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FOLLOWING IN ANOTHER'S FOOTSTEPS: THE ACQUISITION OF INTERNATIONAL LEGAL STANDING BY THE PALESTINE LIBERATION ORGANIZATION

"... a State is created by a nation's struggle for existence."

Theodor Herzl

I. INTRODUCTION

The Palestine Liberation Organization (PLO) is a public body which has been accorded certain international legal standing. The purpose of this Comment is to chronicle the acquisition of that standing by reference to identifiable stages in a similar process undertaken by the Zionist Organization/Jewish Agency for Palestine. This kind of analysis should illustrate not only how international law bears upon Middle Eastern developments, but also how international practice of the last half century has allowed peoples such as the Jews and Palestinians to attain legal standing, as a vehicle for acquiring territorial sovereignty.

International law has been described as a "process by which the peoples of the world clarify and implement their common interests in the shaping and sharing of values."¹ The acquisition of international legal standing is a part of that process and a means toward that end. It is, however, a fairly amorphous concept underlying such better-defined practices as diplomatic recognition or the declaration of an entity's rights by the United Nations. In part, legal standing allows an entity to be the subject of these practices, but in part it is also a product of them. It is not the purpose of this Comment to examine all of the factors which contribute to legal standing, nor even to catalogue those which are strictly legal in nature. Rather, this article will seek to identify and assess the stages through which a non-territorial, non-sovereign group is likely to pass on the way toward attaining legal standing and territorial sovereignty.

The subjects of international law—those national and juridical persons on whom the law confers rights and imposes duties²—have

1. McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 263, 275 (1967) [hereinafter cited as McDougal]. A corollary of this rule seems to be that "an instrumental goal of a public order of human dignity is of course the equipping of all individuals for full participation in authoritative decision." *Id.* at 256.

2. 1 H. LAUTERPACHT, *The Subjects of International Law*, in INTERNATIONAL LAW: COLLECTED PAPERS 148 (E. Lauterpacht ed. 1970) [hereinafter cited as COLLECTED PAPERS].

traditionally and exclusively been states.³ Individuals and groups have enjoyed substantive rights recognized at international law, but such rights have been granted only by municipal law "in accordance with a duty imposed upon the State concerned by International Law."⁴ States, in other words, have traditionally been the beneficiaries of international rights and have served as trustees of those rights for their inhabitants. It follows that a principal distinction between states and individuals at international law has been, and continues to be, that states have a full procedural capacity while a like capacity in individuals is available only by express or tacit agreement of states.⁵

Since at least the early years of this century, however, there has been a trend in substantive international law toward "broader participation."⁶ As a result, individuals and groups are now considered

3. McDougal, *supra* note 1, at 262. States have been the traditional subjects of international law in part because only they were able to offer "solid guarantees for the fulfilment of obligations . . ." W. HALL, *A TREATISE ON INTERNATIONAL LAW* 197 (8th ed. A.P. Higgers 1924) [hereinafter cited as HALL]. This ability to fulfill obligations is particularly important in international law where no independent regime exists to enforce such obligations. Another view is offered by Professor Oppenheim, who suggests that: "[S]ince the Law of Nations is based on the common consent of individual states, states are the principal subjects of International Law. 1 L. OPPENHEIM, *INTERNATIONAL LAW* 19 (8th ed. H. Lauterpacht 1955) [hereinafter cited as OPPENHEIM].

4. OPPENHEIM, *supra* note 3, at 19.

5. 1 H. LAUTERPACHT, *The Place of International Law in Jurisprudence*, in *COLLECTED PAPERS*, *supra* note 2, at 193. Another international legal scholar, Professor M. St. Korowicz, states:

[I]t is a well-established principle of international law that States may by common agreement create and recognize the international personality of individuals, not only in their substantive rights, their duties and responsibilities under international law, but also in their capacity for international procedural action. The fact that the right of individuals to proceed before international bodies is very limited in the practice of international law today [1959], does not exclude the creation or enlargement of this right at any moment by an agreement between States.

M. KOROWICZ, *INTRODUCTION TO INTERNATIONAL LAW* 385 (1959) [hereinafter cited as KOROWICZ].

6. McDougal, *supra* note 1, at 262. In his memorandum, Survey of International Law in Relation to the Work of Codification of the International Law Commission, A/CN.4/1/Rev.1, at 19 (Feb. 10, 1949), the Secretary General of the United Nations said, "Practice has abandoned the doctrine that states are the exclusive subjects of international rights and duties." Also in 1949, the International Court of Justice observed that:

[T]he progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by entities which are not States. Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174, 178 [hereinafter cited as Reparations Case].

Although McDougal, *supra* note 1, at 262, sets 1945 as the approximate beginning of these developments, there is convincing evidence that they began much earlier with the

among the direct recipients of internationally-recognized rights.⁷ Subjects of international law are no longer "identical in their nature or in the extent of their rights." Rather, "their nature depends upon the needs of the community."⁸

While this broadening of participation is a significant development, its importance for individuals and groups is diminished by the fact that international law is still, essentially, state-made law.⁹ Accordingly, the subjects of international law and the rights they possess continue to be determined by states.¹⁰

Among potential subjects are persons situated in diverse countries seeking recognition as a group, and the rights to which they may collectively be entitled. If these persons obtain general state consent, they can now be accorded such international recognition and rights independently of their local municipal laws. Still, they have no procedural capacity to enforce or actualize these rights without, again, obtaining the consent of the community of nations. A quest for international legal standing, then, is the effort to gain that international grant of procedural rights.

advent of the minorities treaties and the mandate system. The minorities treaties have been described as:

[A]n important factor in the process of eroding the concept of absolute State sovereignty in the field of human rights and a telling precedent for international concern with matters which had traditionally been considered as coming within the unfettered discretion of each individual State.

E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 22 (1964). It should be noted that while the minorities treaties granted rights to groups within states, those rights could only be exercised by an established state acting on behalf of the minority. OPPENHEIM, *supra* note 3, at 712, 715-16.

7. Cf. 1 H. LAUTERPACHT, *General Rules of the Law of Peace*, in *COLLECTED PAPERS* 295-300. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948); and Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. 16 at 66, U.N. Doc. A/4684 (1960).

8. *Reparations Case*, [1949] I.C.J. at 178.

9. It has always been obvious for an overwhelming majority of jurists that under the present international law only states and some interstate organizations are able to create rules of the law of nations, and that individuals may derive their international rights only by means of an agreement of states endowing the individual with his own limited personality.

KOROWICZ, *supra* note 5, at 329. See also H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 29-30 (1968) [hereinafter cited as LAUTERPACHT, *HUMAN RIGHTS*].

10. KOROWICZ, *supra* note 5, at 329-30.

II. STEPS IN THE ACQUISITION OF INTERNATIONAL LEGAL STANDING

A. *Speak and Act for a "People"*

The first step taken by the Zionist Organization¹¹ in its effort to bring about a Jewish state¹² was to establish itself as a subject of international law. It did so by supporting and getting influential states to support the proposition that Jews were an identifiable "people" whose principal representative on the international plane was the Zionist Organization.¹³

Use of the word "people," rather than "nation," is intended to emphasize the prevalence of subjective elements in this particular process. "Nation" has an objective sense (*i.e.* community of race, language, religion or culture),¹⁴ whereas the term "people" connotes

11. The Zionist Organization was named by the League of Nations as the "appropriate Jewish agency" to cooperate with the Mandatory in development of the Jewish National Home in Palestine. Although a Jewish Agency was recognized by the British in 1931 as a replacement for the Organization, that Agency and the Zionist Organization remained closely linked until establishment of the State of Israel. Mallison, *The Legal Problems Concerning the Juridical Status and Political Activities of the Zionist Organization/Jewish Agency: A Study in International and United States Law*, 9 WM. & MARY L. REV. 556, 570-71 (1968) [hereinafter cited as Mallison]. See note 40 *infra*.

12. There is little doubt that the Zionists, from their earliest days, sought creation of a sovereign Jewish state. In the Manifesto of the Biltu, members of a movement of the "Lovers of Zion" (early Zionists) declared:

[We want:

1. A home in our country [Palestine]
2. To beg it of the Sultan himself, and if it be impossible to obtain this, to beg that we may at least possess it as a state within a larger state

THE ISRAEL-ARAB READER 4 (W. LAQUEUR ED. 1969) [hereinafter cited as THE ISRAEL-ARAB READER]. In a pamphlet originally published in 1896, Theodor Herzl, founder of political Zionism, suggested:

Let the sovereignty be granted us over a portion of the globe large enough to satisfy the rightful requirements of a nation; the rest we shall manage for ourselves.

T. HERZL, THE JEWISH STATE 92 (1946). After the first Zionist Congress had adjourned in 1897, Herzl wrote in his diary:

If I were to sum up the Basle Congress in one word—which I shall not do openly—it would be this: at Basle I founded the Jewish State.

I. COHEN, THE ZIONIST MOVEMENT 78 (1946) [hereinafter cited as COHEN].

13. See notes 21, 42 *infra*. Sir Herbert Samuel, first British High Commissioner in Mandatory Palestine, testifying before the League of Nations Permanent Mandates Commission on the issue of whether the Zionist Organization was "the authentic interpreter of Jewish opinion," reportedly stated that although there were individuals and groups "on the outskirts of Zionism," these represented "extremes of opinion," and the "main body" of Jewish opinion was "favourable to the Zionists." League of Nations Permanent Mandates Commission, Minutes of the 5th Session (Extraordinary), 9th Meeting, A. 13, 1924 VI, at 63-64.

14. For an enumeration of the qualities of nationhood see J. STOYANOVSKY, THE MANDATE FOR PALESTINE 52 (1928) [hereinafter cited as STOYANOVSKY]; HALL, *supra* note 3, at 17.

such subjective concepts as sharing a high frequency of perspectives¹⁵ or "value-oriented goals"¹⁶ or, more specifically, having a set of common desires to live a distinct community life.¹⁷ Furthermore, "nation" implies a degree of geographic contiguity which is not a necessary element for development of a group's self-consciousness as a "people."

The self-consciousness of Jews as a people, in a political sense, arose most recently out of 19th century nationalism and the increase in persecution which that nationalism fostered.¹⁸ For centuries Jews had maintained a "hope of restoration" to the land of their past. That ancient hope took on "new forms of expression" in the 19th century, among which was Zionism.¹⁹ One aspect of the Zionist Movement, so-called "political Zionism," was motivated in part by the idea that anti-Semitism would not disappear, that Jews would never be truly assimilated in predominantly non-Jewish communities, and that the Jewish people must, therefore, be constituted as a nation.²¹ The Zionist Organization helped develop that self-consciousness by working for a "binding together of the whole Jewry

15. Cf. McDougal, *supra* note 1, at 255.

16. Bassiouni, "Self-Determination" and the Palestinians, 65 AM. J. INT'L L. 31, 31-32 (1971). The full quote is as follows:

Only 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 [constitutes a people].

17. STOVANOVSKY, *supra* note 14, at 52.

18. [T]he XIX century, strongly romantic, with its intense nationalism and acute historical sense, evoked again the yearning for Palestine and the self-consciousness of Jewish individuality, to which the pogroms, themselves product (sic) of Gentile nationalism, gave a tragic meaning and a critical impact.

S. SALEEBY, THE PALESTINE PROBLEM 19 (1970) [hereinafter cited as SALEEBY].

19. R. LEARSI, ISRAEL: A HISTORY OF THE JEWISH PEOPLE 481-82 (1949). Zionism is a "Jewish nationalist movement which has had as its goal the creation and support of a Jewish national state in Palestine . . ."

10 ENCYCLOPEDIA BRITANNICA 886 (1974).

20. See Mallison, *supra* note 11, at 560. This idea was expressed in Herzl's pamphlet, THE JEWISH STATE, *supra* note 12, at 85-92. According to Ormsby-Gore, British representative to the League of Nations' Permanent Mandates Commission, while the original conception of the Jewish National Home in Palestine was as a place of refuge for Jews persecuted in Eastern Europe, the Zionist movement had come to mean much more. "It had united an enormous number of Jews in every country of the world in the interest of restoring the former home of the race." Statement by Mr. Ormsby-Gore on the Administration of the Mandated Territory of Palestine, League of Nations Permanent Mandates Commission, Minutes of the 4th Session, 11th Meeting, A.13 1924 VI, at 87-88.

21. The official statement of Zionist purpose, adopted at the first Zionist Congress, said that the tactics here quoted were among the means to be used to create for the Jewish People a home in Palestine secured by public law. The Basle Declaration, reprinted in THE ISRAEL-ARAB READER, *supra* note 12, at 11-12. See also COHEN, *supra* note 12, at 77.

by means of appropriate institutions, local and international" and for "(t)he strengthening and fostering of Jewish national sentiment and consciousness."²¹

In contrast, the self-consciousness of the Palestinians as a people arose more from circumstance than did that of the Jews. To say circumstance is not to exclude deliberate outside encouragement,²² but the fact of such encouragement does not make a people's self-consciousness, once attained, any the less real or potent.

The Arabs living in Palestine were touched by the spirit of Arab nationalism (a concept born of some of the same 19th century philosophical forces as motivated Zionism).²³ Near the start of the Mandate period, however, their sense of identity as a separate Arab group began to develop in response to Zionist aspirations regarding Palestine.²⁴ British and League of Nations' promises of independent statehood coupled with periods of substantial Jewish immigration into Palestine during the Mandate period contributed to the nascent group identity.²⁵ The attachment of the Palestinian Arabs to a

22. Y. Harkabi, a lecturer at Jerusalem's Hebrew University who has written sympathetically of the Palestinian role in the Middle East concedes:

that states like the U.A.R. [United Arab Republic] and Iraq evoked the idea of 'the Palestinian entity' in meetings of the Arab League from 1959 on, doing so for tactical reasons within inter-Arab rivalries, and the Palestine Liberation Organization was established by a decision of the Arab rulers at their First Summit Conference.

But he is quick to point out that:

the call for the Palestinians to organize themselves and assume the central role in the struggle against Israel came also from within the ranks of the Palestinians themselves.

Harkabi, *The Position of the Palestinians in the Israeli-Arab Conflict and Their National Covenant* (1968), 3 N.Y.U. J. INT'L L. & POL. 209 (1970).

23. Cf. ESCO FOUNDATION FOR PALESTINE, INC., 1 PALESTINE - A STUDY OF JEWISH, ARAB AND BRITISH POLICIES 444 (1947).

24. Lesch, *The Palestine Arab Nationalist Movement Under the Mandate*, in W. QUANDT, F. JABBER & A. LESCH, *THE POLITICS OF PALESTINIAN NATIONALISM*, 5, 14 (1973).

25. *Id.* at 16, 20-21. Arabs argue that the promise of independence for Palestine was contained in a letter of Sir Henry McMahon, British High Commissioner in Cairo, to Hussein ibn Ali, the Sherif of Mecca. The letter, dated October 24, 1915, did pledge independence for a large area of the Middle East in the vicinity of Palestine, and the Arabs understood it, apparently contrary to British intentions, to include Palestine. See the Hussein-McMahon Correspondence July 1915 - March 1916, 27 BRIT. SESS. PAPERS 573, 579, Misc. No. 3, CMD. No. 5957, at 7 (1939), reprinted in J. HUREWITZ, 2 *DIPLOMACY IN THE NEAR AND MIDDLE EAST* 13-16 (1956) [hereinafter cited as HUREWITZ].

However, in 1919 the League of Nations placed Palestine among those mandate territories whose "existence as independent nations can be provisionally recognized." LEAGUE OF NATIONS COVENANT art. 22; see HUREWITZ, *supra* at 61-62; STOVANOVSKY, *supra* note 14, at 36-40.

common land,²⁶ their large-scale displacement from that land at the termination of the Mandate,²⁷ the bitter and frustrating experience of the refugee camps,²⁸ and the policies of the surrounding Arab states²⁹ served to transform that group identity into an emerging nationalist conclusion. Among the aims of the Palestine Liberation Organization is "the undertaking of all means of forging conscious-

In his Statement of British Policy on Palestine of July 1, 1922, the British Secretary of State for the Colonies denied that the McMahon letter was a promise of independence for Palestine, but went on to say, "Nevertheless, it is the intention of His Majesty's Government to foster the establishment of a full measure of self-government for Palestine." Palestine: Correspondence with the Palestine Arab Delegation and the Zionist Organization; British Policy in Palestine, 23 BRIT. SESS. PAPERS 243, 262-63, CMD. No. 1700, at 20 (1922), reprinted in HUREWITZ, *supra* at 103, 106. The promise of independence was re-introduced in a 1939 Statement (White Paper) of British Policy on Palestine. 27 BRIT. SESS. PAPERS 597-608, CMD. No. 6019 (1939), reprinted in HUREWITZ, *supra* at 218-226.

26. See Harkabi, *supra* note 22, at 213. Harkabi quotes a Palestinian, Nasir ad-Din an-Nashashibi, as having written:

Every year I shall say to my little son: "We shall return my son, and you will be with me; we shall return; we shall return to our land and walk there barefoot. We'll remove our shoes so that we may feel the holiness of the ground beneath us. We'll blend our souls with its air and earth. We'll walk till we come to the orange trees; . . . we'll sleep in the shade of the first tree we meet; we'll pay homage to the first martyr's grave we come across. We'll turn here and there to trace our lives. Where are they? Here with this village square, with this mosque's minaret, with the beloved field, the desolate wall, with the remains of a tottering fence and a building whose traces have been erased. Here are our lives."

NASIR AD-DIN AN-NASHASHIBI, RETURN TICKET 205 (1962).

27. Within the 1948 cease fire lines of Israel were approximately 150,000 Arabs whereas formerly there had been about 800,000. W.B. QUANDT, *Political and Military Dimensions of Contemporary Palestinian Nationalism*, in W. QUANDT, F. JASBER & A. LESCH, *THE POLITICS OF PALESTINIAN NATIONALISM* 48 (1973) [hereinafter cited as QUANDT].

28. *Id.* See Harkabi, *supra* note 22, at 211.

29. Following the 1948 Arab invasion of Palestine, Egypt held and administered the Gaza Strip, but never claimed sovereignty over it. The courts in Gaza continued to apply Palestinian law, and the territory's constitution, signed by Egyptian President Nasser in 1961, declared that Gaza is an inseparable part of Palestine. *The International Status of Palestine*, 90 JOUR. DU DROIT INT'L 984 (1963).

During the invasion, Jordan took control of much of the "West Bank" area that was to go to the Arab State envisioned in the United Nations Partition Plan. Later, the Hashemite Kingdom attempted to annex the West Bank following elections in which Palestinian residents of the area voted. The annexation was recognized by only two countries, however, and denounced by the Arab League which resolved, with whatever jurisdiction it had, to treat the area as a "trust until the Palestine case is fully solved in the interests of its inhabitants." Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria-Yehuda*, 3 ISRAEL L. REV. 279, 290 (1968). Jordan lost control of the West Bank during the war with Israel in 1967, and has subsequently ceded her claim to it to the PLO. N.Y. Times, Oct. 29, 1974, at 1, col. 8.

The Arab defeat in the 1967 war "accelerated the development of a Palestinian national movement . . ." QUANDT, *supra* note 27, at 50.

ness and training the Palestinian, in order to acquaint him profoundly with his homeland, spiritually and materially.³⁰

The fact that individuals conceive of themselves as a people is no guarantee that they are collectively entitled to self-government,³¹ or to any other rights available under international law. Although they may have a "moral claim" to such rights,³² they may prefer that those rights be in some sense "legally" established.³³ In that case, the individuals, through a public body organized to represent them, must obtain "consent" to their collective identity as a people and to the public body's status both as their representative and as a subject of international law.

B. *Participate on Behalf of a People in International Affairs*

Consent, which is considered one of the principal sources of law,³⁴ is described in international terms as the "assent of the community of states."³⁵ As a source of international law, consent manifests itself in custom and treaties³⁶—that is, in certain practices of states.³⁷ But practice, as reflecting consent, is not only a primary source of international legal rules, it is an indicator of relationships and status as well.³⁸ Thus, it is to the practice of states that one may

30. THE PALESTINIAN NATIONAL COVENANT, art. 7, reprinted in Harkabi, *supra* note 22, at 227, 232.

31. STOYANOVSKY, *supra* note 14, at 53.

32. They may be like inchoate states which arise in the course of a revolution and are permitted by sovereign states to temporarily exercise certain rights and privileges, by which they are said to have a "moral claim" at international law. C. FENWICK, INTERNATIONAL LAW 102 (1924) [hereinafter cited as FENWICK].

33. The dichotomy between a "moral" claim (see note 32 *supra*) and a legal one at international law is not as clear as a distinction between equity and law in a municipal context. On the international plane, most judicial and legislative functions are operated by the same hand (i.e. the consent of the community of states). Nonetheless, some rudimentary international prerogatives have evolved which may be claimed as a matter of law by groups which have acquired a certain status.

34. Cf. I H. LAUTERPACHT, *The Definition and Nature of International Law and its Place in Jurisprudence*, in COLLECTED PAPERS 32 [hereinafter cited as LAUTERPACHT, *The Nature of International Law*].

35. Mallison, *supra* note 11, at 567. According to Oppenheim, "common consent is the basis of all law." OPPENHEIM, *supra* note 3, at 15.

36. OPPENHEIM, *supra* note 3, at 25.

37. LAUTERPACHT, *The Nature of International Law*, *supra* note 34 at 51.

38. Generally, states may acquire new territorial or other rights without formal recognition being required to affirm their validity. This is not the case with acts creating new rights which acts have violated existing rules of international law. The invalidity of the latter, however, can be wholly or partially cured by acts of other states, specifically, recognition. OPPENHEIM, *supra* note 3, at 141-42.

look to determine if a public body has been accepted as a subject of international law.³⁹

International assent to the idea that Jews constituted a people appeared in the willingness of sovereign states to deal with the entity which purported to represent that people—the Zionist Organization.⁴⁰ It was principally through this practice of established states that the Organization itself acquired legal standing as a public body and hence became a subject of international law.

Prior to the Zionist Organization's founding, Theodor Herzl, who was active in the Zionist movement, sought political support for the concept of a Jewish state in Palestine from the German Kaiser and the Turkish Sultan.⁴¹ Having been received by neither of these heads of state, Herzl is said to have concluded that the only way he could hope to secure practical cooperation was the democratic method of calling a congress of representatives of the Jewish people.⁴² The Zionist Organization was established by such a congress and Herzl, the Organization's president, and his successors

39. Precedent exists for the standing of a public body to be determined according to the practice of established states. The Order of Malta, a medieval hospital organization which acquired territory during the Crusades, did not lose its sovereignty when it lost its territory, according to the Court of Cassation in Italy, because its "attributes of sovereignty and independence," such as the right of active and passive legation and the right of negotiating directly with other states and entering into conventions and treaties, had not ceased. *Nanni and Others v. Pace and The Sovereign Order of Malta*, [1935-1937] Ann. Dig. 2, 5 (No. 2) (Court of Cassation, Italy).

Similarly, Graham, in his study of Vatican diplomacy, concludes that the Holy See possesses non-territorial sovereignty on grounds that:

[I]t can act in its own name in the international community. It can enter into legally binding conventions known as concordats. In the world of diplomacy, the Pope enjoys the rights of active and passive legation . . .

GRAHAM, *VATICAN DIPLOMACY: A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE* 186, 201-02 (1959), quoted in 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 591 (1963). But see note 47 *infra*.

40. Theodor Herzl, who founded the Zionist Organization, had foreseen the need among Jews for a *gestor*, a noble person or group of persons which, according to Roman concepts, was "the director of affairs not strictly his own." If the common cause were in danger, and the *dominus*—or body of citizens—were prevented either by want of will or by some other reason from helping itself, the *gestor*, without obtaining authority in a circumstantial fashion, would "simply take the leadership into his hands and march in the van."

Herzl anticipated that the Jewish *gestor* would be his proposed Society of Jews, which, by his description, had many of the characteristics and functions later attributable to the Zionist Organization. Among other duties, the Society would seek in its external relations to be recognized as a "state-forming power." According to Herzl, "[t]he free assent of many Jews will confer on it the requisite authority in relations with governments." HERZL, *supra* note 12, at 136-41.

41. COHEN, *supra* note 12, at 75.

42. *Id.*

were subsequently able to negotiate with the Kaiser, the Sultan, and with the governments of Great Britain, Russia and Egypt, among others.⁴³ Talks with officials in Great Britain eventually produced the Balfour Declaration and British support for establishment of a Jewish National Home in Palestine.⁴⁴

The willingness of these states to deal with representatives of the Zionist Organization provided high level but limited endorsement of that Organization's claim to represent an identifiable, non-sovereign people. The presence of its representatives at the Paris Peace Conference (1919), however, has been described as a "tentative multilateral recognition of the Zionist Organization as a public body."⁴⁵ The Organization subsequently participated in the drafting of the Mandate for Palestine and was said to have enjoyed a "privileged position" in those discussions because of its "political alliance" with Great Britain.⁴⁶

The substantive powers which an entity possesses and the way it uses them may also contribute to its public body status.⁴⁷ Palestine under the Mandate, for instance, had most of the characteristics of a state.⁴⁸ The Zionist Organization, through the Jewish Agency (and later the Agency alone), had duties—both imposed⁴⁹ and assumed⁵⁰—relating to many of those characteristics.⁵¹ Such

43. *Id.* at 80-83.

44. Mallison, *supra* note 11, at 568. The negotiations, are described in some detail in COHEN, *supra* note 12, at 112-20. It should be noted that the Declaration came in the midst of World War I and was motivated in part by a desire to obtain Jewish sympathy for the Allied cause. It should also be noted that the French and Italian governments concurred in the position taken by the British regarding the National Home. COHEN, *supra*, at 119.

45. Mallison, *supra* note 11, at 569.

46. *Id.*

47. Reparations Case, [1949] I.C.J. at 178-80. In that case, the International Court of Justice began its inquiry into whether the United Nations had the capacity to bring an international claim with an analysis of the United Nations' substantive powers. The court then turned to an examination of whether the practice of states has allowed the use of those powers.

48. See *The International Status of Palestine*, *supra* note 29, at 964.

49. The Mandate for Palestine imposed upon the agency duties relating to the settlement of Jews in Palestine, development of the area's natural resources, construction and operation of public works facilities, and relating generally to "such economic, social, and other matters as may affect the establishment of the Jewish National Home and the interests of the Jewish population in Palestine . . ." League of Nations, Mandate for Palestine, arts. 4, 6, & 11, 25 BRIT. SESS. PAPERS 421, CMD. NO. 1785 (1922), reprinted in HUBERWITZ, *supra* note 25, at 106-11.

50. In its 1946 report, the Anglo-American Committee of Inquiry noted that the Agency had, at first, given the Palestine government effective cooperation, but:

With its large revenue, its able administrators, advisors and staff, and its manifold

duties necessarily brought it into contact with individuals and governments outside Palestine, and these dealings solidified its public body status.⁵² Eventually, the Agency's standing became such that it could act in international forums both independently of the British government and without regard for the limitations which had previously been imposed upon its predecessor, the Zionist Organization, by the Balfour Declaration and the Mandate.⁵³

During the Mandate period, Palestinian Arabs were represented directly and indirectly in international affairs (especially in Great Britain) by numerous individuals and groups.⁵⁴ British policies, however, "hindered the development of permanent, structured organs to articulate the Arab viewpoint."⁵⁵ Although the Arabs desired that Palestine be an Arab country, and sought the "establishment of a national representative government in Palestine,"⁵⁶ Britain, for instance, refused to recognize two important Arab political organizations, the Arab Executive (1920-1934) and the Arab Higher Committee (formed in 1936),⁵⁷ either of which might have served as

activities, the Agency became finally and still remains the most potent non-governmental authority in the Middle East.

Anglo-American Committee of Inquiry, Report to the United States Government and His Majesty's Government in the United Kingdom 20-21 (Dep't of State Publication 2536; Near Eastern Series 2, 1946).

51. The Anglo-American Committee reported that:

The Jews have developed, under the aegis of the Jewish Agency and the Vaad Leumi (the legislative body of the Jewish Community in Palestine), a strong and tightly-woven community. There thus exists a virtual Jewish non-territorial state with its own executive and legislative organs, parallel in many respects to the Mandatory Administration, and serving as the concrete symbol of the Jewish National Home.

Id. at 39.

52. When the Zionist Organization, under the Mandate, was granted certain public works concessions, a dispute arose with a Greek subject who had been granted the concessions by the Ottoman government of Turkey. The Mandatory Administration invited the Greek to negotiate directly with the Organization. When the negotiations failed, the Greek government took up its subject's claims before the Permanent Court of International Justice. The Court concluded that the Jewish Agency (the Zionist Organization's successor) "is in reality a public body, closely connected with the Palestine Administration . . ." and thus had standing to be a party to the negotiations. *Case of the Mavrommatis Palestine Concessions*, [1924] P.C.I.J., ser. A, No. 2, at 21.

53. Mallison, *supra* note 11, at 571, 577.

54. See generally Lesch, *supra* note 24, at 25-40.

55. *Id.* at 20.

56. Arab Delegation memorandum to His Majesty's Government, circulated in Palestine, August 1923, enclosed in Political Report, August 1923 (CO 733/49); quoted in Lesch, *supra* note 24, at 28.

57. Lesch, *supra* note 24, at 20. According to Sir Herbert Samuel, as of 1924 the Arabs of Palestine had not been granted majority representation on the Legislative Council of Palestine because they had declared that if they had a majority they would use it to oppose

the core of the hoped-for government. The Arabs, on the other hand, in what typified their relations with the British, rejected British proposals to establish an "Arab Agency" because to do so would signal their acceptance of the Mandate.⁵⁸ Thus, the Mandate period saw the Arabs of Palestine negotiating with established governments, yet, unlike the Jews, their posture was basically defensive and those who tried to speak for them were not always taken as being their representatives.⁵⁹

From 1948 until 1964, the international contacts of the Palestinians as a people were even more confined, being limited mainly to the Arab League Council, which had appointed its own envoy from Palestine.⁶⁰ The cause of Palestine was, at that time, an "Arab Cause,"⁶¹ while Palestinians, who were dispersed and in political disagreement, were predominantly concerned with the ideals of Arab unity.⁶²

But in January 1964, creation of the Palestine Liberation Organization was authorized at an Arab summit conference pursuant to an Arab League Council decision of the previous September to "affirm a Palestinian entity and place the cause of liberation in the

establishment of the Jewish National Home, and "it was not possible to afford them an opportunity of acting in a way that was hostile to this (the National Home) requirement of the mandate." League of Nations Permanent Mandates Commission, Minutes of the 5th Session (Extraordinary), 9th Meeting, A. 13 1924 VI, at 65.

58. *Id.* at 27-28.

59. The defensive posture of the Arabs is implicit in Lesch's description of their contacts with the British government. *Id.* at 25-40. See also SALEEBY, *supra* note 18, at 44, 48 n.18; and HUREWITZ, *supra* note 25, at 219.

Regarding the status of the Arab delegations in British eyes, Lesch reports that:

In crises, the British did negotiate with the Arab leaders as the de facto spokesmen of their community, but in quiet periods the British could ignore the Arab political bodies or encourage moderates to develop opposition groups.

Lesch, *supra* note 24, at 21. Lesch quotes one contemporary report as noting:

Under a semi-parliamentary regime [the British government would] be forced to heed [the Arabs'] protests, inasmuch as they would have that guise of representative opinion that they could now be said to lack.

Commentary in *Near East and India*, London, December 15, 1932, entered in CO records (CO 733/223/97258); quoted in Lesch, *supra* note 24, at 21.

60. In 1945, upon creation of the Arab League, the de jure independence of Palestine was recognized by the League, and this organization of Arab states, itself, appointed a representative from Palestine. L. KADI, ARAB SUMMIT CONFERENCES AND THE PALESTINE PROBLEM 16-19 (1966) [hereinafter cited as KADI]. When an Arab Government of All Palestine was proclaimed in 1948, member states of the League recognized the government and invited its presence at sessions of the Arab League Council. B. SHWANDRAN, JORDAN: A STATE OF TENSION 267 (1959) [hereinafter cited as SHWANDRAN].

61. QUANT, *supra* note 27, 49-50.

62. *Id.*

hands of the Palestinians themselves."⁶³ The following May, a Palestine National Congress met in Jerusalem and adopted a charter stating that the PLO:

shall be responsible for the direction of the Palestinian people in its struggle for the liberation of its homeland, in all liberalational, political, and financial fields and also for whatever measures may be required by the Palestine case on the inter-Arab and international levels.⁶⁴

The Congress immediately notified U.N. Secretary General U Thant that the PLO would be "the only legitimate spokesman for all matters concerning the Palestine people."⁶⁵

Today, after prevailing in challenges for Palestinian leadership and having undergone major changes of composition,⁶⁶ the PLO retains the support of the Arab League⁶⁷ and has increasingly been allowed to act on the international plane as the exclusive agent of the Palestinian people. It has been accepted as an observer-member of the organization of non-aligned countries,⁶⁸ and has been invited to participate in numerous international conferences.⁶⁹ Its chairman, Yasser Arafat, attended the Second Islamic Summit Conference in February 1974,⁷⁰ has negotiated with government officials in the Soviet Union, East Germany, Poland⁷¹ and France⁷² and was invited to and did address the United Nations General Assembly.⁷³ These practices of states individually and collectively made it increasingly acceptable to deal with the PLO and provided a foundation for the more formal steps of recognition which were to follow.

The concept of consent manifested in practice, while indefinite and unpredictable, is not without value as a determinant of international law and legal relations. Like its counterpart in commercial law, customs and usage of trade, practice looks to the needs and

63. J. COOLEY, GREEN MARCH, BLACK SEPTEMBER: THE STORY OF THE PALESTINIAN ARABS 95 (1973).

64. KADI, *supra* note 60, at 108.

65. *Id.* at 106.

66. Quandt, *supra* note 27, at 67-73.

67. PALESTINE LIBERATION ORGANIZATION, THE PLO: THE SOLE LEGITIMATE REPRESENTATIVE OF THE PALESTINIAN PEOPLE 9 (1974) [hereinafter cited as PLO].

68. *Id.* at 10.

69. G.A. Res. 3237, 29 U.N. GAOR Supp. 31, at 4, U.N. Doc. A/L.742 and Add.1 (1974). See also 56 U.N. ECOSOC 1835 & 1840, 56 U.N. ECOSOC, Supp. 1, at 1, 3, U.N. Doc. E/5544 (1974).

70. PLO, *supra* note 67, at 10-11.

71. *Id.* at 11-14.

72. N.Y. Times, Oct. 29, 1974, at 6, col. 1.

73. G.A. Res. 3210, 29 U.N. GAOR Supp. 31, at 3, U.N. Doc. A/L.736 and Add. 1 & 2 (1974).

realities of the community while putting aside value judgments and abstract criteria.⁷⁴ It thus takes on the virtues of an "invisible hand" as it theoretically reflects and balances competing needs.

The needs in the cases of the Zionist Organization/Jewish Agency and of the PLO are not difficult to identify. In the former, the world's awareness of the Jewish "problem," painfully renewed by World War II; the immediate post-war need to provide for and resettle some 250,000 displaced European Jews; and the considerable political pressures wielded by Jews were among the factors which led the world community to approve the establishment of a separate Jewish state in Palestine.⁷⁵ In the case of the PLO, international terrorism, largely at the hands of too-long-ignored Palestinian refugees; the threat of war between the major powers; and the use of the oil weapon contributed to a need felt almost universally to deal with the Palestine question, and thus presumably to deal with the Palestinians.

Yet, reliance on the practice of states to reflect the needs of the community is not as healthy a concept as it might seem. Practice, in this sense, is not the practice of custom, where the habits of states are based on convictions that certain actions are obligatory or right.⁷⁶ And the needs, while perhaps genuine, are not necessarily the higher needs for principle described by Lauterpacht as arising from the existence of "a community of states under the rule of law."⁷⁷ Practice, in short, need not be based on the "reason of the

74. The needs and realities referred to are those political, social and economic factors which motivate the everyday conduct of states on the international plane (e.g., the need for Americans to keep their automobile gas tanks full). It should be noted that these are not the same needs and realities cited by Lauterpacht as a secondary source of international law. See text accompanying note 77 *infra*.

75. Although the United Nations Special Committee on Palestine recommended that "[a]ny solution for Palestine cannot be considered as a solution of the Jewish problem in general," 1 U.N. S.C.O.P. Report to the General Assembly, Supp. 11, at 46, U.N. Doc. A/364 (1947) [hereinafter cited as UNSCOP Report], the "problem" was clearly on the committee's mind when it foresaw partition of Palestine and creation of a Jewish State as a means of dealing with persons displaced by the war—most of them Jews—who could not (and did not want to be) reabsorbed in large numbers into their German or Austrian communities for fear of anti-Semitism. Almost universally they reportedly favored immigration to Palestine. UNSCOP Report, *supra* at 44; see Subcommittee 3's Report to UNSCOP, A/AC. 13/SC. 3/5, in 2 U.N. S.C.O.P. Report to the General Assembly, Supp. 11, at 14-17, U.N. Doc. A/364 Add. 1 (1974). In addition to the sentiments of the displaced persons, Jews in the United States and elsewhere exerted tremendous political pressure to obtain international approval for establishment of a Jewish State in Palestine. See, e.g., H. TRUMAN, 2 MEMOIRS 156-59 (1956).

76. OPPENHEIM, *supra* note 3, at 26.

77. LAUTERPACHT, *The Definition and Nature of International Law*, *supra* note 34, at 54.

law" and the needs which motivate it may be contrived as well as real, political as well as moral.

C. Obtain Formal Recognition as the People's Representative

What was implicitly accepted in the participation stage above may be declared and made official in a process similar to, but short of, full diplomatic recognition. In this process, states and international organizations formally recognize a public body as the principal, if not exclusive, agent of the people in question. The effect is analogous to that of diplomatic recognition—an ascertainment of the fact that a people exists as a subject of international law⁷⁸ and that the entity representing them is a public body which now has legal standing. The number of states, or status of organization required for the purpose—or for determining whether there is consent—is unclear.⁷⁹ What is clear from the PLO experience, is that many small states, especially in the context of the United Nations, may be just as influential as a few large states.⁸⁰

The British government in its Balfour Declaration of 1917 implicitly recognized the Zionist Organization as a public body representing the Jewish people.⁸¹ This declaration served to secure the Organization's place at the Paris Peace Conference,⁸² and its

78. See H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 279 (1952) [hereinafter cited as KELSEN].

79. "Common consent" can therefore only mean the express or tacit consent of such an overwhelming majority of the members [of the community] that those who dissent are of no importance as compared with the community viewed as an entity in contradistinction to the wills of its single members.

OPPENHEIM, *supra* note 3, at 17. In each particular case, the existence of consent is a question of fact and "a matter of observation and appreciation, and not logical and mathematical decision . . ." *Id.*

80. The votes in the United Nations General Assembly on Resolutions 3236 and 3237 (which recognized the right to self-determination and national sovereignty of the Palestinian people and gave the PLO observer status in the Assembly) were 89 for, 8 against, 37 abstaining; and 95 for, 17 against, and 19 abstaining, respectively. The major western powers and Japan voted against or abstained on both resolutions. G.A. Res. 3236 & 3237, 29 U.N. A/PV. 2282, at 10-12, U.N. Doc. A/5194 (1974).

81. The Zionist Organization, according to Mallison, was "claimed to be a public body representing all Jews from its inception." Mallison, *supra* note 11, at 567. Thus:

[The Balfour Declaration] manifests the British view that the Organization had the juridical status to receive the political promise clause [establishment of a Jewish National Home in Palestine] as well as to be subjected to the legal limitations embodied in the safeguards [protection for the Arabs of Palestine and for the Jews living outside Palestine].

Id. at 567-68.

82. See text accompanying note 45 *supra*.

participation in the drafting of the Mandate for Palestine.⁸³ It was the Mandate itself, however, with its provision for the Zionist Organization to be "the appropriate Jewish agency (to cooperate with the Mandatory),"⁸⁴ which is said to have officially confirmed the Organization as a public body.⁸⁵ This status was judicially affirmed by the Permanent Court of International Justice in its *Mavrommatis Palestine Concessions Case*.⁸⁶

The Palestine Liberation Organization has similarly been accorded recognition as the representative of the Palestinian people, first by individual states and groups of states and later by international organizations. Following establishment of the PLO in 1964, the Arab states welcomed it as "a support for the Palestine entity and a vanguard of the joint Arab struggle to liberate Palestine."⁸⁷ In March 1965, the People's Republic of China recognized the PLO as "a national institution representing the struggle of the people of Palestine for their country."⁸⁸ Stronger endorsements have subsequently come from several European socialist states, including the Soviet Union, from such groups as that of the organization of non-aligned countries, the Organization of African Unity, the Afro-Asian Peoples' Solidarity Organization,⁸⁹ and from the Arab League.⁹⁰ These instances of state and organizational recognition laid the foundation for a statement by the United Nations General Assembly that the PLO is "the representative of the people of Palestine,"⁹¹ and for an invitation from the General Assembly for the PLO to participate in its work as an observer.⁹²

What lies behind the recognition—the criteria upon which this factual decision is made—is a subject generally beyond the scope of this Comment. Two matters in this respect are worthy of notice, however. First, recognition, like practice, may be as much or more

83. See text accompanying note 46 *supra*.

84. League of Nations, Mandate for Palestine, art. 4, *supra* note 49.

85. Cf. Mallison, *supra* note 11, at 570.

86. See note 52 *supra*.

87. From the final communique of the Arab Summit Conference at Alexandria, Sept. 11, 1964, quoted in KADI, *supra* note 60, at 139.

88. KADI, *supra* note 60, at 167.

89. PLO, *supra* note 67, at 10-11. According to a publication of the Arab Information Center, Washington, D.C., the PLO "has been recognised by 74 non-aligned countries, 42 African States, all Muslim States, and all Socialist countries." 1 ARAB REPORT 3 (Dec. 15, 1974) [hereinafter cited as ARAB REPORT]. There seems to be some overlap.

90. N.Y. Times, Oct. 29, 1974, at 1, col. 8.

91. G.A. Res. 3236, 29 U.N. GAOR Supp. 31, at 4, U.N. Doc. A/L.741 and Add.1 (1974).

92. G.A. Res. 3237, 29 U.N. GAOR Supp. 31, at 3, U.N. Doc. A/L.742 and Add.1 (1974).

forced by circumstances and need, as it is derived from a careful analysis of fact or principle. The exigencies of a wartime situation, for example, or the arm-twisting of an oil embargo may yield decisions of expedience in this area as much as in any other.⁹³

Notwithstanding the above, recognition does imply the conclusion that in some more or less imperfect way the entity which purports to speak for a people really is their representative. The two organizations under study appear to meet this criteria in approximately equal measure. The Zionist Organization was guided by a Congress which drew representatives from Jewish communities throughout the world.⁹⁴ Likewise, the base of the PLO's decision-making process is a National Congress to which representatives are said to be elected from a wide range of social, political and professional organizations in states containing Palestinian communities.⁹⁵

Recognition, though basically of a fact already established by other practices, is an important step in itself. When the recognition is accorded by states (but more often when it is granted by organizations) it allows a people officially to become part of the international decision-making process and gives a sense of illegitimacy to agreements reached without them.⁹⁶ It enhances the prestige of their representative entity, and does so partly by downplaying the relevance of its less-widely-condoned activities. Finally, recognition puts political pressure upon states which previously had withheld from dealing with that entity, to reconsider their positions.⁹⁷

Depending upon the nature and strategy of the representative body which is aspiring to legal standing, formal recognition may not be entirely advantageous. Recognition is likely, for instance, to

93. The United States' recognition of the National Council of the Czechoslovak People in September 1918, which Council at the time was "no more than a provisional and absentee government with headquarters in Washington . . ." is such an example. Of this Fenwick commented, "Only the exigencies of war could have justified such a measure consistently with the precedents of international law." FENWICK, *supra* note 32, at 106.

94. COHEN, *supra* note 12, at 75-76.

95. ARAB REPORT, *supra* note 89, at 1. There were, of course, both Jews and Palestinians who disagreed with the aims or policies of their respective organizations and who therefore did not participate in the processes described in the text. See COHEN, *supra* note 12, at 74-75 and KADI, *supra* note 60, at 105.

96. Although the United States has thus far declined to recognize or (as far as is known) negotiate with the PLO, Arab diplomats were reported to have concluded that the elevated status granted the PLO at the October 1974 Arab summit conference would force the United States to deal directly with that organization. N.Y. Times, Oct. 30, 1974, at 18, col. 2.

97. On Jan. 10, 1975, less than two months after the United Nations' action referred to in the text accompanying notes 91 and 92 *supra*, India responded to a PLO request, reportedly made "some time back," and recognized the PLO. N.Y. Times, Jan. 11, 1975, at 3, col. 1.

oblige the entity to begin assuming international responsibilities—the “other side” of being a subject of international law. The Mandate for Palestine made the Zionist Organization “subject always to the control of the (British) Administration,” and allowed it to be the Jewish agency for Palestine only “so long as its organization and constitution are in the opinion of the Mandatory appropriate.”⁹⁸ Similarly, United Nations General Assembly Resolution 3236 of November 21, 1974 recognized that the Palestinian people are entitled to “regain (their) rights” but extended that recognition only to those “means” which are “in accordance with the purposes and principles of the Charter. . . .”⁹⁹ The PLO’s status in general is seen as also likely to temper its international behavior.¹⁰⁰

Formal recognition would appear to be a satisfactory outcome of an entity’s drive for international legal standing. But recognition alone does not guarantee full procedural rights, nor will such procedural rights as are obtained be of value without international recognition of certain substantive rights to which the organization may be entitled. In fact, in order for the entity seeking territorial sovereignty to even be dealt with or recognized as a public body, it, or the people it represents, must have some arguable claim to a fundamental right available at international law. It has been suggested that such a fundamental right is the people’s entitlement to their own institutions of self-government, in other words, to political self-determination.¹⁰¹

D. *Be Entitled as a People to the Right to Self-Determination*

Among the various elements of the Zionist Organization’s Jewish National Home proposal were claims for what translates into the right to self-determination for the Jewish people.¹⁰² Although it is

98. League of Nations, Mandate for Palestine, art. 4, *supra* note 49, at 108.

99. G.A. Res. 3236, 29 U.N. GAOR Supp. No. 31, at 4, U.N. Doc. A/L.741 and Add.1 (1974).

100. N.Y. Times, Oct. 30, 1974, at 18, col. 5.

101. It has been suggested that self-determination is the *sine qua non* of all other rights which a people as a non-sovereign entity may acquire. D. NINCIC, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS*, 253-54 (1970).

102. Self-determination has been defined as:

[T]he process by which a group of people, usually possessing a certain degree of national consciousness, form their own state and choose their own government.

9 ENCYCLOPEDIA BRITANNICA 41 (1974).

The Zionist claim of entitlement to this principle, as it was then termed, was implicit in Herzl’s writing (*supra* note 12), in the Basle Declaration (see text accompanying note 13 *supra*), and in the Zionist Organization’s Memorandum to the Supreme Council at the Paris Peace Conference, HUREWITZ, *supra* note 25, at 45-50.

generally agreed that self-determination did not exist at the time as a "right" at international law¹⁰³ (as it appears to exist today¹⁰⁴), the concept, at least, was both familiar and in limited use.¹⁰⁵ The opportunity for, if not the right to, self-determination was granted the Jewish people by the Mandate provision for substantial Jewish immigration into Palestine.¹⁰⁶ It has also been argued that the distinct absence from the Mandate of requirements for bringing about

103. Fenwick argued in 1924 that a "right of self-determination" had "not attained the validity of a legal rule," FENWICK, *supra* note 32, at 106-07. Professor Green argues that such a right does not even exist today in customary (positive) international law, although he concedes that such a right may be "*in nascendi*" as evidenced by United Nations General Assembly resolutions. Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, 65 AM. J. INT'L L. 40, 46 (1971).

104. Professor Green's arguments, *supra* note 103, to the contrary, there does appear to be a "right" to self-determination recognized at international law. Article 1 of the United Nations Charter, for example, states that one of the purposes of the United Nations is [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" U.N. CHARTER art. 1.

That this right is not exclusively applicable to states, but is available also to individuals constituted as an identifiable people is evidenced by a host of United Nations resolutions conferring a "right" to self-determination upon such groups and citing Article 1 as the source of their authority. A 1970 resolution concerning Palestine, for example, stated:

The General Assembly

Bearing in mind the principle of equal rights and self-determination of peoples enshrined in Articles 1 and 55 of the Charter

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

G.A. Res. 2672 C, 25 U.N. GAOR Supp. 28, at 36, U.N. Doc. A/8204/Add. 1 (1970).

One observer has recently concluded:

[S]elf-determination in international law is . . . synonymous with the right of non-self-governing territories to independence. Such territories can easily be distinguished by virtue of [sic] their being geographically and racially distinct from the metropolitan country which governs them, but with which these territories do not share political power.

Mustafa, *The Principle of Self-Determination in International Law*, 5 INT'L LAW. 479, 486-87 (1971).

105. The concept of self-determination had been articulated as one of the four goals for which the Allies were fighting in World War I. See President Woodrow Wilson's Address of July 4, 1918, N.Y. Times, July 5, 1918, at 1, col. 2-3. The concept underlay the minorities treaties and great power intervention in the Balkans. FENWICK, *supra* note 32, at 107. And it was institutionalized in the mandate provisions (Art. 22) of the League of Nations Covenant. Article 22 refers to the "well-being and development" of the peoples who were formerly subjects of the defeated powers as being a "sacred trust of civilization," and provisionally recognized the independence of some such communities. HUREWITZ, *supra* note 25, at 62.

106. Provisions for large scale Jewish immigration into Palestine and the distinct absence from the Mandate of requirements for ending the Mandate and bringing this immigration to a halt provide support for this observation. See THE CONTEMPORARY MIDDLE EAST 274-75 (B. Rivlin and J. Szlyliowicz eds. 1965) [hereinafter cited as THE CONTEMPORARY MIDDLE EAST].

the early independence of Palestine extended that opportunity for self-determination.¹⁰⁷

Similarly, the Palestinians base their claim to the right to self-determination upon a substantial body of international practice and pronouncement,¹⁰⁸ including a United Nations resolution referring specifically to the "inalienable right" of the Palestinian people to "self-determination."¹⁰⁹

Although a right to self-determination has been declared applicable to "all people,"¹¹⁰ not every group has a right to its own state sovereignty.¹¹¹ The criteria described above¹¹² must in some sense be applied in order to distinguish a "people" from a mere minority group. It has again been suggested, however, that practice should be the determinant, practice here being defined as a people's preparation and capacity (and, it would seem, willingness) to "struggle for self-determination."¹¹³ Palestinian experience in this respect has been mixed. Recent United Nations General Assembly debates, for instance, reveal international support for the Palestinians based

107. Under Article 1 of the Syrian and Iraqi mandates, the mandatory was required to frame an organic law within three years of the coming into force of the mandate and was "to facilitate the progressive development" of those countries "as independent states." Comparable clauses were lacking in the Palestine instrument, which, on the contrary, vested in the mandatory for an indefinite period "full powers of legislation and administration, save as they may be limited by the terms of this mandate." HUREWITZ, *supra* note 25, at 107. This omission, coupled with the immigration provisions mentioned in the text accompanying note 106 *supra*, appears to indicate the intent of the League to maintain the Mandate until a Jewish National Home had been established. See THE CONTEMPORARY MIDDLE EAST, *supra* note 106, at 272. However, the British government in its 1922 policy statement, *supra* note 25, at 104, placed a narrow construction on the term "Jewish National Home," indicating that a "Home" was not to be considered a sovereign Jewish state.

108. The Palestinians cite British pledges of independence and self-governance contained in the McMahon correspondence and 1922 and 1939 policy statements of the British government, and Article 22 of the League of Nations Covenant. See note 25, *supra*. They also base their claim on the United Nations Charter (*supra* note 104); the Partition Plan, which called for creation of independent Arab and Jewish states in the area of Mandatory Palestine west of the Jordan River [G.A. Res. 181, U.N. Doc. A/519, at 131 (1974)]; and upon numerous other United Nations declarations and resolutions of a general nature. See, e.g., United Nations Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 122-24, U.N. Doc. A/8082 (1970); 25 U.N. GAOR Supp. 28, at 36, UN Doc. A/8204/Add. 1 (1970).

109. G.A. Res. 2672 C, G.A. Res. 2963 E, 27 U.N. GAOR Supp. 30, at 29, U.N. Doc. A/8730 (1972).

110. International Covenant on Civil and Political Rights, G.A. Res. 2200 A, 21 U.N. GAOR Supp. 16, at 52, U.N. Doc. A/6316 opened for signature Dec. 16, 1966.

111. NINCIC, *supra* note 101, at 252-53.

112. See subsection A of text.

113. See NINCIC, *supra* note 101, at 253.

upon both arguments as to history and policy and evidence of the people's willingness to "struggle" for statehood.¹¹⁴

If a determination of rights is left to practice, there is no need to wrestle with the secondary matter of implementation. This is particularly true with what are essentially civil wars or revolutions against colonial powers, in which groups within a given territory are contending for that territory's control or sub-division.¹¹⁵ But there are also instances, like the one in question, where one of the contending groups is located essentially outside the territory on which it proposes to exercise its self-rule.¹¹⁶ Under these circumstances, with world peace at stake, the better part of wisdom may be to give practice a lower priority as a means of implementation, and to seek a less precarious alternative.

E. Acquire an International Commitment to the People's Right to Territorial Sovereignty

One such alternative—international fiat in the form of the Partition Plan—has been attempted in the Middle East, but did not succeed in avoiding violence. A step short of that, taken recently with regard to the Palestinians, is an international commitment to

114. United Nations General Assembly 2295th and 2296th Plenary Meetings (XXIX), Press Releases GA/5152 and GA/5153 of Nov. 21 and 22, 1974.

115. The means of implementation of a people's self-determination may include, for instance, a plebiscite or an armed struggle. If the outcome of the latter has been used to determine a people's eligibility for the right, it has already also solved the problem of implementation.

116. United Nations General Assembly Resolution 3236 of Nov. 22, 1974 speaks of the "Palestinian people in Palestine," reaffirms their "inalienable rights" to return to their homes, and "calls for their return." In debate concerning the resolution, the ambassador from Barbados reportedly commented:

His delegation knew that the Palestinian people existed, but where was Palestine? he said. If Palestine did not exist, then what did the co-sponsors mean in referring to the "Palestinian People in Palestine"? he asked . . . {W}hen the draft dealt with their return, [he] had to ask: their return where?

United Nations General Assembly 2296th Plenary Meeting (XXIX), Press Release GA/5153, Take 8, 22 Nov. 1974.

The idea that self-rule is meaningless without territorial sovereignty should not be elevated to the level of a law of nature. Although it appears to be a self-evident proposition, Professor Hall suggests that it became an "inevitable" assumption because at the time international law was being formulated, "no instances were present of civilised communities without fixed seats." HALL, *supra* note 3, at 18. The reference to "civilized" countries provides an interesting point of contrast because, according to Professor al Ghunaimi, the Muslims traditionally "did not consider a fixed territory as an essential element in the structure of the state." AL GHUNAIMI, *THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH* 64 (1968).

the people's right to national sovereignty without specific proposals as to implementation of that right.¹¹⁷ Such a commitment, however limited, gives the stamp of legitimacy to efforts by that people to acquire territory on which to exercise self-rule. It may also provide some authority for intervention by established states in support of that people.

Although it is arguable that a commitment of this kind was contained in the Mandate promise of a Jewish National Home in Palestine,¹¹⁸ an international undertaking to this effect is more clearly evident in the 1947 United Nations Partition Plan.¹¹⁹ The plan, which is based upon a General Assembly resolution considered invalid by the Arabs,¹²⁰ is cited by Israel as one of the legal bases for its existence.¹²¹ Some scholars have conceptually upheld it as an international act of eminent domain,¹²² but the plan appears more likely to have been an exercise of what was still essentially colonial power, and it is unlikely that it could be repeated today.

The plan was not without limitations and qualifications for its beneficiaries, however. Territory granted therein for the Jewish State was little more than half the portion of Palestine originally opened for Jewish settlement.¹²³ In addition, terms of the resolution

117. See notes 132 and 133 *infra*.

118. The argument that the Mandate was a commitment of sovereignty to the Jews follows from the propositions discussed in the text accompanying note 106 and in note 107 *supra*.

119. Part I, A, 3 of the Partition Plan provides that:

Independent Arab and Jewish States . . . shall come into existence in Palestine two months after the evacuation of the armed forces of the Mandatory Power has been completed but in any case not later than 1 Oct. 1948.

G.A. Res. 181, U.N. Doc. A/519 at 131, 133 (1947).

120. According to Elaraby, first Secretary of the United Arab Republic Mission to the United Nations, the resolution was invalid because United Nations Charter provisions (arts. 10, 11, 12, and 14) limit General Assembly power in such matters to that of making recommendations only. Elaraby, *Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements*, in *THE MIDDLE EAST CRISIS: TEST OF INTERNATIONAL LAW* 97, 102 (J. Halderman ed. 1969).

121. The Proclamation of Independence of the State of Israel traces development of "the right of the Jewish People to a national revival in their own country" from its proclamation by the First Zionist Congress, through its "acknowledgement" in the Balfour Declaration, its "reaffirmation" by the Mandate for Palestine, and to its "unassailable recognition" by the United Nations in the Partition Resolution. *THE ISRAEL-ARAB READER*, *supra* note 12, at 126.

122. See Kutner, *International Eminent Domain*, 16 *CATH. LAW.* 296, 311 (1970); Weinfeld, *Eminent Domain Among Peoples, A Jewish State in Palestine and Arab Self-Determination*, 21 *TEMP. L.Q.* 223, 232-33 (1947-48).

123. While the Mandate's Jewish Home provisions applied to all of the territory of Palestine west of the Jordan River, the Partition Plan granted Jews only about 56% of that territory. Elaraby, *supra* note 125, at 102.

required that Arabs be granted citizenship in the Jewish State, if that is where they were living at the time of partition; that they be granted equal rights; and that their property not be taken except for public purposes and then only with full compensation.¹²⁴ However qualified and whatever its validity, the Plan nevertheless provided an interim basis of legality for the State of Israel.¹²⁵

The Partition Plan offered a commitment of territorial sovereignty—similar in terms to that offered the Jews—to the Arabs of Palestine,¹²⁶ but the Arabs declined to accept the proposal. Some scholars have advanced the idea that a territorial commitment to the Arabs actually existed in the Mandate provision limiting Jewish settlement to Cisjordan, the area of Palestine west of the Jordan River; and that the commitment was fulfilled in Britain's 1946 grant of independence to Transjordan, the area of Mandatory Palestine lying east of the Jordan.¹²⁷ The problem with this analysis from the

124. See Part I, B., 10(d), Part I, C., ch. 2.8, and Part I, C., ch. 3.1 of the Partition Plan for provisions concerning equal rights, expropriation, and citizenship in the proposed Arab and Jewish states. *THE ISRAEL-ARAB READER*, *supra* note 12, at 117, 120, 121.

125. According to Professor Wright, the justifiability of the original Arab objection to partition can hardly be questioned, but Israel subsequently attained other grounds on which to rest her claim to legitimacy. Wright, *The Middle East Problem*, 4 *INT'L LAW* 364, 370 (1970) [hereinafter cited as Wright].

126. See note 119 *supra*.

127. The Mandate provision referred to is Article 25, which permits the Mandatory to withhold application of Mandate stipulations in the area between the Jordan River and the eastern boundary of Palestine. The circumstances which led to Article 25's insertion indicate it was intended to apply to the Jewish National Home provisions. HURSWITZ, *supra* note 25, at 111, 107.

Jordan's role in the Palestine problem is interesting and infrequently mentioned. It is succinctly stated by Professor Reisman:

The agony of the Palestinian people did not begin in 1922 with the . . . Mandate It began in 1921 when Winston Churchill gave five thousand pounds a month to the Emir Abdullah and a small state to spend it on to stop Abdullah from waging war on the French in Syria. Abdullah was a Hashemite from Saudi Arabia; he was simply set on top of the Palestinians in that region.

Symposium on Self-Determination and Settlement of the Arab-Israeli Conflict, 65 *AM. J. INT'L L.* No. 4, at 31, 49 (1971).

The "small state" became the country of Transjordan (Jordan today) in 1946 when Great Britain granted it independence under Hashemite rule. Following the 1948 war, Jordan, which had conquered some of the West Bank territory slated for the proposed Arab State, annexed that territory following elections in which Palestinian residents voted. SHWANDRAN, *supra* note 60, at 246, 269, 286, 291-92, 295-97. See generally note 29 *supra*.

From the standpoint of international law, the basis of the act of incorporation [Jordan's incorporation of the West Bank] appears to have been the preceding administration of the area by Jordan, followed by the expressed *animus* of sovereignty. Treated as an instance of acquisitive prescription, the problem presents itself of finding an alternative claimant whose acquiescence may be presumed; the Arab

Palestinian point of view was not only that it required a permanent renunciation of title to their land in Cisjordan, but also that at the time of partition Transjordan was economically backward with little prospect for growth¹²⁸ and was ruled by the House of Hashim, an essentially foreign administration for which the Palestinians held no affection.¹²⁹ Whether or not those who framed the Mandate intended

State envisaged in the [General] Assembly Resolution, many of whose potential citizens voted in the general election, would appear to have been the only contender. Alternatively, may the West Bank be regarded as *res nullius*, open to occupation by the first State to establish effective administration?

The International Status of Palestine, *supra* note 29, at 980. This matter is analytically treated in Blum, *supra* note 29.

According to Dr. Paul Riebenfeld, the Jordanian census taken in 1961 showed that of a total population of 1,640,039 citizens, 1,355,450 were of Palestinian origin. Of the latter, 805,450 lived in the West Bank area and 550,000 lived in the territory of what was formerly Transjordan. In Riebenfeld's opinion:

[E]ven today, with the West Bank in Israeli possession, eighty percent of the area of Palestine belongs to and is occupied by the Arabs of Palestine. . . . What is it that stands in the way of affirming the Palestinian character of Jordan, of the Palestinians voting themselves into power?

Symposium on Self-Determination and the Settlement of the Arab-Israeli Conflict, *supra* at 60-62.

Apparently, the government of Israel also, and not surprisingly, supports the concept that the Palestinians look to the territory of Jordan for purposes of self-determination. See Statements by the Israeli Ambassador to the United Nations at the United Nations General Assembly 2296th Plenary Meeting (XXIX), Press Release GA/5153, Take 9, 22 Nov. 1974.

128. Even the Jewish Agency concluded that Jordan was poorly suited for independent statehood. In a memorandum on Transjordan presented to the Anglo-American Committee of Inquiry on Palestine in 1947, the Agency said:

In view of [the fact that the Amirate of Transjordan owes "its very existence" to the administrative and financial help provided by Great Britain and Palestine], the question may be asked whether a small community such as Transjordan, even if fully developed, could afford to possess all those public services which characterize a modern State. Any student of the country's affairs is bound to reach the conclusion that, in order to allow a grade of efficiency which is the *raison d'être* and prerequisite of a State's independent existence, a wider political entity is required than is found here.

THE JEWISH AGENCY FOR PALESTINE, THE JEWISH CASE BEFORE THE ANGLO-AMERICAN COMMITTEE OF INQUIRY ON PALESTINE 630, 651 (1947) [hereinafter cited as THE JEWISH CASE].

129. Perhaps part of the answer to the question posed by Dr. Riebenfeld in note 131 *supra* lies in the deep differences which existed in 1948 between Transjordanian and Palestinian Arabs. See SHWANDRAN, *supra* note 60, at 300. These differences were later exacerbated by King Hussein's attempts to suppress the Palestinian movement within Jordan. QUANDT, *supra* note 27, at 128. Part of the answer may also lie in inter-Arab rivalry, particularly as between Jordan and other members of the Arab League. See generally SHWANDRAN, *supra* note 60, at 221-99. Finally, part of the answer could lie in Arab motives for support of the Palestinian cause. A statement by Arab leaders following their summit meeting in January 1964, for instance, asserted that:

One way of repelling the threatening Zionist danger was through organization of the

Transjordan to be the Arab half of Palestine, the Partition Plan appears to have made irrelevant such intentions by providing for an Arab State in parts of the territory west of the Jordan River.¹³⁰ The Arab invasion of 1948, some suggest, may have permanently destroyed that Arab State.¹³¹

Nevertheless, the international commitment of sovereignty to the Palestinian Arabs has been revived. On October 28, 1974, the Arab heads of state, meeting in Rabat, Morocco, called for creation of an independent Palestinian state and gave the PLO sole responsibility for any Palestinian-claimed territory relinquished by or liberated from Israel.¹³² Shortly thereafter, on November 22, 1974, the United Nations General Assembly "[r]eaffirm[ed] the inalienable rights of the Palestinian people in Palestine, including: . . . (b) The right to national independence and sovereignty," and the right to return to their homes and property.¹³³ This resolution makes no mention of the Partition Plan and has none of its specificity. The rights it confers however, like those offered to both sides in the Partition Plan, are qualified.¹³⁴

The "right to return," mentioned in the resolution, sounds much like proposals once advanced by the Jews and now by the Palestinians,¹³⁵ which suggest that both groups exercise self-determination within the same territory.¹³⁶ While this idea is not

Palestinian people, thus enabling it to play its part in liberating Palestine and in determining its future.

KADI, *supra* note 60, at 101. This statement suggests at least two motives for organizing the Palestinians, one of which is clearly directed toward Israel.

130. See note 119 *supra*.

131. See Stone, *Peace and the Palestinians*, 3 N.Y.U.J. INT'L L. & POL. 247-48 (1970).

132. N.Y. Times, Oct. 29, 1974, at 1, col. 8.

133. G.A. Res. 3236, 29 U.N. GAOR Supp. 31, at 4, U.N. Doc. A/L.741 and Add.1 (1974).

134. See note 99 *supra*.

135. In an official statement of Zionist aims approved in September 1921, the Zionist Congress affirmed:

[T]he determination of the Jewish people to live with the Arab people on terms of unity and mutual respect, and together with them to make the common home into a flourishing community, the upbuilding of which may assure to each of its peoples an undisturbed national development.

Quoted in the 1922 Statement of British Policy on Palestine, *supra* note 25, at 104.

The Palestine Liberation Organization has advocated establishment in Palestine of a "secular, democratic progressive society without distinction or discrimination as between Jews, Christians, and Muslims." Bassiouni, *supra* note 16, at 38.

136. Professor Bassiouni advocates the "right of return" based upon the assumption that a right to self-determination vested with the Palestinian people while they were living in Palestine. He argues that the right is only exercisable when a "rational nexus" can be proven between a people and a given territory. Bassiouni, *supra* note 16, at 36. But the very basis

necessarily self-contradictory,¹³⁷ neither is it practical in the Middle East. The bitterness and suspicion between Palestinian and Jew, which was a reason for partition,¹³⁸ is clearly still an obstacle to a bi-national state.¹³⁹ More conclusive, however, are the apparent aspirations of Jews and Palestinians to mutually exclusive statehood.¹⁴⁰

Under these circumstances, and given the limitations which now exist on the exercise of international power, an international commitment to a people's right to national sovereignty may be no more useful today than as a bargaining tool in diplomatic negotiations. As a tool, it notifies the party holding territory of the will of the international community—a community upon which that party depends for the exercise of its own legal rights. How effective such a commitment is remains to be seen.

for providing Palestine as a "National Home" for the Jews was the "historical connection of the Jewish people with Palestine." HURWITZ, *supra* note 25, at 107.

137. Self-determination need not be equated with state sovereignty, although sovereignty is an aspect of self-determination. Nincic draws a distinction between "external" and "internal" aspects of self-determination. The former refers to self-government; the latter refers to the freedom of peoples to pursue their economic, social and cultural development. Nincic, *supra* note 101, at 246-49.

138. UNSCOP Report, *supra* note 75, at 47.

139. In a speech before the United Nations General Assembly in response to a vote by that body to invite the PLO as an observer and to affirm the Palestinians' right to self-determination, the Ambassador from Israel, comparing the Palestine Liberation Organization with the Nazis, said:

The PLO murderers are their heirs in method and objective.

The only right that the PLO is prepared to grant Jews is to live as an oppressed minority in one more Arab State.

United Nations General Assembly 2296th Plenary Meeting (XXIX), Press Release GA/5153, Take 13, 22 Nov. 1974.

140. See, e.g., Statement of Dr. Chaim Weizmann in THE JEWISH CASE, *supra* note 128, at 3, 20-21. The Palestine Liberation Organization has advocated the establishment of a secular democratic state in Palestine which would not discriminate between Jews, Christians or Moslems. See note 136 *supra*. However, Article 6 of the Palestine National Covenant provides that only "Jews who were living permanently in Palestine until the beginning of the Zionist invasion will be considered Palestinians." The Zionist invasion was deemed to have begun at the time of the Balfour Declaration, 1917. See Harkabi, *supra* note 22, at 230-31.

On the other hand, Yasser Arafat, in his speech before the United Nations General Assembly, said, referring to a state of Palestine as envisioned by the PLO: "... we include in our perspective *all Jews* now living in Palestine who choose to live with us there in peace and without discrimination." PALESTINE LIBERATION ORGANIZATION, ADDRESS BY MR. YASSER ARAFAT, 29TH SESSION UNITED NATIONS GENERAL ASSEMBLY, NOVEMBER 13, 1974, at 33. Clearly, whether the Palestinian Arab perspective includes full citizenship for all Jews remains an open question. Whether Israel would accept the secular democratic state idea of the PLO also remains in doubt.

F. Establish a Legal Order Over a Defined Population Within a Given Territory

With standing established and rights acknowledged, a people may now be expected to use the means available in international affairs to gain sovereignty and statehood. To be recognized as a nation-state, however, the people must still establish a legal order over a defined population within a given territory.¹⁴¹ While the means used to accomplish that objective are not relevant to the accordance of recognition once statehood has been established,¹⁴² the act of recognition does not necessarily validate any illegality in the method of acquiring the objective.¹⁴³

The Jewish Agency attained the territorial requisite for statehood essentially by purchase and public land reclamation, and was able to hold and enlarge upon that territory militarily,¹⁴⁴ but the area officially claimed for Israel was that which had been granted by the Partition Plan.¹⁴⁵ The population administered within that territory had been described in the Plan,¹⁴⁶ and the legal order imposed was essentially what had been established by the "shadow government" during the Mandate period.¹⁴⁷

141. The traditional prerequisites for statehood are described by Kelsen, *supra* note 78, at 264-65. He defines a legal order as a centralized, coercive regime which regulates the behavior of the members of a community. *Id.* at 100-01.

142. According to Professor Hall:

[I]nternational law takes no cognizance of matters anterior to the acquisition of [statehood], and is, consequently, indifferent to the means which a community may use to form itself into a state.

HALL, *supra* note 3, at 20.

143. Professor Kelsen distinguishes between recognition of a community as a state and recognition of a legal relationship between that state and another. The former involves the ascertainment of a legally relevant fact, while the latter "creates a law" applicable to the relationship between two states. In Kelsen's opinion, the latter cannot be accomplished by recognition because territorial change brought about illegally between two states cannot be validated by the recognition of a third state. Kelsen, *supra* note 78, at 293-94.

144. For a brief description of Jewish land purchasing practices see SALEEBY, *supra* note 18, at 46. For a detailed account of the 1947-49 War, see N. LORCH, *THE EDGE OF THE SWORD* (1961).

145. See text accompanying note 159 *infra*.

146. Part I, C., ch. 3 of the Partition Plan provided that:

1. *Citizenship.* Palestinian citizens residing in Palestine . . . shall, upon the recognition of independence, become citizens of the State of which they are resident . . .

THE ISRAEL-ARAB READER, *supra* note 12, at 121.

147. See notes 50, 51 *supra*.

The new ministries of government were direct transformations of the bureaus of previously existing institutions. The Political Department of the Jewish Agency became the Foreign Ministry; the Social Welfare Department of the National Assembly be-

The Palestine Liberation Organization is moving toward this objective, though as yet it, like the many governments-in-exile which arose during the two world wars, has "no territory . . . on which to find *piéd à terre*."¹⁴⁸ It has been suggested that the PLO will take the interim step of constituting a government-in-exile.¹⁴⁹ Although the legal grounds for such a move are tenuous,¹⁵⁰ the Organization may find that there are sufficient practical reasons for doing so, and much of the world may be sufficiently sympathetic to approve.¹⁵¹ Among the practical reasons is preparation to administer as a state the territory ceded by Jordan and Egypt should it be "liberated" from Israeli control.¹⁵² Such preparation is likely to be more cosmetic than real, as the PLO already performs many of the administrative functions of a government,¹⁵³ but cosmetics generate their own realities.

But being an identifiable people represented by an internationally-recognized public body is far removed from possessing territorial sovereignty and the attributes of statehood. For the Palestinians, the task is made difficult not only by the absence of an international grant of specific territory, but also by Israel's reluctance to

came the Ministry of Social Welfare; the Hagannah [the Agency's defense arm] became the Israeli army.

H. SACHAR, *THE COURSE OF MODERN JEWISH HISTORY* 543 (1963).

148. BROWN, *Sovereignty in Exile*, 35 AM. J. INT'L L. 666, 667 (1941) [hereinafter cited as Brown].

149. N.Y. Times, Oct. 30, 1974, at 18, col. 2.

150. Kelsen describes a government-in-exile as one which has ceased to have effective control over its former territory, but which has maintained "effective" efforts to regain control. "Effective" efforts are defined as "sufficient [armed opposition] to prevent the control of the occupying power from becoming firmly established." KELSEN, *supra* note 78, at 288-90. The PLO would appear not to have met the criterion of "effective" efforts to regain control and its links, in any case, to previous Arab governing authorities in Palestine are so thin as to make a legal claim to government-in-exile status virtually untenable.

151. The moral or subjective grounds for recognizing a government-in-exile were described by Brown in his editorial comment on European governments-in-exile during World War II:

[S]o long as a people do not accept military conquest; so long as they can manifest, in one way or another, their inalterable will to regain their freedom, their sovereignty, even though flouted, restricted, and sent into exile, still persists.

A nation is much more than an outward form of territory and government. It consists of the men and women in whom sovereignty resides.

Brown, *supra* note 148, at 667-68.

152. See text accompanying note 132 *supra*.

153. According to the Arab Information Center, the PLO, in addition to having a regular legislative and executive apparatus, also collects taxes and builds and operates hospitals, schools, vocational and rehabilitation centers, and research centers. ARAB REPORT, *supra* note 89, at 3. It also has a military arm.

surrender areas on two flanks to an organization, if not a people, which is opposed to her existence as a sovereign Jewish state.¹⁵⁴

G. Receive International Recognition as a Territorial Sovereign

Should the territorial requisite of statehood be acquired, diplomatic recognition will help secure it. Recognition, which is liberally defined as the "ascertainment of [a] fact,"¹⁵⁵ may, particularly if coupled with United Nations membership, give a new state some degree of legal and political security. As a member of the community of nations, it is protected by the elementary rule that a violation of the sovereign rights of one is a violation of the rights of all. As a United Nations member, it is implicitly recognized as a state by all other members,¹⁵⁶ and under Art. 2, Sec. 4 of the United Nations Charter those members are prohibited from using force against its territorial integrity.¹⁵⁷ In practice, as is well known, this protection is not particularly effective, but neither is its effect entirely negligible.¹⁵⁸

The State of Israel, upon its declaration of independence, announced itself to the United States as "an independent republic within the frontiers approved by the General Assembly of the United Nations"¹⁵⁹ Although it has been "generally recognized" as a state with title to the territory within those frontiers, there seems to be no such "general recognition" of its sovereignty over the additional territory it has acquired since then.¹⁶⁰

154. N.Y. Times, Oct. 30, 1974, at 18, col. 1. Article 19 of the Palestinian National Covenant states, "The partitioning of Palestine in 1947 and the establishment of Israel is fundamentally null and void." Article 9 declares, "Armed struggle is the only way to liberate Palestine and is therefore a strategy and not tactics," Harkabi, *supra* note 22, at 239, 233.

155. KRILSEN, *supra* note 78, at 279.

156. Article 4 of the United Nations Charter specifies that membership in the United Nations is open to "all . . . peace-loving states." (Emphasis added.) U.N. CHARTER art. 4.

157. Article 2 of the United Nations Charter provides that:

4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Id.

158. United Nations General Assembly delegates, explaining the positions they had taken when voting on G.A. Res. 3236 and 3237, expressed with near uniformity the understanding that although the Palestinians were now recognized as having certain rights in the Middle East, this fact did not put into question Israel's right to existence and to security. G.A. 2296th Plenary Meeting (XXIX), Press Release GA/5153, 22 Nov. 1974.

159. 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 167 (1963).

160. Wright, *Legal Aspects of the Middle East Situation*, in THE MIDDLE EAST CRISIS: TEST OF INTERNATIONAL LAW 5, 18 (J.W. Halderman ed. 1969).

The United Nations accorded Israel recognition by admitting her as a member state (though not unqualifiedly).¹⁶¹ But the United Nations has also refused, in effect, to recognize the extension of Israel's boundaries, at least beyond those which were held prior to the 1967 war.¹⁶²

Although the Palestine Liberation Organization has not yet reached this stage, there can be little doubt, based upon support for it evidenced at the United Nations,¹⁶³ that it is likely to be widely and quickly recognised if it does achieve the requisites of statehood for the Palestinian people.

While diplomatic recognition has been said to offer a modest amount of security, in the special case of Israel (and as may be true in the event a Palestinian state comes into existence), diplomatic recognition and membership in the United Nations are something more akin to a guarantee of existence than is usually the case. The reason is to be found among the same factors which contributed to Israel's establishment and to the PLO's standing today, (*i.e.* community needs). Israel's existence is, in part, the international solu-

[A]cceptance [of the Partition Plan] by the U.N., the recognition of Israel by most states, the willingness of the Arabs at the Lausanne Conference, prior to the armistice of 1949, to accept Israel within the boundaries proposed in the original U.N. resolutions of 1947, the admission of Israel as a member of the U.N., and its continued existence as such for a period of twenty years, indicates that it must now be considered a sovereign state at international law.

Id. at 370.

161. Before admitting Israel to membership, the United Nations General Assembly resolved that Arab refugees wishing to return to their homes within Israel should be allowed to do so, and that compensation should be provided to those who did not wish to return. The General Assembly subsequently required assurances from the Israeli representative that his state would comply with the resolution. Only when it had those assurances did the Assembly vote to admit Israel. INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, THE MIDDLE EAST CONFLICT (NOTES AND DOCUMENTS, 1915-1967) 108-09 (1967).

162. United Nations Security Council Resolution 242 of Nov. 22, 1967 requires Israel to withdraw from "territories occupied" during the October 1967 war. 22 U.N. SCOR, 1350th meeting 8-9 (1967).

Julius Stone observes, however:

The definite articles missing from the phrase "Withdrawal of armed forces from territories occupied," in Security Council Resolution 242 of 1967, are as significant as the closely following reference to "secure and recognized boundaries" in the same Paragraph 1 of that Resolution Not only deliberate omission of the definite articles, but the course of negotiation, indicates that the quoted phrase about withdrawal simply could not foreclose answers to the questions: What forces are to withdraw? From what territories? And when?

Stone, *Forward*, in Y. BLUM, SECURE BOUNDARIES AND MIDDLE EAST PEACE 9 (1971).

163. See note 80 *supra*.

tion to an ancient human dilemma.¹⁶⁴ The Palestinian problem is another dilemma, not as old, but sufficiently intense that the international community is also being moved to deal with it. And it would make little sense to solve one dilemma by resurrecting the other.¹⁶⁵

III. CONCLUSION

The legal history of Jews and Palestinians with regard to Palestine indicates that peoples may become the subjects of international law and be accorded rights thereunder if they obtain the consent of the international community.¹⁶⁶ Consent, furthermore, is manifested primarily in the evolving practice of states, and practice (as applied in this instance) appears to be far more closely wedded to circumstance and necessity than to rules, categories or formulas.

Because this process has an existential nature, it is in a sense, what all people let it be. Thus, it *could* be just. But that possibility, like the salutary idea that a totalitarian state reflects the passively-expressed will of its people, offers little comfort to those against

164. Saleeby paraphrases one of Herzl's arguments for establishment of a Jewish state as follows:

[T]he 'restoration' of Palestine as the Jewish National Home is a historic necessity, not only for the Jews . . . but for the relief of the whole world from a problem whose wide range is beyond doubt equally important for Jews and Gentiles alike. Hence, Zionism becomes a human help to destiny, a man's effort to fulfill God's promise and God's design and, as it were, to correct history.

SALEEBY, *supra* note 18, at 17 (footnotes omitted). See David Ben Gurion's Address to the Anglo-American Committee of Enquiry, 1946, D. BEN GURION, REBIRTH AND DESTINY OF ISRAEL 190-209 (1959).

165. The United Nations General Assembly Delegate from Nepal, reportedly explained his country's decision to abstain from voting on Resolutions 3236 and 3237, in these terms: Every State, including Israel, had a right to live in security. . . . While Nepal was aware of the suffering of the Palestinian people, it felt that "an injustice did not have to be redressed by another injustice."

United Nations General Assembly 2296th Plenary Meeting (XXIX), Press Release GA/5153, Take 17, 22 Nov. 1974.

166. This view has already been expressed by several Soviet authors who have concluded, in the words of one:

[I]t is not possible to deny the international personality to a nation which is fighting for its independence and has entered the stage of creating its own state. It should, however, be borne in mind . . . that the question of the recognition of such a nation as a subject of international law arises in practice only after it has acquired some of the elements of statehood, formed a certain organ [a national committee etc.] which at the outset appears in behalf of the nation, carrying out, of course, the policies of the ruling class of that nation.

Evgeniev, *Pravosubiektnost, suverenitet i nevmeshatelstvo v mezhdunarodnom prave*, SGP, 1952/II, at 77, quoted in NINCIC, *supra* note 101, at 251.

whose cause the once friendly winds have shifted.

The case of Palestine illustrates that international law's apparently close relationship to practice is at once its salvation and its damnation. International policy in Palestine, as administered by the British, vacillated from promises to Jews in response to their needs and pressures to assurances for the Arabs according to the exigencies of the moment.¹⁶⁷ Although that policy sought a particular objective (however vaguely articulated), its failure to base that objective upon well-accepted legal principles and pursue it accordingly led to clashing expectations and an outcome which was bound to be unacceptable to one or all of the parties.

On the other hand, international practice, by recognizing and dealing with "needs" as they arise (e.g., the Jewish "problem"; the claims of Palestinian "refugees" today) relieves some of the emotional pressure which otherwise goes to harden positions and increase the possibility of a violent outcome.

But in allowing international law to function as so much a matter of contingencies, the international community may abandon or ignore rights which the community itself had previously conferred. (Israel, once, in some respects, a nursling of international law, seemed later to become its orphan and the Palestinians, whose standing rose so dramatically in the fall of 1974, are still largely at the mercy of such influential neighbors as Egypt and Syria.)

This is part of the irony of the Palestinian conflict. In addition to such parallels in the history of the Jewish and Palestinian peoples as ancient territorial claims, nationalism, homelessness and great power manipulation, there is the fact that they have taken similar paths toward the attainment of international standing.¹⁶⁸ And because the exercise of sovereignty is an element of international standing, common recognition that the determined more by practice than principle, the fate which befalls one people with respect to that standing may well befall the other. The survival of both peoples thus requires a common recognition that the legal rights and processes upon which each is standing are the same.¹⁶⁹

Robert A. Fisher

167. SALEEBY, *supra* note 18, at 42.

168. Even their publicly-stated objectives have had striking similarity. See note 135 *supra*.

169. Herzl said in 1895:

... It is true that the Jewish State is conceived as a peculiarly modern structure on

unspecified territory. But a State is formed, not by pieces of land, but rather by a number of men united under sovereign rule.

The people is the subjective, land the objective foundation of a State, and the subjective basis is the more important of the two.

HEKZI, *supra* note 12, at 137.