Self-Determination in International Law: The Palestinians

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I. INTRODUCTION

[T]he Arab in Palestine has the right to self-determination. This right is not limited, and cannot be qualified by our own interests . . . It is possible that the realization of the aspirations (of the Palestinian Arabs) will create serious difficulties for us but this is not a reason to deny their rights.¹

— David Ben-Gurion
(Berlin, 1931)

THE PRINCIPLE OR concept of self-determination, as a theoretical term, has long been loosely bandied about within the international community. In practice, self-determination has often been the battle cry of oppressed peoples seeking to rule their own destiny. Indeed, the mix between theoretical self-determination and realpolitik self-determination often resembles that of oil and water: the thin layer of theory floats on top — and often disguises — the vast depths of realpolitik considerations.

Espousals of self-determination have been loudly proclaimed throughout the world. Yet, this hyphenated word remains ambiguous. This paper will focus on the term and analyze it within the framework of the Palestinian problem. At the outset it should be noted that general international acceptance of self-determination is often hampered by problems of definition, implementation, limitation and enforcement. Thus, in examining the population and land of Palestine² and concluding in favor of Palestinian self-determination, a balance shall be struck be-

¹ Lecture by David Ben Gurion (Berlin, 1931), excerpted in Rouleau, The Palestinian Quest, 53 FOREIGN AFF. 264, 266 (1975)
² The geographical description of Palestine appears in the text accompanying note 95 infra.
between the theoretical and realpolitik sides of self-determination. Without this balance, there can be no Middle East peace. For the Palestinians, "... the cause of their violence is the revolting injustice of which they are the victims. So long as this injustice subsists, violence is bound to continue."^{3}

II. THE EVOLUTION OF SELF-DETERMINATION

A. Nationalism

The first expression of self-determination as a political concept has not been clearly dated. The German word for self-determination, Selbstbestimmungsrecht, appeared in a 1896 resolution of the London International Socialist Congress.^{4} Moreover, the German Declaration of Rights of 1848 reflected self-determination principles based on nationalist and democratic principles.^{5} These documents reveal an emphasis on the sovereign independence of nations rather than the rights of a people.\(^6\) The equating of national sovereignty with self-determination undoubtedly stems from the strong nationalistic consciousness of the nineteenth century.

As a term of art, self-determination is not easily defined. Although the nineteenth century notion was a nationalistic, state-sovereignty form of self-determination, the modern view of self-determination is less restrictive. The wealth of twentieth century treatises and documents suggests that self-determination is a collective right of a people sharing similar objective characteristics to freely determine their form of government while further developing their economic, social and cultural status.\(^7\) This definition steps away from national sovereignty notions and assigns the right of self-determination to a people. This assignment more accurately reflects what many believe to be the true roots of modern self-determination: The American and French Revolutions.\(^8\)

\(^{3}\) H. CATTAN, PALESTINE AND INTERNATIONAL LAW 164 (1973).
\(^{4}\) U. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 3 (1972).
\(^{6}\) Id.; UMOZURIKE, supra note 4, at 3.
\(^{8}\) Writers differ as to when self-determination was first expressed. For those favoring the French Revolution as the first such expression, see R. BUELL, INTERNATIONAL RELATIONS 32 (rev. ed. 1929); Woolsey, SELF-DETERMINATION, 13 AM. J. INT'L L. 302 (1919). For writers suggesting that the American Revolution was the first manifestation of self-determination principles, see Toynbee, SELF-DETERMINATION, Q. REV. (London) April 1925, at 317; Barbour, THE CONCEPT OF SELF-DETERMINATION IN AMERICAN THOUGHT, 32 DEP'T. STATE BULL. 576 (1954). See generally, UMOZURIKE, supra note 4, at 198 n. 1.
B. Revolution

The American Revolution was an attempt to remove the yoke of British rule from the colonies. As evidenced by the Declaration of Independence, colonial political theorists, especially Thomas Jefferson, were heavily inculcated in the natural law philosophies of John Locke. Thus, both Jefferson and the Declaration of Independence could assertively state "... that whenever any form of government becomes destructive of these ends [securing life, liberty and the pursuit of happiness], it is the right of the people to alter or abolish it and to institute new government."

Some fifteen years later, France's third estate of commoners drew heavily from the Lockean-based writings of Montesquieu and Rousseau in overthrowing the Bourbon Monarchy and establishing the First Republic. The dissolution of France's tripartite society was heralded by the Declaration of the Rights of Man and Citizen (Déclaration des droits de l'homme et citoyen): "All men were born and remain equal in rights."

While both the American and French Revolutions acknowledged the natural law rights of the people, their expressions of self-determination principles differ from the modern expression. As Alfred Cobban observed, "[T]hen it had been a simple corollary of democracy." For colonists and commoners, self-determination meant democracy. Today self-determination must be read more broadly to allow a people to choose their own governmental status — whether democracy, monarchy, or theocracy.

C. World War I

The self-determination doctrine emerged from the revolutions of the late eighteenth century to face the rigorous demands of nineteenth century nationalism. The twentieth century and the two world wars brought the seeds of self-determination to full bloom. The waste and carnage of W.W.I presented world leaders with a clear view of the dangers of nationalism. The threat and danger of a "world" war, then as now, advanced the acceptance of modern self-determination principles as international law. Thus, self-determination concepts were applied to Europe and the Ottoman Empire by the Allies and the League of Nations. Poland and Czechoslovakia, two non-sovereign territories prior to the War, declared their independence in 1918 upon nationality grounds. Article 22 of the

10 Umezurike, supra note 4, at 10.
11 Cobban, supra note 5, at 114.
13 Poland declared its independence on November 11, 1918 and the Republic of Czech-
League of Nations Covenant called for advanced nations to act as Mandatories over specified colonies and territories which were then incapable of self-rule. Self-determination, though still theoretically based, was gaining acceptance out of necessity—the necessity of meeting the “strenuous conditions of the modern world.”

Many states and organizations accept self-determination as a basic principle of international law. President Woodrow Wilson is generally given credit for its acceptance by the Allies and the League of Nations. As Wilson noted, “self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.” Yet Wilson’s espousal and the subsequent Allied approval of self-determination, must not be blithely accepted. Wilson’s words do not come from his famous Fourteen Points, but from the preamble to his Four Supplementary Points presented on February 11, 1918. His statement must be considered as a partial response to the signing of the Brest-Litovsk Treaty on November 8, 1917. This treaty separated huge areas from Russia on the principle of nationality. Though German troops shortly dispelled any thoughts of self-determination in these areas, nonetheless, the treaty must be seen as a catalyst which focused Allied eyes upon the principle of self-determination.

The Bolshevik adoption of self-determination was incorporated into the Soviet Constitution of 1936. However, this incorporation must be tempered by the realization that, “[s]elf-determination is not an absolute right but is subject to the dictatorship of the proletariat.” Thus the rights of the working class are superior to the right of self-determination. The right of self-determination is thereby limited by the Soviet government’s perception as to when the workers’ rights are being infringed. Similarly, the denial of self-determination in Afghanistan in January 1980 would thus be predicated on the need “to defend the power of the working class.”

.oslovakia came into existence on October 30, 1918. For a comparison between the Poles, Czechs, and Palestinians, see Comment, Standing Before the International Court of Justice, 7 CALIF. W. INT’L. L.J. 454, 467 (1977).

14 League of Nations Covenant, art. 22, para. 2.
15 Id. at para. 1.
17 See OFUATEY-KODJOE, supra note 12, at 72.
18 See UMOZURIKE, supra note 4, at 272. This concept was earlier adopted by the Bolsheviks on November 15, 1917 in the Declaration of Rights of the Peoples of Russia, see Laserson, The Development of Soviet Foreign Policy in Europe 1917-1942, in 1943 INT’L CONCILIATION 5, 11.
19 UMOZURIKE, supra note 4, at 167.
20 J. STALIN, MARXISM AND THE NATIONAL AND COLONIAL QUESTION 168 (1936), quoted in UMOZURIKE, supra note 4, at 167.
The Soviet Union has not stood alone in constitutionally adopting the principle of self-determination. France (1958), the Congo (1963) and the Central African Republic (1962) have all incorporated the doctrine into their constitutions. Even Adolf Hitler extolled the value of national self-determination. For Hitler, though, nationalism was the controlling factor. Hitler was able to use “the principle of national self-determination in order to disguise and justify his policies of territorial expansion.”

D. United Nations

World War II and the formation of the United Nations provided the springboard necessary to bring self-determination to the forefront of international law. The destruction and fears resulting from World War II, as with World War I, did much to advance the principle of self-determination. Here again, the necessity factor — survival — propelled the notion of self-determination into the world’s consciousness. Thereafter the United Nations and its Charter further defined and developed the concept.

The U.N. Charter provides that relations among nations should be “based on respect for the principle of equal rights and self-determination of peoples.” The simple existence of this principle within the U.N. Charter suggests its recognition as a fundamental principle of international law. Each U.N. member also pledges to support the principle of self-determination. The problem arises in distinguishing between a principle and a right. As some have suggested, the principle of self-determination does not imply that a certain people have a right of self-determination. Indeed, one author notes that self-determination was not even a defined right in the 1948 Universal Declaration of Human Rights. What these authors fail to account for, however, is the effect of subsequent U.N. Resolutions on the subject of self-determination.

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21 See Umozurike, supra note 4, at 272, which also notes that the Anglo-Egyptian Treaty (1953), the Franco-Algerian Treaty of Evian (1962) and the Southeast Asia Treaty Organization (SEATO) recognize self-determination.


23 U.N. CHARTER art. 1, para. 2. Similarly, Article 56 provides that “all members pledge themselves to take joint and separate action in cooperation with the Organization to the achievement of the purposes set forth in Article 55.” The purposes included in Article 55 foresee the creation of “friendly relations among nations based on respect for the principle on equal rights and self-determination of peoples.”

24 The authors thus claim that a “principle” and not a “right” is recognized in international law. See, e.g., Mustafa, The Principle of Self-Determination in International Law, 5 INT’L LAW. 479, 480 (1971); Emerson, Self-Determination, 60 PROC.AM. SOC’Y INT’L L. 135, 136 (1966); Note, Toward Self-Determination: A Reappraisal As Reflected in the Declaration on Friendly Relations, 3 GA. J. INT’L & COMP. L. 145, 157 (1973).

25 Mustafa, supra note 24, at 480.
The principle of self-determination proclaimed in Articles 1 and 55 of the U.N. Charter has now become an internationally recognized legal right. Perhaps a distinction can still be made between “right” and “principle”. Self-determination is an acknowledged “principle” of international law. It is the composite elements of this principle which have become “rights.” Thus a collective group has a right to freely choose a form of government while further developing their social, economic and cultural status. Self-determination is a principle of international law but it is also a right to be compared with those of self-defense and non-intervention.26

Post-1948 U.N. Resolutions lend credence to the above argument. Most significantly, three Resolutions seem to bear this out. The 1960 Resolution on the Granting of Independence to Colonial Countries and Peoples,27 the 1966 Covenants on Political and Economic, Social and Cultural Rights,28 and the 1970 Declaration on Friendly Relations,29 all acknowledge the existence of the “right” of self-determination by which peoples may freely pursue their economic, social, cultural and political development.

Thus, despite contrary claims,30 the pre-United Nations principle or theory of self-determination has matured into a full-fledged, recognized right in international law. U.N. practice as well as the aforementioned treaties and constitutions support this view. Moreover, support is also found in the world’s post-W.W. II anti-colonial trend and in the International Court of Justice.

In 1954, Quincy Wright observed that of the eighty-three nations of the world, only nineteen had a continuous existence longer than that of the United States.31 Since its inception, the U.N. has witnessed the decolonization of some seventy territories through the world.32 These statistics reveal not merely an anti-colonial trend, but more importantly, an international acceptance of the principle and right of self-determination. The International Court of Justice also acknowledges this right. In its

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28 International Covenant on Civil and Political Rights, supra note 7; International Covenant on Economic, Social and Cultural Rights, supra note 7.
30 Note, supra note 24, at 157, suggests that the principle of self-determination has not become an internationally recognized legal right. Others find international acceptance of the right of self-determination, see Asamoah, supra note 26, at 177ff; H. Johnson, Self-determination within the Community of Nations 41ff (1967); Wright, Recognition and Self-determination, 48 Proc. Am. Soc'y Int'l L. 23, 29 (1954).
31 Ofuatey-Kodjo, supra note 12, at 186.
1975 Advisory Opinion on Western Sahara, the Court states that developments in international law during the past fifty years indicate general acceptance of self-determination as a recognized international right. In theory, then, self-determination has evolved into an accepted legal right. Yet whether the evolutionary process is dated at 200 years, or whether arguments continue over “principle” versus “right,” one must remember that the arguments are always subject to realpolitik considerations.

These practical or realpolitik considerations all reflect problems of theoretical self-determination. Thus, earlier claims of worldwide acceptance of self-determination are challenged by questions of sovereignty. Each state is composed of minority groups. To allow each group an unqualified right of self-determination would cause the dismemberment of almost every nation. No state or organization can be expected to go to that extent in accepting the principle of self-determination.

Despite the claim that self-determination has become a recognized international right, the fact remains that self-determination may need brute force behind its implementation. Often the issue is not whether a group deserves self-determination but “whether it has the political strength, which may well mean the military force, to validate its claim.” Without might, the enforcement of self-determination legally or politically may prove difficult.

Thus, realpolitik considerations cannot be ignored. To do so only leads to definitional and enforcement problems concerning self-determination. Having dealt with the historical development and acceptance of self-determination, it is best to further expound on the actual, practical problems of self-determination.

III. THE PROBLEMS OF SELF-DETERMINATION

A. Definitions

An inherent problem with the principle of self-determination is that it is a principle of international law. As with other international principles, self-determination is not easily defined. Those opposed to the concept of self-determination have described it as “legally intangible, ambiguous, problematical, and only partially applicable . . . (such) that self-determination is in practice unnecessary and invalid.” Even supporters of the concept fear that the conditions of the world prevent any nation or people from truly determining its own destiny; from exercising its right of

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34 Id.
More succinctly, few can arrive at a standard definition of self-determination. This note’s earlier attempt to define self-determination was merely to lay a rudimentary foundation. Thus, most definitions include the right of a people to determine its social, political, economic and cultural status. Requirements of sovereignty and specific types of self-determination have often entered the equation. For the purposes of this paper, the earlier, workable definition will stand.

Perhaps the most crucial point in understanding the concept of self-determination is that the concept should not be abandoned simply because it lacks a precise, internationally-agreed-upon definition. Many international principles have different definitional interpretations. The United States, for example, finds Soviet treatment of Jews to be violative of human rights. The USSR sees unemployment in the United States as violating human rights. Each nation’s interpretation differs as to what are human rights. Such is the case with defining self-determination.

The Western nations, despite the lack of a standard definition, have come to accept self-determination as a principle of international law. The concept should be accepted not on the basis of the political philosophy of different treatise writers but by its practice in the modern world. Nations and not writers determine what is international law. Terms such as “self-determination” and “peoples” are best defined by international practice and consensus. Hence, definitions of “peoples” and “nationality” will not be found in books but rather in describing the “essence” of groups that have achieved self-determination.

Two case studies emphasize this point. The states of Rwanda and Burundi lie in Africa between Zaire and Tanzania. Both gained their independence in 1962 after a U.N. election showed that the people in the territory of Ruanda-Urundi desired the formation of two separate states. Though the General Assembly originally desired one unified state, the wishes of the inhabitants were granted and two states were formed. Bangladesh, on the other hand, sought to achieve self-determination without the backing of world opinion. Most nations saw the problem

37 COBBAN, supra note 5, at 301, thus suggests that a nation's sovereignty and independence is directly related to its military and economic power.
38 See, e.g., Comment, supra note 13, at 460.
39 See, e.g., UMOZURIK, supra note 4, at 3.
40 ... at 179.
41 Thus a priori definitions are tempered by realpolitik considerations. See OFUATEY-KODJOE, supra note 12, at 151.
as one of internal civil war to be solved by Pakistani authorities. Bangladesh was forced to win its independence not by a worldwide acceptance of its right of self-determination, but by the strength of its people and India's military force. Whether this struggle is classified as secession or self-determination is irrelevant; Bangladesh has, and will suffer for years to come.

The above examples indicate that international opinion plays a role in defining "self-determination," "people," and who is and is not ready to achieve self-determination. Lack of world support caused Bangladesh's self-determination struggle to be far different than that of Rwanda and Burundi. The study also reveals the problem with standard definitions. Bangladesh received little international support and it still achieved self-rule. Yet if international practice sets the definition for self-determination, a lack of international approval suggests that Bangladesh's struggle should have failed. Perhaps this further explains why any definition of self-determination is but a "working" one subject to the exigencies of the modern world. The definition must remain flexible and adaptable to varying conditions because of inherent problems such as implementation and enforcement.

B. Implementation and Enforcement

The problems of implementation and enforcement directly challenge theoretical self-determination with the realities of modern life. The determination of when a group is ready or ripe for self-determination will be a subject of later discussion. Presently, an examination must be made of the corollary question of how it is to be decided when a group is ready.

Two schools of thought — objective and subjective — focus on different factors in determining when a group is ready to achieve self-determination. Both schools will be dealt with more fully in examining the "when" question. Briefly, the subjective school examines the will of the people as the primary factor in evaluating self-determination claims. The objective school views characteristics such as race, religion, and language in making a similar analysis. The distinction made is significant in terms of implementation. The subjective school uses elections, plebiscites or commissions to ascertain the will of the people. Empirical data concerning race, language and religion provides the implementation base for the objective school. Both schools then point to their implementation devices — plebiscites or data — as a later means of showing when a group is ripe for self-determination.

44 Ofuatey-Kodjo, supra note 12, at 144.
45 Id. Only India, Chile, Sweden, Madagascar and the Soviet-bloc nations supported Bangladesh's struggle.
The problem, however, is that the determination of when a people have legitimate self-determination claims should not be strictly subjective or objective. Rather, a mix of the two would seem more appropriate. The examination of the will or wishes (subjective) of a people sharing similar language, racial and religious bonds (objective) would be the most effective and strongest implementation method. The U.N. and other organizations and nations, have conducted plebiscites and elections to determine the will of the people. The election in Ruanda-Urundi is a case in point. The problem with plebiscites, aside from the establishment of residency requirements and determining voting eligibility, is that the plebiscite can only be used to determine the will of the people and not the “nature or size of the group that is to be consulted.” Essentially then, “the people cannot decide until somebody decides who the people are.”

The best implementation method to evaluate the desire for achievement of self-determination is a combination of subjective plebiscites with objective data. The practical realities, though, reveal that military might may be the true key for implementing and enforcing self-determination claims. The International Court of Justice and U.N. General Assembly Resolutions may proclaim self-determination as an internationally recognized right. International law and its organizational supporters, however, are generally powerless to enforce even basic principles of international law. U.N. principles and resolutions are often ignored and blatantly contradicted.

Any realpolitik, practical conclusion therefore must recognize that the methods of implementing self-determination claims and the means of enforcing these claims rest upon two factors. First, as seen with Rwanda and Burundi, the implementation and enforcement of self-determination may rest upon international good will and acceptance. Second, Ban-

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46 Johnson, supra note 30, at 72-81, presents detailed charts depicting various plebiscites or elections and their results. The recognized authority in the plebiscite field is Sarah Wambaugh; see S. Wambaugh, A Monograph on Plebiscites (1920); S. Wambaugh, Plebiscites Since the World War (1933).

47 These practical problems are discussed in Wambaugh, A. Monograph on Plebiscites 32-33 (1920).

48 Opuatey-Kodjo, supra note 12, at 35.


50 International Covenant on Civil and Political Rights, supra note 7; International Covenant on Economic, Social and Cultural Rights, supra note 7; Declaration on The Granting of Independence to Colonial Countries and Peoples, supra note 27; Declaration on Friendly Relations, supra note 29; Advisory Opinion on Western Sahara, supra note 33.


52 As Schoenberg, supra note 22, at 91, observes: “Specifically which groups are allowed self-determination is decided by the configurations of power and interest between dominant and oppressed groups and between competing states.”
gladesh graphically illustrates that military muscle may be the only means of implementation and enforcement when international approval is non-existent. Good will and force thus seem to be the bywords of self-determination. Before turning to consider "when" self-determination is to be achieved by "what" people, the conceptual relationship between self-determination and secession should be discussed.

C. Secession

The very existence of a principle of self-determination questions the traditional view of absolute state sovereignty. The argument that self-determination is simply a byword for revolution has often been made. Nonetheless, the fact that self-determination is a revolutionary proposal does not render it an inherently evil proposal if properly limited. The nineteenth century witnessed violent revolutions based on nationalistic self-determination principles. A new age dawned with the twentieth century's acceptance of changing international law. The danger of world wars helped foster acceptance of an international law principle of self-determination. In accepting self-determination in the post W.W. II anti-colonial era, the world approved the revolutionary notion of colonies cutting the ties to their present or former master. The creation of seventy new nations since the establishment of the U.N. emphasizes this point.

Self-determination is a revolutionary proposal — but in a positive sense. For unlike the nineteenth century nationalistic self-determination, modern self-determination actually promotes peace. This may seem counter-intuitive. Does not the very principle suggest subversion and disruption? "Indeed, is there not a danger that the right of self-determination, brought to its extreme conclusions . . . may not turn into its own negation!" Such a danger is effectively neutralized by realizing that, as with any principle of international law, self-determination has its limits. The aforementioned objective and subjective considerations are important limits. Perhaps the greatest limit on self-determination is found in recognizing the limits on a people's right of secession. Secession involves a group or people breaking away from an established state. Such a right is dependent upon the group's ability to satisfy subjective and objective considerations, and to mobilize military might and gain international approval. Thus the exclusion of secessionist minority groups from the class

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53 See, e.g., Emerson, supra note 24, at 135.
54 Traditional self-determination was invariably marked by violent conflict, see Toynbee, supra note 8, at 323.
55 "However, any attempt on the part of a repressed minority to break away from an established policy is still considered to be a revolutionary act." Friedlander, Self-Determination: A Legal-Political Inquiry, 1975 Det. C.L. Rev. 71, 89.
of people able to claim the right of self-determination is another major limit on the right of self-determination.

Though it is true that a process exists "whereby self-determination evolves into sovereignty," the extension of self-determination rights to all secessionist groups would clearly be anti-state sovereignty. Though the Soviet Union grants the right to secede to each of its republics, it also recognizes that secession is incompatible with its basic military and economic interests. Therefore, this right to secede is actually and always subservient to the dictatorship of the proletariat although it is useful as a propaganda weapon.

Russia is not alone in recognizing the problems of secession. Both former U.N. Secretary General U Thant and the Organization of African Unity (OAU) specifically reject secession in favor of state sovereignty and integrity, although they are supportive of self-determination rights. Though Articles 1(2) and 55 of the U.N. Charter acknowledge the principle of self-determination, this acknowledgement must be balanced by the U.N. members' respect for the sovereign integrity of other nations. Despite U.N. committee reports that self-determination does not extend to all secessionist groups, some states are simply afraid to accept the principle out of fear that the right of self-determination might be equated with the right to secede.

Realistically speaking, states and nations simply will not endorse secession as an integral part of the right of self-determination. To do so would threaten, if not destroy, their very existence. Had the United States accepted a right to secede in the mid-eighteenth century, its character would have been drastically altered and its existence arguably threatened. An international recognition of the right of secession would surely cause international chaos. The relationship between human rights and self-determination might suggest that the right of self-determination also be extended to ethnic minorities. However, unless these ethnic minorities can fulfill the various requirements necessary to achieve self-determination, the states cannot legitimately be expected to support their claims. These requirements, of course, deal with the ensuing problems of

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57 Id. at 257.
58 See COBMAN, supra note 5, at 197-198.
59 See UMOZURIKE, supra note 4, at 197-198.
62 See Doc. 343, 1/16, 6 U.N.C.I.O. Docs. 296 (1945).
64 Such a suggestion was raised and dispensed with in OFUATEY-KONDOE, supra note 12, at 188-189, on the grounds that it would be tantamount to nations endorsing their own destruction.
objective as opposed to subjective determinations of a people, the ques-
tion of readiness or ripeness of a people and other inherent limitations
placed upon the right of self-determination.

D. Achievement and Limitations

The problems of definition, implementation, enforcement and seces-
sion have all briefly touched on when a people are entitled to self-deter-
mination. This section makes a more in-depth examination of “when” a
people are ripe for self-determination.

As noted earlier, although the implementation stage of self-deter-
mination may involve plebiscites and empirical data, the actual achieve-
ment of self-determination relies on universal good will or military might. The-
oretically, the United Nations makes the determination of when a group
is ready to exercise its right of self-determination. By working from the
premise that the U.N. can establish criteria to determine whether or not a
territory is self-governing, the General Assembly has defined both the
people entitled to self-determination and the manner of achieving that
right.66 The General Assembly has even asserted that it alone determines
when a people emerge from a non-self-governing status to one of self-
rule.67 Thus the General Assembly in 1969 recognized the existence of a
Palestinian people and subsequently declared and reaffirmed their right
of self-determination.68

In reality, many peoples claiming the right of self-determination may
never receive or may be unable to wait for U.N. support. The people
themselves may determine that they are ready for self-rule and the test of
readiness may well prove to be military force. Moreover, as observed ear-
lier, U.N. resolutions are easily ignored: the Palestinians’ plight is a case
in point.

Though the United Nations may set criteria for achieving self-deter-
mination, the fundamental standards still revolve around the subjective

648, 7 U.N. GAOR, Supp. (No. 20) 33, U.N. Doc. A/2361 (1952); G.A. Res. 742, 8 U.N.
(1974).
and objective schools of thought. That is, what are the composite elements of “self” in self-determination. Is “self” to be viewed objectively (race, religion, language) or subjectively (will of the people)? It was earlier suggested that people with common objective traits must subjectively feel they are a unified people. In defining “self”, pure objective or subjective standards are inadequate. Yet problems exist even when the standards are merged. For example, objectively, the American colonists differed only slightly from their English counterparts but subjectively they declared themselves to be a separate people.

How many objective factors characterize a people? Are similar race, language and culture sufficient, or must one also look for religious, historical and geographic ties? What of population requirements? Is, as Hitler suggested, a state of six million people too small to constitute a people entitled to self-determination? The above questions demonstrate that a mere checklist of objective factors in evaluating self-determination claims cannot suffice. What is required are “elements of group identity . . . which give rise to a parochial sentiment and which are thus likely to produce government based on consent.” Thus it is that the people properly ready to exercise their self-determination right share similar characteristics and traits and see themselves as one people, one community.

There are, of course, limitations on the right of self-determination. Self-determination does not and cannot apply to secessionist groups. To allow such groups to invoke a right of self-determination would create a state of constant international instability. Self-determination would feed upon itself and bring actual anarchy rather than true self-determination. Another valid limitation on the right of self-determination is that a group, a people, must exercise the right as a collective concept. Though individuals may act for the collective group in pursuing self-determination goals, the right remains collective in nature. Self-determination may be comparable to other “individual” human rights and may be deemed to be an aggregation of these individual rights. Common sense suggests, however, that were an individual to be given the right of self-determination, attempts to exercise this right would again promote anarchy. Only individuals acting on behalf of the collective group promote self-determination. For the sake of the community — the essence of the “social contract” — the right of self-determination must be confined to the collective people.

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71 Hitler further suggested that “to-day it is only under quite peculiar presuppositions that such small state formations can have a possibility of life.” 2 N. Baynes, The Speeches of Adolf Hitler, April 1922-August 1939, at 1437 (1942).
72 Buchheit, supra note 70, at 229.
73 See previous text discussion on secession accompanying note 53-64 supra.
74 See Friedlander, supra note 55, at 76, n.29; Mustafa, supra note 24, at 481.
An important qualification on the right of self-determination deals with the expiration of the right. A group under alien subjugation may not have the present capacity to exercise its right of self-determination. The creation of League of Nations Mandates and their division of non-self-governing territories into A, B and C classes was a recognition of different levels of capability to self-govern. Some territories were simply more politically, economically and socially advanced than others — more capable of exercising their self-determination right. Once established, though, the right of self-determination cannot lapse. Rather, the international community must act as a Trustee or Mandatory over the group until it is capable of fully exercising its right. Such was the case with the League of Nations Mandates and is the essence of the United Nations Trusteeship system. But a group able to exercise a self-determination right may lose such right upon failure to act. This failure to act subjectively suggests that there is no will of the people, ergo no right of self-determination. A people unable to act, a people prevented from acting, finds its right held for itself as a “sacred trust of civilization” until its capability to act fully emerges.

The first paragraph of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples suggests three final criteria in evaluating the right of self-determination: the people must be a subjugated, territorially-based, colonial people. The terms are fairly clear and easily understood. A subjugated people is one that is and has been denied basic human rights. Thus the peoples of Poland and Czechoslovakia were subjugated people within the World War I context and both exercised their self-determination right. Post-W.W.II saw the nations of Rwanda and Burundi emerge from under the tutelage of Belgian U.N. Trusteeship. The right of self-determination exercised in the former territory of Ruanda-Urundi caused the creation of these two states. Indeed, in applying modern self-determination principles to the American colonies, one finds that even the colonists felt they were subjugated, their rights denied, by a form of “taxation without representation.”

The criterion that a people be territorially based is rather simplistic. There must be some affinity between a land and a people in order for the people to exercise its self-determination right. The recognized Palestinian right of self-determination does not give the Palestinians a corollary right to establish a political, social and cultural nation within the confines of

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75 See Ofuaty-Kudoe, supra note 12, at 126.
76 League of Nations Covenant art. 22, para. 2.
77 Declaration on Colonial Peoples, supra note 27.
78 The plan for Ruanda-Urundi approved by the U.N. called for the formation of two states joined by an economic union. Note the similarity between the Ruanda-Urundi Plan and the Partition Plan for Palestine, note 112 infra. Rigo Sureda, supra note 42, at 168 n.8.
New Jersey. The right may allow them to establish a self-determined nation, federation or association within Palestine. The territory requirement is thus a necessary objective characteristic to be considered in the determination of a people's self-determination right.

In brief summary, then, in order to invoke the self-determination right, a "people must be a territory-based, organized community and must be under alien subjugation." The U.N. and general international community, using both objective and subjective standards, makes determinations of when it is ripe for a people to exercise rights of self-determination. When a people comprises a collective, non-secessionist group which has been denied basic human rights and seeks, through various means of enforcement, to secure these rights through the exercise of self-determination, then ripeness attaches. Often though, the people themselves may pre-empt this international determination of their ripeness such as in the case of Bangladesh.

Perhaps the colonial criterion presents the most confusion concerning self-determination. Self-determination may be applicable to all non-self-governing territories and not just to colonial territories. U.N. resolutions, in particular, the 1960 Declaration of Colonial Peoples, have generally spoken of the right of self-determination within a colonial context. The astute observer might quickly inquire whether this basic principle of self-determination is applicable to all non-self-governing territories, not only the colonial ones. As this paper will indicate, the answer is crucial to both an understanding of the principle of self-determination and to the Palestinian claim to that right. A partial answer reveals that U.N. resolutions concerning self-determination are often politically motivated and generally premised upon the belief in the territorial integrity of states. It was this concept of territorial integrity which resulted in the lack of U.N. and worldwide support for the conflicts in Bangladesh, Nigeria (Biafra) and the Congo (Katanga). Each struggle was viewed as merely an internal matter — a civil war against the sovereignty of a state. Only Bangladesh, with large assistance from India, succeeded. Territorial integrity of the sovereign state, rather than the non-colonial nature of the claimed rights of self-determination, was the controlling factor.

A more political and realistic examination of U.N. practice and world history reveals that the U.N.'s preoccupation with self-determination of
colonial territories has resulted from the post-W.W.II anti-colonial era. Though self-determination is a right belonging to all peoples, the U.N. has been mainly confronted with a deluge of self-determination claims from overseas colonies of European powers. Thus, the U.N.'s replies have been confined to colonial situations. Two non-colonial situations reveal the universal applications of self-determination to all peoples. U.N. resolutions 1004 (ES-II) and 1005 (ES-II) supported the self-determination right of the Hungarian people during the 1956 revolution. The various resolutions supporting the political, economic and cultural self-determination rights of the Palestinian people, a non-colonial people, also evidence the universal application of the right.

Thus, although political events have concentrated the United Nation's focus on colonial territories and the U.N. stands firm on the concept of territorial integrity, the principle of self-determination should not be considered strictly a colonial right. The right of self-determination implied in Article 22 of the League of Nations Convenant speaks of colonies and territories formerly under alien subjugation. The International Court of Justice in both its 1971 SouthWest Africa (Namibia) and 1975 Western Sahara opinions, emphasized the applicability of self-determination to all non-self-governing territories. Therefore, self-determination is and should be considered, an inherent right of all peoples—colonial as well as non-colonial. To deny this is to suggest that non-colonial peoples have no right of self-determination. Such a theory runs counter to the very nature of self-determination.

E. Types of Self-Determination

The examination of self-determination problems concludes with an analysis of the various types of self-determination. Self-determination should always be viewed as a continuing process of refining political, economic and cultural development. However, a final step in the transition from "people" to "nation" is the selection of the means by which the people's self-determination goals may be achieved.

Most individuals upon hearing the word "self-determination" assume

84 Otuatye-Kodjoie, supra note 12, at 127.
85 Id. at 128.
86 See notes 68-69 supra.
87 League of Nations Covenant art. 22, para. 1, refers "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them . . ." [emphasis added].
that self-determination equals independence. However, such an equation, in light of the number of colonial peoples achieving independence after W.W. II, while not unreasonable is a wrong equation. Self-determination means more than independence. As a political structure, it may also take the form of an association, federation or merger. An informed observer commented that "most contemporary self-determination conflicts probably could be settled more easily if a political status other than independence were proffered by one of the parties." It is these other political arrangements which should now be explored.

As early as 1952 the General Assembly noted that a territory had three options to attain self-government: independence, "other separate systems of self-government," or free association. More recently, the 1970 Declaration on Friendly Relations affirmed that self-determination may be expressed through independence, free association or any other freely determined political status. The concepts of independence and association, as with merger and federation, are more easily understood through an example than by definition. Thus Mexico, France and Japan are independent countries owing allegiance only to themselves. Ohio, Connecticut and the other forty-eight states form an association; an association of united states. Allegiance is owed not only to the individual states but also to the greater whole, the United States. A merger occurs when a people agree to be assimilated into another nation, as when the Republic of the Seven Ionian Islands merged with Greece in 1864. Lastly, a federation, such as exists in Switzerland, joins together people of different languages, cultures and religions into one nation acting for the common good.

In its 1975 Advisory Opinion on Western Sahara, the International Court of Justice also recognized that self-determination could be achieved not only by independence. Free association and integration or merger were also possible. Treatise writers generally accept these expressions of self-determination and even propose other, more original forms such as an autonomous regime located within a state. Perhaps Lesotho, located entirely within the Union of South Africa, is an example of such a regime. Certainly, the very existence of different forms by which self-determination is expressed in the world today is a sign of their viability as political, economic and cultural structures.

The Swiss federation, as a model of self-determination, and in terms

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89 Note, supra note 24, at 161.
90 G.A. Res. 648, supra note 67.
91 Declaration on Friendly Relations, supra note 29.
92 Sijthof-Leyden, The Right of Self-Determination, in 1 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 327 (J. Verzijl 1962).
93 Advisory Opinion on Western Sahara, supra note 33.
94 See Sijthof-Leyden, supra note 92, at 324.
of Middle East applicability, is perhaps the most interesting structure. To be effective, a federation must not only meet its people's needs but it must also ensure that fundamental self-determination rights are not trammeled. Switzerland, as with Canada and its Quebec Province, is multi-national, multi-lingual and multi-cultural. Despite these cross-cutting cleavages, the nation has been able to avoid involvement in both World Wars and stands as a bastion of neutrality in a world of power struggles. Moreover, one observer suggests that the adoption of a similar shared-sovereignty system between the Palestinians and Jews could funnel the billions expended on war and defense into mutually beneficial cultural, social and economic projects. The feasibility of such a system is hampered by the fact that the Palestinian people are not easily defined; not totally concentrated. It is this system, its possible applicability as a self-determination model for the people of Palestine which must now be addressed.

IV. THE LAND AND PROPHETS OF PALESTINE

A. History and Historic Right

Palestine, as used in this paper, is bounded on the West by the Mediterranean Sea. Its Northern boundary begins at Mt. Hermon and generally follows the present Israel-Lebanon border to the sea. The Golan Heights signal the easternmost extent of Palestine's border. This border then follows the Jordan River, continues through the Dead Sea and concludes at Aquaba. Proceeding westward, Palestine's southern boundary extends from the Gulf of Aquaba to a point on the Mediterranean Sea approximately six or seven miles southwest of the Gaza Strip town of Khan Yusuf. Broader definitions might include parts of Syria and Lebanon but for this note's purpose, the above boundaries will suffice. In essence, the "Palestine" envisioned in this paper is a convenient, workable Palestine — convenient in that it generally adheres to the 1967 cease fire line and workable in that it includes large segments of the Palestinian population.

The history of settlement in Palestine is obscure. Both Jews and Palestinian Arabs claim an existence in Palestine since earliest recorded history. Specifically, many Jews firmly hold that their patriarch, Abraham, first settled the area around 1800 B.C. Palestinians claim the Canan-

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96 Comment, supra note 13, at 458, describes the Mandatory's definition of Palestine's geographic borders.
nites as their ancestors and date their occupation of Palestine as around 3000 B.C.—approximately 1200 years before Abraham, yet 4000 years after the existence of the walled city of Jericho (7000 B.C.).

King David established the first Jewish kingdom in Palestine in 1000 B.C., but 922 B.C. saw the kingdom split into two kingdoms: Israel and Judah. Israel was destroyed by the Assyrians in 721 B.C. and Judah by the Babylonians in 587 B.C. and both its peoples were carried away. Subsequently, Palestine became the subject of pagan, Christian and Moslem rule until the advent of the twentieth century. Its twentieth century history is well known and will be the subject of later discussion.

The prior history serves to focus attention on the Zionist position that Jews have a historic right to Palestine. The concept of historic right suggests that Palestine is the Jewish homeland upon which the Jewish people can exercise their right of self-determination. While Palestine may indeed serve as the center for Jewish culture and religion, established history reveals that consolidated Jewish rule lasted only 400 years, 1000 B.C. to 587 B.C. Indeed, from 587 B.C. to 538 B.C. and after an anti-Roman uprising in 132 A.D., Jews were dispersed and deported from Palestine.

As Henry Cattan observes, “For nineteen centuries the Jews had almost ceased to exist in Palestine.”

A general history of non-rule and non-habitation cannot serve as the basis for a historic right claim to a homeland. International law and international stability cannot condone the acceptance of the historic right concept. The term is disruptive, dangerous, and a threat to world peace. Jewish rule in Palestine approximately equaled Roman rule in England. Acceptance of a principle of historic right might thus lead present-day Romans to lay claim to Big Ben, Parliament and Dover’s White Cliffs.

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98 CATTAN, supra note 3, at 3.

99 The Zionist Organization, in a February 3, 1919 memorandum to the Supreme Council of the Allied Powers, called for a recognition of “the historic title of the Jewish people to Palestine . . ..” Quoted in HUREWITZ, 2 DIPLOMACY IN THE NEAR AND MIDDLE EAST 45 (1958).

100 Balanced against this claim is Lord Sydenham’s 1922 observation: “If we are going to admit claims based on conquest thousands of years ago, the whole world will have to be turned upside down.” 50 PARL. DEB., H.L. (6th ser.) 1021 (1922).

101 Many works deal with the Jewish diaspora or expulsion from Palestine. For chronological purposes, see Khouri, supra note 100, at 2; Bright, supra note 100; H. Cattan, Palesine, The Arabs & Israel 2 (1969).
This thought alone should be enough to provide the historic right concept with a justly-deserved burial.

B. Balfour and the Mandate

Theodore Herzl, the father of political Zionism, commenced work in 1896 with other Zionists toward the goal of obtaining recognition of the Jew's right to establish a state in Palestine. This goal was largely fulfilled, and Zionism greatly strengthened, by the publication of the Balfour Declaration in 1917.13 This declaration was actually a letter written by the British Foreign Minister, Arthur James Balfour, to Lord Rothschild. Sympathizing with Zionist aspirations, the letter clearly indicates British support for "the establishment in Palestine of a national home for the Jewish people." This pledge of support evokes a number of questions. What was the motive behind the statement? What is meant by "national home?"

The document refers not to a "state" or "the" national home; it depicts only "a" national home. The wording is significant for it gained needed Jewish support for the Allies and left Great Britain free to later interpret the ambiguous phrase. These interpretations began with the Churchill White Papers of 1922. This policy statement recognized the Jews' historic connection with Palestine—a shaky support at best—and noted that Palestine was not to be transformed into a Jewish home. Rather, a Jewish home was to be established in Palestine.10 Also in 1922, the British House of Lords expressed its wariness of and dissatisfaction with the Balfour Declaration. On June 21, 1922 the House voted sixty to twenty-nine against the proposed incorporation of the Balfour Declaration in the Palestinian Mandate.105 In 1937, Lord Peel headed a British Commission to investigate Palestinian riots. The Commission's report off-

102 Curiously enough, the Balfour Declaration was written on November 2, 1917 when the Turkish Ottoman Empire, not Great Britain, ruled Palestine. The full text is reproduced below:

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to and approved by the Cabinet.

His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country. I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation.

Balfour Declaration, reprinted in CATAN, supra note 3, at 11.

104 GREAT BRITAIN, PARLIAMENTARY PAPERS, CMD. No. 1700 (1922).

105 50 PARL. DEB., H.L. (5th ser.) 1034 (1922).
handedly noted that the Balfour Declaration had been published primarily to curry Jewish sympathy and support for the Allies’ war effort. And in 1939, the MacDonald White Papers echoed the acknowledgement that the Balfour Declaration had been merely a political move. The White Papers emphasized the creation within ten years of an independent Palestinian state to be governed jointly by the Arabs and Jews.

Article 22 of the League of Nations Covenant set up a mandate system which recognized that certain territories and colonies incapable of self-rule should be placed under the tutelage of more advanced nations. Section 1 of Article 22 provided that “. . . peoples not yet able to stand by themselves . . . form a sacred trust of civilization.” Section 4 observes that “the wishes of these communities must be a principal consideration in the selection of the Mandatory.” Objectively and subjectively, the Article thus impliedly recognizes the right of self-determination. Section 4 also provisionally recognizes the independent status of certain highly developed communities. Palestine was classified as such a community. These Class A mandated communities needed only “administrative advice and assistance . . . until such time as they (were) able to stand alone.” Hence, during the mandate, British-administered Palestine had a flag as well as executive, judicial and legislative bodies. “In effect, with the exception of carrying on its own foreign affairs and of being subject to internal limitations . . . Palestine was seized of all the indicia of a national state.”

The recognition in Article 2, section 4 of the provisionally independent status of Palestine was therefore more fact than verbiage.

A brief summary shows Herzl’s hoped-for Balfour Declaration somewhat watered down by the White Papers of 1922 and 1939. As the White Papers note, Great Britain’s aim as Mandatory was not to establish Palestine as a Jewish state, nor to choose between Arab and Jew, but rather to merge both groups politically into an independent state of Palestine. The realization of this goal was ended with the creation of the State of Israel. Its death knell, however, was sounded by intransigence, social unrest and a plan of partition.

C. Partition Plan, 1948 and Beyond

Wise King Solomon once proposed halving a child in order to satisfy two claimant mothers. Horrified, the true mother spoke against the plan and offered the child to the false mother. Recognizing these maternal in-

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107 GREAT BRITAIN, PARLIAMENTARY PAPERS, CMD. No. 6019 (1939).
distincts, Solomon then awarded the child to the true mother. Solomon also recognized that halving the child would cause its death. Unfortunately, Solomon's wisdom was lost upon Great Britain, the League of Nations and the U.N. when they proposed the partitioning of Palestine. A dispute might be temporarily solved but the death of a child — of a people — would be the price.

The 1936 Peel Commission investigated disturbances in Palestine and concluded that Jewish-Arab self-determination rights would best be respected and Jewish-Arab conflicts best eliminated, by partitioning Palestine. Northern and Western Palestine would become a Jewish state while much of the remainder would be incorporated into Arab Trans-Jordan. Other proposals recommended different geographical dissections, or a federation or even no partition at all. The partition plan finally adopted by the U.N. General Assembly on November 29, 1947 proposed the creation of separate but economically unified Arab and Jewish states. Under this plan a surprising 57% of Palestine was allocated to the Jewish state. The figure is surprising in terms of prior land distribution among Arabs and Jews. United Nations 1947 land ownership statistics reveal that Jews owned only 5.66%, Arabs owned 47.77% and the government possessed the remaining land in Palestine. These statistics disclose that Jews constituted a minority of the population in Palestine and they owned a minority of the land. In essence, the partition plan delegated to a land-holding minority of the population, a majority of the benefits.

Palestine's history following the Partition Plan is well-known and needs little recitation here. Israel proclaimed its existence as a state in May, 1948. Large and costly wars between Israel and her Arab neighbors

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109 Great Britain, Parliamentary Papers, CMD. No. 5479 (1937); See Great Britain, The Political History of Palestine Under British Administration 23 (1947).

110 Article 25 of the Mandate for Palestine allowed the Mandatory to withhold application of the Mandate's provisions to the area known as Trans-Jordan. Great Britain, Parliamentary Papers, CMD. No. 1785 (1923). A September 16, 1922 British Memorandum to the League of Nation Council sought and received League approval to withhold the applicability of the Mandate's Jewish national home provisions to Trans-Jordan. 3 League of Nations O.J. 1188-89, 1390-91 (1922).


113 Cattan, supra note 3, at 55 n. 55-56. Other statistics suggest that Jewish land ownership amounted to 7%; see Chapple, Jewish Land Settlement in Palestine, in W. Khalidi, From Heaven to Conquest 841-843 app (1971).
occurred in 1948, 1956 (Suez crisis), 1967 and 1973. Recent history has witnessed the signing of an Egyptian-Israeli Peace Treaty. This note's purpose, however, is not to recount the history of Palestine. Rather, the above cursory historical sketch serves as a necessary background to a proper understanding and examination of the Arabs of Palestine — hereinafter, the "Palestinians" — the new Jews of the Modern world.

D. The Palestinians

Who are these mysterious Palestinians? All too often, the reader associates "Palestinians" with "terrorists" and envisions air hijackings, guerrilla warfare and the Munich Olympics. However, as noted by an Israeli Minister for Foreign Affairs, "the Palestinian community in general must in no way be equated with the terrorist organizations." Yet the automatic association of "terrorist" with "Palestinian" continues. Perhaps the word "prejudice" most accurately describes these views. For prejudice, in its simplest components, occurs when one prejudges a person or people without truly knowing this person or people. This lack of knowledge, this ignorance, can only be eradicated by learning, by acquiring knowledge of the Palestinian identity.

The Moslem invaders of Palestine in 637 A.D. were not the first forefathers of present-day Palestinians but merely served to supplement an already established people. Prior Christian and pagan rulers also added to the Palestinian people. Mostly though, "the Palestinians of today are the descendants of the Philistines, the Canaanites and other early tribes which inhabited the country . . . since the dawn of history. Their settlement in Palestine can be traced back at least 40 centuries." Many have raised doubts, though especially in a self-determination context, about the existence of a Palestinian identity. It has been widely claimed, and at times rightfully so, that "for the Arab[s], Palestine is (simply) a geographic fact." Hence, voices are heard proclaiming that the Palestinians are more Pan-Arabic than Palestinian and are tied not to one another but to individual plots of land. Despite these claims, many Palestinian Arabs do in fact think of themselves as Palestinians. Palestinians do have a Palestinian identity: they have not, though, reached a high level of "national consciousness."

A brief historical jump backwards may further explain the distinc-

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115 CATTAN, supra note 3, at 7.


117 See the population study done by, Tessler, Israel's Arabs and the Palestinian Problem, 31 MIDDLE EAST J. 313 (1977).
tion between a Palestinian identity and a national consciousness. In 1920, a Muslim-Christian Association, formed "to protest the establishment of the Jewish national home," met in Haifa and called for the creation of a separate Arab nation composed of all the residents of Palestine. This conference was instrumental in creating a Palestinian identity, a sense of communality among the Arabs of Palestine. The 1920's and 1930's saw frequent Arab revolts against Jews and British rule. Despite these attacks and despite a general Arab invasion and war in 1948, Israel was created and survived. Most literature examining the late 1930's and 1940's in Palestine recognizes that after the failure of the 1936-1939 Arab uprisings, talk of Palestinian nationalism virtually disappeared. Apparently even though ideas of national consciousness were, perhaps, not yet ripe, the notion of a Palestinian identity—a sense of belonging to Palestine—did indeed exist. A Palestinian identity has existed for many years but the emergence of a subjective national consciousness has appeared only sporadically.

The importance of identifying a Palestinian people is a fundamental necessity for a self-determination claim. For in applying self-determination concepts to the Palestinians, it must be established that the Palestinians are a collective, subjugated people sharing similar racial, religious, historical and cultural characteristics. Factors surrounding Israel's creation are often proffered as evidence of the lack of a Palestinian identity, national consciousness, or people entitled to exercise a self-determination right. Thus, Arab states and Israel accepted a U.N. plan on May 12, 1949 which called for a territorial settlement similar to that proposed by the Partition Plan. Though eventually repudiated, the plan's significance is that the Arab states — and not the Palestinians — accepted a plan to determine the status of Palestine. To some this might suggest the lack of a Palestinian identity. A more realistic viewing will acknowledge that Palestinians simply lacked representative capacity to act as a people under the 1949 plan.

A larger factor surrounding a Palestinian identity concerns the Palestinian exodus after Israel's creation and the doctrine of extinctive prescription. The debate surrounding the 1948 Palestinian exodus centers on competing claims of "free choice" versus "expulsion." For instance, on April 9, 1948 a joint Irgun-Stern gang (Israeli "terrorists" or "freedom fighters") entered the Palestinian Arab town of Deir Yassin and killed 254 Arabs.

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118 Err, supra note 97, at 143.
fled from the soon-to-be created state of Israel.\textsuperscript{120} Why did they flee? Some claim that Arab states urged the Palestinians to leave so as to focus world opinion on the Arab side against alleged Israeli aggressors. Yet a study of Arab newspapers, radio broadcasts and Arab League minutes reveals no evidence to support this proposition.\textsuperscript{121} More likely, the Palestinians fled because, as James Parkes has observed, the rank and file Palestinians had no leaders since the very concept of Jewish state had earlier caused many middle and professional class Palestinians to flee; many simply lacked the training to defend their homes; and that many were quite used to temporarily fleeing stronger adversaries.\textsuperscript{122} The question truly became "to flee or not to flee." Those who did leave and Palestinians in general, have found their self-determination claim questioned on the grounds of extinctive prescription.

The doctrine of extinctive prescription is similar to the property law concept of adverse possession; both are means of acquiring or losing title over territory. Prescription, specifically extinctive prescription, holds that a claim to a territory is lost if not advanced within a reasonable time period. This loss is conditioned upon the "peaceful and uninterrupted reign by an occupying power in place of the legal sovereign."\textsuperscript{123} The claim is thus made that the Palestinians, by failing to exercise their self-determination right in 1948, lost legal title to Palestine.\textsuperscript{124} Logically, the next step would be to conclude that no right of self-determination exists because there is no land upon which to exercise this right. The argument is an illusory one. A prime necessity of the extinctive prescription doctrine is that of a "peaceful and uninterrupted" foreign reign over the land. Israel's existence and reign has been far from peaceful and uninterrupted. Its claim of legal title has been constantly challenged by Palestinians and other Arab nations. Without "proof of actual consent to territorial claim,"\textsuperscript{125} the doctrine of extinctive prescription cannot apply.

Our examination of the Palestinian people has revealed the existence of an Arab, generally Moslem, people sharing a long, documented history of residency in Palestine. Factors such as the Palestinian exodus, the Arab states' acceptance of a 1949 territorial plan and the concept of extinctive prescription have led to a questioning of the existence of a Palestinian identity and national consciousness. Though a subjective Palestin-

\textsuperscript{120} See Epp, supra note 97, at 187. Estimates of the number of 1948 Palestinian refugees range from 590,000 to one million; Compare Prittie, Middle East Refugees, in The Palestinians, supra note 114, at 52, with Cattan, supra note 3, at 103.

\textsuperscript{121} J. Davis, The Evasive Peace 56 (1968).


\textsuperscript{123} Note, Israel: Conqueror, Liberator or Occupier Within the Context of International Law, 7 SW. U.L. Rev. 206, 209 (1975).

\textsuperscript{124} Id. at 227.

\textsuperscript{125} D. O'Connell, 1 International Law 424 (2d ed. 1970).
ian identity has been established, a true national consciousness has just emerged from formative stages. This national consciousness, labeled Palestinianism, emerged from the creation of the Palestine Liberation Organization (PLO) in 1964.

The PLO is to Palestinianism what the Zionist Organization was to Zionism. Both movements have represented the desires of a relatively powerless and partially homeless people in search of their sovereignty. Both have approved of terrorism as a legitimate force to aid the advancement of their goals. Both have revolted against the present while using historical justifications for their claims, i.e., “We were here first.” The difference between the two, put simply, is that Zionists now have their state, Israel, while the Palestinians do not. As Sholomo Avineri observes, “The PLO, which Arafat leads, is somewhat like what the Zionist Organization used to be. It is a quasi-state in the making: it is not yet a state.” As movements, Zionism is both a political and social movement whereas Palestinianism, traditionally a political movement, is just beginning to incorporate a social praxis comparable to Zionism. As Palestinians become more aware of a national consciousness, this social praxis will grow. The West Bank elections in 1976 evidenced this emerging national consciousness. Pro-PLO mayors were overwhelmingly swept into office. However, in reflecting their constituents’ views, many mayors supported the PLO not for its activities but because it was the only recognized Palestinian spokesperson.

The Palestinians, then, are recognized as a collective people sharing similar objective characteristics and who are subjectively attempting to assert a self-determination right in Palestine through an internationally recognized spokesperson, the PLO. Their right of self-determination has been recognized in the Mandate, the Partition Plan and by various U.N. resolutions. Though the self-determination right has found a niche mainly with colonial territories, previous discussion notes both the accidental and contradictory nature of limiting the right to colonies. Yet in practice, the Palestinians remain the “one case in which the rule restricting self-determination to colonial peoples has not been followed by the U.N.”

128 See Tessler, supra note 117.
127 Palestinian national liberation or guerrilla raids and air hijackings are well known and well documented; see Palestinian Arab Terrorist Acts (1968-1974), in The Palestinians, supra note 114, at 260 app. Similarly, the attack on Deir Yassin on April 9, 1948 (see text at note 168) and the bombing of the King David Hotel on July 22, 1946 by Zionist gangs (Irgun and Stern) are seen as either terrorist attacks or preemptive strikes by national liberation fighters.
129 See notes 68-69, 110, 112 supra.
130 Schoenberg, supra note 22, at 102.
An examination of the Palestinians would be incomplete were it not to include an analysis of self-determination modes best suited to achieve Palestinian self-determination. The first mode, complete independence, is an unacceptable choice. An independent Palestinian state within the confines of Palestine would face tremendous difficulties. For instance, a West Bank-Gaza Strip state, might seem natural in light of the number of Palestinians in each location. To ensure an outlet to the Mediterranean Sea, a road would have to be built through Israeli territory from Gaza to the West Bank (possibly to Hebron). Such a road would present the same problems as the road through East Germany to Berlin — in general, a hapless solution and situation. Moreover, great economic assistance “would have to be provided by Saudi Arabia and the other petroleum-rich principalities of the Persian Gulf.”  

Although the fertile West Bank might provide many necessary foodstuffs and highly educated Palestinians would provide the technical capacity to run the state, the very real possibility exists that the state would become nothing more than an economic Israeli Bantustan—a source of export and cheap labor. The intricately entwined economies of Israel and the Gaza-West Bank areas attest to this observation. Thus, “two separate exclusionist national entities can’t provide a satisfactory basis for long-term peace.”

A merger of the Palestinians into the state of Israel is also unacceptable as past history evidences. During the Mandate, constant uprisings and battles occurred between Jews and Palestinians and old wounds leave deep scars. Aside from the hatred and mistrust, a basic social-cultural problem exists. Israel is a “Western-oriented European nation” whereas the Palestinians are still a largely rural, “peasant community, more of Asia than of West.” A final problem is a statistical one. If the approximately one million Palestinians in the West Bank and Gaza were added to the one-half million Palestinians in Israel (total, 1.5 million), the Palestinian population in 1993, at a four percent annual growth rate, would be forty-six percent of the total population west of the Jordan River. This figure, of course, does not even include the other estimated 2.5 million Palestinians living elsewhere! The prospects for an Israeli-Palestinian merger are dim; the very idea, as history reveals, is unworkable and frightening.

In light of the number of Palestinians living in Jordan, a Jordan-
West Bank merger might seem a natural solution to the Palestinian problem. Two factors, Israel's reluctance to give up the West Bank and King Hussein's possible unwillingness to accept thousands more into an already burdened Jordanian economy, militate against this suggestion. However, an association with Jordan or Israel are distinct possibilities. Due to similar ethnic, cultural, and social ties an association with Jordan would appear more feasible. Either association, however, presents problems of divided loyalty between state and nation and federalism as opposed to states' rights. The need for a firm solution in Palestine calls for a self-determination model with few inherent problems. The United States, a different place at a different time, was effectively able to establish such an association. An association for the Palestinians, with due regard for prior history, would present inherent difficulties of divided loyalty and federalism.

The earlier suggested Swiss-federation approach to the Palestinian problem appears to be the most attractive and feasible mode of self-determination. The Swiss system has generally avoided World Wars and internal struggles. "Under the Swiss system, governmental powers are divided or shared by federal authorities and twenty-three cantons which make up the Swiss federation." Yet, cultural, linguistic and religious differences flourish. It is this system, a system of divergent peoples and cultures, which is best suited for a Palestinian model of self-determination. A federation would focus Palestinian loyalties upon a Palestinian state federated with either or both Israel and Jordan. Palestinians, as a people, would effectively be able to voice views concerning the Palestine-Trans-Jordan area and still retain a share of national identity and consciousness. Joint economic, educational and possibly military programs might evolve from this federation without destroying this Palestinian consciousness. Objectively the people would remain Palestinian and subjectively their will would be expressed.

V. CONCLUSION

The foregoing presentation has described the evolutionary stage of self-determination: from theory to principle and ultimately, to right. Self-determination has moved beyond the nationalistic strains of the nineteenth century or Hitler's Germany. Today, the "right" of self-determination cannot lapse; it inherently belongs to a collective people sharing similar objective characteristics such as race, culture, history, religion and language. This group must objectively see itself as a people; a people

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Further notes that in 1974, 60% (12 of 20) of Jordan's Ministers were Palestinians. See Key to a Wider Peace, TIME, April 14, 1980, at 50.

136 Peretz, supra note 95, at 38 n. 20.
whose basic rights — especially that of self-determination — have been
denied by subjugation by a foreign power. Self-determination, expressed
by independence, association, merger or federation, allows this people to
choose its form of political government while further pursuing economic,
social and cultural development. Realpolitik considerations suggest, how-
ever, that the implementation and enforcement of this right may be
achieved only by military muscle. For it is realpolitik international law
which determines which groups are peoples and when these peoples are
ready to exercise a self-determination right. International acceptance of
Ruanda and Burundi, and rejection of self-determination claims in Nige-
ria and the Congo, attest to these realpolitik conclusions. The suffering
and misery of Bangladesh stand as an example of what international sup-
port means for self-determination claims.

World Wars I and II serve as a constant reminder of a basic reason
for international acceptance of the right of self-determination: survival.
Thus, while the raison d'être of self-determination may be couched in the
belief that all people must be allowed to freely determine their political,
economic and cultural status, an underlying rationale is survival. "Surv-
ival" is not used in the Darwinian sense but rather as a means of empha-
sizing the peace-promoting aspects of self-determination. "World" wars
are now a reality. Allowing a people to freely self-determine their status
may promote peace and ensure survival by lessening the chance that a
Third World War — a true "war to end all wars" — will occur. Beliefs in
basic democratic principles have thus joined hands with the practical re-
alities of modern life.

The Palestinians, as a collective, objectively similar people, must be
allowed to exercise their right of self-determination despite the fact that
the creation of some type of Palestinian state might create problems for
Israel. A true support base might be established for Palestinian fedayeen
raids on Israel and the creation of a Palestinian State might further the
development of Pan-Arabic sentiments among Arab nations. These
problems, however, are beyond the scope of the present inquiry. One
problem that must be examined is Israel's fear that a PLO-Yasir Arafat
led state would eventually attempt to live up to its charter's promise to
drive the Jews into the sea.137

Two reasons seem to preclude Arafat or a radical leader from accom-
plishing that objective. As Frank Epp notes, "it is a historical truism that
an underground movement, once it assumes formal political power, tends
to become responsible, and respectable, in the exercise of authority."138
Thus, the new leadership's focus, even Arafat's would be turned inward to

137 For an interesting analysis of the arguments against a Palestinian state, see Key to a
Wider Peace, supra note 135, at 50.
138 Epp, supra note 97, at 152.
domestic problems facing the state and not toward Israel. Secondly, it is
doubtful that some Arab states, notably Saudi Arabia, Jordan and Egypt,
could tolerate a radical leader. The new state, in whatever self-determi-
nation mode, would be in desperate need of Arab petro dollars. The Arab
leaders could not afford having a radical Palestinian leader stirring up
populations with nationalistic ideas or causing a war which might result
in great oil revenue losses. Thus money, or lack thereof, might cause the
emergence of a moderate Palestinian regime. However, Ayatollah Ruholl-
ah Khomeini's rise to power in Iran in 1979, the "students'" seige of the
American Embassy, and the 200-plus day detainment of Embassy person-
nel, suggest that even the above concepts are subject to question.

Problems exist with the creation of any new state or political entity.
Internal ripples are felt throughout the international community.
Problems, though, can be solved. The Palestinian problem must be solved
for the sake of the Palestinian people and Middle East peace. The Pales-
tinians must be allowed to exercise their self-determination right, for, as
David Ben-Gurion observed, the creation of "serious difficulties for us
. . . is not a reason to deny their rights."139

139 Ben Gurion, supra note 1.