic literature, see KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 51-65 (2008); SUMMERS, *supra* note 86, at 45-81; B.C. Nirmal, *The Right of Self-Determination of the Tibetan People, Approaches and Modalities*, in TIBETAN PEOPLE’S RIGHT OF SELF-DETERMINATION 44, 44-49 (1996); PAUL J.I.M. DE WAART, DYNAMICS OF SELF-DETERMINATION IN PALESTINE: PROTECTION OF PEOPLES AS A HUMAN RIGHT 58-61 (1994); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43(4) INT’L & COMP. L.Q. 857, 866-68 (1994).

<sup>88</sup> Ernest Renan, *What Is a Nation?*, in NATION AND NARRATION 8, 19 (Homi K. Bhabha ed., 2008).

<sup>89</sup> BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (2006). Also on nations and nationalism, see GEORGE ORWELL, *Notes on Nationalism*, in ESSAYS 300 (2014); MARTIN BUBER, *Nationalism*, in A LAND OF TWO PEOPLES: MARTIN BUBER ON JEWS AND ARABS 47 (Paul Mendes-Flohr ed., 2005). For Gandhi, the “truest test of nationalism” was each “person[’s] thinking not only of half a dozen men of his own family or of a hundred men of his own clan, but considering as his very own the interest of that group which he calls his nation.” MAHATMA GANDHI, *Speech at Public Meeting, Jaffna*, in 35 THE COLLECTED WORKS OF MAHATMA GANDHI (SEPTEMBER 1927-JANUARY 1928) 320, 321 (Publ’n Dep’t, Gov’t of India ed., 1969).

<sup>90</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, 613 (July 22) (Cançado Trindade, J., separate). See Rupert Emerson, *Self-Determination*, 65(3) AM. J. INT’L L. 459, 462 (1971) (noting that “all commentators on self-determination have pointed out that neither ‘people’ nor ‘nation’ has any generally accepted meaning which can be applied to the diverse world of political and social reality”). Cristescu’s seminal 1981 study on self-determination provides the most meticulous deconstruction of the concepts of “peoples,” “nations,” and “States,” though he focuses exclusively on the United Nations era. See CRISTESCU, *supra* note 54, at 37-43. Cristescu suggests that there are three main elements of a “people,” namely that it be a “social entity possessing a clear identity and its own characteristics,” that it have a special relationship with a specific territory, and that it differ from ethnic, religious, or linguistic minority groups as these groups are understood within the context of the 1966 International Covenant on Civil and Political Rights. *Id.* at 41. See International Meeting of Experts on Further Study of the Concept of the Rights of Peoples,

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terminological imprecision as to the nature of “peoplehood” at the time of the Palestine Mandate.<sup>91</sup>

The present section does not pretend to be able to magically wish away the terminological imprecision that comes with the concept of “peoplehood” in international law, which it regards as inevitable in a dynamic and multicultural world, or to arrive at a definitive definition of “people” during the interwar years. Identities are multiple and often fluid, and one would do well to bear in mind Sen’s call for a “clearer understanding of the pluralities of human identity, and [. . .] appreciation that they cut across each other and work against a sharp separation along one single hardened line of impenetrable division.”<sup>92</sup> This section seeks to sketch the parameters of how the concept of “peoplehood” was juridically understood at the time of the Palestine Mandate and then to apply this understanding to the case of the Palestinian Arabs. One gets a good sense of how “peoplehood” was understood during the interwar years by looking at the Aaland Islands Question and the 1937 Palestine Royal Commission Report (Peel Report).

In the Aaland Islands Question, the League of Nations viewed self-determination as an equitable principle and only conceded it as an exceptional remedy. Even in those exceptional *de facto* situations in which self-determination could theoretically apply, however, the principle would have to be harmonized with and draw upon the existing law related to the protection of minorities.<sup>93</sup> The beneficiaries of these protections were the same, namely populations who could draw upon “old traditions or on a common

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Final Report and Recommendations, at 7-8, SHS-89/CONF.602/7 (1990). For a flavor of the debates as to the meaning of “peoples,” “nations,” and “States” in the Charter’s *travaux préparatoires*, see 18(2) DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945 657-58 (1954); 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945 300 (1945). See also Kaur, *supra* note 54, at 483-85. But see Higgins, *supra* note 54, at 169-70 (arguing that “people” simply means a given territory’s population writ large). See also Yuval Shany, *Does International Law Grant the People of Crimea and Donetsk a Right to Secede? Revisiting Self-Determination in Light of the 2014 Events in Ukraine*, 21(1) BROWN J. WORLD AFF. 233, 234-37 (2014); RAIČ, *supra* note 42, at 244-47; Chowdhury, *supra* note 54, at 88-93.

<sup>91</sup> Emerson suggests that the definition of “people” during the interwar years and during decolonization after the Second World War fundamentally differed. See Emerson, *supra* note 90, at 463-64. Whether a fundamental difference of definition or a fundamental difference of interpretation and application, on the whole, there is much to commend this line of reasoning.

<sup>92</sup> AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY xiv (2007).

<sup>93</sup> See First Aaland Islands Report, *supra* note 43, at 6.

language and civilization”<sup>94</sup> and had particular “social, ethnical or religious characteristics.”<sup>95</sup> The Second Aaland Islands Report, which a Commission of Rapporteurs presented to the Council of the League of Nations in 1921, described States’ duties with regard to the protection of minorities as follows: “It is just that the ethnical character and the ancient traditions of these minorities should be respected as much as possible, and that they should be specially authorised to practise freely their religion and to cultivate their language.”<sup>96</sup> Thus, “ethnical character,” “ancient traditions,” “religion,” and “language” were indicative of those beneficiaries who were entitled to minority protection as a matter of law. The Permanent Court of International Justice would give a similar understanding of “community” a decade later in *Greco-Bulgarian Communities*,<sup>97</sup> in which it expressly equated “community” and “minority.”<sup>98</sup>

The Peel Report very much reinforces the understanding of “people” in the Aaland Islands Question. The Peel Commission was established in 1936 to advise His Majesty’s Government on the best way forward for the Mandatory amidst increasing inter-communal violence in Palestine.<sup>99</sup> “The disease is so deep-rooted,” the Peel Report would put it, “that, in our firm conviction, the only hope of a cure lies in a surgical operation.”<sup>100</sup> A further partition of Palestine was the recommended “surgical operation,”<sup>101</sup> but whether because of subsequent events or in spite of them, it was never implemented. The Peel Commission’s particular understanding of “peoplehood” revolved around its description of the “force of circumstances” as the existence of a

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Second Aaland Islands Report, *supra* note 43.

<sup>97</sup> See *Greco-Bulgarian Communities*, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17, at 33 (July 31) (defining a “community” as a “group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another”). See *also id.* at 21-23.

<sup>98</sup> See *id.* at 19.

<sup>99</sup> Palestine Royal Commission Report, cmd. 5479 (1937). See Penny Sinanoglou, *The Peel Commission and Partition, 1936-1938*, in *BRITAIN, PALESTINE AND EMPIRE: THE MANDATE YEARS* 119 (Rory Miller ed., 2010); H.St.J.B. Philby, *The Arabs and the Future of Palestine*, 16(1) *FOREIGN AFF.* 156 (1937).

<sup>100</sup> Peel Report, *supra* note 99, at 368.

<sup>101</sup> See *id.* at 370-96.

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conflict between two nationalities, or nations.<sup>102</sup> In the Peel Report’s words, “[t]he Arab community is predominantly Asiatic in character, the Jewish community predominantly European. They differ in religion and in language. Their cultural and social life, their ways of thought and conduct, are as incompatible as their national aspirations.”<sup>103</sup> These characteristics (race, religion and language, cultural and social mores, thought and conduct) were what distinguished the Jews of Palestine from the Arabs of Palestine. It was what made them, so to speak, of different nations.<sup>104</sup> The Peel Report’s typological description of nations was almost identical to the approach that had been taken almost two decades earlier in the Aaland Islands Question, and like the Aaland Islands Question, it teases out a broad and consistent, though admittedly still question-begging and context-specific, understanding of “people.”

Approaching the question of whether the Arabs of Palestine constituted a “people” in the juridical sense at the time of the Palestine Mandate is obviously a complex one given the often nuanced and slippery nature of identity. Then, as now, the question of “peoplehood” raises what Koskeniemi has described as the “‘onion problem’ of nationalism: the problem that one’s definition of the ‘nation’ depends on the perspective (the distance) from which one’s vision is formed.”<sup>105</sup> In sifting through the considerable body of material that can be draw upon in an attempt to clarify the issue, one should be careful not to rely upon second-hand reports, uncorroborated evidence, or partisan or inaccurate testimony,<sup>106</sup> though such can sometimes be in the eye of the beholder and a matter of degree rather than of kind. Some of the material worth drawing upon in the Palestine context has already been commented upon by other scholars; some has been ignored; some has been de-emphasized. Yet, an examination of the terms of the

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<sup>102</sup> See *id.* at 370-76.

<sup>103</sup> *Id.* at 370.

<sup>104</sup> Ten years later, the UNSCOP’s Report to the General Assembly would stress that the Jews and Arabs of Palestine had distinct cultural mores, outlooks, religions, languages, and aspirations. See United Nations Special Committee on Palestine, Report to the General Assembly: Volume I, at 41, U.N. Doc. A/364 (Sept. 3, 1947). See also *id.* at 45 (highlighting the two communities’ spiritual and physical separation, separate ideals and aspirations, and different cultural mores).

<sup>105</sup> Koskeniemi, *supra* note 51, at 260. And the “perspective,” or “distance,” is enormously consequential: “Who they are, how the people is constituted, by what standards and criteria, determines whether or not an individual has access to rights.” Weitz, *supra* note 40, at 496.

<sup>106</sup> See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 225-26 (Dec. 19).

Palestine Mandate and an appreciation for geopolitical developments and the official statements of Arab leaders and scholars at the time suggest that any distinct national identity for Palestinian Arabs *qua* Palestinian Arabs was, at best, *in statu nascendi* during the Mandate.

To begin with, one will recall that the Balfour Declaration and the subsequent reaffirmation of it by the Council of the League of Nations in the form of the Palestine Mandate only recognized national rights for the Jewish people. In other words, from the perspective of the League of Nations, which, in a juridical sense, “represented” the international community at the time, there were no other nations in Palestine. That the terms of the Mandate were never changed suggests that this formally remained the League’s perspective until the Mandate ended in the wake of the Second World War.<sup>107</sup> To be sure, the Mandate acknowledged that there was a non-Jewish population in Palestine and variously referred to this population as “non-Jewish communities,”<sup>108</sup> “inhabitants of Palestine,”<sup>109</sup> and “other sections of the population,”<sup>110</sup> but it never did so in terms of national rights. Most of this non-Jewish population, of course, was Arab, and as a non-Jewish population under the Mandate, it was assured civil and religious rights.<sup>111</sup> Unsurprisingly, because the Palestine Mandate did not consider any parts of the non-Jewish population to be discrete nations, its terms did not recognize national rights for any of them, including Palestinian Arabs.

Geopolitical developments at the time are also important to consider when assessing the question of whether the Arabs of Palestine constituted a “people” in the juridical sense at the time of the Palestine Mandate. While one should be careful not to overlook the significance of truncating the Jewish national home in mid-1922, one should be equally cautious not to conclude from this that “Western Palestine” and “Transjordan” somehow emerged from this as “natural” territorial entities. Indeed, this was far from the case. From both Zionist and Arab perspectives, the (first) partition of Palestine was nothing

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<sup>107</sup> The approval of the League Council was required for amendments to the Mandate. *See* British Mandate for Palestine, *supra* note 58, at 171, art. 27.

<sup>108</sup> *Id.* at 164, pmbl.

<sup>109</sup> *Id.* at 165, art. 2.

<sup>110</sup> *Id.* at 165, art. 6.

<sup>111</sup> *See, e.g., id.* at 165, art. 2.

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more than an exercise in imperial decision-making designed to placate Abdullah. With his own “private pasturage,” the British thought, the Arab Emir would surely quit meddling across Palestine’s northern frontier in the French Mandate for Syria and the Lebanon.<sup>112</sup> London hoped to fashion a bridge of stability between British-controlled territory in Mesopotamia and French-controlled territory in the Levant and, by giving control of the larger part of Palestine to an Arab Emir, to dilute Arab opposition to the Zionist project. This dispensation was squarely rooted in geopolitics, not out of a concern to delineate separate Arab nations, and it was well-recognized for doing precisely this at the time.<sup>113</sup> Reflecting upon these regional machinations decades later, former Arab Knesset Member Azmi Bishara, an anti-imperialist with little in the way of Zionist sympathies, made the following observation:

“I do not think there is a Palestinian nation, I think its [sic] a colonialist invention -- Palestinian nation. When were there any Palestinians? Where did it come from? I think there is an Arab nation [ . . . ] I think that until the end of the 19th century, Palestine was the south of Greater Syria.”<sup>114</sup>

Particularly within elite Arab circles, there was little sense that the borders between and within the British and French A Mandates in the Levant could last or were even desirable, much less that they somehow demarcated national allegiances.<sup>115</sup> Indeed, sentiment was quite to the contrary. As Arab Higher Committee (AHC) representative Jamal Husseini put it in a letter to the United Nations Assistant Secretary-General for Security Council Affairs in late-May 1948, the Arab States surrounding Palestine were

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<sup>112</sup> See REPORT ON MIDDLE EAST CONFERENCE, *supra* note 74, at 7-9.

<sup>113</sup> As Nisan has put it, Transjordan, “founded by Arab aliens in association with British imperialists, represented no national idea or political ideal. From the start it was lacking in roots and values. We might describe it as an ‘imagined kingdom’ born on the edge of a desert, to deny the east bank to Zionism and southern Syria to Arab nationalism.” MORDECHAI NISAN, ONLY ISRAEL WEST OF THE RIVER: THE JEWISH STATE AND THE PALESTINIAN QUESTION 117 (2011). See Mudar Zahran, *Jordan Is Palestinian*, 19(1) MID. E. Q. 3 (2012); Israeli Foreign Minister Abba Eban, Statement to the Knesset Regarding the “Legitimate Rights of the Palestinian People,” Jerusalem, July 18, 1973, in 2 DOCUMENTS ON PALESTINE 403 (Mahdi Abdul Hadi ed., 2007); Mordechai Nisan, *The Palestinian Features of Jordan, in JUDEA, SAMARIA, AND GAZA: VIEWS ON THE PRESENT AND FUTURE* 191 (Daniel J. Elazar ed., 1982). Hupp describes it as a “Kingdom of Dreams.” See CLEA LUTZ HUPP, THE UNITED STATES AND JORDAN: MIDDLE EAST DIPLOMACY DURING THE COLD WAR 9-30 (2014).

<sup>114</sup> Sam Sokol, *The Catastrophe Called Israel?*, JERUSALEM POST, May 10, 2012.

<sup>115</sup> Much of this can be explained, of course, by reference to the 1916 Sykes-Picot Agreement between the two powers. See Sykes-Picot Agreement (May 15-16, 1916), in THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT 13 (Walter Laqueur & Barry Rubin eds., 7th ed. 2008).

“linked to them [i.e., the Arabs of Palestine] by all the ties of nationality and had only been segregated from them by the imperialistic ambitions of foreign powers.”<sup>116</sup> The AHC was the Arab equivalent of the Jewish Agency in Palestine, and it was recognized by the General Assembly as “representative of the views of the Arab population [of Palestine].”<sup>117</sup>

Two years earlier, Husseini had sent a blistering letter to British Prime Minister Clement Attlee in which he criticized the 1946 Report of the Anglo-American Committee of Inquiry and expressed the AHC’s aversion to it in terms that unmistakably reflected Palestinian Arabs’ sense of transboundary national allegiance.<sup>118</sup> The proposals, according to Husseini, “would threaten the existence and national life of the Arab nation.”<sup>119</sup> In no uncertain terms, Husseini then expressed the AHC’s view that Palestinian Arabs would resist the proposals not as a distinct people -- there was little sense of this at the time -- but, rather, as an indispensable part of the Arab people: “The

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<sup>116</sup> Letter Dated 18 May 1948 from the Assistant Secretary-General for Security Council Affairs Addressed to the Arab Higher Committee, and Reply Dated 24 May 1948 Addressed to the Secretary-General Concerning the Questions Submitted by the Security Council, at 5, U.N. Doc. S/775 (May 24, 1948). See Statement to the *Ad Hoc* Committee on the Palestinian Question by the Representative of the Arab Higher Committee, 29 September 1947, in THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS 57, 57 (Ruth Lapidot & Moshe Hirsch eds., 1992) (noting that Arabs generally shared a “racial homogeneity” and “spoke one language, had the same history, tradition and aspirations”).

<sup>117</sup> 1946-47 U.N.Y.B. 285. The General Assembly endorsed the First Committee’s views to this effect. See *id.* at 286. As Husseini put it in his letter, the AHC “speaks in the name of the majority of the whole of Palestine.” Letter Dated 18 May 1948, *supra* note 116, at 2 (also stating that the AHC was “exercising political authority over the overwhelming majority of the citizens of Palestine. The Committee is composed of members representing the different political Arab parties in the country. It thus forms a coalition, which expresses the Arab public opinion in Palestine. Whereas, Arabs are in majority in all districts and sub-districts, save that of Jaffa, in which Tel Aviv is situated, the Arab Higher Committee, therefore, speaks in the name of the majority of the whole of Palestine”). See 2 A SURVEY OF PALESTINE PREPARED IN DECEMBER 1945 AND JANUARY 1946 FOR THE INFORMATION OF THE ANGLO-AMERICAN COMMITTEE OF INQUIRY 945-55 (1991); HENRY CATTAN, PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT 35 (2d ed. 1976); SHABTAI ROSENNE, ISRAEL’S ARMISTICE AGREEMENTS WITH THE ARAB STATES 29 n.1 (1951).

<sup>118</sup> See Arab Reactions in Palestine to the Report of the Anglo-American Committee of Enquiry, June 6, 1946, No. CAB/129/10.

<sup>119</sup> *Id.* at 1 (continuing by asserting later in his letter that the “Arab nation will proceed in mobilising its national forces and preparing the means for the defence of itself, to resume the national movement fight. The Arab nation will not hesitate to adopt an attitude which will lead to the checking of the approaching danger and realise freedom and independence for them”).

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Arab Higher Committee [. . .] confirms the Arab people’s determination -- in Palestine -- to defend their country by all means in their power.”<sup>120</sup>

Put differently, rather than as a Palestinian Arab people as such, the “official” record suggests that the Arabs of Palestine tended to view themselves as part of a single, and singular, nation, the larger Arab nation. Valentine Dannevig, a Norwegian member of the Permanent Mandates Commission, noted during an extraordinary session of the Permanent Mandates Commission in the summer of 1937 that the self-representation of Palestinian Arabs had always consciously been as part of a larger Arab nation.<sup>121</sup> British Secretary of State for Foreign Affairs Anthony Eden reflected a perceptive sensitivity to this transboundary national dynamic in a November 1937 memorandum that noted that the Middle East “is an organic whole. The frontiers between the Arab States as shown on the maps are largely artificial post-war creations, resting on no true national, geographical or ethnographical basis. Palestine’s neighbour States are not ‘foreign’ to Palestine in the European sense, and opinion or events in one produce quick reactions in another.”<sup>122</sup> Indeed, Arab scholars such as Sayegh were quick to criticize attempts to channel and understand Arab national sentiment according to accepted Western notions of the nation-State and national identity.<sup>123</sup> The Lebanese scholar Albert Hourani would note that the first four decades of the twentieth-century were, for many Arabs of the Levant, a rejection of territorial-based nationalism in favor of a sense of unified allegiance across territory, with racial, cultural, and ethnic elements to it.<sup>124</sup>

To fully appreciate the position that Palestine held within this larger geographical conversation, it is helpful to turn to the rise of the General Syrian Congress and Emir Feisal’s brief reign in Damascus. Feisal, who had been maneuvering for control of the Levant at the time, was proclaimed King of Syria by Resolutions adopted in Damascus

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<sup>120</sup> *Id.*

<sup>121</sup> See League of Nations, Permanent Mandates Commission, Minutes of the 32d (Extraordinary) Sess. (Aug. 12, 1937), <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/fd05535118aefode052565ed0065ddf7?OpenDocument>.

<sup>122</sup> PALESTINE, at 3, No. CAB/24/237 (1937).

<sup>123</sup> See SAYEGH, *supra* note 83, at 85-89.

<sup>124</sup> See Albert Hourani, *Near Eastern Nationalism Yesterday and Today*, 42(1) FOREIGN AFF. 123, 130 (1963).



on July 2, 1919,<sup>125</sup> Syria being understood to include, *inter alia*, Palestine.<sup>126</sup> According to Arab scholar George Antonius, the General Syrian Congress, which included representatives from Palestine, was truly representative: “its deliberations did reflect the fears and hopes of the vast majority of the population, and [. . .] the resolutions it passed may safely be taken as expressing those views and sentiments that were most widely held.”<sup>127</sup> Antonius, describing the Resolutions as an “impressive display of patriotic fervour,”<sup>128</sup> wrote that the views as to the territorial integrity of the entirety of Syria were “echoed throughout the country.”<sup>129</sup>

While it is probably impossible to verify the popularity of the General Syrian Congress’ Resolutions of July 1919 within greater Syria, there seems to be little reason to doubt that they echoed widely among many Arabs in the Levant.<sup>130</sup> In fact, in recommending that Emir Feisal be installed as head of a united Syrian State, the King-Crane Commission, which United States President Woodrow Wilson had tasked with advising him on the post-First World War dispensation, stated that “[t]his [recommendation] is expressly and unanimously asked for by the representative Damascus Congress in the name of the Syrian people, and there seems to be no reason to doubt that the great majority of the population of Syria sincerely desire to have Amir Faisal as ruler.”<sup>131</sup> The General Syrian Congress, “reject[ing] the claims of the Zionists for the establishment of a Jewish commonwealth in that part of southern Syria which is known as Palestine, and [. . .] oppos[ing . . .] Jewish immigration into any part of the country,”<sup>132</sup> called for the unity of all of Syria, expressly including Palestine and Lebanon within this

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<sup>125</sup> See Resolutions of the General Syrian Congress, *in* ANTONIUS, *supra* note 12, at app. G at 440.

<sup>126</sup> See *id.* at 440, ¶ 1 (defining Syria’s boundaries as, “on the north, the Taurus Range; on the south, a line running from Rafah to al-Jauf and following the Syria-Hejaz border below ‘Aqaba; on the east, the boundary formed by the Euphrates and Khabur rivers and a line stretching from some distance east of Abu-Kamal to some distance east of al-Jauf; on the west, the Mediterranean Sea”).

<sup>127</sup> ANTONIUS, *supra* note 12, at 293.

<sup>128</sup> *Id.* at 294.

<sup>129</sup> *Id.*

<sup>130</sup> On the General Syrian Congress’ Resolutions of July 2, 1919, see *id.* at 292-94.

<sup>131</sup> Recommendations of the King-Crane Commission with Regard to Syria-Palestine and Iraq (Aug. 29, 1919), <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/392ad7eb00902a0c852570c000795153?OpenDocument&Highlight=2,king-crane>.

<sup>132</sup> Resolutions of the General Syrian Congress, *in* ANTONIUS, *supra* note 12, at 440, ¶ 7.

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understanding of Syrian territory.<sup>133</sup> This prevalent feeling of Palestine as part of Syria is further reinforced when one recalls that just a few months earlier, in March 1919, Feisal had written to Felix Frankfurter, then in Paris representing American Zionism at the Peace Conference, rejecting the suggestion that either Jewish nationalism or Arab nationalism was imperialist in nature and going on to state that “there is room in Syria for both of us.”<sup>134</sup>

Khalidi has suggested that the sense among Palestinian Arabs that theirs was a territory that was naturally part of a greater Syria was but a three year, context-specific aberration (between roughly 1917 and 1920),<sup>135</sup> but this view seems too unequivocal. While the events in Damascus were emblematic of the strong sense of pan-Arabism, and, more specifically, pan-Syrianism, that existed at the time, their effects would continue for some time thereafter, and the dominance of a pan-Syrian consciousness in the region would last well after France succeeded in wresting power from Feisal in 1920.<sup>136</sup> The Peel Report, for example, the most significant report on Palestine of the interwar years, reflected this in no uncertain terms when it was published in 1937. Stating that “Palestine had virtually dropped out of history,”<sup>137</sup> the Peel Report nonetheless recognized that Palestinian Arabs oriented both their territorial compass and national allegiance to Palestine as an integral part of Syria: “poor and neglected though it was, to the Arabs who lived in it Palestine -- or, more strictly speaking, Syria, of which Palestine had been a part since the days of Nebuchadnezzar -- was still their

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<sup>133</sup> See *id.* at 440, ¶ 8.

<sup>134</sup> Charles A. Selden, *Prince of Hedjaz Welcomes Zionists*, N.Y. TIMES, Mar. 5, 1919. Feisal’s memorandum to the Paris Peace Conference is a classic example of this plea for Arab unity. See Amir Faysal’s Memorandum to the Paris Peace Conference, Jan. 1, 1919, in 2 THE ARAB STATES AND THE ARAB LEAGUE: A DOCUMENTARY RECORD 302 (Muhammad Khalil ed., 1962).

<sup>135</sup> See RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS 162-75 (2010). See also As’ad Ghanem, *Palestinian Nationalism: An Overview*, 18(2) ISR. STUD. 11, 12-16 (2013).

<sup>136</sup> See JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 9-18 (1981). On the French bombardment of Damascus five years later, see Quincy Wright, *The Bombardment of Damascus*, 20(2) AM. J. INT’L L. 263 (1926).

<sup>137</sup> Peel Report, *supra* note 99, at 6.

country, their home, the land in which their people for centuries past had lived and left their graves.”<sup>138</sup>

Elsewhere in its report, the Peel Commission recognized that the Arabs of Palestine and Syria were bitter at the divorce that the Mandate system had imposed upon them and sought to reverse its coerced effects.<sup>139</sup> Chief Secretary of the Palestine Government John Hathorn Hall noted shortly after the Peel Report’s release that the idea of Palestine as part of the Arab world had been central to the Arabs since the beginning of the Palestine Mandate and that “[t]he Arab [. . .] was in the habit of referring to Palestine on political occasions as ‘Southern Syria’. The union of sentiment between Palestine and the rest of Arabia was strongly developed [before the uprising of 1936].”<sup>140</sup>

That the Peel Report articulated a shared sense of national identity among the Arabs of Palestine and Syria did not come as a surprise when the report was released in 1937. Indeed, the recognition of a shared sense of national identity formed the basis of much of the Recommendations of the King-Crane Commission with Regard to Syria-Palestine and Iraq in 1919 (King-Crane Recommendations).<sup>141</sup> The King-Crane Commission urged that any foreign administration of Syria-Palestine (as it tellingly referred to this geographical expanse) needed to conform with the spirit of article 22 of the Covenant and not be administered out of colonial ambition, that Syria-Palestine’s unity be upheld and not undermined in any way, that the Zionist project of Jewish statebuilding in Palestine be done away with, and that, ideally, a single power, the United States, administer Syria-Palestine as an undivided Mandate.<sup>142</sup> In stressing the need to uphold Syria-Palestine’s territorial integrity and the national imperatives of its Arab population, the King-Crane Recommendations did not make any fundamental distinctions within the Arab population, and one could reasonably have expected it to have done so had there been a discernible sense that groups within this larger Arab population, such as

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<sup>138</sup> *Id.* See *id.* at 25.

<sup>139</sup> See *id.* at 59. See also *id.* at 58-59.

<sup>140</sup> League of Nations, Permanent Mandates Commission, Minutes of the 32d (Extraordinary) Sess. (Aug. 6, 1937), <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/fdo5535118aefode052565ed0065ddf7?OpenDocument>.

<sup>141</sup> See King-Crane Recommendations, *supra* note 131.

<sup>142</sup> See *id.*

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the Arabs of Palestine, were separate nations. In Syria-Palestine, the Arab population’s “economic, geographic, racial and language unity [was] too manifest [. . .] The country is very largely Arab in language, culture, tradition, and customs.”<sup>143</sup> Unity along such lines hardly gives one reason to postulate a separate “peoplehood” for the Palestinian Arabs at the time.

Even after the King-Crane Commission’s concern not to compartmentalize the Arabs of Syria-Palestine had been jettisoned by subsequent events, Arabs would continue to admonish what they viewed as the arbitrary way in which the British and French had drawn the borders of their respective A Mandates in the Levant. Antonius, for example, reminded an audience at Chatham House in March 1934 that the land mass between the Taurus Mountains in the north and the Sinai Peninsula and Desert in the south and between the Mediterranean Sea in the west and the Syrian Desert in the east formed, historically, Syria, since the time of the Roman Empire.<sup>144</sup> The political difficulties that the Mandatories in the Levant were then experiencing were, according to him, a direct result of what he referred to as the Mandate system’s “dismemberment of Syria.”<sup>145</sup> Speaking for the people of historic Syria -- one can assume here that he was referring to the Arab population alone -- Antonius made the point as follows: “if I were to single out one point on which they were all united in discontent, I should say that it was the dismemberment of this rectangle of land, which is so obviously one from every point of view and which can only live and thrive by remaining one.”<sup>146</sup> He was quite clearly highlighting the unity of historic Syria as a political and national unit.

Antonius expanded upon this commonly-held view that Palestine was but a sub-region of Syria, and an indispensable one at that, in his celebrated work *The Arab Awakening: The Story of the Arab National Movement*, which was originally published in 1938.<sup>147</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> See George Antonius, *Syria and the French Mandate*, 13(4) INT’L AFF. 523, 523-25 (1934).

<sup>145</sup> *Id.* at 525.

<sup>146</sup> *Id.* at 526. Antonius went on to describe the “absurdity of having cut up this small territory into so many divisions.” *Id.*

<sup>147</sup> See also Lawrence’s colorful description of the peoples and geographies of Syria and its six main towns (Jerusalem, Homs, Aleppo, Damascus, Beirut, and Hama) at: T.E. LAWRENCE, *Syria: The Raw Material, in SECRET DESPATCHES FROM ARABIA AND OTHER WRITINGS* 101 (Malcolm Brown ed., 1991) (Arab Bulletin, Mar. 12, 1917, Fragmentary Notes Written Early in 1915, But Not Circulated).

Decrying the partition of Syria, he noted that Syria as a whole shared much in common economically, culturally, and historically -- indicative factors of distinct “peoplehood,” one will recall -- and that, “[i]n spite of the great diversity of its physical features, it was geographically one and formed a self-contained unit enclosed by well-defined natural frontiers.”<sup>148</sup> “In the Arab view,” Antonius put it, “Palestine was an Arab territory forming an integral part of Syria and, as such, was bound to remain in the area of Arab independence.”<sup>149</sup> The AHC made a similar point in July 1937 when it described “Arab Palestine and Arab Syria [as . . .] two areas which are linked by bonds of blood and culture which make them inherently one.”<sup>150</sup> In Jerusalem less than a decade later, the Arab Office would make a similar observation in evidence that it submitted to the Anglo-American Committee of Inquiry.<sup>151</sup>

Antonius, the AHC, and the Arab Office were far from alone in these views. The title of Arab historian Philip Hitti’s monumental *History of Syria Including Lebanon and Palestine* of 1951 is itself indicative. Hitti criticized the very idea and operation of separate British and French A Mandates in the Levant. For him, the existence of the Palestine Mandate meant that the “southern part of Syria [was] amputated.”<sup>152</sup> Writing about the possibility of union among the Arab States in 1943, he observed that Transjordan had a “Biblical name but no real historical existence.”<sup>153</sup> Sayegh’s careful and meticulous choice of words in his 1958 monograph *Arab Unity: Hope and Fulfillment* reflects the unfortunate sense in which the Arab nation had been “acted upon” from outside: “The western sector is geographical Syria, which in turn comprises the political entities which came to be known, after the First World War, as Palestine,

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<sup>148</sup> ANTONIUS, *supra* note 12, at 352.

<sup>149</sup> *Id.* at 284.

<sup>150</sup> Memorandum Submitted by the Arab Higher Committee to the Permanent Mandates Commission and the Secretary of State for the Colonies, July 23, 1937, at 9. Interestingly, Philby predicted that the Arab State of Palestine as proposed by the Peel Report would inevitably unite with Syria. *See* Philby, *supra* note 99, at 164.

<sup>151</sup> “Geographically Palestine is part of Syria; its indigenous inhabitants belong to the Syrian branch of the Arab family of nations; all their culture and tradition link them to the other Arab peoples; and until 1917 Palestine formed part of the Ottoman Empire which included also several of the Arab countries.” The Problem of Palestine, Evidence Submitted by the Arab Office, Jerusalem, to the Anglo-American Committee of Inquiry, March 1946, at 1 (1946).

<sup>152</sup> PHILIP K. HITTI, *HISTORY OF SYRIA INCLUDING LEBANON AND PALESTINE* 703 (1951).

<sup>153</sup> Philip K. Hitti, *The Possibility of Union Among the Arab States*, 48(4) AM. HIST. REV. 722, 727 (1943).

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Transjordan, the Republic of Lebanon and the Republic of Syria proper.”<sup>154</sup> Antonius’, Hitti’s, and Sayegh’s were but three of the most important Arab scholars’ observations of the intimate territorial relationship of Palestine, and its Arabs, within Syria. They were uncontroversial at the time.<sup>155</sup>

As this section has shown, to the extent that one can identify a predominant national orientation, one is led to conclude that Palestinian Arabs tended to project a pan-Arab, and, more specifically, pan-Syrian, sense of national identity during the greater part of the Palestine Mandate, and any distinct national identity for Palestinian Arabs *qua* Palestinian Arabs was, at best, *in statu nascendi* at the time. This sense of national identity continued through the UNSCOP deliberations in 1947 and the United Nations’ work on the question of Palestine up to the 1948 War. It is to these events that this paper now turns.

### **V.) The United Nations Special Committee on Palestine and the Drums of 1948**

1945 saw the Second World War draw to a close and the United Nations replace the League of Nations as the world’s foremost international organization. Two years later, head of the United Kingdom delegation to the United Nations Alexander Cadogan wrote to Victor Hoo, then Acting United Nations Secretary-General, about the Palestine question.<sup>156</sup> Cadogan promised an accounting of the United Kingdom’s administration of the Mandate and asked that the General Assembly make recommendations for Palestine pursuant to article 10 of the Charter.<sup>157</sup> The General Assembly responded by meeting in special session and endorsed the British request while expounding upon certain particulars.

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<sup>154</sup> SAYEGH, *supra* note 83, at 4 n.1.

<sup>155</sup> See DANIEL PIPES, GREATER SYRIA: THE HISTORY OF AN AMBITION 64-71 (1992).

<sup>156</sup> See 1946-47 U.N.Y.B. 276-77.

<sup>157</sup> See *id.* at 276. “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.” U.N. Charter art. 10. On the thinking behind the United Kingdom’s entreaty to the United Nations, see CONOR CRUISE O’BRIEN, THE SIEGE: THE SAGA OF ISRAEL AND ZIONISM 271-77 (1986).

Adopted on May 15, 1947, General Assembly Resolution 106 created the UNSCOP, a special committee that would “have the widest powers to ascertain and record facts, and to investigate all questions and issues relevant to the problem of Palestine.”<sup>158</sup> One of the most contentious issues during the drafting stage was the insistence by the Arab States that the UNSCOP not only be tasked with examining the situation in Palestine generally but that it also needed to focus particular attention on the “termination of the mandate over Palestine and the declaration of its independence.”<sup>159</sup> The Arab world had been united in this goal for some time, a point that the AHC made clear in its official reply to the United Kingdom’s White Paper of May 17, 1939:

“The Arab people have expressed their will and said their word in a loud and decisive manner, and they are certain that with God’s assistance they will reach the desired goal: PALESTINE SHALL BE INDEPENDENT WITHIN AN ARAB FEDERATION AND SHALL REMAIN FOREVER ARAB.”<sup>160</sup>

Although the General Assembly’s final text excluded this express language pointing to independence, in no sense did consideration of independence fall outside of the UNSCOP’s broadly-phrased terms of reference.<sup>161</sup> In fact, the UNSCOP’s Report to the General Assembly (UNSCOP Report) would call for the independence of Palestine, though, to the obvious frustration of the Arab States, as two States, one majority Jewish, one majority Arab, not one.

The UNSCOP conducted its work over several months on three continents (at Lake Success and in Palestine, Beirut, and Geneva).<sup>162</sup> It published its work in a five volume compendium in the autumn of 1947: volume one is the UNSCOP Report; volume two contains twenty-one annexes, an appendix, and maps; volumes three and four are the records of, respectively, the public and private hearings that UNCSOP held; and volume

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<sup>158</sup> G.A. Res. 106, at ¶ 2, U.N. Doc. A/RES/106 (May 15, 1947).

<sup>159</sup> 1946-47 U.N.Y.B. 277.

<sup>160</sup> Reply of the Arab Higher Committee for Palestine to the White Paper Issued by the British Government of May 17, 1939, at 15. On the United Kingdom’s White Paper of May 17, 1939, see Nevill Barbour, *The White Paper of 1939*, in FROM HAVEN TO CONQUEST: READINGS IN ZIONISM AND THE PALESTINE PROBLEM UNTIL 1948 461 (Walid Khalidi ed., 2005).

<sup>161</sup> On the drafting of what was to become Resolution 106, see UNSCOP Report, *supra* note 104, at 1-3; 1946-47 U.N.Y.B. 277-303. *See also* General Assembly, 1(3) INT’L ORG. 488, 488-91 (1947).

<sup>162</sup> *See* UNSCOP Report, *supra* note 104, at 3-9.

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five indexes the UNSCOP Report and its various annexes.<sup>163</sup> Apart from the UNSCOP Report’s obvious legal importance and the role that it played in sustaining the Peel Commission’s basic conclusion that partition was indeed the “least worst” option for Palestine, a close reading of the concerns that the AHC expressed in the General Assembly immediately prior to the founding of the UNSCOP and volumes two, three, and four of the UNSCOP’s work give one a clear sense of the national sentiments of Palestinian Arabs at the time. This material also reveals how internally divided the UNSCOP actually was and demonstrates the fundamentally divergent perspectives of the Jewish and Arab leaders who submitted evidence to the UNSCOP and the intimate bond of the Arabs of Palestine with the larger Arab world.

The UNSCOP began its work in May 1947 by reflecting upon the various proposals that had by that time been put forward with a view to settling the Palestine question. These included plans that had been suggested by commissions and the United Kingdom and proposals for a single Jewish or Arab State that had been put forward by, respectively, Jewish and Arab organizations.<sup>164</sup> At this initial stage of its work, the UNSCOP rejected plans that would have entrenched a single Jewish or Arab State in Palestine and, because they were viewed as unworkable, binational and cantonal alternatives.<sup>165</sup> It then proceeded by unanimously agreeing that the Palestine Mandate should end and that independence should be declared as soon as practicable, that a transitional period should take place between the end of the Mandate and full independence and that the administering authority during this time should be accountable to the United Nations and act on its behalf, that holy places and interests of a religious nature should be preserved and kept safe and accessible, that an international initiative should resolve the issue of displaced European Jews, that the new State or States in Palestine should be

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<sup>163</sup> See *id.*; United Nations Special Committee on Palestine, Report to the General Assembly: Volume II: Annexes, Appendix and Maps, U.N. Doc. A/364/Add.I (Sept. 9, 1947); United Nations Special Committee on Palestine, Report to the General Assembly: Volume III: Annex A: Oral Evidence Presented at Public Meetings, U.N. Doc. A/364/Add.2 (1947); United Nations Special Committee on Palestine, Report to the General Assembly: Volume IV: Annex B: Oral Evidence Presented at Private Meetings, U.N. Doc. A/364/Add.3 (1947); United Nations Special Committee on Palestine, Report to the General Assembly: Volume V: Index to the Report and Annexes, U.N. Doc. A/364/Add.4 (Oct. 9, 1947).

<sup>164</sup> See UNSCOP Report, *supra* note 104, at 39-41.

<sup>165</sup> See *id.* at 42.



democratic, dedicated to peaceful relations with other States, and protective of minority rights, that Palestine's economic unity should be preserved, that capitulations should cease, and that the population in Palestine should cooperate with the United Nations and refrain from violence.<sup>166</sup>

Of the UNSCOP's eleven members, Canada, Czechoslovakia, Guatemala, the Netherlands, Peru, Sweden, and Uruguay formed the majority supporting the partition of Palestine with economic union between the two proposed States.<sup>167</sup> The majority plan cast the conflict as a "clash of two intense nationalisms"<sup>168</sup> and contended that only by partition could "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."<sup>169</sup> Boundaries were set for the two proposed States,<sup>170</sup> and Jerusalem, given its religious and political significance, was to remain outside of the sovereign control of either State but within the economic union between the two States and was to be governed by an international civil servant appointed by the United Nations Trusteeship Council.<sup>171</sup>

India, Iran, and Yugoslavia formed the minority within the UNSCOP that supported a federal State solution.<sup>172</sup> Like the majority partition plan, the minority federal State plan cast the conflict as one of two nationalisms, but even though the UNSCOP minority shared this first principle with the UNSCOP majority, it took a fundamentally different approach to resolving the question of Palestine. Rather than proposing the partition of Palestine into a State with an Arab majority population and a State with a Jewish

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<sup>166</sup> See *id.* at 42-46. Guatemala and Uruguay were the only members of the UNSCOP that opposed a further recommendation to the effect that the UNSCOP's findings would not be considered a solution to what was described as "the Jewish problem in general." *Id.* at 46.

<sup>167</sup> See *id.* at 47-58.

<sup>168</sup> *Id.* at 47.

<sup>169</sup> *Id.* To the extent that they were meant in a legal sense, the words "peoples" and "nations" were not used here as carefully as they might have been. It is unclear whether the Arab "people[]" alluded to was meant to imply the existence of a discrete Palestinian Arab population in the sense of having an identity distinct from other Arab peoples; the use of the word "nations in the international community and in the United Nations" was likely meant to refer to the more juridically correct notion of "States."

<sup>170</sup> See *id.* at 53-56.

<sup>171</sup> See *id.* at 57-58.

<sup>172</sup> See *id.* at 59-64. Although serving on the UNSCOP, Australia refused to support either plan as a matter of principle. See Volume II, *supra* note 163, at 23.

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majority population, the UNSCOP minority argued that a federal plan would give the “most feasible recognition to the nationalistic aspirations of both Arabs and Jews, and [. . .] merge them into a single loyalty and patriotism which would find expression in an independent Palestine.”<sup>173</sup> Interestingly, in recommending a transitional period of at most three years to precede the creation of the proposed federal State of Palestine, the UNSCOP minority noted that independence was a right of the “peoples of Palestine.”<sup>174</sup> This suggests that the Jews and Arabs of Palestine were indeed distinct peoples, though it is important to recognize that this language does not as such imply that the Palestinian Arabs were a people distinct from the Arab people in the region at large. On the question of Jerusalem, the UNSCOP minority proposed that the city be administratively divided into two municipalities, with the Arab majority municipality to include the Old City and with both municipalities to together comprise the capital of Palestine.<sup>175</sup> An international commission was to be established to deal with the question of Jewish immigration to the Jewish sector of the proposed federal State, and such immigration would be permitted not as of right but, rather, on the basis of the “absorptive capacity of the Jewish state in the independent State of Palestine.”<sup>176</sup> In the end, the General Assembly adopted Resolution 181, which rejected the federal State solution and accepted the plan for partition, with the United Nations Palestine Commission being established to facilitate the transition to independence.<sup>177</sup>

The AHC refused to cooperate with the UNSCOP.<sup>178</sup> Like the Arab States, it had wanted the General Assembly to have facilitated the independence of Palestine as a matter of utmost urgency rather than establish the UNSCOP to examine the question of Palestine *de novo*.<sup>179</sup> Even though it did not cooperate with the UNSCOP, the AHC issued *The Palestine Arab Case* in April 1947, a statement in which it noted that “[n]either at that

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<sup>173</sup> UNSCOP Report, *supra* note 104, at 59.

<sup>174</sup> *Id.* at 60.

<sup>175</sup> *See id.* at 63.

<sup>176</sup> *Id.* at 64.

<sup>177</sup> *See* G.A. Res. 181, U.N. Doc. A/RES/181 (Nov. 29, 1947). On the UNSCOP and partition, see Henry Cattán, *Recollections on the United Nations Resolution to Partition Palestine*, 4 PAL. Y.B. INT’L L. 260 (1987); Nabil Elaraby, *Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements*, 33(1) LAW & CONTEMP. PROBS. 97, 97-103 (1968).

<sup>178</sup> *See* Volume II, *supra* note 163, at 5-6.

<sup>179</sup> *See id.* at 1-2.

juncture [i.e., the final days of the Ottoman Empire] nor before was Palestine a unit in itself.”<sup>180</sup> “In those days, the name ‘Palestine’ was never mentioned, nor was the country ever known by it. It was considered as a part of Syria from which, in fact, it was separated by no natural barriers whatever.”<sup>181</sup> The AHC continued by deliberately obfuscating any distinctions that might otherwise be said to exist between Syrians, Lebanese, and Palestinians as Arabs, characterizing them as being essentially cosmetic. They were all one, indistinguishable, “united by practically indissoluble commercial, agricultural and industrial relations, not to mention the equally close ties of language, interests, customs, traditions, religion and blood that bound them together.”<sup>182</sup> The Arab Office in London published a similar view in 1947, reaffirming the “profound national and historical unity”<sup>183</sup> of Syria, Lebanon, Palestine, and Transjordan and referring to Palestine (and its Arabs) as not being distinct as such but, rather, as merely being “part of the Arab world.”<sup>184</sup>

Although it did not cooperate with the UNSCOP, the AHC did express its views in the General Assembly during the debates prior to the UNSCOP’s creation, and these views are revealing. Henry Cattán, speaking for the AHC at the General Assembly’s first special session just a few days prior to the adoption of Resolution 106, decried that “our national patrimony [is] in danger.”<sup>185</sup> Cattán, one of the most eloquent and gifted Arab lawyers in Palestine at the time, went on to make the completely accurate and historically uncontroversial point that Palestine, as it then existed in 1947, had prior to the First World War been part of the Ottoman province of Syria.<sup>186</sup> The irony in this statement should not be lost. In arguing for the independence of Palestine as it then was as a geographical entity (with an Arab majority), Cattán was essentially arguing that what was by his own admission a small part (Palestine) of a larger geographical whole

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<sup>180</sup> The Palestine Arab Case: A Statement by The Arab Higher Committee (The Body Representing the Palestine Arabs) 4 (1947).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> ARAB OFFICE, THE FUTURE OF PALESTINE 3 (reprint 1976) (1947).

<sup>184</sup> *Id.* at 4.

<sup>185</sup> U.N. GAOR, U.N. Doc. A/C.1/PV.48 (May 7, 1947), <http://unispal.un.org/UNISPAL.NSF/o/1343338D30D39DCF85256E5C00578E01>.

<sup>186</sup> *See id.*

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(Syria) was entitled to independence while at the same time refusing to countenance the possibility of a Jewish State in even a small part of that small part.

The evidence that the Arab States gave before the UNSCOP indicates that they did not consider the Arabs of Palestine to be a distinct people. Indeed, Palestinian Arabs were portrayed as being part of the larger Arab whole, the larger Arab nation. Lebanon, representing the Arab States during the public phase of the UNSCOP’s oral hearings on July 22, 1947, spoke of the Zionist presence in Palestine as a foreign one intent on disturbing peace and human rights and portrayed it as that “method of pressing [. . .] claims on the basis of religious grounds and that theory of the lords of races who caused the most terrible war in history [i.e., the Second World War].”<sup>187</sup> An independent Jewish State in Palestine, Lebanon continued, could simply not be countenanced for political, economic, cultural, and ethnic reasons.<sup>188</sup> In other words, Jews did not have a colorable claim to Palestine in any juridical sense as a people and could only be accommodated as one would accommodate a religious or ethnic minority.

The oral evidence that the Arab States gave to the UNSCOP at its private hearings showed a clear fear of Zionism and an insistence that Palestine could not be anything other than Arab, both as an entity (in the juridical sense, as a State) and as a people (the Arabs (of Palestine), as a majority). Iraq reiterated the point that the AHC had made in *The Palestine Arab Case* that Palestine and Syria were indistinguishable. Palestine, according to Iraq, was “only the southern part of the whole of natural and historical Syria. Nationally, the indigenous people of Palestine are one and the same people as those of Syria, and culturally and nationally united with the rest of the Arab world.”<sup>189</sup> “Nationally,” in other words, the Arabs of Palestine and the Arabs of Syria were the same “people,” and in no sense could they be understood as being anything other than the same. At the same time that it dispelled any notion that Palestinian Arabs were distinct from their Arab brothers and sisters in the region, Iraq also denied the peoplehood of the Jews. Iraq further made the point that the nationalism of Palestinian

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<sup>187</sup> Volume III, *supra* note 163, at 241.

<sup>188</sup> *See id.* at 244.

<sup>189</sup> Volume IV, *supra* note 163, at 50.

Arabs was “directly connected with all the Arab world.”<sup>190</sup> A few minutes earlier, Iraqi representative Fadel Jamali expressly stated that the Arabs of Iraq and the Arabs of Palestine formed “one nation.”<sup>191</sup> As Jamali put it to the UNSCOP, “[w]e consider Moslems, Christians and Jews as Arabs. We consider them all Arabs, all Iraqis.”<sup>192</sup> While many Muslims and Christians would obviously identify themselves as Arab, few Jews, any more than Turks or Kurds, would do so, and to insist that Jews are Arabs is to also dispel the *raison d’être* of Zionism, that is, the national liberation movement of the Jewish people.

That these were the views of Iraq before the UNSCOP was hardly surprising, particularly given a very detailed memorandum explaining the Arab view that Iraqi General Nuri as-Sa’id had sent to the Rt. Hon. R.G. Casey, the British Minister of State in Cairo, just four years earlier. In that memorandum, Nuri stressed that Syria, Lebanon, Palestine, and Transjordan were “not distinguishable from each other.”<sup>193</sup> As he put it, Syria was one, though the Mandate system had temporarily divided it into two halves, a northern (French-controlled) half and a southern (British-controlled) half. Nuri referred to the Mandate for Syria and the Lebanon as “Northern Syria” and to the Palestine Mandate (including Transjordan) as “Southern Syria,” and Palestine was identified as one of Syria’s “integral part[s].”<sup>194</sup> To dispel the notion that nationalism in the Arab world could be sensibly understood as one might approach the question of national identity within the context of the European nation-State system, Nuri counseled his British colleague that nationalism in the Arab world was not confined to borders but, rather, transcended them.<sup>195</sup>

Unsurprisingly, Syria echoed the view that Palestine was but a geographical space within a larger Arab whole. As Syrian representative Emir Adel Arslan framed the issue in his evidence before the UNSCOP, the question of Palestine was, for Arabs, a question of

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<sup>190</sup> *Id.* at 55.

<sup>191</sup> *Id.* at 51.

<sup>192</sup> *Id.* at 34.

<sup>193</sup> NURI AS-SA’ID, ARAB INDEPENDENCE AND UNITY 1 (1943).

<sup>194</sup> *Id.* at 4.

<sup>195</sup> *See id.* at 8.

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“national dignity.”<sup>196</sup> This, of course, points to a notion of the nation, for Arabs, that quite clearly transcended the borders of Palestine as a geographical space and makes it difficult to conclude that Palestinian Arabs existed as a people in the juridical sense except as mediated through Arabs outside of the Palestine Mandate. Less than three months earlier, Syria had made the point in the General Assembly that Syria was the “motherland of Palestine”<sup>197</sup> and that, based upon historical, geographical, religious, and racial links, “[t]here is no distinction whatever between the [Arab] Palestinians and the Syrians.”<sup>198</sup> The similarity between the Arab view before the UNSCOP and Prime Minister Meir’s as cited at the beginning of this paper on the question of Palestinian Arab national identity could not be clearer.

Lebanon, again representing the Arab States, spoke before the UNSCOP on July 23, 1947. In response to a question about the viability of a Jewish State in Palestine, Foreign Minister Hamid Frangie denied that such a State would or could be viable. This was so, according to Frangie, because “[t]he surrounding Arab countries would never accept surrendering part of their territory for the creation of a Jewish State.”<sup>199</sup> Clearly, this reflects a view of Palestine as Arab patrimony, Palestine as as much a part of the Arab world, Arab territory, as the independent Arab States in the region were at the time. As Syria would put it just a few minutes later in the General Assembly, a Jewish State in all or part of Palestine would violate not the rights of the Palestinian Arabs as a people as such but, rather, the rights of the Arab States, “their rights, their aspirations, and their interests.”<sup>200</sup>

In light of the fact that the Arab States were unanimous in their evidence before the UNSCOP that they did not consider the Arabs of Palestine to be a distinct people and considering that the general tenor of the AHC’s statements at the time are consistent

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<sup>196</sup> Volume IV, *supra* note 163, at 40. “All the Arab States consider that the establishment of the Jewish State in Palestine would constitute a violation of their rights, their aspirations, and their interests. Therefore it would be difficult, first of all, for them not to defend themselves, and further, to prevent an even more violent movement being the reaction.” *Id.* at 41.

<sup>197</sup> U.N. GAOR, U.N. Doc. A/PV.78 (May 14, 1947), <http://unispal.un.org/UNISPAL.NSF/o/0505FD58B778B90B852571D4004BF3E9>.

<sup>198</sup> *Id.*

<sup>199</sup> Volume IV, *supra* note 163, at 37.

<sup>200</sup> *Id.* at 41.

with this sense of Arab national identity, it is difficult to understand the following sentence, inserted without deep explanation, in the UNSCOP Report: “Palestinian nationalism, as distinct from Arab nationalism, is itself a relatively new phenomenon, which appeared only after the division of the ‘Arab rectangle’ by the settlement of the First World War.”<sup>201</sup> Firstly, the use of the word “Palestinian” to describe any type of “nationalism” during the Mandate is itself misleading given that Jews and Arabs in Palestine were both “Palestinian.”<sup>202</sup> This sentence in the UNSCOP Report could conceivably be interpreted to mean that there was no discernible sense of nationalism of any sort among Palestinian Arabs prior to the Mandate. On this view, there would also clearly have been no sense of distinct national identity for Palestinian Arabs *qua* Palestinian Arabs at the time. Alami takes this view a step further in arguing that, as 1947 led to 1948 and ensuing armed conflict between the Jewish State and its Arab neighbors, Palestinian Arabs only managed to organize themselves locally and without unity, with no general command structure or group effort,<sup>203</sup> hardly a convincing manifestation of a distinctly Palestinian Arab national identity or indicative of what

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<sup>201</sup> UNSCOP Report, *supra* note 104, at 34.

<sup>202</sup> Needless to say, these groups had no discernible sense of shared Palestinian national identity. See Peel Report, *supra* note 99, at 120 (arguing that “[i]t is time, surely, that Palestinian ‘citizenship’ also should be recognized as what it is, as nothing but a legal formula devoid of moral meaning”).

<sup>203</sup> See Alami, *supra* note 79, at 374. Similarly, Nasser’s lament at Cairo’s Officers’ Club in late-April 1959 criticized the Arab States that had intervened in Palestine for “not [being] under the unified flag of Arab nationalism, but torn by internal feuds, jealousies and rancour. We were seven armies fighting in Palestine under 6 or 7 different and separate commands. The great tragedy which befell the Arab nation was a direct result of the jealous ambitions between the different commands.” Speech by President J. ‘Abd an-Nasir at the Officers’ Club, Cairo, Apr. 25, 1959, *in* 2 THE ARAB STATES AND THE ARAB LEAGUE, *supra* note 134, at 975, 977. Karsh argues that Palestinian Arab society collapsed at this time due to its “total lack of national cohesion or willingness to subordinate personal interest to the general good [. . .] There was no sense of an overarching mutual interest or shared destiny. Cities and towns acted as if they were self-contained units, attending to their own needs and eschewing the smallest sacrifice on behalf of other localities.” EFRAIM KARSH, PALESTINE BETRAYED 239-40 (2011). See Efraim Karsh, *The Myth of Palestinian Centrality*, at 10-15 (Begin-Sadat Center for Strategic Studies Mideast Security and Policy Studies No. 108, 2014). See also Benny Morris: “The 1948 War Was an Islamic Holy War,” 17(3) MID. E. Q. 63, 68-69 (2010) (as regards 1948, noting that “[n]ational political awareness was then quite weak among the Palestinians, and this casts much doubt indeed on the credibility of the concept of the ‘Palestinian people’ in 1948. This was hardly something clear or palpable then, but it took hold later”). For a somewhat broader historical perspective, consider Lawrence’s view, written early in 1915. See LAWRENCE, *supra* note 147, at 107 (Arab Bulletin, Mar. 12, 1917, Fragmentary Notes Written Early in 1915, But Not Circulated) (stating that “[t]here is no national feeling [in Syria, understanding Syria, as Lawrence did, as including the six main towns of Jerusalem, Homs, Aleppo, Damascus, Beirut, and Hama]. Between town and town, village and village, family and family, creed and creed, exist intimate jealousies, sedulously fostered by the Turks to render a spontaneous union impossible. The largest indigenous political entity in settled Syria is only the village under its sheikh, and in patriarchal Syria the tribe under its chief”).

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Crossman refers to as the quintessential test of “nationhood”: “war. The community must show that it is worthy of nationhood by fighting for its existence, even when the chances of survival are small.”<sup>204</sup> Even if one accepts the accuracy of the aforementioned sentence in the UNSCOP Report, it should be recognized that it does not imply that Palestinian Arabs identified themselves primarily as Palestinian Arabs, that is, that they identified themselves as Palestinian Arabs more than they did as part of the larger pan-Arab, and, more specifically, pan-Syrian, nation (if nationalism is itself an appropriate concept in this context). On balance, one should approach this isolated sentence with a degree of skepticism.<sup>205</sup>

### **VI.) Conclusion**

Writing in the wake of the rebirth of the Jewish State and the defeat of the Arabs, Alami observed that “[t]he people are in great need of a ‘myth’ to fill their consciousness and imagination: a myth of which they dream in times of peace and in times of trouble, because it gives their life meaning and gives them self-respect and freedom.”<sup>206</sup> Nationalism, or, more specifically, a group’s sense that it possesses a distinct national identity, can indeed serve a “mythic” function. Whether understood as “national consciousness”<sup>207</sup> or “entity-consciousness,”<sup>208</sup> a group’s sense of distinct national identity often reflects a yearning for a form of personality and recognition on the international plane. While a group purporting to be a “people” is free to claim, *proprio motu*, its “peoplehood,” international law will not recognize it as such absent the

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<sup>204</sup> RICHARD H.S. CROSSMAN, A NATION REBORN: A PERSONAL REPORT ON THE ROLES PLAYED BY WEIZMANN, BEVIN AND BEN-GURION IN THE STORY OF ISRAEL 86 (1960).

<sup>205</sup> Also not to be overlooked is the following observation by United Nations Mediator in Palestine Count Folke Bernadotte, shortly before his assassination in September 1948: “The Palestine Arabs have at present no will of their own. Neither have they ever developed any specifically Palestinian nationalism. The demand for a separate Arab State in Palestine is consequently relatively weak. It would seem as though in existing circumstances most of the Palestinian Arabs would be quite content to be incorporated in Transjordan.” FOLKE BERNADOTTE, TO JERUSALEM 113 (Joan Bulman trans., 1951).

<sup>206</sup> Alami, *supra* note 79, at 396.

<sup>207</sup> Leo Pinsker, *Auto-Emancipation: An Appeal to His People by a Russian Jew (1882)*, in THE ZIONIST IDEA, *supra* note 73, at 181, 189.

<sup>208</sup> KHALIDI, *supra* note 135, at 172.



international community's ratification of this claim. It is the merger of subjective belief and objective verification that a "people" makes.<sup>209</sup>

The Mandate system was an administrative arrangement peculiar to the interwar years. As this paper has attempted to show by reference to the terms of the Palestine Mandate and an appreciation for geopolitical developments and the official statements of Arab leaders and scholars at the time, the Mandate years saw little in the way of a distinct national identity for Palestinian Arabs *qua* Palestinian Arabs. This conclusion is further supported by evidence that States gave to the UNSCOP in 1947 and the United Nations' work on the question of Palestine up to the 1948 War. It seems reasonable to conclude, more or less, that the Mandate years were a period in which Palestinian Arabs' national identity was primarily pan-Arab, and, more specifically, pan-Syrian, in orientation. The next almost three decade period, between the 1948 War and the 1973 War, would see little change in this regard, though this same period would witness, in 1973, the introduction of a negotiation paradigm.<sup>210</sup>

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<sup>209</sup> Dinstein defines the subjective element as an existing state of mind or ethos and the objective element as the existence of an ethnic group with links of a common history. See Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25(1) INT'L & COMP. L.Q. 102, 104 (1976). See also Afr. Comm'n Hum. & Peoples' Rts., Kevin Mgwanga Gunme et al. v. Cameroon, at ¶ 179, No. 266/03 (2009); Tal Becker, *Self-Determination in Perspective: Palestinian Claims to Statehood and the Realty of the Right to Self-Determination*, 32(2) ISR. L. REV. 301, 326-27 (1998). It is useful to compare this with Skordas' conception of the "self," which he frames as the "clash between the existential political will of the group exercising the *pouvoir constituant*, and the negative or positive response of the various actors of the international community, that leads to the recognition or non-recognition of the self-determination unit or the new state." Achilles Skordas, *Self-Determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance*, in TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS 207, 209 (Nicholas Tsagourias ed., 2007).

<sup>210</sup> See S.C. Res. 338, at ¶ 3, U.N. Doc. S/RES/338 (Oct. 22, 1973) ("*Decides* that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East").

