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THE FUTURE OF PALESTINE

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EUGENE V. ROSTOW

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***A popular Government,
without popular information or the means of
acquiring it,
is but a Prologue to a Farce or a Tragedy; or
perhaps both.
Knowledge will forever govern ignorance;
And a people who mean to be their own
Governors,
must arm themselves with the power which
knowledge gives.***

**JAMES MADISON to W. T. BARRY
August 4, 1822**

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EUGENE V. ROSTOW

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The Future of Palestine

EUGENE V. ROSTOW

The friends of Israel throughout the world were startled when the news of the agreement between Israel and the Palestinian Liberation Organization (PLO) became public during the last days of August 1993. Some were fearful, others euphoric. Voices of equal experience and authority proclaimed both the doom of Israel and the fulfillment of the Zionist dream. Some saw the dawning of peace; others, nearly inevitable war. Whatever they said, however, all who spoke, and millions more who remained silent, were in fact equally troubled, concerned, confused, and uncertain: the event itself is one of great complexity, which can be understood only as a function of many variables. All recognized in it both risks and opportunities for Israel. No one could be positive about the balance between risks and opportunities. This article attempts a preliminary assessment of the Israeli-PLO agreement in its context of law, history, strategy, and politics. Nothing less can be useful as the basis for policy opinions and recommendations.

In itself, the agreement between Israel and the PLO is important chiefly because it represents the formal end of

Adapted from the paper delivered at the American Leadership Conference on Israel and the Middle East on 10 October 1993 in Arlington, Virginia.

the policy pursued by the Arab states and the Arab peoples (except Egypt after 1977) since the days of the Balfour Declaration and the British Mandate for Palestine. That policy is summed up in the Khartoum formula of 1967: "No negotiations with Israel, no recognition of Israel, no peace with Israel."

The legal argument behind the Khartoum policy has not changed for more than three quarters of a century. It is that the action of Great Britain in issuing the Balfour Declaration and that of the victorious allies in establishing the British Mandate for Palestine were and are illegal, null and void, beyond the powers of the Allies, the League of Nations, and the league's successor, the United Nations. Therefore, the Arabs have contended, the existence of Israel and its presence in Palestine constitute a continuing aggression against the implicit sovereignty of the Palestinian Arabs, deemed to be a "people" and a "nation."

This contention is the only legal and moral justification the Arabs have ever offered for their war against the Jewish political presence in the Middle East for more than seventy-five years. From the legal point of view, it is entirely specious. But, like many myths, it has power. For the PLO and the Arab states to abandon this position, therefore, is (or can become) a climax in the drama of modern Middle Eastern history.

The Khartoum formula has been crumbling gradually, although it is still the official line. In themselves, the bilateral and multilateral talks between Israel and its Middle Eastern neighbors since the Madrid Conference of 1991 violate the Khartoum slogan. Nonetheless, it is a matter of real significance that the PLO, the most passionate defender of the Khartoum doctrine, has finally and publicly renounced the struggle.

For many, many years Israel, the United States, many other countries, and the Security Council of the United Nations have tried to have the Khartoum declaration annulled. Now, because of the collapse of the Soviet Union; because of the position taken by Jordan and the PLO during the Gulf war; because of the strength of the Israeli Defense Forces and the steadfastness of the Israeli people; because of the currents and cross-currents of Arab politics, the Arab chain around Israel has broken at its weakest link: before the PLO lost all its bargaining power and any chance for a role in the future of Palestine, it violated its pledges of solidarity with Syria and Jordan by opening separate peace negotiations with Israel.

The Madrid initiative is the most ambitious effort to enforce Security Council resolutions 242 and 338 ever undertaken. (See appendix A for texts.) It represents the foreign policy of President George Bush and Secretary of State James A. Baker, at its best—the Bush-Baker team of the Gulf war, bold, energetic, and imaginative, not the Bush-Baker team of the Yugoslav tragedy.

The Madrid initiative has made progress. Now the changing structure of world politics offers favorable auguries for the possibility of success if—but only if—the Clinton administration, after a poor start, can find its way to accept and carry forward the coherent principles of the foreign policy the United States has pursued since the time of Truman and Acheson.

The climate of world politics has never been more favorable to the possibility of Arab peace with Israel. Since the collapse of the Soviet Union, 25 countries have established diplomatic relations with Israel for the first time, and 16 have resumed diplomatic relations broken off at the time of the Six-Day War in 1967. This list includes

Russia, China, India, Poland, and many other countries, large and small. Together, they represent a substantial part of the world's population.

If successful, the negotiations which have now begun between Israel, Jordan, and the PLO may lead to any one of a number of peaceful resolutions of Israel's long struggle to exist, and of the Arabs' equally long struggle to destroy it. All that is clear now is that for the first time, serious negotiations can start about the future of Palestine—that is, about the political future of the communities that have grown up within the territory of the British Mandate, Jordan, Israel, and the territories in dispute between them, what we call "the West Bank and the Gaza Strip." This is the only possible legal and historical definition of the word "Palestine." It is the definition used in the PLO Charter. All that can be said at this point is that Israel and the United States have every possible interest in seeing those negotiations pursued on the basis of Security Council resolutions 242 and 338, and the history they embody. No one can be sure how these negotiations will turn out. But they can now begin, and they should begin.

Israel, the United States, and other countries that may be involved in these negotiations will have to proceed not only with patience and resolve, but with extreme caution. In the Middle East, the Roman maxim, *si vis pacem pare bellum* (if you want peace, prepare for war), applies with peculiar force. The history of the area since the end of the Ottoman Empire is a tale of intrigue, deception, terror, and other violence. Some of the other Arab states will follow Egypt's example in scrupulously respecting their peace agreements with Israel, but in the months and years to come, Israel cannot assume that such attitudes and policies will be universal. Israel will have to maintain its armed forces, and from time to time demonstrate its will to use

them, if the negotiations envisaged by the Israeli agreement with the PLO are to succeed.

Moreover, these negotiations cannot succeed without the support of an American policy that is fully consonant with the inherent strength of the American position in the world, and with its national interests. Equally, Israeli diplomacy must rise to the challenge of the occasion by showing the imagination and intelligence of which it has often been capable in the past. Above all, both Israel and the United States should clear away any lingering traces of the defeatism and pessimism of Baker's disastrous speech of May 1989, which has dominated the American view of Middle Eastern policy for so long. What is needed is a coordinated Israeli and American policy of strength without arrogance—a policy firmly based on the rule of law, and of respect for the rights of Israel and of the Arab states alike. Such a policy may succeed. A policy that violates this principle will surely fail.

II.

The only possible bases for these negotiations, as Israel, the Arab states, and the PLO now publicly agree, are Security Council Resolution 242, adopted after the Six-Day War of 1967, and, adopted after the Yom Kippur War of 1973, Resolution 338 which makes Resolution 242 legally binding. Those resolutions provide the only available agenda for negotiation.

From what is publicly known so far about the negotiations between Israel, Jordan, and the Palestinian Arab delegation in Washington and Geneva, they have made no progress because the Arab negotiators are still resisting the territorial provisions of Resolution 242. The

new round of negotiations should, from the first day, confront the reality of those provisions for the first time, and in a fresh perspective.

The Declaration of Principles signed by Israel and the PLO does not end the Israeli occupation of the West Bank, the Golan Heights, and the Gaza Strip. That occupation can end, in the words of Resolution 242, only when the parties have established "a just and lasting peace in the Middle East." In this respect, the procedures used in negotiating the Peace Treaty between Israel and Egypt demonstrate what the twin Security Council resolutions require before the occupation can be ended. That rule is not an abstract statement of legal principle. It reflects the bitter experience not only of Israel, but also of Great Britain, the United States, and Dag Hammarskjöld, the former Secretary-General of the United Nations. Great Britain, the United Nations, and the United States persuaded Israel to withdraw from the Sinai Desert in 1957 in exchange for Nasser's promise to keep the Suez Canal and the Strait of Tiran open to Israeli shipping; to stop all guerrilla attacks against Israel from Egyptian territory; and to make peace. Those promises were all broken. That history is the source of the first of the two territorial provisions of Resolution 242, that the Israelis need not withdraw from any part of the occupied territories until each of the Arab states makes peace. And the word "peace" in Resolution 242 means full and formal peace, not merely an abandonment of all claims of a right to assert that a state of belligerency exists between the Arab states and Israel. By signing the Armistice Agreements of 1949, the Arab states abandoned all claims of belligerent rights. Resolution 242 was intended to take the next and final step from armistice to peace.

The second territorial provision of Resolution 242 is that while Israel should agree to withdraw from some of the

territories it occupied in 1967, it need not withdraw from all those territories. The Resolution states that there should be "withdrawal of Israeli's armed forces from territories occupied in the recent conflict." Five and a half months of vigorous diplomacy, public and private, make it very clear why the wording of the sentence took the form it did. Motion after motion proposed to insert the words "the" or "all the" before the word "territories." They were all defeated, until finally the Soviet Union and the Arab states accepted the language as the best they could get. In short, the extent of Israeli withdrawals was to be a matter of negotiation between the parties.

Despite the language and the negotiating history of Resolution 242, the Arab negotiators insisted that Israel was required to return to the Armistice Demarcation Lines of 1949, the de facto boundary of Israel in June 1967. The best answer to that claim was once given by Lord Caradon, the British Ambassador to the United Nations who had proposed Resolution 242 to the Security Council in 1967 and actively negotiated its passage. Asked whether Resolution 242 required Israel to go back to the Armistice Demarcation Lines of 1949, Lord Caradon remarked,

We didn't say there should be a withdrawal to the '67 line; we did not put the 'the' in. We did not say "all the territories" deliberately We did not say that the '67 boundaries must be forever.

Since the Armistice Agreements of 1949 expressly provide that the Armistice Demarcation Lines are not political boundaries, but can be changed by agreement when the parties move from armistice to peace, the Arab argument against the withdrawal provision of Resolution 242 is

without foundation in law or history. But it continues to be made.

The Peace Agreement between Israel and Egypt required Israel to return the entire Sinai Desert to Egypt. The Sinai Desert had always been recognized as Egyptian territory. It was not part of the Palestine Mandate. Israel had no legal claim to it, except that of victory in a war of self-defense and, in the case of Sharm el-Sheikh, as boundary changes needed for security purposes.

The political importance to Israel of achieving peace with Egypt, the largest and most important Arab state, induced Israel to concede the point. The Sinai transfer had another consequence, however. It meant that Israel had withdrawn from some 94 percent of the territories it occupied during the 1967 war, the bench-mark of Resolution 242. It can hardly be seriously contended that the Security Council, which, after five months of intense diplomacy, deliberately refused to require Israeli withdrawal from all the territory it had occupied in 1967, had done so inadvertently nonetheless. The problem of drawing a secure and recognized political boundary between Israel and Jordan thus transcends the withdrawal clause of Resolution 242. Whatever Israeli withdrawal from the occupied territories Resolution 242 may be presumed to require, a withdrawal from 94 percent of those territories is surely enough to satisfy it.

The basis for the territorial dimension of the Palestinian negotiations is therefore the underlying territorial claims of the parties, as well as the right of Israel to claim territorial adjustments for security reasons or to secure access to international waterways, the two justifications for territorial change acknowledged by Resolution 242.

III.

In order to agree on "secure and recognized" boundaries, the parties should put aside the sterile controversy about the absence of the word "the" from the territorial clause of Resolution 242, and confront their problem with a full awareness of the history of modern Jewish settlement in Palestine.

The respective claims of Israel and Jordan to the West Bank and the Gaza Strip are both unintelligible without reference to the terms of the mandate, which confers on "the Jewish people" of the world the right to make "close settlements" in all of Palestine, and provides that the Arab inhabitants shall continue to have "civil and religious" (but not national political) rights in the territory. In short, the mandate recognizes the historic claims of the Jewish people to Palestine, and reserves to them the right to establish a Homeland which was expected in due course to become a State.

In the mandate, the only qualification to the Jewish right of settlement in Palestine is that Great Britain as the "Mandatory Power" could, if it wished, "postpone and withhold" the right of settlement for the area of Eastern Palestine—now Jordan—because of its turbulent political condition at the time. The British did "postpone and withhold" the Jewish right of settlement in that area in 1922. Since then, the "Tranjordanian Province of Palestine" became "Tranjordan" and now "Jordan." But Jordan's attempt to annex the West Bank area in 1950, when it was the military occupant of the territory after a war of aggression, was not generally recognized, and has now been abandoned, which leaves intact the Jewish right of

settlement in the West Bank and the Gaza Strip. This right is protected by Article 80 of the United Nations Charter, which provides that unless a trusteeship agreement is agreed upon (which was not done for the Palestine Mandate), nothing in the chapter

shall be construed in and of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties.

This paragraph of Article 80, commonly known as "The Palestine Article," was debated and passed with the problem of the Palestine Mandate very much in mind.¹

The Mandates of the League of Nations have a special status in international law. They are considered to be trusts, indeed "sacred trusts." In the case of Namibia, the former South African mandate for the German colony of South West Africa, the International Court of Justice ruled that the mandate survived the end of the League of Nations. It was equally held to survive the Court's decision that South Africa had violated and repudiated the mandate, and had therefore in effect resigned as Mandatory, as Great Britain did when it withdrew from Palestine in 1948. This would be the normal legal view under both civil and common law. A trust does not end because the trustee dies, resigns, or tries to steal the trust property. In the case of Namibia, the Western permanent members of the Security Council negotiated the peaceful compliance of South Africa with the Court's decision; the trust provisions of the mandate were fulfilled; and the new state of Namibia was born.

Thus the Jewish right of settlement in the whole of western Palestine—the area West of the Jordan—survived the British withdrawal in 1948. It was terminated, as far as

the territory of Jordan and Israel are concerned, by the recognition of their independence and their membership in the United Nations. However, the mandate still defines the legal status of the occupied territories, except for the Golan Heights. Israel has never sought to annex these territories, and they have never been generally recognized as parts either of Israel or of Jordan. They are parts of the mandate territory, now legally occupied by Israel with the consent of the Security Council.

Under international law, neither Jordan nor the Palestinian Arab "people" of the West Bank and the Gaza Strip have a substantial claim to the sovereign possession of the occupied territories. Jordan cannot base a claim to the territory on its military occupation and administration of the West Bank between 1948 and 1967, after the Arab war of aggression in 1948. Neither can it base a claim on its attempt to annex the territory in 1950. The annexation was not widely recognized and has been withdrawn. By protecting Arab "civil and religious rights," the mandate implicitly denies Arab claims to national political rights in the area in favor of the Jews; the mandated territory was in effect reserved to the Jewish people for their self-determination and political development, in acknowledgment of the historic connection of the Jewish people to the land. Lord Curzon, who was then the British Foreign Minister, made this reading of the mandate explicit. There remains simply the theory that the Arab inhabitants of the West Bank and the Gaza Strip have an inherent "natural law" claim to the area.

Neither customary international law nor the United Nations Charter acknowledges that every group of people claiming to be a nation has the right to a state of its own. International law rests on the altogether different principle

of the sovereign equality of states. And nearly every state inherited from history contains more than one ethnic, religious, or cultural group: the French in Quebec, for example; the Basques in France and Spain; the Flemish in Belgium; the Kurds in Turkey, Iran, and Iraq; and so on. Therefore, it is a rule essential to international peace that claims of national self-determination be asserted only through peaceful means. The international use of force to vindicate such claims is and must be strictly forbidden by the United Nations Charter.

This comparison of the conflicting legal claims of Israel, Jordan, and the Palestinian Arabs to the disputed territories does not mean that "a just and lasting peace" in the region requires Israeli annexation of the entire West Bank and the Gaza Strip. Rights may be sacrificed or compromised to achieve other goals and values. Israel wishes to remain a largely Jewish state and abhors the idea of "ethnic cleansing." The recognition of the Jewish right of settlement under the mandate does mean, however, that Israel enters these negotiations from a position of great legal, moral, and tactical strength.

During the long period of armistice, which has not yet formally ended, this reality about Israel's claim to the land has been obscured because the great powers prevailed upon Israel to defer settling in the occupied territories on the ground that such settlements were an "obstacle to peace." As it turned out, the Israeli settlements in the West Bank have been a potent inducement to the Arabs to consider peace as a serious alternative. It was becoming obvious that unless the Arabs abandoned the Khartoum principle, there would be no land to divide with Israel, at least in the West Bank. In the new negotiations, the right of the Jewish people to settle in the occupied territories is bound to be a

central issue and should most emphatically be pressed by Israel, the United States, and other nations.

The opposition to Jewish settlements in the West Bank also relied on a legal argument—that such settlements violated the Fourth Geneva Convention forbidding the occupying power from transferring its own citizens into the occupied territories. How that Convention could apply to Jews who already had a legal right, protected by Article 80 of the United Nations Charter, to live in the West Bank, East Jerusalem, and the Gaza Strip, was never explained. In any event, the Geneva convention is irrelevant to the process of ending the occupation and making peace.

Once the negotiations about the future of Palestine are liberated from the narrow question of how far Israel should withdraw from the territories occupied in 1967, bolder and more imaginative approaches to the question of the most appropriate political organization of the territory become practical. Those negotiations should build on the fact of the economic interdependence of all parts of the area; the social co-existence of its peoples: should encourage investment and development throughout Palestine as a common market; and recognize the abiding reality of Israel and Jordan as functioning Jewish and Arab states within Palestine. It is reported that the Palestinian Arabs have agreed to a solution of confederation with Jordan. And former Secretary of State Schultz has recently revealed that he and President Reagan favored the solution of functional confederation for the whole of Palestine. Under such an arrangement between Israel and Jordan, there would be free movement of people, goods, and funds; most Arabs would be citizens of Jordan, most Jews citizens of Israel. Sovereignty would be shared by function, an idea Israel had accepted for Jerusalem in 1948. And Israel could remain a Jewish state.

These ideas may seem fantastic to those who fear that the policies of blind resistance, terrorism, and war which have governed Arab behavior toward the Jews since 1917 are inexorable and immutable. Arabs and Jews have lived peacefully together in Islam for many centuries. There is no reason fixed in the stars why that example cannot be revived. The Turkish tradition of the millet may provide a possible guide to the future. These were the ideas animating the General Assembly Partition Plan of 1948. If the post-Madrid negotiators on the future of Palestine stop squabbling about just where a boundary should be drawn, and concentrate instead on how to organize the co-existence and cooperation of the peoples, the original dreams of Zionism may still be realized.

IV.

The negotiations about the future of Palestine set in motion by the understanding between Israel and the PLO may not lead to peace. In the fragile atmosphere of Arab politics, many factors may thwart the hopes and expectations of the parties.

In order to prevent such a catastrophe, it should be made clear early that in the event the peace process breaks down, the United States and Israel would favor the following policies: (1) the Israeli occupation of the West Bank and Gaza would continue under Security Council Resolutions 242 and 338, with some modifications in the direction of local self government; and (2) the United States and other Western countries would withdraw their objections to further Jewish settlement in the West Bank, the Gaza Strip, and East Jerusalem. As has been noted earlier, the United States and many other nations have for years objected to such settlements on the ground they were

an obstacle to peace. If, after more than 75 years, the Arabs still refuse to accept the legitimacy of a Jewish political presence in the Levant, the United States should drop its long standing objection, and acknowledge the Jewish right of settlement under the mandate for what it is, and thus in effect accept Israeli annexation of the occupied territories.

NOTES

1. I am indebted to my learned friend Dr. Paul Riebenfeld, who has for many years been my mentor on the history of Zionism, for reminding me of some of the circumstances which led to the adoption of Article 80 of the Charter. Strong Jewish delegations representing differing political tendencies within Jewry attended the San Francisco Conference in 1945. Rabbi Stephen S. Wise, Peter Bergson, Eliahu Elath, Professors Ben-Zion Netanayu and A. S. Yehuda, and Harry Selden were among the Jewish representatives. Their mission was to protect the Jewish right of settlement in Palestine under the mandate against erosion in a world of ambitious states. Article 80 was the result of their efforts.

**APPENDIX A ■ ANNEX TO THE FRAMEWORK AGREEMENTS—
UNITED NATIONS SECURITY COUNCIL RESOLUTIONS 242
AND 338**

Resolution 242 of November 22, 1967

The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. *Affirms* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

- (a) For guaranteeing freedom of navigation through international waterways in the area;
- (b) For achieving a just settlement of the refugee problem;
- (c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles of this resolution.

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

Resolution 338 of October 22, 1973

The Security Council

1. *Calls upon* all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;

2. *Calls upon* the parties concerned to start immediately after the cease-fire the implementation of Security Council Resolution 242 (1967) in all of its parts;

3. *Decides* that, immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

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