

1-1-2007

International Law and Legitimacy and the Palestine Question

Rashid Khalidi

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Rashid Khalidi, *International Law and Legitimacy and the Palestine Question*, 30 HASTINGS INT'L & COMP. L. REV. 173 (2007).
Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol30/iss2/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Mr. Khalidi delivered the following speech at the Fourth Annual Rudolf B. Schlesinger Memorial Lecture at the University of California, Hastings College of the Law on October 25, 2006.

International Law and Legitimacy and the Palestine Question

By RASHID KHALIDI

It is a great honor to be invited to give the Fourth Annual Rudolf B. Schlesinger Memorial Lecture at the University of California, Hastings College of the Law. It is a particular honor, inasmuch as I am neither a practitioner of the law, nor an expert of any kind in regard to legal matters. My daughter is a law student, however, for what that is worth! That non sequitur aside, what I propose to speak about today is not international law per se, but rather something I do know something about, specifically aspects of the history of how international law and the growing 20th century framework of international legitimacy emerging from the League of Nations and the United Nations have intersected with the issue of Palestine over the past century or so.

My interest in this topic grew out of the research I began over a decade ago for my just-published book, *The Iron Cage: The Story of the Palestinian Struggle for Statehood*. This book deals with the question of why the Palestinian people, in spite of a well-developed sense of national identity, and levels of social and economic development at least as high as their Arab neighbors, were nevertheless unsuccessful in achieving statehood and independence throughout the course of the 20th century, and into the present century. The conclusions of my book focus mainly on internal Palestinian causes for this failure. I nevertheless give attention to the externally imposed constraints that have operated on the Palestinians since the end of the Ottoman era in their country in 1918 and down to the present. Indeed, the inexorably binding nature of these

constraints is what suggested to me the main title of my book, *The Iron Cage*.

In the course of my research, it became apparent to me that among the most important of these constraints on the Palestinians were international ones, and that these emanated from two of the pillars of the modern international order, and of international legitimacy, specifically the League of Nations and the United Nations. Indeed, in some measure, the treatment of the Palestine issue by these two bodies has shown the limits of international law, and of an international order founded on it.

Moreover, the case of Palestine illustrates strikingly the long-term perils and pitfalls of great powers following shortsighted policies that are not based on their own professed principles, and that are not consonant with international law and legitimacy. This was just as true during the many decades during which Britain dominated the Middle East, as it has been of the more than half a century since then, during which time the United States has been the preeminent power in that region.

Let me explain briefly. Towards the end of World War I, Britain and France sought to obtain compensation in the form of colonial expansion for their huge losses during the course of the war. Part of this compensation was to be in the form of a partition between them and other allied belligerents of the Arab provinces of the Ottoman Empire. However, as the war ended, Britain and France found themselves to be heavily dependent on the military, naval and economic contributions of the United States. This obliged them to accept, at least ostensibly, the American war aims enunciated by President Wilson in December 1917 in the form of the 14 Points. These included the idea of a world body to regulate international affairs, and the principle of self-determination. These two ideas were the germ of the League of Nations and its Mandate system, which when applied to the Middle East obliged these two colonial powers to mask their territorial ambitions in that region behind a Mandatory framework.

The terms of the Covenant of the League of Nations, which established the Mandates, were clear insofar as these Arab regions that had formerly been part of the Ottoman Empire were concerned. According to the Covenant, they were to be under a Class A Mandate, meaning that they had "reached a state of development where their existence as independent nations can be provisionally recognized." This independence was to be subject only to the

rendering of administrative advice and assistance by a mandatory power.

In fact, however, long before Wilson enunciated his 14 Points, the British in 1915 had already promised the Arabs independence in an ill-defined area as part of an ambiguous correspondence with an Arab potentate, Sharif Husayn of Mecca, promises that were later repeated several times by the British. At about the same time, Britain and France had secretly agreed to partition the Arab provinces between them, under the Sykes-Picot accords. Thereafter, in the Balfour Declaration of November 1917, Britain promised to support the establishment of a "Jewish national home" in Palestine. This led to the not entirely unfounded charge that Palestine was a "thrice-promised land." Great Britain eventually decided to achieve its long-standing strategic ambitions in Palestine through support of Zionism. In consequence, it constructed a mandatory regime for Palestine that was in direct contravention of the Covenant of the League of Nations and of its various World War I pledges of independence to the Arabs.

Specifically, this Mandatory regime in Palestine provided no scope whatsoever for treating the Palestinian Arabs, who formed over 90% of the population, as an "independent nation," the manner in which the Iraqis, Trans-Jordanians, Syrians and Lebanese in a similar position were treated under the Mandate system. Indeed, the words "Arab" and "Palestinian" never occur in the text of the Mandate, adopted in July 1922: the overwhelming Arab majority of the population are simply described as "non-Jewish communities in Palestine," or as religious communities, Muslims and Christians, who are to have "civil and religious rights," but no political or national ones. Nor does the text of the Mandate provide for any constitutional institutions or organs of self-government for the population as a whole or for the Arab majority, nor were such institutions or organs ever created by the British. By contrast, in the Mandate, the tiny Jewish minority is described as a people with national rights, and the Mandatory power is enjoined in six of the document's 28 articles to act in support of the project to create a Jewish national home in Palestine, including creating representative institutions and a diplomatic agency, and facilitating immigration and land acquisition.

For decades, Britain twisted and turned as a result of conflicting pressures between the contradictory poles of respect for the principle of self-determination that it had formally accepted and that was embodied in the League of Nations Covenant, and faithfulness to its

commitment to create a Jewish national home while denying Palestinian national rights, as embodied in the Mandate for Palestine. Until the very end of the Mandate, in 1939 on the eve of World War II, however, there was never any question that the commitment to Zionism was the stronger. Over these crucial decades from 1917 until 1939, Great Britain enabled the Zionists to create the demographic, economic and strategic springboard from which they were ultimately able to take over the entire country at the expense of its indigenous population. It thereby helped significantly to produce a conflict that only became more bitterly intractable as time went on.

In other words, this was a case where the post-World War I era community of nations, its will expressed through the League of Nations Covenant, enunciated a principle (that was much later taken up in the Charter of the United Nations), that of support for national self-determination. But that same body, driven by the ambitions of its most powerful member-state, Great Britain, contradicted that principle insofar as the Arab majority population of Palestine was concerned in the Mandate it later drew up for that country. While many blame the conflict that thereafter tore that sad land apart entirely on the Arabs or the Zionists, with perhaps some blame attached to Britain, it is clear that at least some of the blame should be affixed to the international community. Specifically, in Palestine, the League of Nations failed to abide by one of its own basic principles, self-determination, under the pressure of the greatest of the great powers that dominated the League. Britain's agonizingly slow, painful and humiliating withdrawal from Palestine in 1947-48, covered in opprobrium by both Arabs and Jews, should stand as a warning against even the greatest of powers flouting the principles of international law and legitimacy, although it took many decades for the penalty for these departures from principle to catch up with the British.

Among the first major issues that were referred to the new United Nations after World War II was the question of Palestine. The Charter of the United Nations reprised the respect for the principle of self-determination embodied in the League of Nations Charter. The United Nations made the application of this principle universal, in distinction to the League, which had never applied the principle to the pre-World War I colonial possessions of the victorious allied powers, but only to Eastern and Central Europe, the Arab provinces of the Ottoman Empire, and a few other former German colonial possessions (although the latter were in a lower and

less privileged category than were supposed to be Palestine and other Arab lands).

This new commitment to universality (seen also in the Universal Declaration of Human Rights and other documents that provide us with the framework of the modern international order) reflected the greater number of independent states that were part of the United Nations, as well as powerful world-wide aspirations among colonized peoples for independence and self-determination. However, it also reflected something far less idealistic and altruistic: this was the determination of the powers which now dominated the international system, the United States and the USSR, to fragment the colonial empires of the old European great powers, thereby making possible the extension of their own influence into new regions of the world. This powerful combination of forces: idealism, aspirations for freedom, and cynical super-power realpolitik, provided an irresistible solvent that rapidly dissolved the bonds holding together the great colonial empires. Within a little more than a generation after World War II, these empires were a thing of the past.

In the case of Palestine, this new dispensation operated according to form. In its disposition of Palestine, the United Nations General Assembly, in its Resolution 181 of 29 November 1947, at least paid lip service to the principle of self-determination for both peoples, Jewish and Arab. Unlike the League of Nations Mandate of 25 years earlier, the Partition Resolution, which was based on the majority report of the UN Special Commission on Palestine (UNSCOP), acknowledged that there was an Arab people in Palestine, and called for a state for this people. However, under General Assembly Resolution 181, the Arabs, who formed over 65% of the population, were to get a state in only 45% of the country, excluding much of its richest land, and placing huge amounts of Arab property, and nearly as many Arabs as Jews, in the Jewish state which was to be created in the remaining 55% of the country.

The basic reason for this imbalance was simple: World War II had not solely simply been a war like World War I in which the victors shaped a new international order. It also represented a new form of inhumanity, in the form of genocidal policies by the defeated Nazi regime against whole categories of individuals, most notably the Jews in the form of the Holocaust. In response to this new level of barbarism, the victors had not only created the United Nations, but also the Nuremberg Tribunals and a whole body of new principles which have since become central to international law and legitimacy.

It was the unlucky fate of the Palestinian Arabs to be in conflict with a people who were the primary victims of the worst of these crimes. This inequitable disposition of the question of Palestine by the United Nations General Assembly in 1947, with the full support of all the great powers, reflected their sympathy and that of the international community for these victims, even though this resulted in a further injustice, and the creation of a new class of victims, the Palestinian Arabs.

Although the United States and the other great powers voted in the General Assembly in November 1947 for the creation of an Arab state in Palestine alongside a Jewish one, all of them acquiesced in the extinction of that Arab state before its birth. This was the result of the combined clandestine and overt efforts of the new state of Israel, together with Britain and Jordan. These powers acted on the basis of two confidential understandings, one between the Jewish Agency (precursor of the Israeli government) and Trans-Jordan, and the other between Great Britain and Trans-Jordan, which have been revealed over the past two decades by the research of several prominent historians, Israeli, British and American. Thus in regard to the creation of an Arab state in Palestine, the United Nations General Assembly took a decision, and did nothing to see to it that it was carried out.

Two other points are worth making about the responsibility of the United Nations (in addition to that of all the other parties) for the tragedies that ensued for the Palestinians. The first is that the proposal to partition Palestine in 1948 was not made in a vacuum. In addition to the Majority Report that was the basis for the partition resolution, there was also a Minority Report of UNSCOP, which presciently warned against the bloodshed and strife that would necessarily follow implementation of a resolution to give most of a country to a minority of its population, and warned that such an action might precipitate a long-lasting conflict. The General Assembly saw fit to ignore these warnings. It also failed to provide peace-keeping forces, or any other mechanism to ensure that the resolution was respected, and to regulate the ensuing conflict, until it was much too late. These were failings of the international community as a whole, on top of the failures of individual states. And while we can ascribe responsibility to many states, and to several of the great powers, it is the power that already was becoming the world's greatest, the United States, that bears a special share of responsibility for this result, and for its aftermath.

Thereafter, the United States repeatedly sponsored or supported measures in the United Nations or on its own that might have alleviated the conflict. These ranged from General Assembly Resolution 194 of December 1948, which would have allowed the return of Palestinian refugees to their homes and compensated them for their losses, to the efforts of the Palestine Conciliation Commission of 1949, established by the United Nations General Assembly. Nothing ultimately came of either of these efforts, leaving the refugees where they were, and leaving the conflict unsettled until this day. Much later, after the 1967 war, measures championed by the United States included Security Council Resolution 242, which laid down a basis ultimately agreed to by all the parties for resolution of the conflict. They continued through a variety of essentially unilateral American initiatives toward peace, from Kissinger's shuttle diplomacy of 1973-76, resulting in several lasting agreements between the parties, to President Carter's efforts at Camp David that produced an Egyptian-Israeli peace treaty, and James Baker's convening of the 1991 Madrid Peace Conference, which eventually resulted in a Jordanian-Israeli peace treaty.

In all of these cases, however, whatever its declared policy, the United States never unequivocally and in practice supported the self-determination and independent, viable statehood of the Palestinians. Indeed, it often acted to undermine this and other universal principles of international law and legitimacy. Without these principles, a just and lasting resolution of this problem is impossible. Even while declaring support for Palestinian statehood in 2005, President Bush had previously undermined the very principle he was enunciating in a letter in April 2004 to Israeli Prime Minister Ariel Sharon. President Bush asserted that Israel's settlement blocs were "realities," and that Palestinian refugees could not return to Israel in any peace settlement.

It is worth dwelling for a moment on the significance of the agreement the two men reached in 2004. In accepting that Israel had the right to annex the considerable areas of the West Bank occupied in 1967, where the largest of its illegal settlements are located, the President departed significantly from the policy of six previous American administrations. Basing itself on the United Nations Charter, the United States has always maintained since 1967 that Israeli settlements were illegal, and were an "obstacle to peace." With one stroke, the Bush Administration discarded one of the core principles of the internationally recognized basis for Arab-Israeli

peace making, Security Council Resolution 242 of 1967: that principle is the inadmissibility of the acquisition of territory by force. Now, the settlements were described by the President as “realities” that will have to be taken into account in any agreement.

In making policy on Palestine over most of the past century, leaders in both Britain and the United States were driven primarily by powerful strategic and domestic political considerations, rather than by principle. The strategic considerations included the goals of dominating this crucial piece of territory, keeping it in friendly hands, and denying it to others. The political ones included cold calculations of the considerable domestic electoral and other advantages to be obtained from supporting Zionism and later Israel, as against the negligible domestic political costs. There also existed naive sympathy for Zionism among many British and American politicians, based on a particularly Protestant immersion in the Bible. This sympathy was often combined with a laudable desire to make amends for the persecution of the Jews in different parts of Europe (often combined with a less laudable, indeed reprehensible, desire to have the victims of persecution find haven somewhere other than Great Britain or the United States during the 1930s). The result of such attitudes, which necessarily ignored or downplayed vital realities on the ground in Palestine, has been an enduring tragedy.