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Self-Determination and the Palestinians

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SECOND SESSION

Thursday, April 29, 1971, at 2:15 p.m.

Self-Determination and Settlement of the Arab-Israeli Conflict

The session convened at 2:15 o'clock p.m. in the Presidential Ballroom of the Statler-Hilton Hotel, Ambassador Charles W. Yost, former United States representative to the United Nations, now of Columbia University, presiding. Ambassador Yost introduced the speakers, Professor M. Cherif Bassiouni of DePaul University, and Professor Leslie C. Green of the University of Alberta.

"SELF-DETERMINATION" AND THE PALESTINIANS

By M. C. Bassiouni *

"SELF-DETERMINATION" AS A GENERAL PRINCIPLE OF INTERNATIONAL LAW: HISTORICAL EVOLUTION AND RECOGNITION

The right of "self-determination" is the product of an evolutionary process which does not owe its existence to the grace of history, but developed in spite of it. Its manifestations were varied and diverse. At times, it was an exercise of community behavioral auto-determination, as in the case of the Greek *Polis* and the city-state, soon to evolve, in a different way with the propagation of Judaism, Christianity and Islam. The focus then was on a widening of the individual moral choice, but which, when exercised collectively, was "self-determination." The religious wars between Christian sects were predicated on a right of "self-determination" as recorded in such early treaties as the Treaty of Westphalia (1648).

The separation of Church and State and the emergence of doctrines of political freedom of choice resulted in writings and declarations concerning the rights of man. They caused the ideological struggle to move gradually from the religious to the political sphere, even though the distinction is immaterial in this context.

The successive wave of human thought and events which advanced the notion of collective "self-determination" started amidst theories of political freedom and socio-economic justice. The emergence of choice of government doctrines and popular representation in the decision-making process of states was but the start, soon to be followed by notions of popular representation and constitutional control of the organs of power. All of these remained in the sphere of individual freedom of choice and did not rise to the level of the right of "self-determination." It was not until the "people" had state-making power that the right of "self-determination" was manifest. Not every group, however, constitutes a "people": "Only

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that group of individuals who feel commonly bound by certain factors of some permanency, and whose collective behavior reveals that they share certain value-oriented goals which they are desirous of implementing."

These "commonly binding factors of some permanency" have not always been the same, but any known community was invariably predicated on any one or a combination of the following factors: religion, race, culture, language and political ideology. Nationalism invariably consisted of a combination of these factors, but nations seldom consist of a cohesive group linked by identical factors. Whenever sufficient commonly binding factors gave rise to a nationalistic concept, the latter in turn generated its own "common binding factors." The grouping of diverse "collectivities" into a single political entity, *i.e.*, a state, presupposes the existence of "*socio-economic-political structures capable of allowing the co-existing pursuit of whatever ideological differences are combined under that umbrella.*"

The advent of the League of Nations saw the application of the principle of "self-determination" to "nationalities" as a question of minorities' rights—a theme which the United Nations subsequently pursued as one of human rights. History reveals, however, that, whether religious or political, "self-determination" is the framework of a value-oriented inquiry.

Unfulfilled declarations on "self-determination" were numerous between 1914 and 1945. The notion was used as a pretext for Germany to invade Czechoslovakia and as a basis for the victorious allies to decide the fate of Europe in the Declarations of Yalta and Potsdam. "Self-determination" was announced in 1945 as a policy of the United States in keeping with the Wilson Doctrine and proclaimed to be a policy principle of many a nation, among which were Western European countries that continued their colonial policies and practices undaunted by this proclaimed right. It was stated as an objective of NATO by its member states and heralded at San Francisco, to be finally enshrined in the United Nations Charter. Indeed, Articles 1(2) and 55 of the Charter state it explicitly, while Chapters XI, XII, and XIII, on non-self-governing territories and the trusteeship system, embody it in spirit, and their provisions designated *inter alia* to attain that goal. The International Covenant on Civil and Political Rights explicitly states: "All peoples have the right of self-determination: By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development . . . [and] freely dispose of their natural wealth and resources." All of which ultimately evidences the recognition attained by this principle, even though it is still not undisputed.

History clearly reveals a consistent trend of still growing acceptance by the common morality of mankind of "self-determination" as a general principle of international law. This is clearly evidenced by the recognition given thereto in treaties, declarations, public pronouncements by state officials, writings of scholars and its embodiment in the United Nations Charter. The actual practice of states, particularly colonial and neo-colonial states, does not demonstrate that the right, though recog-

nized in principle, has been applied voluntarily or consistently. It is certainly conceded that "self-determination" is not part of customary international law, since the custom and usage of member states of the world community do not evidence it by their practice. If that were the case, however, and "self-determination" were practiced as a customary matter, the question of its existence would be moot in light of the challenges it still meets.

The prolific history of General Assembly resolutions has certainly exhibited a recurring and confirmed adherence to the principle by those states who voted for these resolutions. Considering, therefore, the law and practice of the United Nations and the previous history of "self-determination," as a right to exercise collective behavioral freedom of choice, the conclusion is warranted that it is a general principle of international law recognized by the world community even though not always applied.

Nature of the Right

"Self-determination" is a catch-all concept which exists as a principle, develops into a right under certain circumstances, unfolds as a process and results in a remedy. As an abstract principle it can be enunciated without reference to a specific context; as a right it is operative only in a relative context, and as a remedy, its equitable application is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate.

"Self-determination" becomes a right whenever: a given collectivity is prevented or seriously impeded from freely adhering to or exercising its values, beliefs and practices on the indigenous territory which they inhabit (or from which have been removed) by another collectivity by coercive means.

The inarticulate premise of that right is the existence of conflicting value-oriented beliefs and practices of two (or more) collectivities on a given territory where the "socio-economic-political structures do not permit the relatively unimpeded co-existing pursuit" of these divergent beliefs and practices.

The right of self-determination is, therefore, born out of conflict between two collectivities who have opposing ideological contentions and the implication is that, whenever such a conflict arises but is not channeled through "structures permitting their relatively unimpeded co-existing pursuit" on that territory, then "self-determination" becomes: (a) the *right* relied upon by the oppressed group, and (b) the *resolutive* norm which grants the non-dominant party the choice of an uncoerced determination.

A cursory review of the types of issues in which the right was invoked reveals that it was claimed as a basis for the following: as a right to internal revolution—as grounds for cessation—as a claim for unification of peoples—as a claim for unification of people and territory—as a claim for choice of state affiliation—as minorities' rights—as means for acquisition of territory—as a human right. Whatever the claim relied upon, there are invariably two co-existing interrelated factors: *people and territory*.

A central question remains to be answered with respect to the nature of such a right: Is it a peoples' right or is it a territorial right exercisable by those within its confines? In the abstract, people determine their goals regardless of geographic limitations; however, realistically, it is exercisable only when it can be actuated within a given territory susceptible of acquiring the characteristics of sovereignty which is a prerequisite for acquiring membership in the community of nations.

*Palestine and the Palestinians: A People and Its Territory **

The area known as Palestine is bordered by the Mediterranean on the east, the Jordan River on the west, the Golan Mountains and the Sea of Galilee on the north, and the Negev and Sinai Deserts on the south. The Palestinians are descendants of Abraham, Semites by race, who have continuously inhabited that same area known as Palestine since time immemorial. Since 1948, after the creation of the state of Israel on that territory, they are living in forced exile.

Ever since 634, Semitic Arabs incorporated that region in the Islamic nation after defeating the Roman occupiers who in 70 A.D. had expelled the Jews. Few Jews had remained on that land since the Diaspora, but not all the inhabitants were Jews and not all Jews left Palestine. When the Arabs drove the Romans out of Palestine, they rescinded the decree of banishment from Jerusalem, but few Jews returned until the nineteenth century.

The territory and population of Palestine had always remained an identifiable entity from either the Roman Empire, the Islamic nation, or the Turkish Ottoman Empire. When the Turks were driven out of Palestine during World War I by Arab and British forces, England established, with the help of the League of Nations, a colonial regime in Palestine. The mandate system, even considering that it was a colonial device, spoke of the "provisionally independent state of Palestine," thus further underlining the identifiable character of the territory and its inhabitants. The mandate system was predicated on the existence of a Palestinian entity which, under the mandatory's administration, was to acquire complete independence. The administration of Palestine under the mandate reinforced that fact through the establishment of legislative, executive and judicial bodies. Palestine had a flag, its nationals carried passports recognized abroad. In effect, with the exception of foreign affairs and subject to the internal limitations imposed by Great Britain which exercised it in the same manner as it had in Egypt or India, Palestine had most of the characteristics of a state.

After 1947-48, the Palestinians, however, ceased to be a "people" and

* The ideas and figures presented in this section have been introduced in Bassiouni, "The 'Middle East': The Misunderstood Conflict," 19 Kansas Law Rev. 373 (1971). See also, Bassiouni and Fisher, "The Arab-Israeli Conflict—Real and Apparent Issues: An Insight into its Future from the Lessons of the Past," 44 St. John's Law Rev. 399 (1970); Bassiouni, "Some Legal Aspects of the Arab-Israeli Conflict," in *The Arab Israeli Confrontation of June 1967* (ed. I. ABU-Lughod, 1970); *idem*, "The Middle-East in Transition: From War to War, A Proposed Solution," 4 Int. Law 379 (1970).

became refugees just as Palestine ceased to exist as an identifiable region. Between 1948 and 1969, Palestinians were almost uniformly treated as "refugees." Even the United Nations in its oft-reaffirmed resolution of 1948 (Res. 194) granting the "refugees" a right to return to their former homeland and to compensation for their lost property never admitted to the reality that these refugees constitute a "people."

As further evidence of the continued misunderstanding of the United Nations' perception of the nature of the problem is Resolution 242 of November, 1967, wherein the Security Council referring to the Palestinians stated: "2. Affirms further the necessity . . . (b) for achieving a just settlement of the *refugee problem* . . ." [Emphasis added.] The Palestinian people rated one line and the dignified label of "refugee problem." It was not until December, 1969, that a General Assembly resolution finally recognized for the first time the Palestinian people as a fact and spoke of the "*inalienable rights of the Palestinian people*."¹

THE DEMOGRAPHIC CONTEXT OF THE RIGHT OF SELF-DETERMINATION IN PALESTINE AND THE UNITED NATIONS

At the time Lord Balfour responded to a letter from Baron Rothschild in 1917, the population of Palestine was approximately 90 percent non-Jewish. The Balfour Declaration, mindful of the Arab character of Palestine, promised to facilitate the establishment of a "National Jewish Homeland in *Palestine*" [emphasis added] to Jews willing to immigrate there, but sought to safeguard the rights of the Arabs and did so in these terms:

It being clearly understood that nothing shall be done which may prejudice the civil and religious rights of non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

A Jewish national home was contemplated then by all parties concerned as the establishment of a Jewish minority, endowed with the right to pursue its religious and cultural heritage in freedom and peace. The outcome was to be quite different. Immigration quotas were imposed by the colonial Power (Great Britain), then increased by political pressure from Zionists and sympathizers as well as anti-Semites who saw in the contemplated "National Jewish Homeland" a way to rid themselves of Jewish minorities. Great Britain never entertained the notion that Jewish immigration could be allowed against the will of the Arab inhabitants, and when it reached such proportions as to change the Arab character of Palestine it declared in 1939 that the entire population ratio was to be kept at the level it had reached of one third Jewish and two thirds non-Jewish Arabs. By 1947, after an onslaught of post-World-War-II illegal immigration, the Jewish population was estimated at about 700,000 to an estimated 900,000 non-Jewish Arabs. In some twenty-five years, Arabs who had constituted 90 percent of the people of Palestine became barely some 55 percent, even though they still owned over 80 percent of the land and

¹ Res. 2535 (XXIV), U.N. General Assembly, 24th Sess., Official Records, Supp. No. 40.

most of its commerce and industry. Arab sources consider, however, these estimates to be inflated.

Consider two factors: (1) the demographic transformation was imposed by a foreign colonial Power, Great Britain, and abused by illegal immigration, and (2) the process of determining the will of the "people" was based on an estimated head count of those who were physically present in Palestine without distinction as to the juridical status of those persons (who could have been immigrants, deportable aliens, tourists, foreign citizens and nationals). Notwithstanding these two factors, the United Nations decreed the partition of Palestine into a Jewish and an Arab state. The Jewish state was given approximately 56 percent of the territory of Palestine, soon to be enlarged after the 1948 war to include another 23 percent of Palestine (of that portion of Palestine which the Partition Plan had allotted to the contemplated Palestinian Arab State).

The United Nations considered in the formulation of the Partition Plan two factors: (a) The inhabitants of Palestine could no longer coexist in peace; (b) There was roughly a 55 percent to 45 percent ratio between Jews and non-Jews in Palestine. On this basis, the United Nations could be said to have adhered to some form of self-determination when it imposed its Solomonian justice of splitting the territory roughly in two halves for what in its judgment represented approximately an equal number of persons who belonged to the two opposing collectivities. The United Nations further added the subsequent caveat of the right of the Palestinians to return in peace to where they had lived (if it had become part of the territory allotted the Jewish state), if they desired, and in any event to be compensated for their property.

The fallacy in that approach to the right of self-determination lies in that not all individuals or collectivities have a right of self-determination on any territory of their choice; only those people who have a legitimate right to a given territory can exercise it on that same territory. The right of self-determination accrues to a given people on a given territory with which they have a legitimate "link" and upon which their future political expectations can be realized. Therefore, some legitimate criteria for the determination of those who constitute this group called "people" and their relationship to the territory must be established. The test proposed is the existence of a "link" or "rational nexus" between the people and the territory, and this can be ascertained by a criterion of nationality (in applicable cases).

It is estimated that over one half of the 700,000 persons of the Jewish faith present in Palestine in 1947 who were estimated to constitute some 45 percent of the entire population of Palestine were not Palestinian nationals. Palestinian nationality did exist and was so recorded on official documents, including passports which were issued only to nationals. Assuming the validity of the estimate that one half of that group or approximately 350,000 were Palestinian nationals, then approximately one third of the entire population dictated the outcome of the future of Palestine against the express will of two thirds of the remaining nationals, which vitiates the argument that the partition was predicated on a modicum of

self-determination. This assertion is predicated, however, on the choice of a nationality criterion for the exercise of the right of self-determination and a majoritarian rule as the valid process.

The partition, in effect, foreclosed the Palestinians' right of self-determination by including in the category of "people" eligible to exercise it, persons who did not qualify under the nationality criterion. This criterion is obviously not the only one which could be devised, but certainly physical presence alone would not suffice either. It is advanced that a "right" of self-determination for the Israelis exists and is equal in dignity to the Palestinians' "right." This also presupposes that equal "rights" spring from equally legitimate sources. The Palestinians' claim that they are a "people" linked to that territory upon which they are entitled to exercise their right of self-determination, but that people of the Jewish faith cannot make an equally strong claim. Israel rather argues historical legitimacy, but in fact seeks to trade its military supremacy for recognition by treaty which would give it a color of legitimacy by condonation and foreclose any subsequent Palestinian claims predicated on "self-determination" at the state-making stage of its own creation. That is why the Palestinians claim that the exercise of the right of "self-determination" in Palestine is restricted to the population of Palestine prior to its radical demographic transformation between 1922 and 1947. They maintain that the mandate system and its successor, the trusteeship system of the United Nations, did not envision or permit a trust territory to be so administered by a trustee as to allow an imposed or forceful demographic transformation designed to alter the indigenous character of that territory and remove its original inhabitants. For the United Nations to act on the basis of imposed conditions (unauthorized foreign immigration) is in manifest derogation of its obligations to the original indigenous population and their legitimate rights to the protection of which it is pledged as a "sacred trust of civilization."

The right of self-determination in this case should have been considered by the General Assembly when it decided on partition to be in accordance with legitimate criteria determined by the rights and obligations arising out of the trusteeship system and its stated purposes to which it was morally and legally bound. That, it did not do. But in 1970, recognizing the existence of the Palestinian peoples' right to self-determination, it passed the following resolution.

Recognizing that the problem of the Palestinian Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights,

Recalling its resolution 2535B (XXIV) of 10 December 1969, in which it reaffirmed the inalienable rights of the people of Palestine,

Bearing in mind the principle of equal rights and self-determination of peoples enshrined in Articles 1 and 55 of the Charter of the United Nations and more recently affirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,²

² Res. 2625 (XXV), U.N. General Assembly, 25th Sess., Official Records, Supp. No. 40 (A/8013), p. 30.

1. *Recognizes* that the people of Palestine are entitled to equal rights and self-determination in accordance with the Charter of the United Nations;

2. Declares that full respect for the inalienable rights of the people of Palestine is an indispensable element in the establishment of a just and lasting peace in the Middle East.³

APPLICATION OF THE RIGHT OF SELF-DETERMINATION TO THE
PALESTINIANS AND THE RELATIONSHIP BETWEEN
"PEOPLE" AND "TERRITORY"

The right of self-determination as stated above presupposes the existence of two interrelated factors: *people and territory*. The Palestinians are no longer physically present on the territory on which they claim they once had a right of self-determination. The two elements of territory and population have been severed by the coercive displacement of the Palestinian population from that territory. Does that fact extinguish the right? It must be noted that what is claimed by the Palestinians is not a right of "self-determination" arising only in the present or after their displacement in 1948 from Palestine, but a right which existed at the time the mandate was established and never terminated. The main tenet of this position is that legitimate rights such as "self-determination" are not extinguishable by the coercive displacement (or preventing the return) of the "people" from the "territory" after the right has accrued to this very "people" on that very territory.

This proposition, therefore, rejects a post-1948 right of self-determination which would link the Palestinian people to territory other than that which Israel carved out of original Palestine. This is the position of the Palestine Liberation Organization which was expressed in Article 6 of the 1968 Palestinian National Covenant: "Jews who were living permanently in Palestine until the beginning of the Zionist invasion will be considered Palestinians."

1923 was chosen as the cut-off year by the P.L.O., because in their opinion it is the commencement of the Zionist invasion. That cut-off date is, however, debatable since Palestinian Arab representatives agreed in the ensuing years to an immigration quota which allowed for the lawful entry of many European Jews.

The population of Palestine, which under this argument would constitute the "Palestinian people" entitled to the exercise of "self-determination," is estimated to be one third Jewish and all that must be taken into account. Assuming the validity of the proposition that one third of the population consisted of Jews eligible to choose partition, the Partition Plan as it relates to territorial apportionment is also defenseless, as it gave the Jewish state 56 percent of the territory of Palestine.

What, then, is the remedy for a "people" whose right of "self-determination" was violated? A right to return—this was indeed established by United Nations General Assembly resolution but never enforced.

³ Res. 2672 C (XXV), *ibid.*, p. 4, Dec. 8, 1970.

CONCLUSION

The Palestinians are a people whose right of "self-determination" has been violated. The Palestine Liberation Organization proposes a political solution: *The establishment in Palestine of a secular, democratic, progressive society without distinction or discrimination as between Jews, Christians, and Muslims.* This is rejected by Israel, which continues to be essentially a creature of world Zionism, designed to maintain its exclusivist character for the alleged benefit of world Jewry. The two diverse collectivities (Jewish and non-Jewish) maintain opposing and conflicting ideologies and are not likely to be reconciled without the transformation of the "socio-economic-political structures" of Israel "to allow for the peaceful coexisting pursuit" of the views of these two collectivities. Interestingly enough, all of Palestine and half of the Palestinian people are now under Israeli control. If Israel were *not* to return the West Bank and Gaza to Jordan and Egypt and the Palestinians living thereon would remain on these territories, their original claim to "self-determination" would end. Only two issues would remain pending: (1) the right of return for the balance of the Palestinians, and (2) guarantees of implementing human rights available under international law to the Palestinians residing in Israel-Palestine.

Most writers and political pundits assume that the West Bank and Gaza must or will be returned to Jordan and Egypt and some speak of a separate Palestinian state on these territories. Considering that the Palestinians are not parties to the Jarring talks and that they are not parties to Resolution 242, only Jordan and Egypt can be the recipients of these territories if and when they are to be returned by Israel. Several worthwhile plans have been submitted and discussed concerning the establishment of a Palestinian state, an Israeli-Palestinian commonwealth as proposed by Professor Gottlieb, or a Sinai-Gaza trusteeship by Professor Reisman. These proposals ignore the reality that Israel controls these territories and will relinquish them in whole or in part only to states, Egypt and Jordan, in exchange for whatever *quid pro quo* they may secure. Israel will not create a Palestinian state, and it is my estimate that neither will Jordan or Egypt. That leaves the Palestinians themselves, who are not, in my opinion, in a position nor are they willing to establish a state on either or both of the territories in question. The next best thing to a protracted guerrilla war may well be if Israel would not return the West Bank and Gaza and if the United Nations would cause Israel to return the remainder of the Palestinians, Israel would then become a pluralistic society, and, with equal rights in this pluralistic society to all, Jews and non-Jews, the present conflict would be resolved.

The "right of self-determination" would be implemented by a return of all Palestinians to what was their homeland. The only issue would be whether Israel would establish a democratic pluralistic society.

Hope more than realism leads me to assert that even if Palestinians would not at first be equal to Israeli Jews, it would be a matter of time