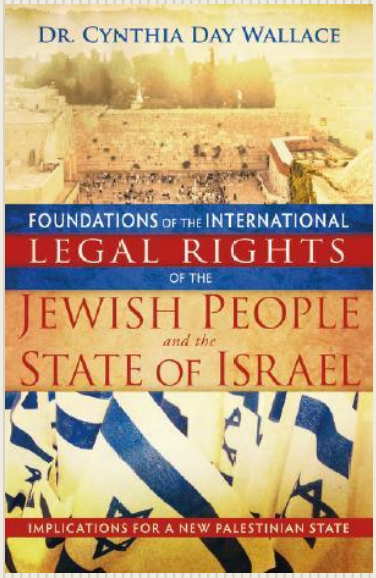

FOUNDATIONS OF THE INTERNATIONAL LEGAL RIGHTS OF THE JEWISH PEOPLE & THE STATE OF ISRAEL: IMPLICATIONS FOR A NEW PALESTINIAN STATE

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Executive Summary

Presented by

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EXECUTIVE SUMMARY

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PART I: FOUNDATIONS OF THE INTERNATIONAL LEGAL RIGHTS OF THE JEWISH PEOPLE AND THE STATE OF ISRAEL

In international law, as in all law, there are always two sides to a question. If this were not the case, there would be little need for legal solutions. Moreover, both parties in any conflict believe the right is on their side, or at least that they have means to prove this to be so. Accordingly, no law is ever created in a vacuum; a law is created when a serious enough need arises.

In 1917, owing to the events of World War I, a serious need was identified and a voice was raised. The need was that of the Jewish people, dispersed across the earth for some two thousand years, to have a national home. The voice was that of Lord Balfour, speaking on behalf of the British War Cabinet in defense of the Jewish people worldwide. This compelling need found official expression in the Balfour Declaration of 1917.

The *Balfour Declaration* was a *political* statement with no legal authority; moreover, it was *not international*. Nonetheless it was a major turning point in the history of the dispersed Jewish people, giving them a future hope of eventually fulfilling their never dying longing for their ancient Holy Land. What it accomplished was to raise the profile, internationally, of the need of a stateless people to have a "national home" to which they could return. Of monumental significance was the official recognition of the all-important *historic*, *religious* and *cultural* links of the Jews to the land of their forefathers, the land that had come to be known under the Greeks and Romans as "Palestine".

Because the cause was just and the concept justified, there needed to be a way to elevate the content of this Declaration to the level of international law. Accordingly, the matter was taken up by the Supreme Council of the Principal Allied and Associated Powers (Britain, France, Italy, Japan and the United States) at the Paris Peace Conference in 1919. The issue became more complex as submissions for territorial claims were presented by both Arab and Jewish delegations, as the old Ottoman Empire was being apportioned out to the victorious Powers; thus the matter was not able to be settled within the time frame of the Paris Conference.

What did happen at the Paris Conference that factored into the progression of events we are considering here was the establishment of the *League of Nations* which, in Article 22 of its Covenant, provided for the setting up of a mandate system as a trust for the Old Ottoman territories.

The next important milestone on the road to international legal status and a Jewish national home was the *San Remo Conference*, held at Villa Devachan in San Remo, Italy, from 18 to 26 April 1920. This was an 'extension' of the Paris Peace Conference of 1919 for the purpose of dealing with some of these outstanding issues. The aim of the four (out of five) members of the Supreme Council of the Principal Allied and Associated Powers that met in San Remo (the United States being present as observer only, owing to the new noninterventionist policy of President Woodrow Wilson), was to consider the earlier submissions of the claimants, to deliberate and to make decisions on the legal recognition of each claim. The outcome, relying on Article 22 of the Covenant of the League of Nations, was the setting up of three mandates, one over Syria and Lebanon (later separated into two mandates), one over Mesopotamia (Iraq), and one over Palestine. The *Mandate for Palestine* was entrusted to Great Britain, as a "sacred trust of civilization" in respect of "the establishment in Palestine of a National Home for the Jewish people". This was a binding resolution with all the force of international law.

In two out of the original three Mandates, it was recognized that the indigenous people had the capacity to govern themselves, with the Mandatory Power merely assisting in the establishment of the institutions of

government, where necessary. This was not true of Palestine, as Palestine was, under the Mandate, to become a homeland ("national home") for the Jewish people. Although the Jewish people were part of the indigenous population of Palestine, the majority of them at that time were not living in the Land. The Mandate for Palestine was thus quite different from the others and set out how the Land was to be settled by Jews in preparation for their forming a viable nation in the territory then known as "Palestine". The *unique* obligations of the Mandatory to the Jewish people in respect of the establishment of their national home in Palestine thus gave a *sui generis* (unique, one of a kind) character to the Mandate for Palestine.

The boundaries of the "Palestine" referred to in the claimants' submissions included territories *west and east* of the Jordan River. The submissions of the Jewish claimants specified that the ultimate purpose of the mandate would be the "creation of an autonomous commonwealth", provided "that nothing must be done that might prejudice the civil and religious rights of the non-Jewish communities at present established in Palestine". The resulting Mandate for Palestine, approved by the Council of the League of Nations in July 1922, was an international treaty and, as such, was legally binding.

The decision made in San Remo was a watershed moment in the history of the Jewish people who had been a people without a home for some two thousand years. From the perspective of Chaim Weizmann, president of the newly formed Zionist Organization and later to become the first President of the State of Israel, "recognition of our rights in Palestine is embodied in the treaty with Turkey, and has become part of international law. This is the most momentous political event in the whole history of our movement, and it is, perhaps, no exaggeration to say in the whole history of our people since the Exile." To the Zionist Organization of America, the San Remo Resolution "crowns the British [Balfour] declaration by enacting it as part of the law of nations of the world."

The policy to be given effect in the Mandate for Palestine was consistent with the Balfour Declaration, in significantly recognizing the *historic, cultural* and *religious* ties of the Jewish people to the Holy Land, and even stronger than the Declaration through the insertion of the fundamental principle that Palestine should be *reconstituted* as the national home of the Jewish people. It is particularly relevant to underline the inclusion in the terms of the Mandate (through Article 2) of the fundamental principle set out in the Preamble of this international agreement that "recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for *reconstituting* their national home in that country".

The *primary objective of the Mandate* was to provide *a national home for the Jewish people*—including Jewish people dispersed *worldwide*—in their ancestral home. The Arab people, who already exercised sovereignty in a number of States, were guaranteed protection of their civil and religious rights under the Mandate as long as they wished to remain, even after the State of Israel was ultimately formed in 1948. Moreover, Trans-Jordan was meanwhile added as a territory under Arab sovereignty, *carved out of the very mandated territory at issue*, by the British, prior to the actual signing of the Mandate in 1922 (see below).

When the Council of the League of Nations approved the Mandate for Palestine in July 1922, it became binding on all 51 Members of the League. This act of the League enabled the ultimate realization of the long cherished dream of the *restoration* of the Jewish people to *their ancient land* and *validated the existence of historical facts and events linking the Jewish people to Palestine.* For the Supreme Council of the Principal Allied Powers, and for the Council of the League of Nations, these *historical facts* were considered to be *accepted and established*. In the words of Neville Barbour, "*In 1922, international sanction was given to the Balfour Declaration by the issue of the Palestine Mandate*".

The rights granted to the Jewish people in the Mandate for Palestine were to be given effect in *all of Palestine*. It thus follows that the *legal rights* of the claimants to sovereignty over the *Old City of Jerusalem* similarly derive from the decisions of the Supreme Council of the Principal Allied Powers in San Remo and from the terms of the Mandate for Palestine approved by the Council of the League of Nations.

In March 1921, in Cairo, Great Britain decided to partition the mandated territory of Palestine, for international political reasons of its own. Article 25 of the Mandate gave the Mandatory Power permission

to postpone or withhold most of the terms of the Mandate in the area of land east of the Jordan River ("Trans-Jordan"). Great Britain, as Mandatory Power, exercised that right.

For former UN Ambassador, Professor Yehuda Zvi Blum, *the rights vested in the Arab people of Palestine with respect to the principle of self-determination were fulfilled as a result of this initial partition of Palestine approved by the Council of the League of Nations in 1922. According to Professor Blum: "The Palestinian Arabs have long enjoyed self-determination in their own state – the Palestinian Arab State of Jordan*". (Worth mentioning here, in a letter apparently written on 17 January 1921 to Churchill's Private Secretary, Col. T.E. Lawrence ("of Arabia") had reported that, in return for Arab sovereignty in Iraq, Trans-Jordan and Syria, King Hussein's eldest son, Emir Feisal—a man said by Lawrence to be known for keeping his word—had "*agreed to abandon all claims of his father to Palestine*".)

After this partition, Churchill—British Colonial Secretary at the time—immediately reaffirmed the commitment of Great Britain to give effect to the policies of the Balfour Declaration in *all the other parts of the territory* covered by the Mandate for Palestine west of the Jordan River. *This pledge included the area of Jerusalem and its Old City.* In Churchill's own words: "It is manifestly right that the Jews who are scattered all over the world should have a national centre and a national home where some of them may be reunited. And where else could that be but in the land of Palestine, with which for more than three thousand years they have been intimately and profoundly associated?"

Thus, in a word, *the primary foundations in international law for the "legal" claim based on "historic rights" or "historic title" of the Jewish people in respect of Palestine are the San Remo decisions of April 1920, the Mandate for Palestine of July 1922,* approved by the Council of the League of Nations and bearing the signatures of those same Principal Allied Powers but rendering it an international treaty binding on all Member States, *and the Covenant of the League of Nations itself (Art. 22).*

PART II: THE QUESTION OF A UNILATERAL DECLARATION OF A STATE OF PALESTINE

Many years passed from the adoption of the Mandate in 1922 to the creation of the State of Israel in 1948. An event that precipitated Israeli statehood was the vote by the UN General Assembly in 1947 for the partition of Palestine (Resolution 181 (II)), recommending the setting up of a Jewish and an Arab State in that territory. While UNGA resolutions are no more than recommendatory, with no legally binding force, the Jews accepted the partition plan, whereas the Arabs rejected it. The UK terminated its role as Mandatory Power and pulled out of the territory on 14 May 1948. On that date, to take effect at midnight, the Jews declared the State of Israel.

The following day, the armies of five surrounding Arab nations attacked the new Jewish State (Israeli War of Independence). The Arabs unexpectedly met defeat, though Jordan illegally annexed Judea and Samaria. Israel regained control over its mandated territory in a war of self-defense, the Six-Day War, in 1967. Despite these intervening events that have since influenced its ongoing relevance, not least of which being the fulfillment of its primary purpose, the creation of a Jewish State, certain fundamental aspects of the Mandate remain valid and legally binding and are highly relevant for the determination of the "core issues" to be negotiated between the two parties on the "permanent status" (or "final status") of Jerusalem and the "West Bank".

In order to get the proper perspective in considering the international legal framework surrounding the question of a unilaterally declared Palestinian State with the eastern part of Jerusalem as its capital, we may need to go beyond the law, *per se*, to consider the impact of public opinion on the formulation of both customary and codified international law. Accordingly, attention should be drawn to the degree to which equitable resolutions to the "core issues" of today's Israeli / Arab Palestinian conflict can be exacerbated by linguistic hyperbole, factual distortion or pure political maneuvering and calculated rhetoric. Some of this rhetoric has a critical need to be subjected to the light of legal terminology and precision. Otherwise it can easily lead to gross distortions of truth, which can even result in ill-advised international legal responses.

Take for example, the *"Palestinian" identity*. At the time of the San Remo decision and the resulting Mandate for Palestine, the territory then known as "Palestine" was designated expressly for the "*reconstitution*" of the "national home" of the Jewish people *only*. While care was taken to protect the rights of Arab inhabitants, the Jews alone were a people without a country. Indeed, this was the very purpose of the Mandate for Palestine and its predecessor the Balfour Declaration. At the time of the Mandate, it would have been more accurate to refer to "Palestinian Jews" and "Palestinian Arabs" (along with various other non-Jewish inhabitants). But because of the creation of the State of Israel, the Palestinian Jews retained their ancient name of "Israelis" while the non-Jews (mainly but not all Arabs) appropriated the name "Palestinians", with the result that they are often erroneously viewed as being the rightful inhabitants of the Land. In actual fact, the Land called "Palestine" covers territory that the Jews have called the "Holy Land" well before the name "Palestine" was first used by the Greeks and Romans. The truth is that the territory known as "Palestine" has never—either since this name was applied or before—been an Arab nation or been designated to be an Arab nation. But this nomenclature carries great psychological impact with the inference that it is the former Arab inhabitants of Palestine that are the *true* "Palestinians" and that they *alone* belong in "Palestine".

As regards the *refugee question*, the legal definition of "refugee" is "a person who flees or is expelled from a country, esp[ecially] because of persecution, and seeks haven in another country" (*Black's Law Dictionary*). The present plight of all those living in refugee camps is truly pitiable and rightfully arouses the compassion of the world; but most Palestinians identified as "refugees" are well over a generation away from the events that caused the foregoing generation to flee. Vast Arab lands were accorded statehood generations ago and could easily accommodate all these most unfortunate "refugees" who have been made a spectacle of for six decades instead of being integrated as productive members of society among their own people. *In addition* to the other San Remo mandated territories that gained statehood before Israel, and could well have absorbed their Arab brothers, Trans-Jordan was partitioned off *specially* for the Palestinian Arabs in the territory originally designated for the Jewish national home. *This already furnished a legitimate 'new State' for the Arabs within the territory of "Palestine".* International law has never had to grapple with the question of the 'inheritance' of refugee status, such a situation being unique in human history.

Concerning the *"1967 lines"*, as a point of reference for a potential new Palestinian State, there is constant mention of withdrawal to the "1967 *borders*". Firstly, this terminology is legally incorrect. The word "borders" is generally used in international law to mean "national boundaries", which the 1967 "lines" most decidedly are not. The definition of a "border" under international law is "a boundary between one nation (or a political subdivision [of that nation]) and another" (*Black's Law Dictionary)*. No such national boundaries have ever been established for the reborn State of Israel. The 1967 "lines" are purely *military* no-cross lines ("armistice demarcation lines"), from Israel's 1948 War of Independence. These "lines" have been *expressly* repeated in *numerous* 1949 Israeli-Palestinian armistice agreements to neither represent national borders nor prejudice the future bilateral negotiation of same. These 1949 armistice lines remained valid until the outbreak of the 1967 Six-Day War. Linking them with the 1967 war – where lost territory was recovered by the Israel Defense Forces, under attack – by calling them "1967 borders" instead of 1949 armistice lines, fosters the erroneous notion that these are ill-gotten "borders", thus highly prejudicing the issue and its outcome. Eugene Rostow, U.S. Undersecretary of State for Political Affairs in 1967 and one of the drafters of the 1967 UN Security Council *Resolution 242* on "safe and secure" borders, stated in 1990 that it and subsequent Security Council Resolution 338 " . . . rest on two principles, Israel may administer the territory until its Arab neighbors make peace; and when peace is made, Israel should withdraw to 'secure and recognized borders,' which need not be the same as the Armistice Demarcation Lines of 1949". In a word, the 1967 lines are *not* "borders" at all, and this word should not be used to create and perpetuate the impression that Israel has illegally transgressed the borders of another state, when this is clearly not the case.

Similarly, with regard to the *disputed territories*, the widespread use of the words "occupied territory" rather than "disputed territory" (which in fact it is) has a major psychological impact that can result in real and even legal ramifications. Furthermore, this language and what it tends to connote ("belligerent occupation") totally ignores the international treaty language of "*reconstituted*", as contained in the

Mandate for Palestine. *Reconstituted* territory precludes "belligerent occupation", even if permanent national borders have yet to be negotiated. A state cannot, by definition, be a "belligerent occupying power" in a territory that is being "reconstituted" in its name, according to the provisions of a legally binding instrument of international law. "[O]ccupation occurs when a belligerent state invades the territory of another state with the intention of holding the territory at least temporarily" (West's Encyclopedia of American Law). The territory that Israel reclaimed in 1967 was never rightfully "the territory of another state", nor did Israel obtain it by war of aggression. Indeed, it was territory that had been specifically designated for a *Jewish* national home, under the legally binding Mandate for Palestine in 1922.

A close corollary is the question of *settlements*. The sensitivities surrounding this question are exacerbated by the very fact that the legality/illegality of such settlements is based on factors that may not follow prescribed international law norms but rather are complicated by the unique nature of the Israeli case. For example, while it is often claimed that such settlements violate Article 49 of the Geneva Convention (IV), the inclusion of this article in the Convention had a different purpose altogether than to govern circumstances such as those existing in present-day Israel. The drafters' intent was that of *protecting vulnerable civilians in times of armed conflict* by creating an international legal instrument that would declare as unlawful all *coerced deportation* such as that suffered by over forty million Germans, Soviets, Poles, Ukrainians, Hungarians, and others, immediately after the Second World War. In the case of Israel, under international law as embodied in the Mandate for Palestine, Jews were *permitted* and even *encouraged* to settle in *every part* of Palestine; they were *not* deported or forcibly transferred. Accordingly, calling the "East Jerusalem", Judea and Samaria Israeli settlements "illegal" is not an apt application of the Fourth Geneva Convention.

The *question of Jerusalem* may be the most volatile of all. Owing to the sacredness of this city to so many, it has become evident that the positions of Israel and the Palestinians regarding the Old City are virtually irreconcilable. Evidence of this is the fact that it was not named in the Framework for Peace in the Middle East, agreed in the 1978 Camp David Accords between Israel and Egypt. In the latter case, Jerusalem was indeed on the agenda, but was left out of the actual Accords, owing to the inability of the two parties to resolve their fundamental differences on the highly loaded issue. The failure of the Camp David Summit of July 2000 again underlined the significance of the question of Jerusalem and its Old City.

Coming to the *role of the United Nations* in the current debate, it must be recalled that, according to the UN Charter, the UN General Assembly does not have the power to create legally binding decisions. General Assembly Resolutions have only the power to recommend, with no legally binding force. Therefore, were there to be a Resolution "recognizing" the "Arab Palestinians" as a political/state entity, this would not, in and of itself, constitute the creation of a State of Palestine under international law, any more than the 1947 Resolution 181 (II) (the UN Partition Plan) created the State of Israel.

Moreover there have been commitments on both sides to *"permanent status" negotiations.* The PLO leadership pledged in 1993 to commit virtually *all* the important issues of "permanent status" to resolution by *negotiations only*. Under the 1995 Interim Agreement (Oslo II), the parties undertook *not to act unilaterally* to alter the status of the territories prior to the results of permanent status negotiations. It was clearly stipulated and agreed that: "… *neither side* shall initiate or take *any step* that will *change the status* of the West Bank and the Gaza strip pending the outcome of *the permanent status negotiations"* (emphasis added).

A unilaterally declared Palestinian State would therefore be in breach of commitments embodied in an international legal instrument as well in publicly declared and published official statements and documents.

In sum, the conflict is not a traditional conflict over *borders*—that is not even really the issue, as demonstrated by the fact that national boundaries have gone so long undetermined. It is a conflict over historic rights and the internationally recognized need of a unified 'people' to have a place (and territorial space) to come 'home' to after some two thousand years of 'statelessness' and separation from the Land of their fathers—the *only* place that they call "holy" and the *only* Land they have ever called "home".