The Thin Green Line

From Intractable Problems
to Feasible Solutions
in the Israeli-Palestinian Conflict

Leon Sheleff

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The Thin Green Line: Dedication

For my colleagues and friends at Tel Aviv University, who, at the onset of the first *intifada* in 1987, created a campus-based organization, *Ad Kahn*, dedicated to maintaining a dialogue with our Palestinian counterparts, and to searching for a just two-state solution for our two peoples, based on mutual respect and reconciliation.

This book was submitted for publication on June 10, 2003; the following day the author's great heart stopped beating. When I was able to undertake the final editing of his manuscript, I found myself asking whether there was any point in publishing it. So much had changed since Leon passed away: Mahmoud Abbas (Abu Mazen) had resigned as prime minister of the Palestinian Authority; Bush's "road map" was stymied by increased terrorism in the region; and Sharon was touting his new initiative: the unilateral withdrawal from Gaza. Nevertheless, it seemed to me that the overall impetus for the book—the need to explode the myths governing peace negotiations between Israel and the Palestinians, and to warn of the dangers inherent in Israel's attitude towards these negotiations—outweighed the details of external developments.

*Now, by an odd quirk of fate, Abu Mazen is once again at the helm, and there are indications that the dormant "road map" will be revived. Thus, **The Thin Green Line** seems more relevant than ever as a guide for understanding why negotiations break down, and what conditions are necessary for their success.*

—Rinah Sheleff
December 2004

Preface

THIS BOOK WAS written during the first period of Arik Sharon's premiership. It was started during a period of despondency for the Israeli people, who were subjected to a barrage of almost daily suicidal terrorist attacks. It was also a period of despair, particularly among those of left-wing persuasion in the peace camp, at the breakdown of the Oslo peace process and the dissipation of the sanguine hopes for an end to the century-long dispute with the Palestinians.

The book has been updated and is being published in the wake of Sharon's overwhelming and amazing electoral victory in the 2003 elections. Overwhelming, because he doubled the number of Likud members in the Knesset and reduced Labor Party adversaries to the ignominious total of 19 members, precisely half that of the victorious Likud. Amazing, as the electorate was voicing its approval to a ruling party in the midst of a devastating economic depression, with high unemployment and a threatened credit crisis; after two years of dwindling personal security and a heavy toll of Israeli victims of terrorism; and despite a spate of corruption scandals engulfing the Likud party, highlighted by a publicized leak of a lengthy criminal investigation being conducted against the prime minister and his two sons, and involving millionaire friends in different parts of the world.

Any attempt to attach the election result to the ineptitude of Labor's electoral strategists, the assumed inexperience of their newly-elected leader Amram Mitzna or the failure of their representatives in Sharon's coalition government, particularly in the defence and foreign ministries, is to misinterpret the message conveyed by the Israeli public—namely that the Oslo peace plan was the source of the tragic

situation that had emerged, and that those who bore responsibility for it had to be politically punished. The Labor leaders (Yitzhak Rabin, Shimon Peres and Ehud Barak) had deluded the Israeli public into believing that a lasting peace settlement with the Palestinians was possible, after themselves being duped by the wily machinations of the untrustworthy partners to the negotiations, most notably Yasser Arafat, the former terrorist transformed into an undeserved Nobel laureate, and now turned arch-villain.

The Israeli electorate has spoken (in the lowest turn-out ever, indicating not just a lethargic electoral campaign, but a debilitating apathy as to the nation's fate). Its voice must be respected, and the clear right-wing orientation of its response will inevitably find expression in present policy and practice. But those of a different persuasion are no less obliged to be faithful to their alternative beliefs and, as part of an inevitable ongoing debate, to expose what they consider to be the fallacies of majority thinking, the comforting superficiality of its analysis, its falsification of recent history, and the dangers embodied in its errors.

In response to the outbreak of the second *intifada*, standard thinking among most Israeli Jews—as presented in newspaper articles, political speeches, call-in radio programs and casual conversations—was that the Palestinians were solely responsible for the disastrous situation that had developed, and that the Israeli negotiators had made generous concessions in order to reach a viable and final settlement. It was the rejection of those offers that had caused the degeneration into violence.

This seems to me a biased version of recent history, including a certain amount of self-righteousness about what has transpired. While Palestinian responsibility for the present situation cannot be ignored, and while widespread Palestinian support for terrorist activity has re-created the wall of distrust that had already existed between the two peoples, Israel's contribution to the present horrendous reality needs to be acknowledged.

The tone of this book is frankly polemical, since I write it as an Israeli citizen concerned for the future of my country, its values

and its quality of life. But most of the chapters are based on prior academic research, on issues that I have addressed over the years in Hebrew books and in legal and sociological journals. There I provided detailed annotations; here I have elected to keep references to a minimum, since my intention is to make a contribution to the current political debate, involving deep ideological divisions within Israel itself.

My aim is to argue that a) the presumably intractable problems of Jerusalem and the "right of return" can be amicably and relatively easily resolved through a proper re-definition of the issues; b) any peace process, to be successful, must incorporate, from its inception, procedures for reconciliation and projected plans for future co-operation; c) an honest acknowledgment is required by both sides of recent errors, which, in the case of Israel, involve mainly the reckless manner in which settlements were established on the West Bank and in Gaza, and the manner in which personal machinations of Israeli leaders led to rash actions with devastating consequences; and d) a probing analysis of Israeli policy is needed, devoid of the latent anti-Semitism of some of its outside detractors and the blatant post-Zionism of some of its internal critics, but sustained instead by deep concern over policies that are in violation of the best in Israeli culture and Jewish traditions, as well as being detrimental to Israel's true interests and perhaps also to those of world Jewry.

As an addendum to this preface, I note the belated publication of the "road map", laying out a timetable for a Palestinian state with "temporary" borders. There is a certain surrealist quality to this latest plan for peace, because President Bush's "vision" of a two-state solution is no more than a faint echo of rhythmic slogans chanted at left-wing peace demonstrations in Israel for the past three decades—of two states for two peoples. The plan itself is being discussed within weeks of an election in which left-wing policy (including a call for an immediate resumption of peace talks

with the Palestinians even while the violence persists) was decisively rejected by the Israeli people. Furthermore, it has been presented to an Israeli government, which includes a majority utterly opposed to the idea of a Palestinian state, as well as a number of ministers who are ideologically in favor of physically transferring Palestinians out of the West Bank and Gaza into neighboring Arab countries.

The map was drawn up also a mere two years after Ehud Barak was soundly defeated, to a large extent because he was considered to have made too many concessions to the Palestinians and to have moved too fast in the negotiations. Yet the plan (which Sharon immediately welcomed) offers more and in a shorter period of time than anything envisaged by Barak. Sharon's cabinet affirmed its support for the plan by the narrowest of margins (12 in favor, 7 against, and 4 abstaining—among the abstentions was Benjamin Netanyahu). A number of ministers voted for it in direct violation of their professed opposition, presumably after intense arm-twisting and lobbying by the prime minister. They may also have come to the conclusion that the vote was merely an empty gesture, since the map would likely remain as no more than a scrap of paper and never become part of geographic reality. In any event, they were undoubtedly convinced that Israel's dire financial straits and its deteriorating public relations image required an accommodation with United States demands.

Nothing could indicate the government's distaste for the action that it was being forced to take, or the nature of the predicament Sharon was in, than the manner in which such a crucial decision, involving such a turnaround in standard Israeli thinking, was presented to the cabinet. The item dealing with the map was not part of the written agenda for the weekly cabinet meeting. It was tacked on verbally some 72 hours in advance, and individual members were not supplied with any detailed information about the nature of the understandings reached between Sharon and the Bush administration as to the dozen-odd reservations that Israel had to the map. These reservations constitute not only a fundamental change in the map (which was presented originally as being a definitive and irrevocable document, and which was

accepted unequivocally by the Palestinians), but are also an essential prerequisite for any willingness to accept it on the part of even moderate right-wingers. Indeed, a number of those who voted in favor were quick to explain to the media that their support was garnered only after they had been satisfied that the reservations were to be considered an integral part of the road map. As for those who had voted against the resolution, some of them explained that, if they did not resign immediately from the government, it was only because they wished to continue to fight against its implementation from within. Indeed, some commentators and pundits immediately connected this strategy with Sharon's own past success when, as an ordinary cabinet minister, he undermined compromise policies with the Arabs that he was opposed to by constantly placing halters upon whoever the prime minister of the time happened to be. What is even more significant is that the cabinet colleagues from Sharon's own party were equally divided between those supporting the road map and those opposing it or abstaining.

One might say of this peace plan what is generally said of Israel's wars—that it was undertaken for lack of an alternative ("*b'lait breira*"). The economic and security disaster of the past two-and-a-half years, caused by the Palestinian *intifada*, was undoubtedly the key catalyst in forcing the Israeli leadership into this volte face. More's the pity. For the need for compromise and reconciliation with the Palestinians and recognition of their right to self-determination has been on the Israeli political agenda for over three decades—and constantly rejected. It is vital to record this failure of faith, because peace should not be made out of fear of being considered recalcitrant, but out of an awareness of its positive benefits.

These factors add to the many paradoxes of the conflict as described in this book, in which the ultimate paradox may be that those who rejected the Oslo peace plan out of hand are now faced with a far more radical road map. Linked to this is the ultimate Israeli failure: instead of the pride associated with Israel's initiative in carefully creating a peace process in secret talks by effectively

using a Norwegian intermediary, Israel is now the recipient of a public American dictate, underscored by international support, which, given its subservient client status, it is reluctantly forced to accept. What could and should have been an exciting enterprise of constructive peace-making, stemming from Israeli sources, based on magnanimous gestures, anchored in Israeli interests and acknowledging respect for Palestinian needs, has turned into a murky bargaining process, with each minor concession (such as the removal even of uninhabited outposts) endlessly debated and often forthcoming only because of American pressure, which is based mainly on the latter's global needs.

Indeed, the map itself was probably conceived at a stage when Bush was carefully laying out another road map—this one pointing in the direction of war with Iraq. Anxious not to antagonize the Arab world, he sent out emissaries to convince the Arab leaders that Iraq under Saddam Hussein constituted a real threat to the Middle East. However, the message that he received in return, as conveyed by the emissaries, was that the source of the Middle East's instability was the festering sore of the Palestinian problem. It was then that he apparently realized that the best and quickest way to ensure Arab acquiescence in the upcoming war was to offer the idea of a Palestinian state. Shortly afterwards, Bush made his "vision of a two-state" speech. This aspect of the preparations for the war certainly made it easier for Tony Blair to offer his strong support for it.

Despite earlier statements by Bush that he would not repeat Bill Clinton's error of getting bogged down in the intricacies of the conflict, this is precisely what occurred once the war was over. As to why Sharon was so willing to accept the map, the answer is that Sharon had recently gone cap in hand to Washington to raise a combined loan and grant totaling 12 billion dollars. The possibility of rejection was a powerful tool of persuasion for Bush. A further factor influencing Sharon was undoubtedly the heavy loss of life incurred by the Israeli people during the *intifada*. Sharon had promised security and had failed to provide it. "Let the army win!" was the cry of his supporters. Yet, despite a powerful military

presence, almost as many citizens had been killed in two years of the *intifada* as the number of soldiers who had lost their lives in the eighteen years of fighting in Lebanon. At some point it must have occurred to Israeli strategists that a negotiated peace might actually bring the security Israelis desperately needed. This suggests that it was through the vicious violence of terror that Israeli agreement to the road map, with it projected Palestinian state, was achieved. Truth to tell and sad to relate, this last surmise is as close to being an accurate assessment as any of the explanations currently being offered for the radical change in Israel's policy.

It is perhaps only those in the peace camp who can fully perceive this awesome reality. Their opponents were so intent on verbally denying the Palestinians' right to independence that, in the end, they are having it physically forced upon them. In similar fashion, it should be remembered, the peace with Egypt became possible only after the Yom Kippur War, the peace with Jordan only after the first *intifada* and the signing of the Oslo accords.

For those in the peace camp, there is little comfort in the attainment of peace in the wake of violence or war, when the purpose of a peace movement is to avoid war. There is little to hope for from a peace process that appears so inherently flawed and that is undertaken so grudgingly.

The road map of a two-state solution, whatever its virtues, is no blueprint for a genuine two-nation reconciliation. It is not just security needs that must be guaranteed; it is not just a cessation of hostilities that must be sought; it is not just a formal peace that must be signed. There must be a sincere commitment to a mutual accounting of errors committed and injustices inflicted in the past so that a deep process of reconciliation can be undertaken; there must be a professed willingness to move together optimistically into joint ventures awaiting in a shared future. For this a road map is of only limited value. It contains too many potential dead-ends and tempting possibilities to reluctant travelers for devising devious routes or escaping into hidden byways, whereas what is urgently needed is a grand vista of a future rapprochement that those in

Israel's peace camp have for many long years envisaged. These yearnings require not a one-dimensional map, but an expansive "atlas", providing a larger and more comprehensive picture, an atlas that will recognize the validity and relevance of the original green line, not only as the geographical border between two states, but also as the bridge for meaningful interaction between two peoples.

My book does not deal with the "road map", as such, since it seems to be no more than the minimum required to cope with the present tragic situation. If, like so many previous peace proposals, it fails to materialize, then the seeds of its undoing, at least from the perspective of Israeli actions (and reactions and non-actions), will be understood better because of the thesis presented herein. On the other hand, if it does provide a firm basis for creating a conditional Palestinian state, with only temporary borders and no affirmed capital city, then the proposals that I outline here may be seen as being relevant for moving into a more permanent and more promising future.

In any event, the manuscript was completed before the road map was published. In fact, a completed version was held up for several months during the recent election campaign in Israel. I have since then made only minimal changes in order to reflect and respond to the latest events. On occasion, the change involved simply a switch of a verb from future tense to present or past tense. The book is updated to the week of the summit meeting in Aqaba between President Bush, King Abdullah and the two prime ministers, Sharon and Mahmoud Abbas (Abu-Mazen). At this stage, Sharon's cabinet is still intact, as is his party. Whether this will be so at the time of publication is a moot point.

Some friends and colleagues have read parts or all of the manuscript, and their comments are greatly appreciated, especially where their critique forced me to revise and rewrite. In this regard,

Chapter 1

Palestine:
From Road Map to Atlas

A BOOK'S TITLE is intended to indicate the general theme to be explored; the sub-title's task is one of clarification by pithily stating the thesis to be presented. I have tried to achieve this in my choice of title and sub-title, but am aware of the fact that, while the sub-title is self-explanatory, some uncertainty may have been caused by the title, *The Thin Green Line*, and thus a short explanation is in order. The title was chosen to reflect cryptically the presumed complexity of the subject matter, while simultaneously expressing the essential simplicity of the underlying framework when shorn of the cant that has so often been expounded on it by all sides, and devoid of many of the extraneous words and phrases, the explosive ideas and ideologies, the hollow slogans and sentiments, which have intruded into a debate that has spawned more heat than warmth, more hate and hurt than factual information and perceptive understandings.

In the Israeli-Palestinian conflict, the thin green line is the essence of the matter; it is a reference to the traditionally acknowledged borders of the State of Israel as laid down in the armistice agreements of 1949. These agreements brought an end to the fighting between Israel and the Arabs, more specifically the

armed forces of six neighboring Arab states, some of them contiguous (Jordan, Egypt, Syria and Lebanon), some of them in the vicinity (Saudi Arabia and Iraq), as well as the armed forces of the Palestinians themselves. The term "green line" is generally presumed to refer to the color of the crayon used to demarcate the area designated as part of Israel in the cease-fire agreement, basically acknowledging the military success of Israel in the war, and allowing its new borders to be larger by some thirty per cent than the area originally assigned to Israel in the UN decision of November 29, 1947.

The UN partition plan on Palestine was, like many other compromises, unfavorable to both sides involved in the conflict over Palestine's future. Both sides, the Jews and the Arabs, the Zionists and the Palestinians, were given territory far less than either desired, and far less than they had bargained for. Jerusalem, a focal center for both sides—as the eternal capital of the Jewish people, where King Solomon's temple had once stood; as the third holy city for Moslems including the site of Mohammad's ascent to heaven; and as the revered place for Christians where Jesus had taught, been crucified and resurrected—was to be given to neither side, but to become a unique political unit, an international city.

The Zionist movement most reluctantly accepted the partition plan by a narrow vote of an executive body of four votes to three. The Palestinians rejected the compromise. Thus, shortly afterwards, the intermittent struggle that had existed between Jews and Arabs in Palestine escalated during the few remaining months of the British Mandate, and broke out into full-scale war on May 15, with the termination of the mandate and the official establishment of the state of Israel.

Had the Palestinians also accepted the UN partition decision, the whole history of the area would have been substantially different. In the event, despite its heavy losses (one percent of the total Jewish population—6,000 fatalities out of a total population of 600,000), Israel became the main beneficiary of the war, especially once the green line was drawn, allowing the addition of extensive areas that its armed forces had occupied: in the desert area of the Negev to

the south, in the mountainous region of the Galilee in the north, and in some of the fertile agricultural land in the center. There is no east or west in Israel, given its narrow dimensions (about 10 miles across at the bottle-neck near Netanya, and less than a hundred kilometres from the bustling coastal city of Tel Aviv, the hub of commerce and culture, to Jerusalem, the capital, sitting along the green line). On the other side of the green line at this point, was East Jerusalem, officially annexed after the war by the State of Jordan, together with most of the rest of the West Bank. Jordan itself changed its official name at that stage from Transjordan, i.e. the extensive area to the east of the Jordan river, to which was now added the West Bank with its Palestinian inhabitants, including large numbers of refugees who had fled from areas conquered by the Israeli forces.

All the states that have, over the years, recognized the state of Israel and entered into diplomatic relations with it, have done so within the context (politically) and the area (geographically) of the green line—with the notable exception of Jerusalem itself. The vast majority of countries recognizing Israel have deliberately refrained from acknowledging its sovereignty in West Jerusalem, and have given both symbolic and substantive expression to this fact by setting up their embassies in Tel Aviv. This was the situation for West Jerusalem before the 1967 war, and has been true ever since for the unified city.

In effect, Jordan was the second major beneficiary of the 1948 war, as it gained a substantial additional tract of land. The vanquished in this armed conflict were the Palestinians. Their leadership did not declare a state (retrospectively, probably a monumental error of judgment), and most of them (over half-a-million) became refugees, while others (nearly 200,000), living on land either originally assigned to, or later conquered by, Israel, became its citizens. For the Palestinians, the 15th of May is a day of mourning, semi-officially known as a Day of Disaster (*Naqba*). Israel itself celebrates its Day of Independence according to the Hebrew calendar (the 5th of Iyar), and rarely does this occur on the 15th of May itself. For Israeli Arabs, these days test to the

extreme the dilemma of their dual loyalties—to the state of which they are citizens, as a sizable minority (today of over fifteen percent), and to the ethnic group of Palestinians to which they belong, and in a larger sense, to the surrounding Arab world, and perhaps also, for the vast majority of them, to the nation (*Umma*) of Islam.

The green line is here defined as a thin line, because it is so porous. Originally it set out the borders of the new state, with an implicit assumption that the actual borders would be demarcated when a final peace settlement was reached, and with a further underlying assumption that the final border would probably follow the basic contours of the green line itself. But since 1967 the line has become ever more porous. It has disappeared from almost all official maps in Israel, whether in school atlases or tourist brochures. There are generations of Israeli children, born after 1967, who are barely aware of its existence.

The thin green line is porous mainly because Israel has officially pursued a policy, given approval by its Supreme Court, of encouraging Israeli settlement in the conquered territories of the West Bank and Gaza, as well as on the Golan Heights, which was conquered from Syria. For some this is done for security purposes; for others it is an affirmation of an historical, biblical right.

Both in official parlance and in public awareness, the green line is almost invisible; it is mainly a vague historical memory, often referred to in other terms, such as "*kav ha-tefer,*" the peripheral "borderline" areas (or "seam line" in the authorized translation), used mainly when dealing with security issues and the problem of the fight against terrorist activities, such as suicide bombers. The problem has been how to avoid infiltration of potential terrorists through the borderline areas, easily done by evading the roadblocks since, until recently, there was no fence along or near, the green line between Israel and the West Bank.

Hence the title with its adjectival addition—*thin.* It is also an echo of a book and movie dealing with an instance of capital punishment in the United States, entitled the *Thin Blue Line,* aimed at emphasizing the problems associated with this penalty; and a similar adjectival expression of a *thin red line* to describe an acute

military situation. In the case of the green line, the reference is not merely metaphorical, but factually perceived, specifically the thinness of the geographical line. The line basically separates the state of Israel from surrounding Arab states, and also, most pertinently, from the West Bank and Gaza.

The line thus both symbolizes and stresses that the essential conflict is based on the national aspirations of two groups with basically legitimate (if theoretically and logically different) claims to the same piece of land—nothing unusual, since most wars over national aspirations (as opposed to religious conflagrations) are fought not in order to kill people, but in order to occupy land. However much there are religious overtones to the present conflict, with religious fundamentalism contributing to the intensity of the conflict, the real issue is the fate and future status of the West Bank and Gaza, specifically their formal transformation into the State of Palestine. As an Israeli, I am acutely aware that such an outcome must be sought through accommodating the yearnings and strivings, the needs and interests of both peoples living in what was once Mandatory Palestine. This book will attempt to relate to these aspects from an Israeli perspective. Since security is one of the major apprehensions affecting Israeli attitudes, let me clarify succinctly my approach to this factor.

I do not believe that there can be any real security for Israel until there is a Palestinian state. Not only that, but the very debate over Israel's future security can only really begin once Israel has formally declared its willingness to accept a two-state solution to the area that was once Mandatory Palestine. Initially Israel, through Prime Minister Arik Sharon, did no more than express vague vacillation and passive acquiescence in such a possibility, in response to American pressure, aimed at de-fusing the Palestinian issue so as to create an easier climate in the Middle East for the planned onslaught on Iraq. It was only once that war was over that American insistence on a more substantive commitment was conveyed to the Israeli political leadership.

Till then, the possible creation of a Palestinian state had never been discussed in positive terms by the cabinet, and Sharon's own

Likud party had strongly negated the idea, in a vote of its central committee, instigated by former prime minister and then foreign minister, Benjamin Netanyahu. Nevertheless, the population at large was gradually becoming attuned, or perhaps, resigned, to the idea of a Palestinian state—an idea that was anathema until recently. Tragically, this emerging consensus is the result not of an understanding of the right for independence of the Palestinians after years under prolonged military occupation, or even of an awareness that it serves Israel's best interests, but because in the present unbearable situation of rampant violence, Israel can no longer ignore the geo-political reality of the price that prolonged occupation has extorted from it, not only in the eroded security of its citizens, but in the inroads made upon the very fabric of its democratic structure and moral stature.

Indeed, only now, after the formal declaration in Aqaba of Israel's acceptance of a Palestinian state, can the country begin to make any real long-term plans for its future, not only in terms of its relations with the Palestinians and other Arab countries, but also with respect to its political status in the world. All past and present security measures are thus no more than holding operations; in many instances they were, and still are, counter-productive. The very level of violence of the present *intifada* will make any future negotiations far more difficult than would have been the situation without the *intifada*, but possibly no more difficult than was the original breakthrough of the initial stages of the Oslo process. Indeed, the pre-Oslo situation is already a fading, distant memory, and the process itself is so belittled that the initiative, the courage and the foresight required to set it in motion have long been forgotten or, even more, denigrated.

In order to understand the myopic nature of Israeli politics on the Palestinian issue, it should be remembered that throughout the Seventies (i.e. the first decade of the occupation) the Israeli approach, originally formulated by Prime Minister Golda Meir, was that, "There are no Palestinians," or, alternatively, "We are all Palestinians" (since she and others of her generation had, until 1948, lived in Mandatory Palestine). Later, under Menachem

Begin's leadership, the term "Palestine" was banned from use in official Israeli publications and on government radio and television. In the late 1980's and early 1990's, Israelis were forbidden by law to have contact with the Palestine Liberation Organization (PLO). Many leading politicians persistently and pointedly referred to the "so-called" PLO, the "so-called" referring both to Palestine and to the notion of liberation. In the Madrid talks in the early 1990's, when Yitzhak Shamir was prime minister, Palestinians were only allowed to participate as part of a Jordanian delegation. But Madrid itself, an outcome of the first *intifada*, was an essential precursor of Oslo.

As the term "Palestinian" began to intrude into the Israeli discourse, care was always taken to avoid the use of the word "state"; a Palestinian *entity* became the acceptable term. When, through the Oslo Accords, a degree of autonomy was conceded, the term changed to Palestinian Authority—which has much of the external trappings of statehood, but still lacks the official nomenclature.

A major assumption upon which Israel proceeds in its attitude to Palestine is that a state is presumed to have absolute sovereignty, and that any entity falling short of 100% control of its territory and the inhabitants living there is somehow not a state. This is an anachronistic understanding of the nation-state, yet it affects attitudes to both the state of Israel itself and the idea of a Palestinian state. Thus, at the height of the Oslo process, neither Rabin nor Peres, neither Clinton nor Barak deigned, or perhaps dared, to allow the two words, "Palestinian state", to pass their lips. The Israeli public was not yet ready to move beyond the inhibitions that had been so carefully cultivated. On the other hand, Israel zealously guards its own presumed full sovereignty, especially in regard to its asserted claims over all of Jerusalem. After all, Sharon's publicized and provocative visit to the Temple Mount was ostensibly to prove Israeli sovereignty there (although, as will be shown, he also had other ulterior motives).

States today do not have 100% sovereignty. States are bound by international law. Many voluntarily forego some of their sovereignty in order to gain the benefits of belonging to a larger

organization (*vide* the European Union or even the looser Council of Europe); some of them are so small that they require some degree of protective suzerainty, assigning certain functions of government (e.g. foreign representation, currency) to other countries, generally their immediate neighbors. On one occasion former Prime Minister Benjamin Netanyahu remarked that, while he was opposed to a Palestinian state, he had no objection to the Palestinians becoming like Andorra—apparently ignorant of the fact that Andorra is a sovereign state, even though it is, in many respects, dependent on its two larger neighbors, Spain and France.

Paradoxically, Israel is actually one of the few states that seems, at least formally, to be close to 100% sovereignty—but this is mainly a sign of its weakness, since it lacks full membership in any regional organization, such as Britain, France, Germany have in the European Union, or in a larger security organization, such as NATO. Furthermore, other countries forego some of their sovereignty internally in order to set up a federal state, where the organs of central government of the country as such are obliged to surrender some of their exclusive powers in order to accommodate the demands and needs of its constituent parts—in the case of the United States, its 50 states and even the Indian reservations. Britain has acted similarly recently in giving autonomy to Wales, Scotland and Northern Ireland.

In this context, the questions until recently really were: At what stage does a Palestinian state come into being? When do the paraphernalia of statehood that characterize the Palestinian Authority constitute an actual state? How much percentage of sovereignty is needed in order to declare—or acknowledge—statehood? Would participation in the Olympic Games, for instance, do the trick, since only states may participate? After all, East Timor had token representation at the Sydney Olympics in 2000 as a prelude to its formal constitution as an independent state. Palestine already has observer status at the UN and diplomatic representation in many countries.

Even more complicated is the recent idea of setting up a "temporary" state. What is the difference between a temporary

state and the remaining states in the world that are all, to the best of my knowledge, "permanent"? For that matter, what is the difference between such a temporary state and the present Palestinian Authority, with its many manifestations of statehood? And if the temporary nature is a result of its borders not being finally determined, then Israel, of course, is in a similar situation, since it also lacks permanent borders. After all, the green line is originally a consequence of a cease-fire armistice agreement, not a fully-fledged peace accord.

What is of particular interest is the fact that the vocabulary of Israeli politics has been gradually changing, at first almost unnoticed, but increasingly intruding on public consciousness. More and more politicians began, in the wake of the *intifada*, to refer to a conjectural Palestinian state, a concept they would have shunned only a few years ago. Often the use was in an argumentative and negative context—such as the claim that Israel recognizes the rights of the Palestinians, but they don't recognize our rights, the implication being that a Palestinian state is a clear possibility, but is being held up by Palestinian obstinacy about recognizing Israel's legitimacy. Statements of this type, however, were generally made by those who opposed the Oslo Accords—not because of their critique of its details, but because of an utter rejection of its principles, and because of their reluctance, at that stage, to even contemplate the idea of Palestinian autonomy, let alone independence. Furthermore, when Begin, during the earlier peace negotiations with Egypt, spoke of according autonomy to the Palestinians, he explained very carefully that he meant only at the personal, not the national, level, as linked to individuals and not the territory.

The most significant phenomenon in this regard was Sharon's hesitant references to a Palestinian state, made at the prompting of President George W. Bush, originally at a time when the latter was seeking Arab support for his planned war against Iraq. Sharon went along willingly with this approach, since no practical demands were being made about a firm timetable for its establishment, the nature of Israeli concessions, or the recognized borders it would be

entitled to. Indeed, for home consumption in the Hebrew language, he sometimes added that it would take the Palestinians several decades before they would be ready for statehood, and then only on about half of the West Bank and Gaza. Furthermore, the June 2002 speech, in which Bush mentioned a Palestinian state for the first time, also contained a vigorous denunciation of Yasser Arafat. This resulted in an ecstatic response in circles close to Sharon, since this criticism of Arafat had been a major plank in his discussions with the American administration. Thus, the full import of the new American terminology was ignored in the excitement of the de-legitimization of the Palestinian leader. This latter tactical victory for Sharon was celebrated, even though it was intricately embedded in a strategic defeat for the right-wing ideology of his party.

What is required is not half-hearted agreements to short-term American policy, but a positive, comprehensive Israeli policy based on the acceptance of a two-state solution. From an Israeli perspective, the Middle East does not require the "vision" of an American president, but a proactive conceptualization by Israeli leaders, one which can see beyond its immediate security needs into a future vista of regional co-operation, economic prosperity, mutual respect, political rights and religious toleration.

Indeed, a crucial aspect of my thesis is that only when Israeli officialdom will be prepared to refer to the State of Israel and the State of Palestine in equal terms, can the real negotiations and hard bargaining over the future of both states begin, and their needs for security and cooperation be debated. A close perusal of statements by leading cabinet members shows that Sharon is the only one prepared to refer specifically to a Palestinian state—but then he is the only leader in close, personal contact with the American president, and is thus obliged to satisfy his demands.

The long-term solutions are contingent upon Israeli understanding of its need to accommodate the legitimate aspirations of the Palestinian people. Only from this opening gambit can it focus on its own real security concerns and its social and economic

well-being. This requires not merely a pragmatic change in its policies, but a paradigmatic transformation in the way Israel comprehends its present situation and envisages its future potentialities.

A Palestinian state is now on the world agenda, placed there by Bush with his "road map", initially an attempt to pacify opinion in the Arab world because of the Iraqi issue. The sad reality for Israel is that, instead of the Oslo process, which Israel itself had courageously initiated through secret negotiations,—and in which the United States later became involved, offering its "good offices" to help sort out the inevitable complications—Israel is now in the embarrassing situation of having a plan imposed upon it by the American "road map". The irony is that those who opposed the Oslo process (Sharon and his Likud party) are now being presented with a plan, not of their making, which goes far beyond the parameters of the Oslo process.

This book is partly polemic and partly projective. It attempts to analyze critically the Israeli perspective, and in particular the errors made by dominant groups in the country—political, judicial, academic. It is in a sense a *nostra culpa*—a beating of the breast as to errors made, injustices inflicted, opportunities missed. These will include *inter alia,* discussions as to what a "Jewish state" of Israel is, could be, should be, in contrast to negativistic rejections of the Zionist movement by some academic post-Zionists;[1] a lament as to the failure of the Supreme Court to judiciously implement the Geneva Convention, thereby making possible the wholesale transfer of a population of several hundred thousand Jews into the West Bank;[2] and a critique of politicians whose glib statements and rash actions came back much later to haunt them and the people who elected them, particularly with respect to the reckless and arrogant manner in which Jews were settled in the territories.

This is a one-sided book; it deals with the Israeli perspective, from a critical approach. I write it in English, since many of its points I have already made in earlier Hebrew writings, in books and legal and sociological journals.[3] I believe it is important for

supporters of Israel, cut off from daily contact with Israeli life, and denied easy access to Hebrew communications media and academic writings, to have a fuller picture than is normally presented to the world-wide Jewish community. I believe it is also important for those who are engaged in conflict with us to be aware of the nature of the debate in Israel—to be aware also of an Israeli reality far different from that presented by militant settlers living in their midst, soldiers in control of their lives, or employers in Israel for whom they may have worked.

For years now, indeed for over three decades, Israelis have spoken in favor of a Palestinian state, as the right of the Palestinians and as a necessary prerequisite for Israel's security.[4] With the breakdown of the peace process, it became almost an axiom in Israeli politics that the peace movement, sustained mainly by the left wing, was in crisis, unable to convince a skeptical Israeli public that the Palestinian leadership was a trustworthy negotiating partner. The recent elections certainly provide affirmation of this fact. Yet, the real crisis is of those members of the right-wing "nationalist camp", who are surely no longer able to ignore the existence of a Palestinian people with legitimate demands for an independent existence, nor to deny the futility of trying to avoid its inevitability. The present level of terror certainly makes negotiations excruciatingly complicated, but more vital than ever.

It is also of interest to note the manner in which every right-wing prime minister, when confronting the reality of power and forced to come to terms with the exigencies of external pressure, has foresworn his deep ideological commitments. Begin, who had resigned in protest from a coalition government that decided after the Six-Day War to agree to a ten-kilometer pullback from the Suez Canal, eventually gave up all of the Sinai; Shamir, who agreed to go to the Madrid Conference, where, for the first time, Palestinians were given representation, though it was widely known that the Palestinian delegates were in close contact with the PLO; Netanyahu, who, when out of power refuses to give up any land to the Palestinians, yet as prime minister pulled Israeli forces out of Hebron; Sharon, who refuses to meet with Arafat (even while

allowing his son to act as an intermediary at meetings on several occasions), but gives verbal acknowledgement to the future existence of a Palestinian state. Apparently, governmental responsibility seems to miraculously focus the mind or to clarify the full meaning of political reality. The changing approaches reflect Israeli leaders' respective surrender to the awareness of this fluctuating reality.

Sharon himself has consistently excluded any negotiations while the violence against Israel continues, for, as he constantly stresses, he is not prepared to reward the Palestinians for their violence. Yet, what is his verbal concession of a future Palestinian state if not recognition of the reality of a Palestinian presence that can no longer be ignored? If a Palestinian state is in the offing at the start of the third millennium, why was it taboo at the end of the second millennium? What has changed—except for the tragic violence of the past three years? Why the vicious criticisms of Rabin's efforts through the Oslo process? Why the mocking references to Peres and his vision of a new Middle East? Why the desperate warnings to Barak that he was moving too fast and too far? The present road map, for all its limitations, supposedly leads to a Palestinian state in 2005, and in this sense offers a destination never enunciated during Rabin's period of office. Bush himself incorporates the terminology of vision and a re-constituted Middle East—precisely the imagery which was considered illusory when used by Peres.

This book is critical in dealing with the past, but positive in its projection of the future—offering ideas as to reconciliation for past mutual harms and pursuit not merely of peace, but of a possible confederative future. It exposes aspects of Israeli failures. It does not deal, except peripherally and *en passant*, with Palestinian failures. These are, in my opinion, far worse and far more numerous: from the rejection of the United Nations recognition of two states in 1947 to the choice of the terrorist route as the path to be followed in a struggle for independence. I leave it to Palestinians to do their own soul-searching— and they have much to do. But perhaps they may have to wait for their own state before they may proceed in this direction.[5]

FOOTNOTES—CHAPTER 1

1. In general, see L.J. Silberstein, *Postzionism Debates: Knowledge and Power in Israeli Culture* (New York: Routledge, 1999).

2. On the Convention see J.S. Pictet (ed.), *Commentary on the 4th Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Geneva, 1958).

3. See, for instance, Leon Sheleff, *The Rule of Law and the Role of Politics* (Tel Aviv: Papyrus Publishing/Tel Aviv University, 1996, in Hebrew).

4. For many years, the now defunct magazine, New Outlook, published in Tel Aviv, carried articles in this vein.

5. For a vivid and honest account, critical of both Israeli politics (and the occupation) and Palestinian society (in terms of its patriarchal structure), see Raymonda Hawa Tawil, *My Home My Prison* (Hebrew edition, 1979).

Jerusalem:
Figment of the Imagination

J EWISH TRADITION REFERS to the city of Jerusalem in both abstract and concrete terms—Jerusalem above and Jerusalem below, or celestial Jerusalem and earthly Jerusalem. The former has obvious religious and spiritual overtones; the latter is more directly linked to geographical concepts, the hills and valleys on which it is situated, the buildings and roads which have been built there, the lines on a map which demarcate its perimeters, and the historical memories linked to specific sites. The two Jerusalems are, however, intricately bound up with each other. Jerusalem, the eternal capital city of the Jewish people (in the language of both Israeli politics and Israeli law),[1] derives its powerful mystique from its presumed original appearance in Jewish history as the site on Mount Moriah of the *Aqedah*, where Isaac was to have been sacrificed by Abraham,[2] his father (and the patriarch of the Jewish people), to the self-same place where two Temples were constructed, according to specifications meticulously outlined in the Bible. This area, now known as the Temple Mount, is the heart of Jerusalem, its very essence and the *raison d'etre* for the special affection that the city evokes in the Jewish people, the focus of their yearnings during the years of exile, the font of their pride at the return to Zion.

Israelis well remember the short, simple sentence uttered by the commander, who, in 1967 led the successful onslaught on this area—"*Har ha-bayit be'yadeinu*—The Temple Mount is in our hands."[3] But this pronouncement reflected only the immediate military victory—it had almost no relevance to the subsequent situation nor to the present, ongoing reality. For shortly after the Six-Day War, the Israeli authorities announced that the Temple Mount would remain in the charge of the Islamic authorities, and that Israel would limit its control to security factors.

On the Temple Mount stand two impressive, buildings, the Dome of the Rock, a beautiful golden structure, one of the most dominant and impressively beautiful landmarks of the city, and the Mosque of *El-'Aqsa*, with its gleaming silver roof. These sites were chosen during Moslem rule in the city not only because of its vantage in height, but also because it is claimed to be the site from which Mohammad made his ascent into heaven. The compound is known in Arabic as *Harem El-Sharif*.

This paradox—of the heart of geographical Jerusalem and the focal concern of Jewish historical memories being out of the direct control of Israel, except for security surveillance—is essential to an understanding of the overall paradox of the city of Jerusalem, of the myths surrounding it, of the innocent misconceptions and deliberate misrepresentations associated with it, of the imaginary conceptualizations underlying the claims upon it.

Jerusalem has no intrinsic value as a site for a city. There is no river or sea nearby, no minerals underground or fertile fields surrounding it, no natural passage for wayfarers or armies. Its significance, apart from its natural beauty (slowly being undermined by encroaching urban settlement), arises from its prominent mention in the Bible, specifically from the decision of King David to transfer his capital from Hebron to an area still known as the City of David, *'Ir David*.[4] But there is no real overlap between this area and the Jerusalem of today. In fact, *'Ir David* constitutes only an infinitesimal fraction of the metropolis into which Jerusalem is expanding. This fact is basic to any understanding of the status of

Jerusalem—the lack of geographical congruity between biblical Jerusalem, the ancient city surrounded by hills (in Hebrew, "*harim*"), and modern Jerusalem, the capital city of Israel, surrounded by suburbia and satellite urban appendages (in Hebrew, "*'arim*"). On one occasion, a deputy minister in the Begin government had referred in official documents to "Jerusalem, D.C." When challenged as to whether this implied some special semantic association with Washington, D.C., he explained that the D.C. stood for "David's City."[5]

From a political perspective—more specifically in general geo-political terms—this lack of overlap between the Jerusalem of yesteryear and present-day Jerusalem takes on added pertinence, given the potent sensitivities of most Jews in Israel and elsewhere towards the symbolic value of their ancient capital. It is generally acknowledged that one of the most effective slogans used by Benyamin Netanyahu in his 1996 election victory over the then reigning prime minister, Shimon Peres, was that the latter would, in the course of the peace process, divide up Jerusalem. Indeed, standard political thinking in Israel is that no serious contender for the top office in Israel can afford to seem to be vulnerable on the issue of Jerusalem. Being "soft on Jerusalem" is tantamount to committing political suicide.

It is this basic fact of Israeli politics that prevents any real and serious debate over its future and, conversely, allows for denying the simple physical reality that *politically* united Jerusalem, a mixture of self-contained, ethnically homogenous communities and neighborhoods, is in fact a *socially* divided city. The old walled city (adjacent to the Temple Mount) has historically been divided into four quarters—Christian, Moslem, Jewish, Armenian. This is a microcosm reflecting the larger structure of the whole city. But, whereas the four quarters constitute a fairly integrated mosaic, blending through winding alleyways into a semblance of "oneness," the total city is, with only few exceptions, a hodge-podge of alienated and antagonistic groupings. This is particularly on the eastern side, where modern Jewish neighborhoods were scattered among Arab

areas after the 1967 War; while on the western side, the population is almost exclusively Jewish, although just as divided between the ultra-orthodox communities and their secular adversaries.

A major new thoroughfare—Route One—neatly slices through the city, effectively dividing it between its Arab and Jewish inhabitants. As one drives toward the city center from the northern side, the very dress of the population spells out the split: on the left, inhabitants with traditional Arab headgear, the *kafiyya,* and light-colored flowing robes; on the right, the somber black coat and hat of ultra-orthodox Jews, venturing out of their exclusive neighborhoods.

More significantly, most of the Arab inhabitants of Jerusalem, the capital city of Israel, are not Israeli citizens. When the two parts of the city were combined shortly after the Six-Day War, almost all Arabs rejected the offer of Israeli citizenship, preferring to retain their Jordanian citizenship which they had been accorded during the nineteen years of Jordanian rule between 1948 and 1967. In sharp contrast to this offer of allowing Arabs to make a choice, a different policy was adopted in the early years of the state of Israel, when Israeli citizenship was conferred on the Arab inhabitants of those areas conquered during the 1948 war and officially incorporated into Israel: the Galilee in the north, the Negev in the south, and the Triangle in the center. In most instances of formal annexation of a territory, the inhabitants become citizens of the annexing state, and indeed, this is precisely what the Jordanians did after their conquest of the eastern precincts of the city and the West Bank in 1948.

Today, the vast majority of the Arab inhabitants of East Jerusalem refuse to participate even in municipal elections for the mayor and city council, even though Israeli law allows permanent residents who are not citizens to vote in local elections. This is an astonishing aspect of the situation, given their numbers (about one-third of the city's population), which could give them the balance of power between the opposing factions in the elections. If ever there was an example of people making their intentions clear

by the act of abstention, this consistent pattern of voting boycott over the last thirty years cannot be dismissed or ignored.

Moreover, even Israeli officialdom confirms the dual and dubious status of Jerusalem by, for instance, allowing several countries to maintain two consulates in Israel's capital city, one in the western half, the other in the eastern side. I know of no similar arrangement in any other city (even those several times larger than Jerusalem, with a population still well under one million inhabitants).

Of course, this duality is maintained not only for the convenience of the local population, so that members of each population group will not have to cross over into "alien" territory, but also as a political statement—namely that, for the consulates concerned, Jerusalem's final status has yet to be determined. Originally, by the 1947 partition plan for all of Palestine, it was designed to be an international city; it subsequently was divided (similar to Berlin) into eastern and western sections, under Jordanian and Israeli rule respectively; then formally combined into one city immediately after cessation of fighting in the 1967 war. While the politicians were careful to avoid using the formal language of annexation, it was generally considered in Israel that East Jerusalem—plus some surrounding areas beyond it—had been annexed to Israel. Later legislation gave added legal and constitutional meaning to this fact when, in the Basic Law: Jerusalem, the Capital City, it was declared to be the united and eternal capital of the State of Israel. These political and legal developments now need to be examined.

The issue of citizenship is crucial to an understanding of the status of Jerusalem—and, of course, for the status of the Jerusalemites themselves. Basically, Israel has very lenient laws of citizenship in favor of Jews, who are entitled to immediate citizenship on their arrival in Israel with a visa for permanent residency.[6] This inviting approach is considered to be almost the acme of Zionist ideology, with its implied statement of welcoming

Jews. This rule even applies to non-Jewish spouses of Jewish immigrants, as well as to other family members. Only for stated reasons of present health problems or past delinquency record, will a Jew be denied his right to take up citizenship. Other immigrants to Israel have to go through a waiting period of five years, a standard period applied in most countries, although some also require the fulfillment of certain conditions, such as proficiency in the national language, oaths of loyalty, etc.

As for immigration, Israel adopts a strict policy toward Arab refugees who fled during the 1948 and 1967 wars, and denies them the right to return—whether to their homes or into Israel or (for those in other countries) into territories occupied by Israel (although, after the cessation of hostilities in 1949 several tens of thousands were allowed to return under terms of family reunification, while of course, members of the PLO were allowed into the West Bank and Gaza under of the Oslo Agreement). This refusal to allow immigration is also applied in East Jerusalem and has many consequences, some of which will be dealt with later in this chapter.

In the past I have used this issue of citizenship as a key factor in determining the status of an area in dispute or in doubt—namely, has it been annexed? The particular case examined was the Golan Heights, where a similar (but not identical) approach was used in a presumed annexation of the Heights.[7] By legislation in 1980, provision was made for applying Israeli law and administration in the Golan Heights.[8] I argued that such legislation had no implications for the status of the Golan—it still remained an occupied area—as international law does not recognize unilateral acts of annexation. Since, in any event, the specific term of annexation was not used, the correct legal interpretation of the law had to be one which was compatible with international law, namely that no annexation had taken place, and that the law did no more than what was contained in its language, which was the application of Israeli law and administration in the assigned area. It should be noted that Syrian presence in the Golan was always negligible. No courts or administrative offices existed, as most of the 100,000

inhabitants had fled during the 1967 war and never returned. The inhabitants who remained—about 15,000 in number, almost all members of the Druze community—were, for all practical purposes, given the lack of any residual Syrian presence, subject to Israeli law and administration. Thus, the only critical factor that would indicate a change of status for the area would be citizenship for the inhabitants. If this was not accorded them automatically, the implication would axiomatically be that the status of the territory considered had also not changed. In effect, they were given the option of citizenship, for which only a small minority applied.

The arguments used *vis-à-vis* the Golan could well be adapted to the Jerusalem situation, as identical wording had been used to unify the two parts of the city, although the procedures used were totally different. A week after the Six-Day War ended, legislation was passed providing that any part of Eretz-Yisrael (i.e., Mandatory Palestine) could have Israeli law and administration imposed upon it by ministerial decree. The law was activated a few days later, when the Minister of the Interior declared that a particular area, spelled out in terms of topographical points on a map, would, from the day of the order being promulgated in the Government Gazette, be subject to Israeli law and administration. These points were understood by politicians and the public to be more or less according to the contours of East Jerusalem, but in reality they were far more "more" than "less", as substantial parts of the surrounding territory were also incorporated within the perimeter of the lines drawn between the specified topographical points. What should be made clear is that no simple unification of East and West Jerusalem was effected.

On the very same day, the minister of the interior issued a second proclamation (under a regular Israeli law empowering him to make new delimitations of municipal boundaries), expanding the area of Jerusalem by incorporating all territory within the perimeter of a series of topographical points—the identical points that had been enumerated in the first proclamation.

It was generally presumed in Israel that the ministerial action had both the political intention and legal effect of annexation.

However, the same argument that I used to examine the legal status of the Golan could be used *mutatis mutandis* in the case of East Jerusalem. Nevertheless, it should be noted that whereas the law relating to the Golan refers to it directly by name (both in the title and the relevant section), the ministerial edict makes no reference to East Jerusalem as such. The reason for not mentioning East Jerusalem by name is that the intention was to incorporate not just the city itself, but additional adjacent areas—a fact which enabled Israel to make an extensive commitment to the building of new neighborhoods in these partly vacant areas.

This is where the paradox of Jerusalem appears, the myths are created, and loose language is used. For in 1967, the ministerial act did not lead to a simple union of East and West Jerusalem, as could have been done, but to the creation of a new entity, consisting of three parts—West Jerusalem, till then under Israeli control; East Jerusalem, till then under Jordanian rule; and further land, partly uninhabited, also formerly part of Jordan, but not part of East Jerusalem.

It is this process that makes the debate over dividing Jerusalem (because of its historical connections) so factually meaningless, since significant parts of present-day Jerusalem never were part of historical Jerusalem, not in biblical times, not during Roman rule, the Crusades, the Moslem conquest, the Ottoman period, the British Mandate, nor Jordanian control. In this sense Jerusalem is a figment of the imagination—or, more specifically, a creation of city planning, political machinations and legal edict. If the boundaries can be so casually delimited in the direction of expansion, then there seems little reason why they could not be delimited in the direction of contraction, without affecting the validity of biblical claims, historical connections, or even religious sentiments. This factor takes on added pertinence when it is remembered that the *raison d'etre* of the Jewish claims, connections and sentiments—*Har-ha-Bayit*, the Temple Mount—is itself in the control of Moslem authority with respect to its everyday operations.

In essence, then, the politically loaded issue of dividing Jerusalem is a red herring. Factually, it is divided by choice of most of its population, with a minimum of intermingling between the population groups. More important, the Arabs of East Jerusalem are politically considered to be part of the Palestinian people (unlike the Arabs of Israel, who are not only citizens of Israel, but are also not generally referred to as Palestinians—although in some academic circles and in radical political parlance, such ethnic references are increasing in frequency).

Neither in the Golan law, nor in the ministerial edict concerning Jerusalem, is there any indication as to the status of the inhabitants. If an act of annexation had indeed been performed, the expected outcome would be that permanent residents of the area would automatically become Israeli citizens, unless there was good reason for them to request an exception—for instance, because they were citizens of a third state, or because of possible legal complications arising out of such a change in citizenship status. Israel's policy, however, was of an opposite nature; citizenship was only granted to those who specifically requested it. This administrative attitude strengthens the supposition that no act of annexation had taken place—clearly not by international law, but not even by domestic law.

Even the fact of allowing the option of seeking citizenship in a specific area does not *ipso facto* prove that annexation has taken place, certainly not according to Israeli procedures. For example, Jewish immigrants to Israel who go directly to live in settlements on the West Bank (i.e., outside of Israel's recognized borders) are given immediate Israeli citizenship.

The legal parallels between the Golan and Jerusalem retained their validity until a controversial Basic Law dealing with the status of Jerusalem was enacted. It is possible that this legislation has indeed changed the status of Jerusalem and also, as a consequence, the status of its inhabitants. Basic Laws in Israel have a special constitutional effect. In lieu of a written constitution, a series of about a dozen Basic Laws have been passed over the years, dealing with different aspects of Israeli governmental structure and civil

rights issues.[9] The relevant law is known as Basic Law: Jerusalem, the Capital City, and states unequivocally that united, eternal Jerusalem is the capital city of the State of Israel.

Given the constitutional nature of this law (as opposed to an ordinary law for the Golan and only administrative decrees for the 1967 attempt at annexation), it is possible that this Basic Law has effected a political transformation, even if in conflict with international law. However, it led to an immediate negative reaction to the legislation, in particular, the removal of some embassies from Jerusalem to Tel Aviv. Thus, the immediate effect of the legislation, aimed at strengthening Israel's hold on Jerusalem, was actually to weaken its international standing. It should be noted that the countries that moved their embassies were all among Israel's strongest allies. They were the only ones who had earlier agreed to place their embassies in Jerusalem; most countries had refused to do so because of its ambiguous status.

During the term of the Netanyahu government, Israeli political canvassing led to a Republican-led Congress passing a resolution, against the wishes of the Clinton administration, which stated that by the end of the century, the American embassy should be moved to Jerusalem. This was considered in many Israeli political circles as a great achievement for upgrading Jerusalem's status, but, of course, it can also be seen as indicative of the problematics: most countries do not request an allied state to legislate the location of its embassy.[10] On the contrary, it is assumed almost automatically that embassies are situated in or immediately adjacent to the capital city. Inasmuch as Israeli sovereignty is at stake, it is not unilateral declarations or even one-sided actions by Israel that determine whether sovereignty has been established, but the manner in which other sovereign bodies relate to these claims. Embassies located in Tel Aviv are a clear indication of the fact that Israel's claims to sovereignty in Jerusalem are not recognized.

The truth of the matter is that, aside from international doubts as to its status, even by Israeli law, it is not completely clear as to what Jerusalem's status is. It is possible that a Basic Law is determinative, and that the correct interpretation of the 1980 Basic

Law is to indicate annexation of those areas originally mentioned in the 1967 ministerial decree, or at least that part which was formerly East Jerusalem. But as a corollary to such a status, the implications would be that the 250,000 Arab inhabitants of that part of the city had become Israeli citizens. Yet this is not the case, since neither Israeli officialdom nor the Arabs of Jerusalem desire such an outcome.

This uncertainty as to status can possibly only be resolved by judicial interpretation, but judicial involvement is most unlikely. On the one hand, the Arab inhabitants of East Jerusalem have no desire to take out Israeli citizenship, while, on the other hand, Israel wishes to have physical control over the area, while not adding to the number of its non-Jewish citizens (currently about fifteen percent of the population). What does, however, concern the Arab inhabitants of East Jerusalem is recognition of their permanent residence in the city, a status that they can only attain (or retain) through the auspices of the Israel Ministry of the Interior. Those who are successful are given an identity card (as are the Druze inhabitants in the Golan), indicating their permanent residency (similar perhaps to the well-known "green card" of American immigration).

This factor of residency is a major point of contention between Israel and the Palestinians. I shall examine it as part of a larger picture of actions, feelings and motivations by both Arabs and Jews, in terms of daily living, political struggles and overall aspirations in regard to Jerusalem.

In the 1947 partition plan of the United Nations, Jerusalem was—because of its religious association with three monotheistic religions and its political significance as the focal point of intermittent strife among them—to become an international city, an independent unit, more or less on the model of ancient Greek city states, free towns such as those in the Hanseatic League, or idiosyncratic modern examples, including Monaco, Trieste, San Marino, Vatican City, West Berlin and Hong Kong. Little attention was paid to the mechanics of making such a city viable, given its

strategic position between the two states that were to arise by virtue of the partition decision. After the 1949 cease-fire agreement, the city of Jerusalem was split in two, the eastern suburbs being annexed to Jordan (which, with the parallel annexation of the West Bank also changed its name from Trans-Jordan), the western suburbs being annexed to Israel and declared to be the capital city. Neither annexation met with international approval.

From the Arab point of view, the inhabitants of the West Bank, including East Jerusalem, became Jordanian citizens. East Jerusalem is used here in a geographical sense—the official term used in common parlance of the Arabic language was *el-Quds*, meaning "the holy place."

At the time of the 1967 War, both (separate) cities were no more than small towns, with fewer than 200,000 inhabitants in the two areas, with the Jewish population slightly the larger. Jews who had been living in East Jerusalem in 1948, including especially the Jewish quarter of the old, walled city, had all left their homes, as did Arab inhabitants of the western section. The holiest site of the Jewish religion, the Western Wall of the Temple, at the edge of the Temple Mount (the only part that remained after the burning of the Temple in the first century), became out of bounds to potential Jewish worshippers. It is partly the trauma of this experience that is at the core of Israel's insistence that the city should never again be divided. Only one part of the eastern side remained in Israeli control as an enclave—Mount Scopus, the site of the Hebrew University. Once every two weeks a convoy was allowed to bring in food and allow for the exchange of academic personnel and others responsible for the upkeep of the buildings and their contents.[11]

Shortly after the 1967 War, in which East Jerusalem was conquered, several buildings next to the Western Wall were demolished by governmental edict, in order to expose its full grandeur and to allow for the building of a large square at its foot. The wall now serves as a focal point for Jewish pilgrimages, as well as regular religious services and occasional mammoth gatherings to celebrate holidays or commemorate significant events. The demolition of buildings led to the eviction of those Arab families

who had been living in houses adjacent to the alleys leading up to the Wall. This eviction was to be a forerunner of further political and legal battles linked to residential rights.

A further early example was the policy of rebuilding the Jewish Quarter—from refurbishing a landmark synagogue to the construction of new houses and apartment blocks, designated for possession and ownership by Jews. An anticipated heavy consumer demand led to the institution of lottery procedures to determine who would be allowed to buy and live in the area. An application by an Arab to take part in the lottery was rejected out of hand. This decision was challenged in the High Court of Justice, but the petition was rejected on the basis that historically, the division into four different quarters had been a singular characteristic of the Old City, and it was reasonable for the Israeli authorities to wish to re-establish this pattern of living.

Some years later, the ostensibly reasonable logic of this argument was undermined when Arik Sharon, then a senior cabinet minister, bought an apartment in the Moslim Quarter, and a legal challenge to this breach of the historical division was rejected. In actual fact, the Sharon family never moved in, as the minister continued to live on a farm in the south of the country and to use alternative official governmental residences on those occasions when he was obliged to sleep in the capital city. The upshot of his purchase was, however, to lead to further acts based on security considerations—a constant round-the-clock presence of guards to protect the building, at an exorbitant cost to the Israeli taxpayer.

Once again, the artificial fictions of Jerusalem were activated. Even today, its division into ethnic and religious quarters is assiduously respected when the fate of the Jewish Quarter is at stake, but peremptorily ignored when other quarters are affected. In fact, a number of other Jewish groups (mainly *yeshivot*—religious colleges) have moved into non-Jewish quarters, again involving security factors where special protection has to be provided, especially since some of these inhabitants have been attacked and even murdered by Arabs while going about their everyday activities.

In contrast to support for Jewish residents on the eastern side of the city, Palestinians wishing to reside there often encounter a host of difficulties. Since East Jerusalem is considered to be a part of Israel, clear distinctions are drawn between Palestinians living in the city and those living on the West Bank. There is no easy means of changing their residence from a town or village on the West Bank, or in Gaza, to an address in East Jerusalem. All residents of East Jerusalem are provided with Israeli identity cards (as presumed permanent residents of Israel, but not citizens of the State).[12] This status may, however, easily be lost, such as where an Arab with long-standing residence in the city leaves it to go overseas or to move to the West Bank or Gaza for personal, family or business reasons. It is clearly the desire and design of the Israeli authorities to discourage any increase of the Arab population of East Jerusalem.

Human rights organizations have extensively documented the difficulties encountered by Palestinians at the hands of Israeli authorities. For instance, a person leaving the city for an extended period of time for legitimate reasons, such as for the purposes of study overseas, or in order to live in closer proximity to a work situation on the West Bank, may be denied the right to return.[13] Babies born of mothers living in East Jerusalem may be refused registration within Israel; this will also prevent their families from receiving special grants from the National Social Security system. A West Bank Palestinian marrying a resident of East Jerusalem may be prevented from taking up residence in the spouse's home— similarly, of course, in the case of non-Palestinians. Other problems arise, such as deliberate procrastination in granting building permits in East Jerusalem, and the related problem of demolition of homes built without permits.[14]

Similar issues arise at the larger level. In education, for instance, the curriculum of the Arab schools in East Jerusalem was determined by the Jordanians and, subsequently, by the educational arm of the Palestinian Authority. This obviously took place with the acquiescence of the Israeli educational authorities. No attempt was made to align the educational curriculum in East Jerusalem with that provided in Arab schools in Israel. A few years ago a

university was established, el-Quds University, accredited by the Palestinian Authority, spread over four campuses, three of them on the West Bank, and one campus, including administration offices, in East Jerusalem. This led to political demands by right-wing politicians for the closure of the East Jerusalem campus, but the authorities have taken no action. Several other offices linked to the Palestinian Authority are also situated in East Jerusalem. In the past, efforts were made by Israeli officialdom to close them down— often a Sisyphus-like procedure, since the offices would be immediately reopened at a new address. It is generally believed that the closures are done more for symbolic internal Israeli politics, to demonstrate a firm hand against any semblance of Palestinian governmental presence, than to actually diminish it.

The most important case of Palestinian political activity in East Jerusalem was Orient House, a spacious private dwelling place, and the focal point of a host of quasi-governmental activities carried out on behalf of the Palestinian Authority. The Israeli governmental authorities constantly threatened to close it down, but its variegated activities continued unabated. Many foreign dignitaries visiting Israel paid routine visits there; the strength of the Israeli negative response depended partly on the status of the personage and partly on the extent of the media coverage. Outside, prominently displayed, was the Palestinian flag; inside, Palestinian affairs were conducted on a daily basis under the direction of a well-known Palestinian leader, the late Faisal Husseini. Situated near the dividing line between East and West Jerusalem, the area outside was often the scene of occasional demonstrations by Israeli right-wing activists, requiring police intervention as the opposing factions exchanged verbal abuse and occasional physical violence. Several days before the May 1999 elections, the Government announced that, because of recent provocative actions taken by the Palestinians at Orient House, steps would be taken to put a stop to the activities there. An Israeli organization centered in Jerusalem challenged the government in the Israeli High Court of Justice, but the issue became moot when the Netanyahu government lost the elections, and the threats against Orient House were dropped.

Just over two years later, a few weeks after Husseini's death, and a few months into Sharon's premiership, when activities at the Orient House had drastically diminished, the police raided it and closed it down, as an immediate reaction to a devastating suicide bomb attack in the heart of Jerusalem. The Israeli flag was hoisted for a few hours and then taken down after it became clear that the building was privately owned, and thus no indication of official status should be made. Immediate official announcements indicated that the closure was to be permanent, but later contrary statements were also made as to the temporary nature of the closure, since the building was basically a private residence. Criticism of Israel's action was intense. If the intention was to indicate exclusive Israeli sovereignty in Jerusalem, the effect was precisely the opposite, inasmuch as sovereignty entails recognition by others.

In general, the Palestinian Jerusalemites have constantly found means of entrenching their autonomous control, in violation of Israeli governmental directives. For example, a Palestinian census carried out on the West Bank also embraced Palestinians living in East Jerusalem. Despite warnings by the Israeli authorities that strict demarcation should be observed between the West Bank and Jerusalem, devious means were found of enforcing the census. In the age of computerized communications and technological sophistication, virtual reality can easily overcome geo-political aims and physical restrictions.

It should be noted, however, that, according to the original theoretical framework conceived by Menachem Begin, prime minister during the critical peace process with the Egyptians in the late Seventies, the autonomy to be granted to the Palestinians was to be based not on territory, but on persons. If this perspective were to be applied, then obviously there should be no objection to East Jerusalemites being counted among the Palestinian population; on the contrary, such a conjunction should even be encouraged. (Israeli Jews living on the West Bank have the right to vote in national elections at polling stations in their settlements, even though geographically living outside of Israel).[15] But here, once again, is an example of fictional concepts taking precedence over

mundane reality. For all intents and purposes, from their legal status to their emotional identifications, the Arabs of East Jerusalem are an integral part of the Palestinian people; they are not, and do not wish to be, Israelis. For that matter, neither does Israeli officialdom desire their membership in the Israeli political community. The willingness of these inhabitants to carry Israeli identity cards is only a result of their "personal realpolitik"—their right to retain residency in Jerusalem.

In contrast to these demonstrations of Palestinian presence and control, are Israeli defensive reactions—such as a widely-publicized meeting of the Israeli cabinet under Netanyahu's Likud government in the Jerusalem city hall. If anything is calculated to demonstrate the problematics of the present situation, it is just such a futile symbolic gesture. Few things could so demean the sovereign stature of a governmental body as its willingness to meet in a municipal facility. Similarly, the much-heralded celebration of the anniversary of three thousand years of Jerusalem petered out in a series of sparsely attended and little-noted cultural events. Indeed, the one event that was meant clearly to indicate Jerusalem's significance to the Israeli people, as well as international recognition of this reality, was the sad gathering (during this so-called celebratory year) of leaders from all over the world, including the Arab world, at the funeral of the assassinated prime minister, Yitzhak Rabin, buried on Mount Herzl in Jerusalem, near Theodor Herzl and other founders of the Zionist movement.

Perhaps most significant was the participation of King Hussein, for, after all—beyond the fact that the two countries had recently signed a peace agreement—it was he who had lost control of the city during the 1967 War; it was his country that had granted citizenship to the Arab residents of East Jerusalem. Several years earlier, before the Oslo peace process, Hussein had publicly withdrawn his claims over the West Bank, including Jerusalem, in favor of the Palestinians. Interestingly, this announcement aroused little public or academic interest, even though the political and legal implications were clearly far-reaching. By revoking any interest in re-imposing Jordanian sovereignty, he was paving the way for a

Palestinian state—and simultaneously removing an essential plank of standard Labor Party thinking that no Palestinian state should be established, and that most of the West Bank (without East Jerusalem) should be returned to Jordan.

Even when the peace treaty with Jordan was signed, there was almost no indication, in political or academic discourse, that Hussein's renunciation of the West Bank had created the essential conditions for a Palestinian state.

One of the uncontested truisms of Israeli politics is that, while deep political rifts exist over the future status of the occupied territories (Gaza, Golan, West Bank), there is a consensus among almost all Jewish Israelis that Jerusalem must never again be divided. This determination is legally enshrined in the Basic Law: Jerusalem, the Capital City, and pompously reiterated in political declarations. The fate of Jerusalem is also generally considered to be the major stumbling block to a full and final rapprochement between Israelis and Palestinians, and thus was always to be the ultimate item on the agenda of the permanent agreement between the sides.

Yet, for all the sentimental attachment to Jerusalem, expressed in poems and prayers, in art and drama; for all its powerful symbolism, the product of thousands of years of history; for all its unique beauty, with its undulating landscape of hills and valleys, and its unique architecture with its stone facades; for all its lodestar enticements for tourists from all over the world, Jerusalem is a city in deep trouble. Ethnic and religious tensions abound, not just between Jews and Moslems, but also between ultra-orthodox and secular Jews. It has with a crippling financial debt, and is one of the poorest of Israeli cities. While its population increases constantly, a contrary migratory process is under way: a "flight from blight" of young and talented people, linked to government and academic positions, seeking residence outside its municipal limits in the satellite towns that dot the mountainous landscape for tens of kilometers, leading down toward the coastal plain. The advantages are obvious—of having fairly easy access to the capital city, while living among stunningly beautiful mountain scenery.

As a result of this migration, Jerusalem is being denuded of essential tax funding, unable to derive revenues from those who earn their living there, and who enjoy personal benefits from its cultural attractions. This, of course is a worldwide pattern, but it takes on added pertinence in the environs of Jerusalem. For there is a further factor driving young secular people out of Jerusalem itself: a demographic factor of tremendous population increase among the ultra-orthodox communities, partly the result of a high birth-rate, and partly the result of the phenomenon of "*hazarah b'teshuva*"—the equivalent of "born-again" Jews, who have been absorbed into the ultra-orthodox communities. Two significant statistical factors should be noted—firstly the municipal administration consists of about fifty percent representation for parties that are either orthodox or ultra-orthodox, while the former mayor, Ehud Olmert, now deputy prime minister, rose to power in 1994 in a clear victory over long-term incumbent, Teddy Kollek (a reign of nearly 29 years from 1966), largely because of a clever deal done at the last moment with an ultra-orthodox candidate for the mayoralty, who withdrew from the race in return for a promise of appointment as a deputy mayor and other perks.

This coalition was basically repeated in later elections, even though a religious candidate could conceivably win an election (only a 40% majority is required to avoid a second round of voting). However, it was widely felt that the existing situation was preferable to the religious parties—of growing power without added responsibility. In any event, demographic trends and political developments finally tempted an ultra-orthodox leader to make a direct and successful bid for the mayoralty, as an independent candidate. Secondly, trends also indicate that about forty percent of all the children are in schools oriented to ultra-orthodox pedagogy. These figures obviously have a cumulative effect on secular Jews; they lead to a cyclical phenomenon of population growth, based on large families among the ultra-orthodox communities, causing secular Jews to leave the city altogether.

The population growth of the ultra-orthodox has other consequences—on the one hand, the need for additional accommodation;

on the other, encroachment into neighborhoods where they formerly had never lived, preferring ghetto-like exclusivity in precincts such as the well-known and picturesque Mea Shearim. This change in itself led to a major crisis in which, having slowly bought apartments and built institutions on both sides of a major thoroughfare in the north of the city, just beyond Mea Shearim, the ultra-orthodox insisted that the road be closed on the Sabbath and on religious holidays. This led to violent demonstrations, judicial litigation, extensive public debate—and a commission of inquiry. A compromise was worked out (basically to nobody's satisfaction), which would institute the closure of the road for several hours at times when worshippers were likely to be leaving for and returning from synagogue. In fact, much vehicular traffic now avoids the area, since there are today several alternative routes (including the aforementioned Route One). Furthermore, Jewish Jerusalemites have long been used to taking detours or longer routes, so as to avoid going through problematical Arab areas considered dangerous, especially because of the violence during the years of the *intifada*.

As for those who have left the city, many probably retain true affection both for its beauty and its history, but apparently not sufficiently to want to be fully part of it. This latter factor was actually put to a test in the form of a proposal made by then Mayor Olmert to extend the city limits by tens of kilometers in a westerly direction. The proposal was vehemently and vociferously rejected by irate inhabitants of those satellite towns and villages. While they relished the proximity to the capital city, they did not wish to be part of it. Many of them had left it because of the transformation that had come over it—the increase in the number of the ultra-orthodox, the inroads they were making into formerly secular neighborhoods, their infiltration of the political structure of the municipality. These people were in no mood to pay taxes in order to cover the deficit created by exemptions granted to ultra-orthodox institutions and to students at *yeshivot*, or religious colleges.

The background to the unemployed status of the ultra-orthodox is a further reflection of both religious power and logical paradox. When the state of Israel was established, an agreement

was reached whereby a small number of *yeshiva* students would be released from army conscription. The purpose of this agreement was to ensure, in the aftermath of the Holocaust, that there would be a continuation of the traditions of Eastern Europe. A condition of such release from the draft was the full-time involvement in religious study.

Over time, however, the original quota laid down was breached, the numbers grew, the control was relaxed, and today a significant number of each draft-age group are released for the purpose of religious study—with no control of admission, no ongoing testing, no conditions to fulfill in terms of proof of knowledge. Indeed, the only condition is an obverse one: the continued deferment of draft is dependent on continued membership in a *yeshiva*—until the student reaches an age, where he is entitled to full release from the army. This policy has led to a large number of young Israelis using religious study as a cover for evasion of military duty.

In terms of the social consequences, a generation of young ultra-orthodox are growing up without having to work in their most productive years, and without receiving adequate training for a productive profession or trade in later life (except teaching religious studies). The consequences have been economically devastating for the two towns with the largest concentration of *yeshiva* students—Jerusalem and Bnei Brak, both counted among the poorest cities in Israel.

It is this "inverted pyramid"[16] of able-bodied men not working—in fact, legally not entitled to work as a condition of their continued deferment of army duty—that is one of the underlying causes of Jerusalem's economic woes. The incorporation of outlying towns and villages within its perimeter would provide a much-needed financial fillip to the municipal coffers. However, the debate on this issue discloses a further reality about the mythical status of Jerusalem: whatever consensus there may be about not dividing it, there seems to be an emerging, contrary consensus of not expanding it. Surely, if the sentimental attachments to Jerusalem were meaningful, any Jewish citizen of Israel should welcome the offered opportunity of being included by a stroke of the pen within

its orbit. But the opposition to western expansion gives the lie not only to the protestations over Jerusalem's centrality; it also clarifies the essential flexible nature of its boundaries.

Basically, what Mayor Olmert wished to do to the west of the city is what the Israeli government did on its eastern side in 1967: arbitrarily increase its size without considering its biblical contours, and without consulting with its inhabitants. Furthermore, the struggle over its western boundary also clarifies the nature of its eastern boundary as an administrative decree, devoid of true historical meaning. Indeed, just beyond the lines drawn to the east in 1967, there is a new Jewish satellite town, Ma-aleh Adumim, whose inhabitants (in contrast to the western side) would actually be most agreeable to being incorporated into Jerusalem, as this would entrench their position in the final stages of the peace process. Located to the east of Jerusalem, they are geographically situated on the West Bank; inclusion within Jerusalem would nullify their West Bank geographical status and ensure that their town would not be part of any bargaining with the Palestinians.

With the lines on the outskirts of Jerusalem being so freely and casually drawn, with expansion on the west being a wishful solution to economic problems and demographic factors in the capital city, and expansion to the east being a wishful solution to the political uncertainty of a satellite town's status, an opposite corollary becomes a truly viable option: of contracting the border on the eastern side so as to allow a division of the city based not just on ethnic lines (between Jew and Arab), but also on political considerations (for instance, the capital cities of the states of Israel and a future Palestine). As it is, those who travel to some of the farthest extremes of the city on its eastern side are obliged to pass through a security check-post, similar to those found on many roads on the green line between Israel and the West Bank. Thus, while the map might have to be rewritten, the facts on the ground would remain basically unchanged.

What would make such a division of the sprawling city more amenable to Jewish and Israeli sensitivities is that the name for Jerusalem in Arabic is *El-Quds*, so that any such division of the

city would have the linguistic advantage of the capital city of a Palestinian state not having the identical name as the Israeli capital. Any such division would also presumably be based on the assumption that the new Jewish suburbs in the east would remain a part of the state of Israel in Jerusalem, in terms of re-drawn official borders.

I present this picture not as an ideal solution, and not even as a preferred solution—but only as a possible solution, one that is far more easily attainable than is normally imagined. But it is not necessarily the best or even optimal solution. For instance, it would not solve the problem at the heart of the dispute, at the heart of the city geographically, and in the hearts of the contending parties: the fate of the walled old city, divided up into its four quarters— Jewish, Moslem, Christian, Armenian; and the fate of the Temple Mount—as mentioned, in Moslem religious control under Israeli security surveillance. It is to this matter that we must now turn.

The Temple Mount is a site holy to both religions, Judaism and Islam. For Jews it is presumed to be the site, where the *Aqedah*, the sacrifice of Isaac, took place. Later it was to be the site of the Temple built by King Solomon and the second Temple that replaced it after it was destroyed. The second Temple also suffered a similar fate when it was razed by the Roman legions waging war against a Jewish rebellion. All that remained was the Western Wall, which, in the years of exile, became the place where Jews came to mourn their loss and bemoan their fate.

For Moslems its religious significance is linked to the fact that it is the site from whence Mohammed ascended to heaven, the precise spot considered to be within the magnificent Dome of the Rock. Within the overall precincts stands the el-Aqsa Mosque, adding to both the physical grandeur of the area and its religious importance.

Because of the Moslem presence in the area, there is a dispute among religious Jews as to whether it is permissible to set foot there. One body of opinion holds that the site has been defiled by the presence of a mosque; in addition, even outside of the buildings, there is a danger of desecration in that visitors may inadvertently

tread on the site where the Holy Ark was once situated. However, a contrasting viewpoint insists on the right of Jews to enter the compound and to pray there.[17]

The Western Wall and the precincts of the Temple Mount are contiguous. The wall itself, despite its impressive height, does not overlook the Moslem compound, but is actually at its foot. The Wall, several stories high, is composed of rows of massive stones, with small bushes somehow miraculously embedded in the higher parts, providing a colorful contrast of green against the somber gray of the rocks. Traditionally, Jews (secular and religious) have observed the custom of leaving notes in the crevices of the Wall with their prayers, hopes and wishes for their future. A visit to the Wall is considered a desirable pilgrimage for Jewish tourists, and many avail themselves of the opportunity to place a note in the Wall. Several years ago, modern technology was placed at the service of those unable or unwilling to make a personal pilgrimage: Messages may now be sent by fax machine, and every now and again they are gathered up by a local rabbi and placed in various spots in the Wall.

Apart from this, the Wall serves as a place of worship, and every day a number of services are held there simultaneously. The worshippers congregate around the table where the prayers are chanted from, facing an ark with the scrolls of the Torah within, as is customary in synagogues. Saturdays and holidays draw larger crowds, most especially the pilgrimage holidays, as laid down in the Bible, of Pesach (Passover), Shavuot (The Feast of Weeks) and Sukkot (The Feast of Tabernacles). The latter holiday, in particular, tends to attract a lot of activity, because it follows closely on the New Year and Yom Kippur holidays, and because of secondary holidays associated with it. Over the years, a special pattern has emerged, where a group of religious Jews, "The Faithful of the Mount," demand their right to enter the compound and carry out services there. This request is routinely rejected, which leads to petitions to the High Court of Justice. These sometimes end in a compromise, for instance, of allowing entry into the compound, but with strict prohibition that no prayer services be held.

This particular group is only one of several for whom the right to return to the Temple Mount has become a significant issue. Some of them are working actively in preparation for the re-building of the temple, sewing the special garments which the High Priest will have to wear to perform his functions. Other groups are embarked on much more ambitious projects—for instance, the search for a pure red heifer (one that has no hair that is not red) that is required for one of the sacrifices (as described in the Bible), or the search for a group of pure people, uncontaminated by any sacrilegious contacts. This entails isolating a small group of newly-born babies and educating them in a special structure, raised from the ground, which is the source of some of the defilement. It has been reported that such a project is already under way, but given the implications of potential prosecution for child abuse, it is possible that the claims made about this project are as yet no more than braggadocio, perhaps propaganda to raise financial support for this dubious project.

More practical is the search for the heifer. Here cooperation has been elicited from Christian fundamentalist groups, mainly in the United States, including at least one Texan rancher who is carefully searching for such a heifer, including the prospect of breeding one. The idea of rebuilding the Temple fits in well with Christian fundamentalist ideas, most particularly at the end of the second millennium and the start of the third, which signals the possible second coming of the Messiah.

So, while the ultimate aims of the Jewish and Christian fundamentalists are at odds with each other, in terms of their eschatological aspirations, they are prepared to cooperate at this preliminary stage against a common foe: the Moslems, whose presence on the Temple Mount prevents the rebuilding of the Temple.

In this fantasy world of religious fanaticism, clear danger lurks—namely that a militant group within fundamentalist circles will attempt to sway history and try to destroy the two Moslem buildings. This is not a pessimistic prediction of the future, but a factual account of failed or frustrated attempts in the past. The

latter originally was an arson attack perpetrated against the el-Aqsa Mosque, which caused serious damage. The culprit, a Christian tourist from Australia, was subsequently found by an Israeli court to be of unsound mind. A governmental commission also examined the background and implications of this act.

Years later, a small Jewish group was thwarted by pre-emptive action by security forces shortly before implementing a similar plan. It also transpired that a more organized and professional group, known as the "Jewish underground", had seriously considered taking similar action but had been dissuaded by a rabbi with whom they had consulted. His reasoning related not so much to the repercussions of any such act, but to his contention that a basically secular Israeli population was unprepared for such a messianic event.[18]

On the eve of the millennium, warnings were issued of potential provocations by Christian fundamentalist groups, including possible attempts to harm the mosques, presumably also in preparation for the reconstruction of the Temple as a prior requisite to an eschatological age, in which Jews were to acknowledge their historical error and convert to Christianity. One such group, consisting of several families, was deported from Israel in late 1998; two other groups were deported in September 1999. The majority of the people involved were American citizens.

But even without such third-party intervention by Western Christians, religious tensions between Jew and Moslem are latent and on occasion break out in acts of violence, much of it linked to the area of the Temple Mount. On one occasion, in October 1990, when the Feast of the Tabernacle overlapped with the Moslem holiday of Ramadan, underlying tensions led to an outbreak of stone-throwing by Moslems from the vantage height of the Temple Mount, upon Jewish worshippers below in the square facing the Western Wall. Nobody was seriously injured, but swift reaction by the Israeli police to restrain the Moslems led to an escalation of violence in which a group of policemen opened fire, in what they claimed was self-defense, as they had been surrounded by a menacing crowd. Twenty Moslems were killed.[19]

On another occasion, in 1996, when Israeli authorities opened a tunnel in the proximity of the Temple Mount, violence erupted and spread to other areas. Dozens of Arabs and Israelis, both soldiers and civilians, were killed. And, of course, the el-'Aqsa *intifada*" broke out after five Moslems were killed by police fire on the Temple Mount during protest demonstrations against the visit there the day before by the then leader of the opposition, Arik Sharon, in the company of about half a dozen fellow parliamentarians and several hundred police. The consequences of this brash act are still with us and will be discussed in more detail in the final chapter.

This, then, is part of the reality of Jerusalem. Beyond its religious and historical significance, is today's reality: two ethnic-religious communities, living in geographical proximity but social distance, sharing the same city, but with differing, even antagonistic, allegiances. The slogan of a "united city" will not bridge the gap—but sincere negotiations during the peace process might effectuate a changed climate, one in which all opinions and all options would be seriously considered, whether dividing the city or fully sharing it. Most of all, given the unique nature of the city, mutual sensitivity is required, as is the pursuit of original solutions.

Many ancient maps of the world then known to the map-makers show Jerusalem at the center, with three arms stretching out in the direction of the three continents in its proximity—Europe, Asia, Africa. Symbolically, the city's central position has grown over the years because of its links with the three monotheistic religions, all linked through the Old Testament to the same divine being.

It was this factor, more than any other, that led to the 1947 UN decision to extract Jerusalem from the partition division of Mandatory Palestine into two separate states, one Jewish and one Arab—while Jerusalem itself would be turned into an international city. If such a proposition were to be placed again on the international agenda, it would evoke a similar response of rejection by both Israeli and Palestinian public opinion and official

pronouncement. For the moment, the issue of Jerusalem seems to be a straightforward struggle between Israeli (and Jewish) and Palestinian (and Arab) aspirations. However, the very fact of international interest may—once again paradoxically—provide an opening for the kind of original thinking that is required in order to cope with its complexities.

On the assumption that a Palestinian state will emerge in the near future, the issue of Jerusalem on a bilateral basis becomes crucial. The debate at present resolves around the following possibilities:

(a) that it will remain the undivided, eternal (and exclusive) capital city of Israel—the presumed consensus of the Israeli people;

(b) that it will be divided into two cities, East Jerusalem as the capital city of Palestine, known as el-Quds, and West Jerusalem as the capital of Israel, a prospect that some left-wing groupings in Israel support;

(c) that it will remain an undivided city, which, in a totally unprecedented formula, would be the capital of both states, leaving a host of practical problems at the local level to be resolved, one suggestion being the division of the city into a number of boroughs on the model of cities such as New York, London or Melbourne.

Any such duality of the city as envisaged in the latter two suggestions, involving shared Israeli and Palestinian control, would also have symbolic significance in linguistic terms—since the Hebrew term for Jerusalem—*Yerushalayim*—embodies in its very name the idea of duality. In Hebrew, there is a special grammatical form for a plural noun, where the idea of twinning is involved—using, instead of the normal "*im*" for the masculine, or "*ot*" for the feminine, a special alternative of "*ayim*," as in "*ainayim*" (for eyes), "*raglayim*" (for legs), "*oznayim*" (for ears)—because in all these instances there are two on every normal human body. Other terms are "*michnasayim*" (for trousers, as these are two-legged), "*mishkefayim*"

(for optical glasses), or terms used for periods of time, viz., "*sha'atayim*" (two hours), "*yomayim*" (two days), "*shvu'ayim*" (two weeks, a fortnight), "*chodshayim*" (two months), "*shnatayim*" (two years), and, of course, the number "*shnayim*," meaning two. So the word "*Yerushalayim*" conjures up, in its very grammatical form, the idea of duality. The end part of the word also connotes the word "*shalom*" for peace.

Given this background, with its deep religious, historical and sentimental associations, it seems to me that any solution for Jerusalem should go way beyond any standard thinking about cities or capital cities. I wish specifically to explore the possibility of this special city fulfilling a unique role as not only a shared capital of the two states whose borders meet along the green line in its center, but also with a recognized status in the world community. However, instead of the amorphous international city of the 1947 partition decision, this treasured city, situated in Asia, yet linked spiritually also to the Western world of Christianity, would become a center for international organizations, in the manner of Geneva and the Hague. These possibilities will be explored in the next chapter in the context of an Israeli—Palestinian confederation. To appreciate this possibility, a prior reference to the nature of capitals is necessary.

It should not be forgotten that some capital cities are artificially created (and even made into separate territories) in order to avoid feuding among major contenders for that status—for instance, Ottawa as between Toronto and Montreal in Canada, Canberra as between Sydney and Melbourne in Australia, or Washington, D.C. in the United States as between several urban rivals. Slightly different examples are of Berne in Switzerland and Buenos Aires in the Argentine. In Brazil, several factors led to the creation in a remote area of the futuristic capital city of Brasilia, oriented from the beginning to the needs of the 21st century. In South Africa, four competing provinces emerging from a war between two British colonies and two Afrikaner (Boer) independent states, led to a tripartite governmental system, with separate capital cities responsible for different functions: administrative in Pretoria, legislative in Cape

Town, and judicial in Bloemfontein. The fourth province of Natal was monetarily compensated for its lack of a share in the capital.

In Europe, Brussels is the not only the capital of Belgium, but the administrative capital of the European Union, while Luxembourg City, capital of Luxembourg, is the site of the European Court. Within Rome, the capital of Italy, is the Vatican City, a compromise settlement reached after decades of a standoff in the late 19th and early 20th centuries between the recently unified state of Italy and the remnant of the former Papal States. Most states in the United States follow a policy of making the capital city a minor or less significant town, such as Albany in New York, Sacramento in California, Springfield in Illinois, or Columbus in Ohio, and Harrisburg in Pennsylvania. Furthermore, there are instances of two large cities being closely aligned to each other, for example, Minneapolis and St. Paul, separated by a river and known colloquially as the Twin Cities, or Dallas and Fort Worth. In Israel itself, the official name of Tel Aviv is Tel Aviv-Jaffa, as a result of a union between the two, Jaffa being a biblical site with a fairly large Arab population, Tel Aviv a new city built nearby as a parallel Jewish city at the turn of the century. In Africa, two capital cities, Brazzaville and Kinshasa, are separated only by a river, along which boats ply all the day.

With this as a background, with the ideas of duality and peace ensconced in its name, what future prospects are there for the unique and special city of Jerusalem? This can best be discussed in a larger context, of its unique role as a capital of several political units, as will be described in the next chapter.

FOOTNOTES—CHAPTER 2

1.   See Teddy Kollek and Moshe Pearlman, *Jerusalem: A History of Forty Centuries* (New York: Random House, 1968). Included are chapters on "The City of David" (Ch. 2), "Solomon's Temple" (Ch. 3), "Jerusalem and Jesus" (Ch. 11), "Christian Jerusalem" (Ch. 14), "Moslem Jerusalem"

(Ch. 15), "The Christian Kingdom" (Ch. 16), "Ottoman Jerusalem" (Ch. 18), "Jerusalem of the Mandate" (Ch. 19), "Capital of Israel" (Ch. 20), and "Jerusalem Reunited" (Ch. 21).

2. See *Genesis* 22. (In all instances, biblical quotes are from a modern translation of the Bible, *Tanakh: The Holy Scriptures,* Philadelphia: The Jewish Publication Society, 1986.)

3. The commander, Mordechai Gur, subsequently wrote a Hebrew book describing the battle, using this sentence in the title. He later became the commander-in-chief of the army and subsequently entered politics, as a member of the Knesset and a cabinet minister.

4. See *II Samuel*, 5:7: "But David captured the stronghold of Zion; it is now the City of David".

5. The use of "David's City" is incorrect, as in all translations from the Bible, and in everyday use today, the reference is to "The City of David". The term "David's City" has no meaningful resonance in English.

6. This rule is in terms of the Law of the Return, as mentioned in Ch.1; see further discussion in Ch. 7.

7. See Leon Sheleff, "Application of Israel Law to the Golan Heights is Not Annexation", *Brooklyn Journal of International Law* 20 (1994), p. 333.

8. For details of the rushed manner in which the law was passed (basically in violation of the internal parliamentary rules of procedure), see *ibid.,* footnote 6, at p. 334. See also response to my article by Asher Maoz in the same issue of the *Brooklyn Journal of International Law*: "The Application of Israeli Law to the Golan Heights is Annexation", at p. 355. The articles were written in tandem, after having been originally presented in the form of a debate at a faculty seminar in the Faculty of Law at Haifa University, and also appeared in shorter versions in a Hebrew journal, *Ha-Praklit*, the official journal of the Israeli Bar Association.

9. Basic Laws are enacted by the Knesset in normal sessions. No special or entrenched majority is required (except for a few designated existing sections). In theory, the Knesset is presumed to be acting on such occasions not as a legislative body, but as a constitutive one.

10. It should be noted that the key date for the establishment of an embassy has elapsed without any such action being taken—neither the move to an existing building, nor even the purchase of property for such a future step.

11. In terms of clarifying the problematic nature of issues relating to sovereignty, an interesting question arises as to where sovereignty resided in relation to this enclave: with the Israelis occupying the campus, but without the opportunity of using it for its designated purpose of a university campus; with the Jordanians, who totally surrounded it and on whom the Israelis were dependent for maintaining regular access to it; or neither, since Jerusalem had originally been declared an international city, and the physical presence of Jordanians and Israelis was, by most countries, not considered to have provided any legal proof of sovereign control.

12. Even automobile registration licenses and number-plates are different for East Jerusalem from the rest of the West Bank.

13. See the joint publication by *Hamoked*—Center for the Defense of the Individual—and *B'Tselem*—the Israeli Information Center for Human Rights in the Occupied Territories: *The Quiet Deportation* (1997, in Hebrew).

14. An Israeli organization was established to challenge this policy, including petitions to the High Court of Justice, and there were volunteer efforts to help the residents attempt to re-build their homes. It should be mentioned that these demolitions are administrative actions, and are not linked to punitive actions taken against families of terrorist activity. In this context see *B'Tselem, Demolition and Sealing of Houses as a Punitive Measure in the West Bank and Gaza Strip During the Intifada* (September, 1989).

15. In general, Israel does not allow absentee voting (except in limited cases of sailors and diplomatic staff). In the case of the territories, polling booths are actually set up in the settlements, even though they are situated outside of the geographical boundaries of the state.

16. The term "inverted pyramid" was originally used by a leader of the Israeli Labor Zionist movement, Ber Borochov, to describe the abnormal occupational structure of the Jewish people in the Diaspora where, in direct contrast to other nations, few people were involved in physical labor, and most of them were in what are now known as white collar professions.

17. Several years ago, former Chief Rabbi Shlomo Goren published a Hebrew monograph, claiming that it was possible to walk on the compound, on condition that certain areas were avoided. He provided a map showing where the site of the Holy Ark was presumed to have been situated.

18. This discussion is fully described by one of the participants in it, a member of the underground, who wrote a book about the movement, while in prison, serving a sentence for terrorist actions as part of his membership in the underground organization. See Haggai Segal, *Achim Yakarim—My Dear Brothers: The Story of the 'Jewish Underground'* (Jerusalem: Keter, 1987, in Hebrew).

19. This event took place on 8th October, 1990, almost exactly ten years before the outbreak of the el-Aqsa *intifada*, also linked to the killing of Moslems on the Temple Mount.

Chapter 3

Confederation:
One Land,
Two States,
Three Capitals

A<small>FTER THE</small> S<small>ECOND</small> World War, one of the victorious parties, France, and the vanquished nation, Germany, set about on a modest attempt to create a minimum link between the two hostile states that would prevent a regression into yet another bloody confrontation between them. Their opening gambit was to suggest common control over two of the essential commodities needed for waging war: coal and steel. The three Benelux countries (already associated in an economic union) and Italy also joined in the proposed project. As an underlying current to their deliberations, there were a number of leading statesmen who were also considering—and hesitatingly debating—the idea of a far more extensive (in number) and a far more comprehensive (in content) framework. Some were even articulating the idea of a United States of Europe. Gradually, over the years, what started as a Common Market became a Community, and then a Union. The six founding

members were joined by a further nine, with several more countries recently accepted for membership.

Every member of the Union has surrendered some of its sovereignty in order to enjoy the benefits of membership. While using the term Union, the better reference to what has been constructed is probably a confederation, a term which, despite some uncertainty as to its precise definition, conveys the idea of sovereign states combining certain aspects of their social, political, judicial and economic life into a joint entity. Such an entity includes some of the typical features of a state, such as a legislative assembly, an executive government, and a judicial system. The European Union of today contains all these organs, and this co-operative endeavor has, according to many, contributed significantly to the maintenance of peace in Western and Central Europe, despite the historic enmity, the ongoing tensions, and the recurrent flare-ups of local conflicts. In an early leading judgment, the European Court stated categorically that a new legal order had been established,[1] and developments since then have emphasized not just the "newness" in chronological time, but also the novelty in terms of the nature of its activities and power.

A series of treaties subsequent to the founding Treaty of Rome have expanded the orbit of the Union's authority (for instance, in fiscal matters), and suggested that the existing governmental machinery is likely to be further embellished in the future. A fully-fledged United States of Europe seems unlikely to emerge, however, given the wide range of its present membership and the zealousness with which most nation-states are likely to guard their independence, however much their actual sovereignty may have been diminished. Among the significant external expressions of this trans-national framework are the sites of the tri-partite capital: Brussels, where the executive and administrative offices are situated, Strasbourg as the seat of its Parliament (which is duplicated in Brussels itself), and Luxembourg as its judicial branch.

These developments have been among the most significant in the political structure of the post-war world. A key issue is whether the European experience is a one-time phenomenon, unique to

that continent, or whether it is a harbinger of similar possible developments in other areas of the world—indeed, whether it could not be regarded as an exhortatory model that could well be adopted elsewhere, or, to be more practical, could be adapted to differing conditions.

Specifically, I wish to pursue the possibility of hypothesizing a confederative framework between Israel and the future state of Palestine, which would provide solutions to some of the most serious points of dispute between the two parties, including, as already mentioned, the status of Jerusalem. While the European Union is based on three separate capitals, each with different responsibilities for the three aspects of the traditional division of power, the basic idea would be to have a sharing of capital status for Jerusalem among three separate political groupings. This idea is not too far removed from several ideas that have been bandied about in recent years, but it extends them to a logical conclusion; in some respects even joins together contrasting ideas. For instance, where the available options for Jerusalem are presented as being either of dividing it up or of sharing it, a confederation of two states provides for the implementation of both options. Jerusalem, by this model, would be divided into El Kuds (East Jerusalem) as the capital of Palestine, and Yerushalayim, the Hebrew term for Jerusalem (namely the western part) as the capital of Israel, while the total, united city—Jerusalem—would be the capital, with all three branches of government, of the confederation. To facilitate the practical aspects, a suitable campus would be set aside where the various organs of the confederation would be housed, perhaps somewhere straddling the old green line. An area near this campus would be designated for the international bodies that would be hopefully attracted to its environs, as suggested in the previous chapter.

The idea of a confederation would clearly provide a feasible solution to the intricate complications of the status of Jerusalem, and as such would contribute to resolving one of the major bones of contention between the two parties. Each would have sovereign control over those areas of Jerusalem in which its own citizens were living. At the same time, both states would possess shared sovereign

control over the whole city in terms of their joint membership of the confederation. To facilitate the actual daily operations of the city, a borough system would be set up, with special arrangements to be made for the manner in which the mayoralty and the city council would be constituted.

Within this governmental framework, the contentious issue of the old walled city, and more particularly the Temple Mount, would be resolved by excluding it from both El Kuds (East Jerusalem) and Yerushalayim (West Jerusalem), but by having it incorporated as an integral part of the total city. Easy access to these sites for worshippers of all three monotheistic religions would have to be guaranteed, and perhaps—in a saner and safer climate than what exists today—an ecumenical religious authority could be established to oversee the religious activities in this sensitive and important area.

It should be mentioned that from a purely theological perspective (shorn of all the aspects of the recent political struggle), it is far easier to achieve rapprochement between Judaism and Islam than between Judaism and Christianity, because the differences with Judaism relate to the very origins of Christianity and the very basis of its belief-system.[2] Part of this is connected even with the Temple Mount in terms of Jesus' criticism of its daily operations and his prophecy as to its impending destruction. Despite struggles between Judaism and Islam in the early days of Mohammed's mission, there is no similar religious confrontation between Judaism and Islam. In this context, a compromise on *Har ha-Bayit* (the Temple Mount, or *Harim el-Sharif*) is a distinct possibility in the right political climate, whereas *vis-à-vis* Christianity, a joint project of a similar nature might encounter insurmountable theological obstacles.

Counter objections as to the viability of a confederation will no doubt be lodged, and later in this chapter some of these possible reservations will be dealt with. But first, other beneficial aspects of the scheme will be addressed. Some of these are practical and are constantly under discussion at the daily operational level, while others are more abstract, dealing with the symbolic importance of

belonging to a group (ethnic or religious) and the manner in which individuals assert their self-identity through such membership.

The idea of a confederation has actually been raised on a number of occasions. One leading Israeli politician, who has frequently mentioned such a possibility is Shimon Peres,[3] but he has done so generally in terms of a future relationship with Jordan, to a large extent, perhaps, because until recently he was hidebound by his Labor Party's rejection of an independent Palestinian state. The Labor Party professed an interest in returning most of the West Bank to Jordan. Within this conceptualization, the Palestinians would be a part of the state of Jordan as they had been before the 1967 war, but West Bank inhabitants could continue to work in Israel, by virtue of a confederative set-up between Israel and Jordan.

Another leading member of the Labor Party, Arieh Lova Eliav, who subsequently left it in order to help found a political alignment to the left of Labor, suggested the idea of a tripartite confederation, consisting of Israel, Jordan and Palestine.[4] In discussing this idea, he did not mention its potential for dealing with the question of Jerusalem, but focused on practical economic and technical matters, particularly noting the need for a combined effort to cope with the chronic problem of water shortage.[5] Indeed, over the years, some political pundits have suggested that the desert terrain and the climatic conditions would lead to wars in the area, not over oil supplies, but over water resources.

Long before Israel and Jordan signed their peace treaty they had maintained regular, unpublicized meetings to deal with water matters. Part of the peace agreement between Israel and Jordan contains an agreement by the former to provide generous amounts of water from the River Jordan to the state of Jordan,[5] a generosity that was, according to most experts, not repeated in terms of the agreements between the state of Israel and the Palestinian Authority. Stories abound of serious water shortages in West Bank towns and villages, with inhabitants denied ready use of water for essential domestic and hygienic needs, while in the Jewish settlements in

the vicinity, there is an unlimited supply of water to irrigate luxuriant gardens in private homes and public areas.[6]

At one stage, when a worsening water situation threatened, caused by lengthy drought, Israel considered importing water from Turkey by ship, and in the course of these negotiations, indicated that some of the water to be brought would also be allocated to the Palestinians and Jordanians. Arrangements of this kind help to stress the inter-dependence of these three countries, and most particularly the symbiotic relationship that exists in the area to the west of the River Jordan in what was Mandatory Palestine. While the possible inclusion of Jordan in any confederation cannot be ruled out, at this stage it seems more sensible to concentrate on a two-state structure. Among other factors, what has to be noted is the need for parity between the two groups. A confederation of three states would place Israel in the invidious position of being in a minority *vis-à-vis* its two Arab partners. In the long run, any small confederation might well expand into a larger combination, including also other non-Arab states, in order to provide a balance for Israel's interests—for instance a re-united Cyprus—but such eventualities would at this juncture only complicate the existing situation. The importance of acknowledging such future potentialities is simply to ensure that settlements reached, including so-called "final" settlements, should always contain a minimum open-endedness to allow for both foreseeable and unforeseen later developments.

In fact, no confederation can be set out (though it can be roughly envisaged) until there are two sovereign states in existence. Any direct diplomatic negotiations to create a confederation could only be conducted after the establishment of a Palestinian state. Thus, important as it is to reach some sort of finality in negotiations, there should also be an understood recognition of latent potentialities in the future. Until now, much standard Israeli thinking has involved a desire to reach finality, mainly because of a fear that, after receiving most of their claims (for instance, statehood), the Palestinians would, in time, continue to make new

demands on the Israelis. However, some flexibility must be incorporated into agreed settlements. The status of Jerusalem, as outlined here, as well as the very idea of a confederation, can only be negotiated after an initial two-state situation has been reached.

Factors on the ground also point to the advantages of joint activities in a shared governmental framework. The "thin green line" has meant that populations pass easily from one side to the other. On the assumption that a Palestinian state will be established, and in the eventuality of some Jewish settlers remaining in that geographical area, it would be in their interest to be part of a larger confederation.

Even more so would such considerations apply to the Arabs living in Israel. A confederation would enable them to resolve some of the problematics of their dual status as Israeli citizens and ethnic Palestinians. It would seem that this has, to some extent, been the experience of similarly-placed population groups within the European Union, even if the evidence is not conclusive. The fact of membership of a state in the larger union may have made it easier for some minority groups to be reconciled to their minority status. In Britain, for instance, the status of the Welsh in the west and the Scots in the north has quite possibly been substantively enhanced by virtue of Britain's membership in the European Union. Recently, recognition has been given to their autonomous status by devolution of power. This new dispensation might have ensued in any event, but the fact of being part of a larger political unit may well have contributed to facilitating the process which led to devolution. Even before devolution was attained, there were indications that minority ethnic groups, or nations that have no state of their own, are finding it easier to relate to the majority population, because both are incorporated in an even larger entity, in which all groups are inevitably minorities, in which no one group can attain hegemony—despite a certain dominance, by virtue of its size and geographical centrality, that attaches to Germany.

These possibilities take on added significance in view of political and social developments in which many individuals in the modern

world are being exposed to situations where they consciously bear several identities—for instance, not just of citizenship of a state, but that of a regional ethnic group, or a religion, or, for many indigenous people, a tribe. Many years ago, Will Herberg suggested that citizenship in the United States was too loose and amorphous, and that people needed a linking affiliation smaller than the state in order to provide a social anchor; he suggested that the link in America was religious membership. Hence, the title of his book: *Protestant, Catholic, Jew.*[7] The America of today is even more heterogeneous, as are most other so-called nation-states, and for many people, ethnicity (in the form of language, religion, cultural norms) is no less important than nationhood or citizenship.

At the same time, the possibility exists not just of intra-membership (within a state), but also ultra-membership (outside of a state). For instance, many Arabs living in nation-states (Egypt, Syria, Tunisia, Kuwait) have a sense of also belonging to a trans-ethnic group, which might include both the Arab nation and the *Ummah* (nation) of Islam. In Latin America, the Spanish language and the Catholic religion may give rise to similar sentiments. Processes of this nature are part of the reality in Europe, where an inhabitant of Edinburgh, for instance, may consider himself to be Scottish, British and European. On this basis, an Arab with Israeli citizenship may relate not only to his affiliations with the Palestinian people and the Arab people, but also to his citizenship within a confederation. As an Israeli, he is part of a minority, but as an individual linked to the confederation, he shares membership with both fellow-Israelis and ethnically fellow-Palestinians.

What is of practical import is that within the confederation itself, the two populations—of Israel and Palestine—will be very close to parity, especially if many refugees in neighboring countries decide to settle in the new State of Palestine. The problem of asymmetry will not be concerned so much with a difference in population numbers, but with the far stronger Israeli economy. It is not clear how such discrepancies can be resolved, for while Israel will perforce have to give up territory and some of its sovereignty, it cannot be expected to agree to a similar diminution in economic matters.

On the other hand, one of the main attractions of nations linking together is the economic benefits that accrue (the European Union started, as mentioned, as a Common Market). Certainly for the currently impoverished Palestinians, there would have to be clear promise of economic advances that would ensue from any political cooperative endeavors. Indeed, according to many commentators, one of the reasons for the breakdown in the peace process, and the general Palestinian withdrawal of support for it, was the fact that for most Palestinians, their economic situation drastically worsened.[8] So any serious attempt to establish a confederation would have to be provide firm guarantees of the positive economic consequences for the Palestinian population: a resolution of the economic depression in the West Bank and Gaza, employment possibilities for Palestinians, joint tourist ventures, regional transport arrangements, and so forth. It is reasonable to presume that there would be a large inflow of investment and entrepreneurial capital, from both public (e.g., the World Bank) and private sources (including multi-nationals), just as there was in the early years following the Oslo accords.

A confederation would also make it easier to give urgent attention to environmental issues. It has long been obvious that ecological problems can only be resolved by joint programs of several states. Pollutants are no respecters of artificial political boundaries, and only joint and concerted activities by those on either side of the political divide can offer some hope of coping with the problem. So important are the two issues of water and the environment that, in any case—even in the absence of a confederative agreement—the two states would have to reach some understanding as to the potential dangers to which both are at present exposed. Here Israel's technological prowess, for instance in advanced research in solar heating and desalination of sea water, could be judiciously exploited to the advantage of both nations.

An additional pre-requisite for any confederation would be the need for both states to be committed—in theory and in practice, in rhetorical affirmation and in legal documentation—to a

democratic system of government. For Israel, this would mean a revamping of its system, inasmuch as it has been flawed by the years of occupation, while for Palestine, this would entail an all-out and earnest effort to become the first Arab state with an extensive tangible expression of the democratic underpinnings of the regime. This would include regular free elections within a multiparty system, an independent judiciary, constitutional protection for vulnerable groups, such as women, children, the aged, and for non-Palestinians—for instance, Jews—wishing to reside within the Palestinian state. At present, after the collapse of totalitarianism in Eastern Europe, the end of one-party political systems in Africa, and the demise of military dictatorships in Latin America, the Arab world is almost alone in its glaring absence of democracies.[9] This will have to be remedied, with the sanguine possibility that the Palestinians might lead the way. In any event, a proper democratic structure in the state of Palestine would be a *sine qua non* for any hopes of creating a confederation.

The larger symbolic problems should also be amenable to practical solutions within the framework of a confederation. For instance, in Israel there have been countless discussions as to the inability of Israeli Arabs to relate positively to a flag on which is emblazoned the Star of David, or an anthem (*Ha-Tikvah*) which refers to the yearning of a "Jewish soul" to return to Zion, and of the hope (the title word—*tikvah*—means hope) to be a free people in the Land of Zion and Jerusalem. Arab soccer players, chosen for the Israeli national team, are often picked up by a television camera during the playing of the anthem, with their lips tightly pursed. On one occasion, one of them admitted that he did not even know the words. A leading figure in the Israeli establishment, Miriam Ben-Porat, who had filled the positions of Deputy Chief Justice and of Government Comptroller, once suggested the idea of having a second anthem, which would be compatible with the emotional sentiments of the Arab minority—a situation that was adopted in South Africa, where the old anthem was retained together with the addition of the anthem of the African National Congress.

A confederation would contribute substantively to facilitating an acceptable solution to many of these intangible issues. Beyond the separate flags and anthems of each of the two constituent states, there would also be a flag and anthem for the confederation itself. Thus, for instance, in particularly sensitive locations—for instance the Old City of Jerusalem—all three flags could be hoisted or only that of the confederation. At ceremonial and sensitive occasions, the anthem of each state, together with the anthem of the confederation, would be sung.

In symbolic terms, a problem would certainly arise in terms of the language of this anthem, just as the choice of an official language would be problematical, as it is in other multi-language countries. While Arabic is a recognized international language, and also an official language of the state of Israel, most Israeli Jews do not know it; at the most, they may learn it for a few years in primary classes at school, with minimum proficiency. In fact, there may be more Palestinian leaders who know Hebrew adequately (in some cases, arising out of time spent in Israeli prisons) than Jewish Israeli politicians who can express themselves satisfactorily in Arabic. In any event, the language of discourse at the governmental level between Israelis and Palestinians is normally English; being neutral, it is probably the language that would be designated as a third language of any confederation. This, after all, was the solution adopted in India and many other former colonial possessions of the British Empire, with English as the *lingua franca* in a multi-language state.

No less difficult would be the determination of which areas of governmental activity would devolve upon the confederation, and which would remain within the sole purview of each independent state. These are matters that would have to be carefully designed and defined—and could only be discussed in an atmosphere of mutual trust and shared desire to work together for the benefit of both communities. Some of the factors involved may only become discernible in the course of daily operations. In the European Union, given its starting point as a community dealing with steel and

coal, few people could have envisaged its present involvement in agricultural matters.

Possibly the most acute problem would be the judicial section. In Europe, much of the development of the Union was facilitated by progressive and path-breaking decisions. Indeed, in some cases, advancement was facilitated by the creative jurisprudence of the judicial branch.[10] Within nation-states, the political power of the courts is often the source of contention. In Israel itself, much public debate has arisen out of some of the more controversial decisions of an activist judiciary, leading occasionally to direct attacks on some of its decisions and even on the institution itself. This is a phenomenon that has occurred also in other countries; witness, for instance, calls for impeachment of United States Supreme Court justices whose decisions were considered too far from the middle ground. Thus, the jurisdiction of a confederation court would have to be carefully worked out. Its powers at the beginning would have to be limited, and parity between the sides would have to be ensured, perhaps with an acceptable outsider as a special appointment on three-judge or five-judge benches. The court would obviously have to deal with issues of allocation of power between the states and the confederation, but it should also deal with basic human rights and act as a court of appeal for certain areas of the law—for instance, in criminal and penological matters, especially when dealing with grave offenses and more extreme punishments.[11]

Till now most references have been to the European Union as a desirable model. Yet, it must be admitted that a bi-national confederation, of two states belonging to vastly different cultures and religions, is vastly different from a union of 15 nations, all of them part of the same Western, Christian culture, despite their divisions into Protestant, Catholic and Orthodox groupings, with Turkey, a nominally Moslem state, at this stage still only a candidate for membership. Given the breakdown of the Soviet Union, and the existence of several moderate Moslem states in its proximity with Turkish-oriented languages, Turkey may be better off as a

dominant member of a loose grouping or confederation of such states (about seven in number) than as a questionable appendage to the European Union. These are the sorts of ideas of constellations of states based on culture, and particularly religious culture, which have been presented by Samuel Huntington in his *Clash of Civilizations*—although his reference to Turkey's possibilities is within a much larger Islamic orbit, whereas my suggestion here hints basically at a smaller grouping based more on language affinity than religion. [12]

It must also be admitted that a bi-national confederation does not exist anywhere else in the world. The confederation of three Arab states (in the 1980s) of Egypt, Syria and Yemen collapsed fairly rapidly. Furthermore, not just confederations, but bi-national states seem to have acute problems in surviving. The Czechs and the Slovaks agreed peacefully to split up. The ethnic Greeks and ethnic Turks in Cyprus were embroiled in a devastating conflict, which led to partition of the island, the invasion of the Turkish army, the flight of thousands of refugees, crossing *their* "green line" between the two Cypriot communities, the declaration of a Turkish state in the North, not recognized by any other state, and the slow disintegration of the hopes that, despite general Turkish-Greek animosity, which had existed for hundreds of years on the European mainland, the two communities could live together in the shared island state of Cyprus.[13]

A question arises as to whether both of these states— Czechoslovakia and Cyprus—might perhaps have succeeded if instead of one state, arrangements had been made for two separate states, based largely on ethnic considerations, which would then be joined together in a meaningful confederation. Even more so, one wonders if such a plan could have provided a recipe for successful co-habitation in other areas, such as Yugoslavia. Would there have been a more successful political experiment if the major groups living in the Balkans had each been accorded an independent sovereign state, with all six of them—Slovenia, Serbia, Croatia, Montenegro, Macedonia and Bosnia Herzegovina—linking up in a Confederation of Yugoslavia?

Further to the north, one might ask whether the five Nordic countries (Sweden, Norway, Denmark, Finland and Iceland) might not have been able to serve their joint interests more effectively in the world's political and economic arenas, had they developed their many existing joint Scandinavian endeavors within a more closely-aligned confederation of their own. In the past this might have been impossible because of NATO military bases in Iceland, because of its strategic position during the height of the Cold War. Today it may be complicated by the fact that the countries have adopted different approaches to membership in the European Union, with some joining and other remaining outside.

In Israel there are proponents of Israel as a bi-national state, rather than a Jewish state—in the parlance that has been widely mentioned, a nation of "all of its citizens".[14] The idea of bi-nationalism in the geographical area known as Palestine has a lengthy history. It was a position favored at one stage by left-wing members of the Zionist movement, including both academic scholars and active politicians. At one stage, long before any peace process between the state of Israel and the Palestinian Liberation Organization, it was favored by the PLO, which called for a secular state in Mandatory Palestine. Indeed, among a fair percentage of the population on the West Bank and Gaza, such a bi-national secular state is still today considered a desirable political aim, with its prospects of a likely Arab majority in the near future.

However, those Israelis who tout the idea of a bi-national state are generally referring only to that area which is within the green line—namely, the state of Israel itself. For the moment, there has not yet been a suggestion for changing the name of that state, but the name itself, Israel, already belies the idea of bi-nationalism. In fact, the only truly bi-national state that could emerge within geographical Palestine would be one that embraced *all* of the Mandatory area—from the sea to the Jordan River, and south in a straight line from the Dead Sea to the Red Sea. In such a state, the Arabs and Hebrews would be in a flexible state of parity. But the specific aspects of Jewish culture would be, I believe, placed in

jeopardy, given the far greater power (numerically and in many other ways) of the Arabic language *vis-à-vis* Hebrew, and of Islam *vis-à-vis* Judaism. The only way that some measure of bi-nationalism could be achieved in a practical manner, without endangering the "weaker" group (namely the Jews—or, if you wish, the Hebrews or Zionists or Israelis) is through a confederation structure. Within the nation-state of Israel, the Hebrew language, the Jewish culture and religion could be protected and perfected with state approval and support. Surely, this is one of the reasons why nation-states are set up in the first place, for otherwise larger states could easily be established on a continent-wide basis.[15]

Yet Europe has chosen the route of confederation. The Dutch, Portuguese, Greeks, are not required to lose their special identity, yet are eager to be part of a larger political entity, which gives them a share of power as part of a stronger Europe *vis-à-vis* America and Japan or even Russia and China. In the United States, initial independence was based on thirteen sovereign states linked in a loose confederation (as laid out in the Articles of Confederation of 1777). This confederation was probably far looser than the present European Union; it had no overall court system or executive authority. When this arrangement was replaced a decade later by a federal system, it was accompanied by endless struggles (in the courts, the political arena, and finally the Civil War) as to the allocation of power between the federal government and the individual states, many of them jealously and zealously guarding what they still considered as their "sovereignty".[16] What enabled the United States to succeed as a nation-state was the fact that:

(a) there was no debate as to the official language;
(b) religion was kept out of federal affairs, with the intent of avoiding typical "European" struggles between Catholics and Protestants, Anglicans and Puritans;
(c) the Native Americans were neatly neutralized by parcelling them off into reservations, without offering them citizenship as individuals, or even group rights as states within the "United States"; and

(d) the issue of slavery and the rights of blacks was made a local, i.e., state issue and not a nation-wide federal matter.[17]

The question for nation-states, from a democratic and modern universalistic perspective, is indeed whether they are a states for all their citizens, in two major capacities. Do they provide human and civil rights for all their citizens (and specifically, in a modern world of legal and illegal migration, also for all its inhabitants)? In terms of group membership, do they accord their minority populations group rights? These are specific, empirical questions that must be carefully examined.

A truly bi-national state cannot arise in Israel where the Arabs are only fifteen percent (or eighteen percent, if the inhabitants of East Jerusalem—almost none of whom have opted for citizenship—are included in Israel). All known examples of such a numbers discrepancy become nation-states of the majority population group. The question, then, is: How are minority rights respected and protected? The picture is usually a mixed one, and so it is with Israel. In terms of civil rights, the Arabs generally utilize effectively the power of their vote; in a proportional voting system, they have generally achieved significant representation in the Knesset.[18] On the other hand, there has been only minimum representation at the executive level (a few ministers and deputy ministers). Arabic is an official language, but it required a Supreme Court decision to enforce the use of Arabic on highway road signs. Days of rest are determined according to religious affiliation—Friday, Saturday or Sunday—but budget allocations for religious needs of Moslems, Christians and Druze are infinitesimal.[19]

In many circumstances, regional autonomy is a possible solution for minority needs and claims. This has not been granted in Israel, but there is a basic problem here, as the concentration of Arabs is spread out—although they are a majority in the Galilee, the northern hilly region. In any event, civil society among the Arabs has led to some effective canvassing by unofficial organizations, generally initiated by their representatives at the local level. The fact that there is a residential differentiation between Jews and Arabs means

that there are many Arab mayors or heads of local councils, and this sometimes gives them lobbying power in semi-official bodies, such as the central body of local authorities, where they often have a casting vote between a right-wing and a left-wing candidate. Despite a natural propensity to support the left, in local matters their interests may be served by supporting a candidate of the right (if, for instance, his party is in power, or more specifically, his party has supplied the Minister for the Interior). It is possible to add many more variables to this list, showing positive and negative aspects of governmental policy, in which Israel, as a nation-state, can compare favorably with many other nation-states dealing with a fifteen to twenty percent minority.

However, the most problematic aspects are the issue of land and the rules of immigration. As for the latter, these favor Diaspora Jews and deny the rights of Palestinian refugees, a problem that will be discussed in a later chapter. As for land, this is one area in which there has been severe discrimination, as land belonging to Arabs has been expropriated and assigned to Jews in both agricultural and urban areas. Tension in this matter has led to annual organized protests by the Arabs, on what is known as Land Day. These demonstrations are held on 30th March, and in addition to the specific question of land, also commemorate the death of six protestors on the occasion of the first Land Day, in the late Seventies, when police in several different places opened fire on demonstrators. On a number of occasions since then violence has erupted on Land Day, but in recent years, a *modus vivendi* has been worked out, where the police remain at a discreet distance and allow local leaders to take responsibility for peaceful demonstrations.

Land discrimination strikes at the heart of the Zionist-Palestinian confrontation, where land was sought (and bought) by Jewish immigrants to Palestine under Ottoman and then British control. The oft-quoted slogan was, "Land without people for a people without land". To this day, some Israeli politicians and academicians argue that the Arab population migrated into Palestine in the twentieth century, largely attracted by economic potentialities created by the Zionist presence.

This is a deep and difficult issue, and in recent years a number of Israeli academicians have presented a disturbing picture of the land grab that they claim took place.[20] Recently, a Supreme Court decision indicated judicial willingness to intervene on behalf of Israeli Arabs seeking to buy property in circumstances which till now had been reserved for Jews.

The overall picture, however, is not a consequence of the supposed evils of Zionism, but a mild echo of extensive land appropriations that are part of world history. Indeed, countries that are today among the leaders of the democratic world, with all the manifestations of human rights (for instance, a constitutional bill of rights) are far greater culprits, especially the English-speaking ex-colonies or former dominions. The United States expropriated land from the Native Americans, often transferring the dispossessed people to hostile environments through treaties, which they sometimes later ignored or unilaterally rescinded. The Australians totally denied any minimum claims of the Aborigines until 1992, when a judicial precedent attempted to rewrite Australia history and relate the excesses of the past. New Zealand and Canada attempted to come to terms with their indigenous populations through legal agreements, which then often broke down through the naked use of superior European power.[21] Similarly throughout Latin America. Many of these countries are now trying to redress past grievances; their discriminatory and harmful actions in the farthest reaches of the world are only now, in recent years, being fully documented, and they make for sorry reading.[22]

Israel, too, will have to come to terms with its actions in this regard, in the course of a total peace process: a full peace that will embrace not just the Palestinians beyond the green line, but its own citizens within it. Aspects of such a process will be discussed in the penultimate chapter. Recounting them now does not lead to any necessary conclusion as to a bi-national state. A confederative structure between two states may well provide a far better basis for such reassessment. In other words, while Israel would be a nation-state oriented to expressions of the majority culture, with adequate

safeguards for the rights and culture of the minority, the confederation as such would express the idea of bi-nationality.

Declarations of bi-national states, in and of themselves, do not resolve sensitive issues. Canada is a bi-national state in which French-speaking Quebec has yet to achieve full recognition as a "distinctive society", and in which the possibility of its eventual independence, supported in the past by close to half the population of Quebec, has not been finally discarded. So important is their distinctiveness as a French society, that discrimination has been practiced within the province against the English language. Today, of course, Canada itself is far more than merely bi-national on an English-French basis; it is far more multi-cultural because of its belated recognition of the rights of its "First Nations",[23] as well as its welcoming policy in recent years to a polyglot of new immigrants.

The closest example of a bi-national state is Belgium. It has known in the past violent clashes between Flemish and Walloons, based mainly on language differences. These overlap neatly with regional differences: French-speaking Walloons in the South, near France, and the Flemish in the North, near the Netherlands. This is the basis of the Belgian nation-state; in practical terms, each group is given representation on more or less parity principle, including regional governments. The main problem has revolved around the awkward situation of its capital city, Brussels. The city was once a bastion of the Flemish, but immigration patterns have transformed the situation.[24] Today Brussels has a French-speaking majority of close to 85%, yet is surrounded by a Flemish population.

In recent years, the tensions between the groups have largely subsided, and even the problematic position of Brussels has changed. It consists today of a more heterogeneous population, partly the result of its choice as the capital of the European Union. The flag of the Union flies prominently in many places, and there is an overall awareness of its special position as the leading city of a small nation, chosen to be the capital. In this sense, it has begun to resemble The Hague and Geneva, also important places for international organizations, also important cities of small states.

Could similar consequences emerge for a Jerusalem that would fulfill a fourfold role: not just as capital of Israel and as capital of Palestine, but also as a center for international organizations and as the capital of a Confederation of Israel and Palestine?

Such an outcome would be only one clear manifestation of a confederation, but, as I have suggested, it would offer many other advantages to the rival peoples. In the present impasse, with heavy casualties on both sides, many leading figures in Israeli society are asking seriously to consider a unilateral solution imposed by Israel, in which it would complete its withdrawal from those parts of the territories with an overwhelming Palestinian population, most of which are in any case already in the control of the Palestinian Authority, and then create a hermetically sealed border—in the process probably annexing most of the areas where there are Jewish settlements.

This could probably only be achieved in Gaza, which can be closed off tightly, as Egypt did for nineteen years till the 1967 war. It would also involve evacuating the 5,000 Jewish settlers living there in several isolated settlements. The topography of the West Bank in relation to Israel, however, makes any suggestion of a hermetically-sealed border (short of a replication of the now defunct electrified border between East and West Germany) no more than a pipe dream, the product of frustration at the heavy toll taken by terrorist attacks. The major reason negating any possibility of total physical separation is the very presence of Jewish settlements in the territories, which has created the complicated jigsaw puzzle situation. And, of course, the "united" city of Jerusalem would be a further stumbling-block to separation of the populations.

The more than three decades of Israeli occupation have created a dynamic of their own. The two populations are today inextricably intertwined: Jewish settlers are on the West Bank, Palestinians work in Israel, and the sizable Arab minority in Israel has ethnic and even family contacts with their brethren in the occupied areas. These factors suggest that the only viable two-state solution is one in which the two states reach an accommodation as to their future

interaction—and the optimal, if not ideal, basis for such an accommodation is that of confederation.

The confederation could be further enhanced, and Jerusalem's special status in the world further acknowledged, if its international aspect was also incorporated—not as an international city, but as a recognized center for international organizations, similar to Geneva and The Hague.

The headquarters of international organizations might be transferred to Jerusalem. Recently, for instance, some organizations, both official and non-governmental, have moved out of their traditional premises, mainly from Geneva, to other less expensive cities. Such organizations could re-locate to Jerusalem. Furthermore, new institutions might be established there, such as an International Court for Political Arbitration and Reconciliation, as a parallel venture to the recently-established International Criminal Court, which deals mainly with political crimes. Given the developments of the truth and reconciliation tribunals[25] in a number of countries emerging from years of intense strife, violence and violations of human rights, the better model for meting out justice might well be a tribunal seeking compromise solutions, rather than a court based on models of confrontation. If the century-long impasse between Jew and Arab, between the Israeli and Palestinian people, could be resolved, if peace could be attained, and if cooperative forms could be established, then the geographical site in Jerusalem of a reconciliation tribunal would take on added pertinence.

Other institutions that logically come to mind are academic institutions: a further UN University (in addition to existing branches, such as in Tokyo), special research institutes, and a Conference Center, where preliminary discussions could be held as to the nature of special years in the universal calendar: the Year of . . . , or the Decade of . . . At a recent conference in Jerusalem, a Jerusalem Declaration for Science was enunciated, obligating all students taking a degree in research science to commit themselves to use their learning in pursuit of the advance of humanity, and

not for other aims—much like the Hippocratic Oath for doctors. Such a prospect could lead to a trans-national organization devoted to the provision of immediate humanitarian aid in disaster situations, whether caused by nature or by politics—especially given Israel's experience in recent years, in both categories (for instance, the earthquakes in Nicaragua and Turkey, and the ethnic tragedies in Rwanda and Yugoslavia). Other centers could be set up for the official monitoring of wholesale violations of human rights, or early warning systems of future potential explosive situations.[26]

Where could these institutions be housed? Perhaps on Har Homa, the open area between Jerusalem and Bethlehem, designed for a controversial large-scale neighborhood still to be completed. The negative response to this plan was universal, and in Israel an alternative was suggested of planting a forest there to symbolize the peace process. Israeli officialdom argued that Israel could do whatever it wished within its own sovereign territory; they also promised that a percentage of the apartments would be made available to Arabs.

Throughout the discussion, the impression was created that Har Homa was somewhere near the center of Jerusalem. In actual fact, the site is many kilometers from the city center. One reaches these environs along a winding and undulating road that passes through uninhabited areas, until one reaches the outskirts of Bethlehem. Indeed, the present bulldozing activities reach almost to the fences of the houses on the outskirts of municipal Bethlehem. The organic connection of this new proposed neighborhood is with Bethlehem, and not Jerusalem. It is not even certain that all of it is within the municipal boundary of Jerusalem. This is merely one example of building projects designed to bring an Israeli presence into border areas, as well as to limit the flexibility and ease of Arab travel.

Two can play at this game, however, as the Palestinians have proved—most particularly in a new governmental building which includes a legislative chamber, erected at the edge of the area already assigned to the autonomous control of the Palestinian Authority.

In 1998 some right-wing Israeli politicians claimed that a third of the building was in the area under Israeli control and demanded that that part of it which is in Israeli territory should be demolished. The official response of the Israeli Minister of Internal Security, in whose power it is to issue a demolition order, was that the error was of only one meter—and that the whole misunderstanding had arisen as a result of the width of the nib of the pen used to draw the demarcation line.

Of such trivialities are complex political issues comprised. Of such irrelevancies are deep historical processes affected. Of such illusions of reality are laid the basis for figments of the imagination.

What is needed is original and creative thinking and determined and courageous actions, which will use the positive symbolic aspirations conjured up in the concept of duality and peace enshrined in the very name of Jerusalem, *Yerushalayim*, to place the city once again in world consciousness—not just as a capital city, but as a regional center and as a force for world-wide cooperation through its focus as the site for international institutions.

FOOTNOTES—CHAPTER 3

1. See the leading case of Van Gend and Loos v. Nederlandse Administratie der Belastingen, Case 26/62 (1963) ECR 1.

2. For some of the problematics, from a theological perspective, see Leon Sheleff, *In the Shadow of the Cross: Jewish-Christian Relations Through the Ages* (London: Valentine Mitchell, 2004).

3. For general views, based on the optimism engendered by the Oslo process, see Shimon Peres (with Aryeh Naor), *The New Middle East* (New York: Holt, 1993) at pp. 163-179.

4. See Arieh (Lova) Eliav*, Rings of Faith* (Tel Aviv: Am Oved, 1993, in Hebrew). In the final pages of the book, Eliav discusses the possibility of a tripartite confederation, consisting of Israel-Palestine-Jordan, which he refers to as Yis-Pal-Or. He mentions discussing these ideas at an academic seminar at Harvard University. For a slightly different approach, see Daniel

Elazar, *Two Peoples—One Land: Federal Solutions for Israel, the Palestinians, and Jordan* (Lanham: University Press of America, 1991).

5. For a general analysis of the overall issue of co-operative endeavors, see Eyal Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use* (Cambridge: Cambridge University Press, 2002).

6. See documentation by B'Tselem, *Thirsty for a Solution: The Water Crisis: The Water Crisis in the Occupied Territories and its Resolution in the Final Status Agreement* (July, 2000, in Hebrew); and *Not Even a Drop: The Water Crisis in Palestinian Villages Without a Water Network* (July, 2001, in Hebrew).

7. Will Herberg, *Protestant, Catholic, Jew: An Essay in American Religious Sociology* (Chicago: University of Chicago Press, 1970).

8. For an overall survey, see UNESCO, *The Economy of the West Bank and Gaza Strip: A Retrospective on the 1990s and Future Challenges* (January, 1999).

9. For a critical analysis of the state of democracy in the Arab countries, see, for instance, David Pryce-Jones, *The Closed Circle: An Interpretation of the Arabs* (London: Phoenix, 2002). He writes that, "the Arabs have trapped themselves inside a closed circle," which prevents them from breaking out of negative traditional practices and "evolving into modern participatory societies" (p. 403). However, for a penetrating analysis of possible positive prospects, see Nathan J. Brown*, Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: SUNY Press, 2002).

10. For a good discussion, see Maria Luis Fernandez Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International, 1999).

11. See a similar suggestion for supra-national review of extreme penalties in Leon Sheleff*, Ultimate Penalties: Capital Punishment, Life Imprisonment, Physical Torture* (Columbus: The Ohio State University, 1987), ch. 14, "Supra-National Due Process".

12. Samuel Huntington*, Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996).

13. See, for instance, Zaim Necatigil*, The Cyprus Question and the Turkish Position in International Law* (Oxford: Oxford University Press, 1993).

14. The issue of the nomenclature of a Jewish state in contrast to a "state of all its citizens" has become an issue in recent years in the political arena and in academic discussions.

15. The only really continent-wide state, is Australia, though certain countries are partially so, such as the United States, Canada, China and Russia.

16. See my discussion of these issues in *Coke v. Marshall: The Legal Legacies of Two Uncommon Common Law Jurists* (in manuscript), dealing with recurrent political and juridical crises.

17. It should be noted that constant frictions arose between the northern and southern states over the issue of whether fugitive slaves, seeking protection in the north, should be returned to their "owners" in the south, since both the U.S. Constitution and the Federal Fugitive Slave Act obligated such action, but local state laws often prohibited it. On the legal status of Indian reservations see Carol Tebben, "An American Trifederalism Based on the Constitutional Status of Tribal Nations," *University of Pennsylvania Journal of Constitutional Law* 5 (2003), p. 318.

18. In the 1999 elections for the Knesset there were thirteen Arab members in a house of 120 members (12 men and one woman). In the more recent elections, held in January 2003, the number of Arabs fell to a much lower level of only nine, partly a reflection of the weakness of the left wing in general.

19. However, since there is no separation of religion and state, these discriminatory practices can be (and sometimes are) challenged in court. In any event, far greater discrimination is practiced against non-Orthodox Jewish groups, such as the Reform and Conservative movements.

20. See, for instance, Sandy Kedar, "Majority Time, Minority Time: Land, Nation and the Law of Adverse Possession in Israel", *Iyunei Mishpat* 21 (1998), p. 665 (in Hebrew).

21. See Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 1999), ch. 6, "The Invention of Discovery", and ch. 12, "Land is Forever".

22. See, for instance, Juan E. Mendez, Guillermo O'Donnell and P.S. Pinheiro (eds.) *The (Un)Rule of Law and the Underprivileged in Latin America* (Notre Dame: University of Notre Dame Press, 1999).

23. See, for instance, Bruce Clark, *Native Liberty/Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990).

24. See the proceedings of a conference held in Jerusalem in December, 1994: Joel Kotek, Simone Susskind and Steven Kaplan (eds.), *Brussels and*

Jerusalem: From Conflict to Solution (Jerusalem: The Harry S. Truman Research Institute for the Advancement of Peace, the Hebrew University, 1996), especially the section entitled "The Brussels Case"—including articles by Hervé Hasquin "Brussels: The Francophone Point of View" (p. 33), Anja Detant, "The Flemings in Brussels" (p. 41), Edouard Poullet, "The Brussels Dynamic" (p. 69) and Michiel Vandenbussche, "The Flemish Community Commission Within The Brussels Pacification Model" (p. 85).

25. See P. Hayner, "Fifteen Truth Commissions, 1974-1994: A Comparative Study," *Human Rights Quarterly* 16, p. 597. There is at present a non-governmental organization in Jerusalem which monitors potential genocidal organizations. It grew out of work done by a Jerusalem psychologist, Israel Charny; see *Genocide: The Human Cancer* (New York: Hearst Books, 1982), and the Internet newsletter on the Holocaust and Genocide, edited by him. The work of "*B'Tselem",* the Israeli human rights organization for documenting violations committed by Israeli authorities in the occupied territories, provides an ongoing and up-dated surveillance of developments in their various reports.

Chapter 4

Territories:
Geneva Con(tra)vention(s)

A SIGNIFICANT PROPORTION of Israeli Jews, certainly of a right-wing persuasion, but also from other political sectors, believe that the major stumbling-block to peace is Palestinian terror. They hold both the militant Islamic groups that rejected the Oslo peace process *ab initio* and *in toto* (Hamas and the Islamic Jihad) and Yasser Arafat responsible.

These critics point to the cunning machinations of Yasser Arafat and his supporters in the P.L.O., who only temporarily and partially forsook the weapon of terror as a useful tactic to make sufficient gains, and then, with the breakdown of the process in the aftermath of the failed Camp David talks in 2000, willingly returned to the terrorist track. Furthermore, the very weapons that they were using had been made readily available to them by the generous folly of the Israeli negotiators, who had allowed the establishment of a legitimate police force in the area under the exclusive control of the Palestinian Authority, and then failed to strictly monitor the implementation of the agreement, as the police unit was expanded into a paramilitary force and the opportunity of illegally obtaining weaponry was exploited to the hilt.

The result was that the second *intifada* (uprising) of the Palestinians in October, 2000, was no mere repetition of the first one thirteen years before, manifested mainly by stone-throwing youths. It involved cross-fire between two opposing forces, with rockets and mortars and suicide bombings activated by the Palestinians, and helicopters, tanks and planes utilized by the Israeli army.

On the other hand, there is also a substantial body of opinion in Israel which holds that the major stumbling-block to peace is the existence of Jewish settlers scattered throughout the West Bank and even in parts of Gaza. Without the settlers, it would be far easier to draw demarcation lines between the State of Israel and a projected State of Palestine—more or less separated by the green line of the 1949 armistice agreement. In the absence of settlements, a *status ante quo* could be reinstated. This probably would entail agreed-upon border adjustments, both to cater for Israel's security concerns, given the narrow breadth of the country (10 kilometers) at its bottleneck just north of Tel Aviv, and also, by conceding a corridor strip between the West Bank and Gaza, to cater for Palestine's need for a link between its two parts. Whatever the debilitating accumulative effect that Palestinian terror has had on the possibilities of a peaceful settlement, it is the Israeli settlers, many of them arrogant in their assertion of their presence, who hinder a true rapprochement because of the rage they induce among the Palestinians and the problems that their possible removal poses for Israeli politicians.

Acts of terror are a horrendous problem, an ultimate denial of a victim's basic human right. Terror not only poisons the atmosphere, but poses acute challenges as to how to combat it. While international law lays down rules as to how to conduct "normal wars" between recognized states, and how to deal with freedom fighters (those who abide by certain clearly defined basic rules in the course of their struggle), it provides little guidance to states as to how to cope with terrorist activities,[1] in terms of pre-emptive actions, protective measures on behalf of vulnerable innocent

populations, and interrogation procedures under conditions *in extremis* (where lives of hostages are in danger, for instance).

Be that as it may (and I have dealt with aspects of terror in the past),[2] concern as to how to cope with terror cannot deflect internal Israeli dialogue, and larger universal involvement, from the problematics posed by the settlements. (Incidentally, this is not a unique problem, *vide*: the Russians left stranded in parts of the former Soviet Union, the Protestants [former settlers from the island of Britain] in Northern Ireland, or the million French who settled in Algeria, when it was considered an integral part of France.)

In this chapter, I shall deal with the hindrance of the settlers on the West Bank and Gaza as a stumbling block to peace, and also describe the manner in which this situation came about. The basic figures are of just over 200,000 Jewish settlers in the West Bank and about 5,000 in Gaza. There is no recent census, and often the numbers are inflated or deflated for purposes of political debate, depending on the argument being made by a particular protagonist. In addition, there is a far more complex debate as to the status of a further 200,000 Jews living in the eastern environs of Jerusalem, in those areas that were added to Jerusalem immediately after the cessation of hostilities in 1967. Given the fact that the Jewish population of Israel is about 5 million, the percentage of settlers on the West Bank (exclusive of Jerusalem) and Gaza is almost five per cent of this population. If the Jerusalemites living beyond what was the green line are included, the number approaches ten percent.

The impact of the settlers extends far beyond their numbers. The kernel of these settlers is a militant ideological group, numbering probably about 50,000, nearly all of them Orthodox Jews, clearly recognizable by their dress (especially so for the males, with their distinctive headgear of *yarmulkes* [skullcaps] perched on the back of their heads). Their leaders, many of whom have official positions as heads of local councils or members of the settlers' overall executive body, have tremendous political clout, due to their ready access to right-wing politicians. In addition, these settlers serve as an inspiration for hundreds of thousands more, particularly young

Orthodox Jews, who see them as a latter-day expression of the pioneering spirit that characterized Israeli society and the Zionist movement in the past.

Their model is the kibbutzim that were set up all over Israel prior to statehood, in the face of British opposition. However, while the members of the kibbutzim were secular socialists, intent on re-creating an agricultural base for the Jewish people, based on high intellectual and cultural standards, and seeking to define afresh the nature of the Jewish economic structure which emphasized Jewish labor, the militant settlers in the occupied territories are right-wing religious zealots, intent on re-constituting a religious basis for the Jewish state. Most of them are employed within the green line (in Israel proper), while their houses and public buildings in the settlements, as well as the extensive road system, were often constructed by Palestinian laborers or, more recently, foreign workers.

A further source of strength for the settlers in the political arena is the number of leading politicians who actually live there, lending a personal aspect to large-scale political considerations. These include cabinet ministers and leading members of the Knesset or, at the least, close members of their families.

The settlement movement is generally considered to be a right-wing phenomenon, supported intensively by the National Religious party (of Orthodox persuasion), and also by the Likud and a few smaller groupings to the right of the Likud. However, the initial infiltration was sanctioned by the Labor party in the early 1970's, long before the Likud had had any real share in governmental policy. The major reasoning of the then Labor establishment, under Golda Meir, was linked to its perceptions of Israel's security needs, though historical and religious considerations probably facilitated the decision-making process. Because of the weight of the security question, care was taken to establish the settlements as near as possible to the green line and to avoid placing them in the proximity of Palestinian towns or villages.

Nevertheless, with the passing of time, and with changing perceptions of reality, it was during periods of Labor rule that

some of the most extensive expansion took place—most notably, and most regrettably, during the Oslo peace process. Figures indicate that the number of settlers was doubled in the final decade of the twentieth century, a period when Rabin, Peres and Barak were all, at different stages, prime ministers in charge of the peace process.

It has also been claimed that more Jewish Israelis were settled in the West Bank during the one and a half year of Barak's premiership than during the three preceding years of Netanyahu's rule. Indeed, in retrospect, one of Barak's early mistakes was the appointment of the leader of the National Religious Party, Yitzhak Levi, to the position of Minister of Housing, especially since the latter had made no secret of the fact that his major consideration in joining a peace-oriented left-wing coalition government was to protect the interests of the settlers. It may be that Barak deliberately allowed the increase in the settlement program in order to neutralize their likely virulent opposition to his ambitious policies, aimed at reaching an early and final agreement with the Palestinians.[3]

The publicly supported and financed building program was so extensive that today it is claimed that many new houses are standing empty, given the reluctance of Israelis to take the risks of living on the West Bank, with the concomitant dangers of being exposed to terrorist attacks in the settlements and on the roads. Indeed, even the much-vaunted building project at Har Homa, right next to the outskirts of Bethlehem, is in dire straits, given its proximity to the intermittent outbursts of shooting between nearby Gilo in Jerusalem and Palestinian Beit-Jalla.[4]

I have already suggested that the settlement project in the territories is possibly the major ideological error of the Zionist movement. It is instructive to reconstruct the various stages of this process, noting the various governmental agencies that were involved (including the august body of the Israeli Supreme Court).[5]

The settlements were set up originally by the Labor government in areas considered crucial for Israel's defense needs. The most definitive public exposition was the "Alon Plan", formulated by then deputy prime minister and sometime foreign minister, Yigal

Alon, but never submitted to full-scale discussion by the cabinet then led by Golda Meir. The basic factor (most important to remember today) was to create a situation on the ground that would enable Israel to return the West Bank to Jordan, while allowing for Israel's eastern border to be extended slightly, along a line determined by the placement of the settlements. A further string of settlements was to be placed on the mountain ridge above the Beqa Valley, along the Jordanian border. The underlying assumption was that the Palestinians would eventually be returned to Jordanian control and would retain their Jordanian citizenship. Given the fact that hardly any states had recognized the Jordanian annexation of the West Bank (and no Arab states had done so), this policy amounted, in effect, to indirect recognition of Jordanian annexation by the state of Israel. Jordanian law continued to be applied throughout the West Bank, except for East Jerusalem. The situation was entirely different in Gaza, since Egypt had never annexed it and did not ask for it to be returned during the peace negotiations.

During the rule of the first Likud government, settlements were established far beyond the parameters originally set out by the Labor party policy. During this period Arik Sharon was actually one of the first leading politicians to articulate the idea of an independent Palestinian state. But he was referring to the State of Jordan (that part beyond the river, not including the West Bank), which, due to the large number of Palestinians living there, was where they could create their homeland. This would enable Israel to annex the West Bank. Palestinians living there would not become Israelis, because they would presumably change their Jordanian citizenship, together with all other Jordanians, to Palestinian citizenship, even though they would be living in an expanded Israel.

While no official declarations of this nature were made, since legal niceties were not at issue, this was the logical outcome of Sharon's future plans. On this basis, there was an urgent need for increased settlement throughout the West Bank—not only without regard to proximity to Palestinian towns and villages, but, on the contrary, specifically intended to place as many Israelis in such

locations, in order to accentuate the Israeli presence. Since there were not sufficient people with the necessary ideological zeal to move beyond the green line, enticing economic inducements were offered to ordinary Israelis, where cramped two-room apartments in crowded towns inside of the green line could be exchanged for spacious five-room houses with neat gardens, amidst beautiful scenery, beyond the green line. In most cases, new wide roads provided quick and easy access to places of employment within Israel.

Despite the years of Likud rule, which extended over most of the twenty-odd year period from 1977 to 1999, no serious attempt was ever made to annex the territories, although this was the logical aim and *de facto* consequence of right-wing ideology. According to this ideology, Israel had historical rights embedded in biblical narrative. Furthermore, demands for Israeli withdrawal made by outsiders were often seen as typical examples of anti-Semitic discrimination. After all, so the argument was constantly reiterated, Israel was the only country denied the spoils of war.

This argument is almost pathologically oblivious of the fact that, since the Second World War, the one notable example of a country allowed to retain almost all of its territorial conquests is actually Israel, with its green line drawn along the outlines of Israeli military presence, and constituting a thirty percent increase in the size originally accorded it by the 1947 partition plan. All countries that have recognized Israel have recognized it on this basis, including Egypt and Jordan in the peace agreements—and also the Palestinians, as an underlying assumption of the Oslo peace process. Indeed, their argument is that their negotiations are based on the historic compromise, in which they have concurred, of 78% of Mandatory Palestine going to Israel, and 22% to Palestine. It is their understanding of this compromise that makes them so reluctant to give up any further territory, particularly not in favor of the settlers.

The Oslo peace process collapsed, to a large extent, because Israel, despite the supposedly magnanimous gesture of Barak in moving determinedly beyond any earlier hesitant probings, insisted

on bargaining over the 22%, mainly in order to be able to maintain most of the Jewish settlements. Barak's intention was to annex these areas; thus, the first serious indication of possible annexation came from a Labor premier. Even this was done only with a slight hint of a fully-fledged Palestinian state next to Israel. Israel's intentions were made more palatable by Barak's offer of a slice of territory, semi-arid but capable of development, to be attached to Gaza. This was the first time that any official Israeli proposal had invoked border adjustments of the green line, immediately evoking protests from Israeli right-wingers and Israelis living near the designated area.

The problem with Barak's intentions was that the settlements that he wished to retain within Israeli sovereignty were so geographically dispersed that they left the proposed Palestinian entity cut up into three distinct and isolated areas, with Gaza constituting a fourth part. As it is, a Palestinian state divided into the West Bank and Gaza would pose many problems for efficient rule and interaction. To add to this a truncated West Bank, divided into three separate cantons, surrounded by Israeli settlements, was to clarify for the Palestinians exactly how much both Israel and Palestine were the captive inheritors of facts that had been meticulously carved out on the ground in the preceding years.

One could, of course, point to precedents. Pakistan was once divided into two parts, separated by thousands of miles (but finally East Pakistan became Bangladesh), and there are archipelagoes with the sea as separation. But the only real precedent for one state separated by land barriers of another state is Bobutswana, seven separate areas in the midst of former apartheid South Africa.

While the possibility of annexation was hesitantly raised by Barak, as a possible *quid pro quo* to satisfy the Israeli public, on two previous occasions Israel had unilaterally annexed territories conquered in the 1967 war—or, to be more precise, had purported to annex, with the precise legal consequences debatable. As already noted, East Jerusalem, and an area beyond it was annexed immediately after the war; some years later, the Golan Heights,

conquered from Syria, were also annexed in a similar, but not identical, manner.[6] At no stage was a formal declaration of annexation made. Israeli authorities were at pains to avoid any specific use of the term, presumably bowing to the fact that unilateral annexation is normally not recognized by international law, as Saddam Hussein found out to his cost. The intervention by a number of countries, led by the United States, was carried out only *after* his annexation of Kuwait; his earlier invasion, in and of itself, had not evoked the same broad willingness to be involved in forcing his withdrawal. Annexations, to be recognized, must be accomplished by mutual consent of the parties, preferably with the consent of the affected population.

In order to overcome this legal obstacle, the Israeli authorities devised a specific formula, that of "applying Israeli law and administration" in a designated area. This formula avoided the use of the word "annexation", so as not to cause problems in the international arena. However, for internal domestic consumption, it was broadly accepted that annexation had indeed taken place.

At the administrative level, Israel did not impose citizenship upon the inhabitants, which it had done earlier in 1949 to the Arabs who were living at the time in the territory then annexed, i.e., within the green line. However, it did offer citizenship to all the residents of East Jerusalem and, later, the Golan, but only a handful accepted the offer in Jerusalem and only a small minority in the Golan (among them 15,000 Druze, who were the only Syrians to remain in their homes; all the others fled and have never returned, not even to the small portion, including the city of Quneitra, returned to Syria after the 1973 Yom Kippur War— Syria keeps it as a ghost town, partly for propaganda purposes).

I have argued that the issue of citizenship for the question of annexation is actually crucial, especially when a national law is in violation of international law principles. Where international law does not allow for unilateral annexation, a country defying this rule should, for the purposes of its own national law, at least make a formal declaration of annexation, so as to remove all doubt as to its intent in such a crucial matter as its international boundaries,

so that its neighbors and others will be fully aware of the bounds of its claimed sovereignty. In lieu of such declaration, an alternative would be to adopt administrative measures indicating the full incorporation of the designated territory within state sovereignty. The most significant act would be to confer citizenship immediately and automatically on all the permanent residents, unless they had a good reason for declining to accept (such as being in possession of the citizenship of a third country, which did not allow dual citizenship).

On the assumption that Israel's offer of choice may indicate a democratic consideration of the wishes of the inhabitants (by not imposing on adults a status not desired by them), the situation of children born subsequent to the annexation would be conceivably of a different nature. If East Jerusalem and the Golan are parts of sovereign Israel (as is presumed by most Israelis), then the thousands of children born since that supposed annexation should be registered as Israeli citizens. Yet no such executive or administrative directive has ever been given. On this basis, as well as a number of additional facts, I submit that no annexation ever took place—a crucial fact when contemplating the possibility of withdrawing from these areas in the course of further peace talks.

The full legal impact of these Israeli governmental actions was discussed in two legal debates. In the case of East Jerusalem, Yoram Dinstein expressed reservations about the government's action, while Yehuda Blum supported it.[7] In the case of the Golan Heights, I expressed the view that, not only in terms of international law, but also internal Israeli law, no annexation had taken place,[8] to which Asher Maoz responded that, while admittedly in violation of international law, the Golan Law did achieve its internal purpose of annexing that area.[9]

In any event, no similar devious moves have ever been attempted for the West Bank. The creation of settlements was carried out within a legal vacuum. Not even ardent right-wing leaders or the settlers themselves ever made insistent demands for annexation. For them, possession seemed to constitute the proverbial nine-tenths of the law. Their presence was of the essence. The legal

niceties were irrelevant. In any case, they considered the territories to be liberated, not occupied; thus, according to this thinking, annexation is unnecessary, since the area is already inherently part of the Land of Israel (*Eretz Yisrael*).

The only authoritative answer to the dilemma of the Golan and East Jerusalem would be that of the Israeli Supreme Court, but it has never been asked directly to address the issue. When indirect challenges were mounted (for instance, that any negotiations for giving up Israeli territory would be considered as treason) the court deftly evaded the issue. However, while the Israeli Supreme Court has not dealt with the issue of annexation of the Golan and East Jerusalem, it has dealt extensively with the issue of the West Bank and Gaza in the context of a host of legal problems connected with the application of the Fourth Protocol of the 1949 Geneva Convention. This protocol lays down the rules to be observed by an occupying power toward the inhabitants, known in the Convention as "Protected Persons". Ranking high in importance in this jurisprudence is the status of the settlements.

The Israeli Supreme Court, sitting as a first instance High Court of Justice, has been actively involved in the fluid and indefinite legal situation on the West Bank. It has opened its portals expansively to allow Palestinians to present their grievances directly to the highest judicial authority in Israel. Since the actual occupation in 1967, over a thousand petitions have been submitted to the Court, challenging general directives and specific actions by the military government. No other country in the world has accumulated such a massive amount of litigation dealing with the legal rights of protected persons under military occupation. The very fact of this openness has been a source of pride to many Israelis of liberal persuasion and to most of its legal establishment.

Because of the high standards of the Israeli judiciary and the esteem in which its members, singly and collectively, are held, it might well have been presumed that their decisions would contribute substantially to the development of international law

in this sensitive area, and lay down useful and meaningful precedents on behalf of vulnerable people exposed to the pressures and vagaries of military rule by a foreign power. Israel itself, as a young state, had played an important part in the formulation of the Geneva Convention, in the wake of the tragic Holocaust that had befallen the Jewish people just a few years earlier, and had been among the first signatories of the Convention.

However, while the Supreme Court was willing to allow the Palestinians to plead their case, ostensibly on equal terms with any other Israeli litigant, and, indeed, on equal terms with the military authorities themselves, their actual decisions were substantively adverse to these petitions.[10] A major preliminary decision was that the Geneva Convention itself was not considered binding in Israeli law, but that the Courts would be willing to act according to the spirit of the Convention, particularly in applying its humanitarian provisions.[11] This framework for discussion was to become crucial in terms of the legal status of settlements, as will be shown shortly.

The reason for relating to the Convention as non-binding is deeply embedded in the English common law system, of which Israel was formally a part until 1980. The common law approach to international conventions is to recognize their obligatory force only if they are specifically incorporated into the law of the land by virtue of legislation. Ratification by the executive government indicates, according to the common law approach, an obligation toward the world community only, but does not make the Convention part of the national law. This approach is in sharp contrast to that adopted by many other countries, e.g., in the civil law system of European countries such as France and the Netherlands. Conventions that are ratified are considered to be, in the hierarchy of legal norms, superior to ordinary legislation. The common law rejects this approach because of a deep legal norm, that of parliamentary supremacy; thus, executive action (whatever its international consequences) has no independent legal standing within the national legal system.

On this line of reasoning, the Israeli Supreme Court came to the conclusion that, for as long as the Knesset failed to pass the

necessary legislation, the Court would not be bound by the Geneva Convention. However, given the commendable humanitarian ideas ensconced in the Convention, the Court declared that it would, as far as possible, act in accordance with the spirit of the Convention, especially when dealing with human problems, such as house demolitions, personal deportations, family separation and torture in interrogation. Unfortunately, in the vast majority of these cases, the Court, having declared its willingness to be guided by the general principles of the Convention, in almost all the cases—with a few noted exceptions—rejected the Palestinian petitions. Generally the submissions of the military authorities, explaining why there was a need to demolish a house, to deport an individual, to deny family unification, and to allow physical force in interrogation, were accepted. These decisions have been subjected to a great deal of criticism, in both Israel and abroad.[12]

The situation in regard to settlements is different, since the issue is not considered a humanitarian one. Indeed, when on one momentous occasion, the Court did actually peremptorily order the government to immediately cease work on a projected settlement, at a place called Elon Moreh, its reasoning was based not on the Geneva Convention, but the earlier Hague Convention of 1907, which dealt more with the rules of war itself, and stated that no changes should be effected in the lives of a conquered people unless it could be justified by the military needs of the conquering army. The Court then stated that since there was clear-cut evidence in this particular case that no security considerations were involved, the Palestinian petition would be upheld.[13] This was considered, at the time, by many, a death-blow to the settlement movement. Yet, since then, settlements have grown fourfold. How did this come about?

It was the result of a deplorable combination of apparent judicial error, purposeful legal manipulations and general political inertia. The basic problem is related paradoxically to the positive decision on Elon Moreh. Aware that apparently only military considerations would justify future settlements, those in favor of such settlements sought a means of avoiding further judicial

involvement. The best description of the subsequent developments is provided by Menachem Hofnung in a Hebrew book.[14] Care was taken to expropriate land intended for settlement some time before the actual construction of the site. Thus, when the expropriation was challenged by its Palestinian owners, no mention would be made of the final purpose to which the land would be put. It was usually not difficult to find some military justification for putting land in the public domain, citing, for example, its strategic advantage should hostilities ever erupt. This litigation would be conducted before a minor tribunal, itself linked to the civilian arm of the military occupation.

After the legal status had been firmly and formally changed, the way was now clear for a settlement to be established, since the original owners had no further legal rights to their former property. This was where the aforementioned legal manipulation came into force.

The political inertia refers to the fact that the Israeli Supreme Court, sitting as a first instance High Court of Justice, has over the years adopted a liberal approach to issues of justiciability and standing, allowing public organizations a fairly free hand in making general claims on behalf of specific groups or of general public issues that are included in the organization's terms of reference. Thus, the way was open for many peace-oriented or human rights organizations, or even political parties, to request judicial intervention to stop the continued building of settlements, pointing out the devious process used to overcome the Elon Moreh decision.

For several years, while many other petitions were lodged, no efforts were made in regard to the settlements, until, towards the end of the Eighties, the Peace Now movement finally challenged the whole settlement project, arguing in a well-presented brief that they were illegal.[15] The petition was rejected, but interesting comment was made by one of the judges, Justice Goldberg, who pointed out that while the Court's overall policy of activism and willingness to come to the aid of petitioners was admirable, there are times when it would be wise to exercise discretion, so as not to endanger the judicial institution itself. Justice Goldberg's comment

lends itself to a number of interpretations; one clear possibility is that the petition itself was on solid ground, but the Court would best be advised, in its own interests, to refrain from intervening.[16] In one respect, it must be admitted that it is difficult to conceive of a Court order mandating the removal of tens of thousands of settlers from their homes. (Whether this can be done in the course of a political settlement will be discussed in a later chapter).

It would thus seem that the Peace Now petition was lodged too late. Since the number of settlers has doubled since then, it is unfortunate that no request was made at that time to place a full ban on further settlements in the future, unless genuine security considerations could be proved. For those purposes the Israeli army has a special separate division that sponsors military outposts that combine military service with partial agricultural activities. These could well have solved the security issue, while avoiding the complications of permanent settlement, with the attendant emotional and economic attachment by the settlers to their homes.

The legal machinations and political inertia, however severe, were secondary to the original judicial error: the refusal to recognize the Geneva Convention as binding. As pointed out, the reason for this was Israeli acceptance of the common law approach to Conventions—namely, that their obligatory nature was dependent not on their executive ratification, but on specific legislation incorporating them. This, however, was the situation in respect of *ordinary* conventions. In contrast, some conventions are considered to be part of customary international law. Any rule of such customary law is automatically binding on all countries, irrespective of it being enunciated in a convention or not. A state wishing not to be bound by a rule of international customary law must declare this fact specifically and officially.

The real question confronting the Israeli Supreme Court in regard to the settlements was whether the Convention was a part of customary law or not.[17] The Convention itself does not refer to settlements as such, but states clearly and categorically that there may be no transfer of population, neither by deporting inhabitants of the conquered territory (the "protected persons"), nor by

transferring citizens of the conquering state into the conquered territory. While the first part of the rule is part of the Convention's humanitarian provisions, the second part is of a different nature. The reason for denying the right to transfer one's own citizens into occupied territory was to prevent the occupying power from being tempted into making a historical error, where immediate actions aimed at consolidating its presence by transferring its citizens might, in the long run, lead to unfortunate, perhaps unforeseen, consequences.[18] This, I submit, is exactly what has happened in Israel; the settlements are a hindrance to any prospects of peace.

The question is whether the Supreme Court, in some of its earlier decisions, long before the Peace Now petition, and about the time of the earlier Elon Moreh case, could have put a final stop to the settlement project. The answer is: undoubtedly so, on condition that they had activated not the Hague Convention of 1907, but the Geneva Convention. The difference, in terms of settlements, is that whereas the Hague Convention deals only with the question of military needs, and makes no reference to transfer of population (thus enabling the legal machinations described above), the Geneva Convention lays down an absolute ban on transfer of population. True, an individual citizen of the conquering power may make a private deal with a citizen of the occupied territory and buy his house. That is perfectly permissible, but such deals cannot be done through governmental planning and policies. Had the High Court of Justice, in the Elon Moreh case or in similar cases at that time in the late 1970's when the settlement program was still in its earliest stages, decided to invoke the Geneva Convention, then the only conclusion would have been an absolute ban on government-sponsored or government-supported settlements. To reach such a decision, what was needed was an affirmation that the Geneva Convention was binding, because it was a part of customary international law. Was it of such a nature? The evidence certainly indicates so.

The many serious violations of basic human rights during the Second World War were a clear precipitating factor in clarifying the necessity for a special convention. The outrage evoked by the

excesses committed during the war seemed to place future protections against later occurrences on a special plane. As one of the first nations to have the Convention invoked in its domestic court system, the Israeli Supreme Court was presented with a golden opportunity to give added weight to the Convention by declaring it to be a part of Israeli domestic law by virtue of its status as part of customary international law. This would have reflected Israel's early involvement in the formulation of the Convention, as well as the special sensitivity of Israeli justices to the tragedies that could befall innocent persons as the victims of war.

It must be stressed that there is no authorized manner in which the ambit of customary international law is set out. It develops through a process known as *opinio juris*, namely the opinions of leading jurists. This term refers mainly to legal writings by legal luminaries, but also includes judicial decisions. Even if initially the status of the Convention was not indubitably clear, the actual lengthy list of decisions by the Israeli Supreme Court, in and of itself, could be added as a crucial weight in favor of its binding nature.[19]

Unfortunately, such an outcome was not forthcoming. Despite the deserved reputation of the Israeli Court for being activist, especially in the area of human rights,[20] it failed to provide the strong judicial precedent for the binding power of the Convention that could well have been its singular and special contribution to world jurisprudence. A golden opportunity, presented by a quirk of historical fate, was squandered. As a result, at the immediate local level, Israeli negotiators in the peace process are saddled today with the aftermath of judicial error, legal machinations and political inertia.

Other issues have complicated the situation even further. The two most significant are a religious belief that regards the West Bank (soon given its biblical appellation of Samaria and Judah— *Shomron* and *Yehudah*) as part of God's Promised Land indeed, its very heart; and an ideology that lay historically at the root of the

Zionist movement in the early twentieth century, where the acquisition of land was a slow, arduous, acre-by-acre process, leading ultimately to a collective presence strong enough to support independence.

Thus, in religious terms, the West Bank was seen by many not as "occupied" territory, but as "liberated" sacred land. Their rejection of the term "occupied" had nothing to do with the nigh-universal refusal of the world community to recognize Jordan's attempt at annexation, but with their perception that the biblical area belonged inherently to the Jewish people (for some, this included land east of the Jordan River and inside Jordan itself). From the depth of Jewish memory was added a more recent reminiscence, namely that the contours of the Israeli state had been determined largely by the presence of Jewish settlers in collective and cooperative farms in the outlying areas. For many, the Jewish settlers in the territories were seen as being a continuation of the pioneering spirit of the pre-state years, and attempts were made to use the terminology associated with the pre-state settlement process.

The religious conferring of historic rights confuses, as a leading Israeli historian, Jacob Talmon, explained many years ago, the *reason* for Jewish sentimental attachments to historical Palestine[21] with recognized *legal rights*. A right to immigration is indeed recognized today, as is a right to self-determination, but these have nothing to do with biblical justification. The recognition by the UN of the Zionist claim to an independent, sovereign state was not, as is often suggested by both Arab and Israeli conventional thought, an outcome of the Holocaust, with the guilt feelings induced in the Western world as to its failure to protect the Jewish people in Europe, but a result of an uprising by the Jewish population in Mandatory Palestine, accompanied by a Palestinian uprising in a tri-partite struggle. The British finally withdrew, and the UN recognized the existence of two separate states. To make a comparison today between the Zionist struggle against the might of the British Empire, still at the height of its power, with the efforts of the settlers, acting under the protection of an occupied army, and with

massive financial support from governmental sources, is to distort the recent history of Ottoman and Mandatory Palestine, and to denigrate the nature of the Zionist movement.

There is indeed a fascinating debate, led by revisionist historians and critical sociologists, as to whether the Zionist movement was really a typical example of old-style colonialism or not.[23] Inasmuch as colonialism, in its pure definition, requires a home base, a mother country, from whose precincts military, religious, diplomatic and commercial personnel set out, then the Zionist movement, originating and centered largely in a hostile environment in Eastern Europe, and with only minimal positive contacts with the Ottoman and British authorities, certainly lacks the necessary conditions of colonial processes.

In contrast, the settlements on the West Bank and in Gaza are almost exemplary examples of such dominance, made all the more acute and incongruous because of their immediate proximity to their home country. In addition, Israeli "colonialism" was taking place in a post-colonial world, a world with which Israel, in the early Sixties (before the 1967 Six-Day War) had established many positive relations. Israel developed strong ties with the newly-independent states of Africa and Asia, partly because of its own experiences as a new state, partly because of its unique social experimentation with new forms of living, such as *kibbutz*, or even youth movements, and the manner in which they could be incorporated into the common endeavors of a society seeking stability and progress.

Just as there is no real parallel between biblical Jerusalem and the Jerusalem of today (an awareness of which makes it easier to countenance its division between two states), so there is no parallel between settlements set up in Mandatory Palestine or in the early years of the State (*kibbutzim* and *moshavim*) and the settlements in the occupied West Bank and in Gaza. In fact, the Hebrew provides different words to describe the two phenomena ("*hit-yashvut*" for the earlier period and "*hit-nachlut*" for the occupied territories).

This does not mean that all aspects of earlier Zionist settlement were pure and straightforward. Many problematic aspects have been documented, mainly in recent academic research.[23] From the beginning there was the catchy phrase of "a land without people for a people without land", a phrase that ideologically allowed for a certain oblivion to the presence of Arabs in Palestine. Part of this was subsumed under the rubric of a socialist ideological thrust (especially noted in the *kibbutzim*) of stressing the need for Jewish labor, in order to re-create a normal Jewish people based on with physical, agricultural laborers. However, this policy inevitably involved discriminatory practices against the local Arab population, who were often denied access to jobs that were being reserved for Jews—some of them recent arrivals, who were fleeing Nazi persecution, or who had voluntarily arrived to become pioneering laborers after giving up promising intellectual professions in their country of origin.

I mention these facts because in the territories, the physical labor, such as the actual building of settlements, was carried out largely by the local Palestinian population, while Jewish settlers continued to be employed, for the most part, inside Israel proper, enjoying the special infrastructure of new roads that carried them speedily from their West Bank homes to Tel Aviv, Jerusalem and their environs inside the green line. In terms of continuity of ideology and idealism, the present settlements in the territories are a blatant deviation, indeed a perverse negation.

The oft-quoted phrase of "a land without a people" came back to haunt the nature of relations between Israel and the Palestinians. Now their presence was recognized as a source of cheap physical labor, including in Israel itself, where they worked without the extensive protective devices that a strong trade union movement had achieved for Israeli citizens.[24] This presence, however, was limited to their value as individual laborers. No realization was inferred as to their group identity and their right to self-determination in a post-war post-colonial world. This is true of both settlers, living in constant, close proximity to them, and of

the general Israeli public, including poets and writers and most of the leading politicians, from Golda Meir and Moshe Dayan in the early Seventies to Yitzhak Rabin and Shimon Peres, right up until the Oslo breakthrough—plus, of course, almost all right-wing politicians.

But for those involved in establishing settlements—the settlers themselves, the politicians and the administrative functionaries—there was an additional factor conveniently ignored. In the areas where spacious houses were being built for Jewish settlers, lived Palestinians: in ten major cities (eight on the West Bank, two in Gaza),[25] smaller towns, rural villages and also refugee camps of the people who had fled in the 1948 war. No one visiting the West Bank can fail to distinguish between the Jewish settlements and the Arab towns and villages: red-roofed, double-story houses in sharp contrast to crowded gray buildings. But most pertinently, heavy investment—infra-structure, houses, gardens and roads—was poured into meeting the needs of newly-arrived Jewish settlers, while the needs of their nearby neighbors living in the decrepit surroundings of refugee camps were ignored.

No attempt was made to institute a dramatic break-through to alleviate the disastrous conditions in these camps. Over the years Israel had constantly castigated the Arab countries (Lebanon, Syria, Jordan and Egypt) for refusing to attempt to resolve the problem of the refugees, leaving the humanitarian help to the special United Nations Relief Works Agency (UNRWA), while exploiting their plight as a political football to lambaste Israel for creating the problem by its very existence. Yet, in the area where a significant proportion of refugees is located there is no indication of any real Israeli concern for their plight; not necessarily because of Israeli responsibility in wake of the Six Day War (as Israel's enemies claim), but out of an ordinary humanitarian desire to contribute to their betterment as suffering human beings, as an expression of real responsibility for the fate of "protected persons" now directly under Israeli (military) control—and just possibly, to contribute to the creation of a climate of goodwill between the state of Israel and the Palestinian people.

In retrospect, it is difficult to believe that in the more than three decades of Israeli occupation, the state has seen to the housing of several hundred thousand of its citizens beyond the green line, while not putting forth an iota of effort into resolving, on a human basis, the desperate needs of Arab refugees. The contrast between the well-being of Jewish settlers and the lack of minimum welfare conditions for Palestinian refugees is a visible eyesore on the geographical scenery, but it also has more subtle political implications, in terms of the mutual rights and interests of the two populations. Most of all, it represents the sad human dimensions of Palestinian tragedy and Israeli haughty oblivion. In a larger sense, it highlights Israel's oblivion to the true lessons of the sad vicissitudes of Jewish history, in the distant past and through to modern times, and to the prescient biblical injunction, reiterated manifold times, to be considerate to the stranger ("*ger*") and to treat him justly.

This insensitivity is particularly poignant in view of the outstanding record of the humanitarian assistance that Israel— both its official bodies and voluntary organizations—has offered to people suffering from the consequences of natural and human disasters. Its oblivion to the plight of Palestinian refugees has both substantive and symbolic expression. In Hebrew the words for "omission" and "mishap" combine into the word "*mechdal*", and it was this term that was applied to the catastrophic errors linked to the outbreak of the Yom Kippur War. The same may well be applied to Israel's overall attitude and policy toward the Palestinian refugees in their camps in areas under Israeli rule. While for the Arab states they may well have been a convenient political football with which to lambaste Israel, for Israel itself they constitute a proverbial "own goal", a missed opportunity to activate the best in Jewish tradition.

The settlements have also affected the most recent attempt to achieve some separation between Israel and the Palestinians, in the wake of the terror attacks by the Palestinians. Some time after the second *intifada* erupted, suggestions were made in Israel to build a barrier between Israel and the occupied territories. When the

government procrastinated on the matter, Prime Minister Sharon was accused by some people on the left of refusing to build it for ideological reasons, since a physical differentiation between Israel and the territories would represent a tangible recognition of two separate political entities; the green line would basically be reinstated, and the settlers would be separated from Israel proper. This Sharon was not prepared to countenance—at least at a time before President Bush had placed the idea of two states firmly on the agenda. However, Sharon's resistance was interpreted as recklessness on a security issue and became a possible political liability when early elections were called.

Unfortunately, when the building of a barrier finally began shortly before the elections, it was clear that its placement would reflect not just security planning, but also ideological concerns and topographical preferences. Instead of the barrier being built along the green line, as elementary political geography would have dictated, it was placed for the most part beyond it, within the West Bank. While great care was taken to place the barrier to the east of many Jewish settlements, thereby effectively appropriating them unilaterally to the state of Israel, total disregard was shown to the needs of Palestinians. In at least one case the barrier separated a village from its agricultural fields.[26] The one concession made was to allow for a narrow passageway, which would presumably be under Israeli security control—the very factor, when applied throughout the West Bank that had led to friction and caused so much Palestinian resentment.

Indeed, if there was any one factor that led to Palestinian anger at the Oslo process, which allocated parts of the West Bank to Israeli control (areas with both settlers and Palestinians) and other parts to Palestinian control (areas without settlers), it was the fact that movement within the West Bank itself was made subject to "border" crossings between the two areas. These checkpoints became points of constant friction, as ordinary Palestinian travel was hindered by border controls, often conducted in a demeaning manner, occasionally entailing violations of human rights where, for example, people in need of hospitalization were held up for

critical periods. A major drawback of the Oslo process was the impediment of free movement within the West Bank, based largely on the security needs of the settlements. The barrier now being erected is virtually an entrenchment of this factor, a symbolic expression of the very ongoing hostility which a proper peace process should seek to counteract.

FOOTNOTES—CHAPTER 4

1. See Yonah Alexander, M. Browne and A. Nanes (eds.), *Control of Terrorism: International Documents* (New York: Crane Russak, 1979), and Edward Kossoy, *Living with Guerrilla: Guerrilla as a Legal Problem and a Political Fact* (Geneva: Libraire Dror, 1976).

2. See Leon Sheleff, *Ultimate Penalties: Capital Punishment, Life Imprisonment, Physical Torture* (Columbus: The Ohio State University Press, 1987), ch. 9 ("Humanicide"), ch. 10 ("Treason and Terror"), ch. 13 ("Revenge and Retaliation").

3. It should not be forgotten that during the peace process, Rabin had often made disparaging comments that antagonized the settlers, who were the major, organized group leading the public battle against the process. It seems that Barak was trying to minimize their protests, but this was in many respects a futile attempt, given the gulf separating the supporters of the peace process and its opponents.

4. Gilo is situated on the outskirts of Jerusalem, beyond the green line. It became a target for nightly shootings from a nearby Palestinian village.

5. For good descriptions of the early stages, see Allan Gerson, *Israel, the West Bank and International Law* (London: Frank Cass, 1978), and Esther Cohen, *Human Rights in the Israeli-Occupied Territories, 1967-1982* (Manchester: Manchester University Press, 1985).

6. See discussion in ch. 2, "Jerusalem: A Figment of the Imagination".

7. Yoram Dinstein, "Zion by International Law Shall be Redeemed", *Ha-Praklit* 27 (1971-1972), p. 5 (in Hebrew); and reply by Yehuda Blum, *Ibid*, p. 315 (in Hebrew).

8. Leon Sheleff, "Application of Israeli Law to the Golan Heights is Not Annexation," *Brooklyn Journal of International Law* 20 (1994), p. 333.

9.   Asher Maoz, "The Application of Israeli Law to the Golan Heights is Annexation," *Ibid*, p. 355.

10.   See, for instance, Avishai Ehrlich, "Bagatzim—Petitions to the High Court: A Statistical Portrait," *Israeli Democracy*, 1 (1987), p. 33.

11.   See David Lahav *et. al.*, *Israel, the "Intifada" and the Rule of Law* (Tel Aviv: Ministry of Defense Publications, 1993); in contrast see R. Shehadeh and J. Kattab, *The West Bank and the Rule of Law* (Geneva: International Commission of Jurists and Law in the Service of Man, 1980).

12.   See, for instance, Michael Keren, "Law, Security and Politics: An Israeli Case Study," *International Journal of the Sociology of Law,* 21 (1993), p. 105.

13.   It should be noted that in this case (H.C.J. 390/79, *Davikat v. State of Israel* P.D. 34(1) 1), there were a number of unusual factors that undoubtedly affected the judicial decision. It was known that in the cabinet itself several ministers were opposed to the settlement, including the minister of defense. In addition the settlers themselves presented their views, which, in contrast to the government's position, emphasized historical rights and not security considerations.

14.   Menachem Hofnung, *Israel—State Security Versus the Rule of Law, 1948-1991: The Legal Aspects* (Tel Aviv: Sifriat Poalim, 1992, in Hebrew).

15.   H.C.J. 4481/91, *Bargil, Director of "Peace Now" v. State of Israel*, P.D. 47(4) 210.

16.   The Peace Now movement continued to protest the settlement policy, and maintains one of the best monitoring machinery of the building of more houses, and of the number that remain empty after construction.

17.   For general discussion of this issue, see Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1991).

18.   See discussion of section 49 in J.S. Pictet (ed.), *Commentary on the 4th Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Geneva, 1958).

19.   The basic consideration here is that the mere fact that a responsible Supreme Court, widely respected, has in over a thousand cases made reference to and use of the Convention is a significant contribution to according the provisions of the Convention the force of customary international law. This specific argument has not yet been put to the Court.

20.   There is an ongoing debate in Israel as to whether, and to what extent, the Court is liberal. See, for instance, S. Goldstein, "Protection of Human

Rights by Judges: The Israeli Experience," *St. Louis University Law Journal* 38 (1994), p. 617.

21. See Jacob Talmon, *The Age of Violence* (Tel Aviv, Am Oved Publishers 1974, in Hebrew) at pp. 370-374, dealing with "historical right" within a perspective which relates to existing political reality and draws a distinction between sentimental attachments and rights. These pages, and those preceding and following, deal with the consequences of the Six Day War and describe, in prophetic form, the need for mutual accommodation between the two peoples in parallel states, and the dire consequences for Israel if it fails to come to terms with this reality. Talmon's sensitive understanding and timely warning make sober reading almost three decades later.

22. For an interesting analysis, see Ronen Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (Cambridge: Cambridge University Press, 2000).

23. See, for instance, Gershon Shafir, *Land, Labor and the Origins of the Israeli-Palestinian Conflict 1882-1914* (Cambridge: Cambridge University Press, 1989).

24. An organization (*Kav L'Oved*—A Line for the Worker) was formed, which provided legal advice and representation in courts, in order to protect the rights of these workers. Later this organization focused most of its work on foreign laborers, as their number increased, while the number of Palestinians dwindled.

25. The cities are: Ramallah, Bethlehem, Hebron, Jericho, Tul Qarem, Qalqiliyah, Jenin and Nablus (Shechem), Gaza City and Khan Yunis.

26. See B'Tselem, *Behind the Barrier: Human Rights Violations as a Result of Israel's Separation Barrier* (Jerusalem, 2003).

Chapter 5

Israel:
Nation-States as Ethnodemocracies

A S POINTED OUT in earlier chapters, the issue of Jerusalem and the problematics of the settlements in occupied territory stem from incorrect perceptions of historical facts and modern geo-political reality. For many, simplistic slogans lead to facile conceptualizations favoring a maximalist Israeli stance. However, some of the critique of Israeli policies also tends on occasion to err in terms of narrow scrutiny that lacks a comparative perspective. Post-Zionist thinking can be as unfair and inaccurate in its assessment of Israeli positions as pro-Zionist circles are obsequiously supportive.

A prior condition to any overall and conclusive settlement between the Israelis and the Palestinians is the need for the former to possess a clearer understanding of the nature of the state which was created in 1948—as a culmination of a half-century of political struggle by the Zionist movement, as a tangible expression of almost two thousand years of Jewish yearning, as a response to the overwhelming tragedy of the Holocaust, and as the outcome by the middle of 1949 of a basically successful military struggle against

the Arab forces arraigned against them. Jewish sovereignty had been restored in the Holy Land—but not as part of a larger empire or in the peripheral area between two large empires (as had been the case in earlier, mainly biblical, times), but in an emerging world of nation-states. It was clear that the number of such political entities would grow as decolonization would inevitably take place in the aftermath of World War II, throughout what had been the furthest reaches of European domination. Just as World War I had led to an attempt to resolve the issue of minorities in Europe itself, so, too, World War II was clearly destined to lead to independence for peoples beyond it.[1]

In many respects, Israel (together with India) was a forerunner, and perhaps a model and even inspiration, for the countries of Africa and Asia to realize that their own struggle for independence would not be in vain. In many respects, the importance of India was pre-eminent, as the jewel of the British Crown was given up, but the impetus of the struggle in Palestine of its two nationalist movements, and perhaps especially the Zionist movement, should not be gainsaid in universal terms, even though the basic status of mandate and not colony was different.

The term "nation-state" is in common use today, but in reality there are very few true nation-states, namely states within a declared geographical area, which are inhabited by a homogeneous population, sharing one language, a separate ethnic identity and a common culture, generally including religion, and in which people with this language, identity and culture are not found in aggregate in any other country. Only under these conditions can a true nation-state be considered to have come into existence. From this perspective, the country often considered a prototype—France—fails to fulfill the essential conditions of a nation-state, partly because of minority groups within the country (Corsicans, Bretons, and even Basques, not to mention the century-long period when Algeria, with its Arab and Berber populations, was considered part of France), while in several contiguous countries there are large, recognized French communities (Belgium, Switzerland), as well as

the French in Quebec. Thus, France, the presumed pioneering example of a nation-state, is lacking in many of its essential attributes.[2]

A similar situation is applicable to Israel, which also is often referred to colloquially as the "Jewish state". Here the factor in terms of ethnicity is Jewishness, in terms of language, Hebrew, and in terms of culture, the Jewish culture, including the Bible as a font of the people, a list of festivals, mainly religious in nature, common memories of a distinguished yet tortuous past, an extensive literature in several languages (Hebrew, Yiddish, Ladino), and a lengthy experience of minority status, involving a rejection of some of the underlying themes of the dominant majority, highlighted by a refusal to acknowledge Jesus as the son of God or as the Messiah, and a refusal to acknowledge Mohammad as the last, and therefore the most authoritative, prophet.

Yet in Israel itself, over fifteen percent of the population is non-Jewish, including mainly Arabs, but also other smaller groups, as well as a sizable number of legal and illegal foreign workers, and "temporary residents", some of whom have been in Israel for years with their families and show little indication of one day leaving. Furthermore, aggregates of Jews who partake in the same culture may be found in many communities throughout the world. Thus, Israel does not qualify as a nation-state, and this is what lies at the heart of much of the academic and political critique of many aspects of Israeli politics and culture. Yet, the fact is that, to a large extent, the term is a misnomer and does more to hinder understanding of political and cultural situations than to clarify them. France is not the only so-called nation-state that is not really such. In that sense, Israel is not the only country struggling with the problematics of differential treatment by a majority grouping of a minority or minorities.

One of the major critiques of the Israeli situation is that of Sammy Smooha, who suggests that any analysis of the situation of the major groupings in Israeli society shows that its ostensibly democratic structure (regular elections, an independent judiciary, the protection of civil rights, a free press, majority rule) is marred

by the fact that these factors are heavily oriented in favor of the Jewish majority at the expense of the Arab minority. In a series of articles, Smooha has argued that the definition of Israel that best reflects its reality is that of an *ethnodemocracy*.[3] Its democratic values are available mostly to Jews, while the Arabs suffer from constant discrimination—from the key issue of land allocation, through minority representation in the political and public spheres, to the more subtle symbolic expressions of the flag (with the Star of David emblazoned on it), and the anthem (with its reference to the Jew's yearning to return to Zion).

Smooha's work has elicited a great deal of interest and evoked many responses, both supportive and critical. Those who differ from him range widely, from writers who claim that Israel's attitude to the Arabs is reasonable,[4] and that discriminatory patterns are not inherent in a Jewish state or in the nature of the Zionist movement but are a direct result of the difficult security conditions confronting the state,[5] to those with a more radical approach who argue that any outer appurtenances of democracy that ostensibly suggest a democratic framework are totally nullified because of the ongoing occupation of the West Bank and Gaza and the many violations of the basic rights of Palestinians living there.[6] According to this latter approach, the nature of Israeli democracy cannot be determined within the confines of the green line; it is the total picture that must be analyzed, and three decades of control over another people's destiny must inevitably raise doubts as to the quality of Israeli democracy—in fact as to whether it is a democracy at all.[7]

As to the latter point, the lengthy Israeli occupation of the West Bank has indeed had debilitating effects upon Israeli society and has seriously undermined its democratic structure; but comparatively speaking, it cannot be said that its democracy has been totally destroyed, unless similar conclusions are drawn as to other societies generally considered to be democratic—starting from the Greek city-states, with their slave class, the helots, through an entrenched legal recognition of slavery in the United States Constitution,[8] to the ongoing problems of leading members of the

Western culture (Australia, New Zealand and all of the Americas) in trying to come to terms with the devastation that their conquest and presence wrought upon the indigenous inhabitants of these extensive continental areas.[9]

For most countries, in a fluid world situation, with large population mobility, easy access to transport and communications, and a growing ideological belief in pluralism or multi-culturalism,[10] the world is gradually becoming—especially in the light of the breakdown in the 1990's of dictatorial and military regimes—a world of ethnodemocracies. This is a world which has seen a substantive increase—in South America, Africa and Eastern Europe—in the number of ostensible democracies, especially the move from one-party to multi-party systems, but in which, for the most part, a particular group will be accorded—or will usurp— dominance. In some cases, this is done assertively and ostentatiously (this is true of Israel, with its declaration of the state as belonging to the Jewish people and its symbols expressing this affiliation).[11] In most cases, it is done more subtly and in a more sophisticated manner. The English, for example, dominated the Welsh for some 700 years, until the latter were recently given a modicum of political autonomy, to enhance its cultural autonomy, e.g., preservation of the Welsh language and formation of the indigenous Church in Wales.[12]

The United States itself is today a leading example of multi-culturalism, yet till recently its motif was that of a "melting-pot", in which immigrants from all over the world were expected to unite into a homogeneous population[13]—speaking English, for the most part practicing Christianity, preferably of the Protestant kind, and largely "white" in terms of its "ethnic" affiliation. In this melting-pot, especially in the Southern States, there was no room for Blacks or Asiatics, nor for Native Americans, who until 1924 were denied even citizenship status for as long as they retained their group identity. Indeed, in order to allow the new polyglot nation to form itself into a homogeneous entity, the indigenous populations were deliberately kept out of the parameters of the nation that was to be formed, through a series of treaties that were

signed between the United States government and the various tribes. So intent were the Americans on excluding the original inhabitants from any share in the nation being formed that they were quite willing even to forego sovereignty over certain limited areas by assigning them as tribal reservations.[14]

In Australia, only recently has an attempt been made to recognize the very group existence of Aboriginal people. Their citizenship rights were accorded in 1962, but it was only in the past decade that any legal recognition has been made of fundamental Aboriginal rights, or that any meaningful debate was undertaken as to the need to acknowledge the harm done to them, and to ask their forgiveness.[15]

Canada's situation as a nation-state is even more complicated, as it is linked to the need to come to terms with its indigenous population of First Nations of three distinct groupings—the Inuit, the Native Americans and the Metis—as well as to the separate aspirations of the French community in Quebec.[16]

In Europe, apart from the aforementioned Britain (more precisely, the United Kingdom of Britain and Northern Ireland) and France, Yugoslavia is the most obvious example of a country that attempted to place its overall geographical unity above the separate ethnic identities of its constituent populations—with eventual disastrous effects.

The Soviet Union broke up into its fifteen separate parts, but not before it had bequeathed a legacy of minority Russians in most of the new states set up in the Baltic and in central Asia.

Very few countries in Europe do not have substantive minority populations—from the Basques and Catalonians in Spain and the near-parity of Flemish and Walloons in Belgium on the western side, to the minority of Slovaks in the Czech state and the minority of Czechs in Slovakia; the Albanian minorities in contiguous Balkan states; the Hungarian minority in Romania; the various minorities spread out through the far reaches of Russia; the specially constituted nation-state of Poland, with the Poles originally barely two-thirds as against large groups of ethnic Ukrainians, Beylorussians and Germans as well as Jews; and Moslem Azeris in

Armenia, all on the eastern side, with, in the Scandinavian north, the Sumi people in Norway, a Finnish minority in Sweden, and the people of Greenland still under Danish control.[17]

In Africa, so-called nation-states were artificially carved out by European overlords at the Congress of Berlin in the late 19th century, with little consideration given to local reality, as tribes were split down the middle by arbitrary lines drawn on a map by distant diplomats, leading to later struggles for tribal or ethnic hegemony when the colonies became sovereign states.[18]

In Asia and in Oceania, most independent countries have large minority groups leading to recurrent clashes, as the latter seek greater recognition or regional autonomy or actual independence. There are heterogeneous archipelagoes, such as the Philippines (a Christian country with about seven percent Moslems concentrated largely in its further reaches), or Indonesia, with its well-known futile struggle to incorporate East Timor, as well as China with not only the unique Buddhist land of Tibet, but with Moslem groups in its western perimeter and various linguistic minorities with varying degrees of separatist tendencies.

Near the Indian sub-continent, there is Sri Lanka, with its ongoing struggle between the majority Buddhist Sinhalese and the minority Hindu Tamils, as well as the constant tensions with Pakistan over the future of Kashmir, because of the split almost six decades ago between a Hindu ruler and a largely Moslem population.

In Arab countries, minority rights are sought for the Christian Coptic minority in Egypt, the Berber minority in Algeria, the Kurds in Iraq, the Christians and Druze in Lebanon and the Africans in the South of Sudan, with the Polisario in the Sahara fighting for independence from Morocco.[19]

It is in this world of so-called nation-states that the nature of Israel's ethnodemocracy must be studied—that is, not as some exceptional example of majority domination arising out of the special nature of the Zionist movement, but as merely one typical example, in a heterogeneous country, of a dominant group imposing its ideas and ideology on the overall culture, or seeking to further

its own interests. This is not to justify hegemonic rule or discriminatory practices, but to attempt to place the situation of Israel, for all its distinctive qualities as a Jewish state and as the culmination of a national movement known by the special name of Zionism, within a realistic perspective. Failure to do so will only distort the nature of the Israeli-Palestinian conflict, and exacerbate the prevailing tensions in the area.

Israel's failings as a democracy, *vis-à-vis* both the Arab minority in Israel and the Palestinians under its military occupation in Gaza and the West Bank, is a failing shared by other democracies, which have not resolved their internal relations among dominant majorities toward their minorities, or in their former (or still existent) colonial possessions, or during more recent military operations in various parts of the world.

Indeed, with globalization and the ever-increasing power of multi-national companies, the imbalance of political domination and economic exploitation may be greater today than in colonial times. It includes such subtle phenomena as the "brain drain" of the talented from peripheral areas to the centers of power and progress, on the one hand, and the parallel move, on the other hand, of masses of untrained workers, both legal and illegal, from the underdeveloped and struggling South (Africa, Asia, South America) into the vortex of a nether class within the dominant and thriving North (Western Europe and North America). It also promotes clever manipulation of easily accessible cheap labor (including children) in the South to feed the productive needs of a North (or a West, to use the older, but more incorrect term), engaged in a consumer spree of tantalizing luxury goods and constantly up-dated technological gadgetry.

The issue for Israel, then, becomes not whether it is an ethnodemocracy in some sort of solitary situation, but what sort of ethnodemocracy it is, and how it compares to the host of other ethnodemocracies that are found in plentiful supply all over the world.

In some respects Israel's ethnodemocracy is undoubtedly flawed; in other respects it has some notable achievements. Of the

latter it might be noted that from its outset, the language and culture of the Arab minority was given recognition—Arabic as an official language next to Hebrew; Friday or Sunday as a legal day of rest, linked to the religious identification of the individual, in contrast to Saturday as the Jewish Sabbath for the majority; special school curriculum for Arab children; exemption from the army, based on an awareness of a clash of loyalties, because of ethnic links with the hostile Arab neighboring states; and a proportional electoral system that guarantees fair representation in the Knesset, which in most elections has been, for the Arab minority, only slightly under its percentage of the total population and vastly superior to electoral representation of most other minorities in other democracies. These phenomena reflect a willingness by the ethnic majority to make provisions for the group needs of the minority in a manner that is far more forthcoming than in most democracies.

It must be immediately conceded that this positive picture has its negative side. Much of the differentiation is based not on a commitment to multi-culturalism nor on an eagerness to further Arab rights, culture, interests, needs, but on the desire to ensure separation between the majority and minority. Thus, marriages across religious lines are not possible within Israel itself, since no provisions are made for civil marriages. Furthermore, in the first nineteen years of statehood, Israel maintained tight control over the Arab minority by imposing military rule in the key areas of concentration of Arabs. Most critically, land became a major issue of contention as large-scale expropriations took place—both in those areas from which Arabs had fled during the 1948 war and of property owned by Israeli Arab citizens, often to transfer land from Arab villages to nearby Jewish agricultural settlements.

Moreover, few Arabs have risen high in the hierarchy of government, few businesses run by Jews seek Arab executives, the academic world is notoriously skewed against Arabs as staff and students; public services in Arab areas are deficient; development of a suitable infrastructure, and master plans for the building of houses for an ever-growing population have always been neglected, an issue particularly glaring in the light of Israel's proud reputation

of being able to absorb hundreds of thousands of displaced persons from Europe in the first years of the state, refugees from Arab countries in the 1950's, and waves of immigrants from Eastern Europe and Ethiopia in the 1990's.

These are largely practical matters, but there is also the symbolic factor, which exacerbates the problem posed for Arabs of reconciling themselves to minority status, almost alone in the vast Arab world that spreads throughout North Africa and West Asia. The symbolic factors cannot, of course, be ignored. While bearing an attractive and positive significance for Jews, they inevitably create dilemmas for a minority—just as references to a deity in a national anthem (the British), or in a constitutional document (as in Canada's reference in its Charter of Human Rights to a belief in God) may adversely affect an atheist citizen, or the cross on a flag (as in Switzerland and nearly a dozen other countries in Europe) may cause some distress to a Jew. However, symbolic factors must also be seen in perspective. They generally become intolerable only when, at the everyday, practical level, the minority group is subjected to overpowering discriminatory practices. Some Arab leaders in Israel have indicated that these symbolic factors would probably be handled more tolerantly by the Arab minority if other substantive complaints about practical discrimination were adequately and fairly addressed. A rectification of the larger failings at the practical level would simultaneously defuse much of the other tensions relating to minority status.

There may very well be an additional intangible factor that affects majority-minority relations, namely, the great deal of ambivalence that exists among the Jewish population as to the nature of Jewish culture and its role in the state of Israel. In other words, even the reaction of the Arab minority population can best be understood in terms of the majority population's attitude towards the nature of the Jewish state. While an important constitutional document defines the state of Israel as Jewish and democratic, the basic thrust of much analysis, whether legal or political, whether religious or secular, is that these two variables are inherently

inconsistent, and that the definition itself is an oxymoron. Thus, the equation: If Judaism and democracy are totally and irrevocably incompatible, then an Arab minority is structurally excluded from any meaningful participation in the life of the Jewish state. This may be a comfortable assumption for those for whom the very presence of Arabs is, at the least, a gnawing nuisance and, at the most (or worst) a potential fifth column.

For secular liberals and radicals, as well as others seeking universalistic principles as a collective lodestar for the state of which they are citizens, the concept of a Jewish state is an unnecessary hindrance to their ideological propensities. It involves, firstly, a lack of separation of religion and state, which, based largely on the American model, is presumed to be the essence of a healthy comity; second, it imposes a constant identification with a culture which, in its daily manifestations in Israel, holds little attraction for secular Jews.

It is vitally necessary to confront these issues in order to provide a framework for discussing Jewish-Arab relations. If no attention is paid to these factors, then the nature of an individual's Jewishness becomes no more than a chance and empty consequence of genetic progenitors. It is significant to note that within the social sciences (in contrast to the humanities) there is in Israel almost no professional concern or research involvement with the sociology of Judaism[20]—this despite the interest shown by many non-Jewish sociologists, notably Max Weber, in Judaism,[21] and despite the many fascinating characteristics of the Jewish people because of their singular history.

The problem of the Arab minority in Israel, or of the Palestinians in the West Bank and Gaza, must be examined within the context of the crisis of Judaism in Israel. In many respects, what is considered works of post-Zionism by social scientists and polemical writers is really post-Judaism, with Jewish identity seen as a burdensome quirk of fate, and its practical expression found mainly in modern Hebrew culture.

In 1992, after years of debate and political maneuverings, a Basic Law (part of Israel's flexible constitutional structure) was

passed, entitled Human Dignity and Freedom. This law is considered to be a partial bill of rights. It was the basis for a ruling by the Supreme Court holding that, just as in the United States, Israeli judges had now been given the power to declare legislation unconstitutional if it violated the principles laid down in the Basic Law.[22] In the first clause of the law, reference is made to the need to make laws compatible with the definitional statement of Israel as Jewish and democratic. I believe that this law presents an ultimate challenge to Israeli society, as to whether it can indeed integrate these two variables—or whether a Jewish state is inherently incapable of being truly democratic and can be no more than "ethno"-democratic, in the most negative sense of the term. Indeed, a democracy, as Smooha describes it, which reserves its benefits only for a particular privileged group in the country, is actually more acutely deficient because its very discrimination is a denial of its democratic pretensions.

This Basic Law is not the only official declaration of Israel's desire to present itself as a Jewish state with democratic aspirations. Its Declaration of Independence makes a stirring statement of its commitment to values of freedom, peace and justice in the spirit of the prophets of Israel. While this Declaration is not a constitutional document *per se,* judicial decisions have reiterated on several occasions that it serves as a collective belief system, and should therefore always have inspirational influence on public life in Israel and judicial decision-making. In 1980, important legislation known as the Foundations of Law Act stated that judges, when dealing with a novel, unclear legal situation not dealt with previously in legislation or litigation, should draw on Jewish heritage to derive their decision in the dispute, subject to that particular aspect of the heritage being compatible with the three values mentioned in the Declaration of Independence (liberty, peace and justice), as well as an additional value of equity.

This law evoked only minimal response—both in judicial decisions or in academic writing—but, in many respects, it provides a suitable framework for molding the wealth of Jewish law, with its myriad of rules and rulings, many of them contradictory, in a

positive direction, amenable to the needs of a modern society. Unfortunately, little interest was shown in seeking such an outcome to the law. Had efforts been made to do so, a suitable framework could have been created for the more recent, specific need to link democracy and Judaism together, as laid down in the Basic Law of 1992. As it turns out, the law has evoked far more interest in the newly acquired capacity to nullify laws than in the challenge of defining Judaism in a manner compatible with democratic principles.

This failure on the part of the judiciary and the academic world is no accident; it reflects the problem of dealing with the content of Judaism in a modern state. For many, Judaism is considered an irrelevant issue. For the religious Orthodox, the laws are immutable. In their view, not only the Five Books of Moses (the *Torah*), but all the consequent canonical books, as well as the later interpretations, known as the Oral Law (*Torah she-b'al Peh*), were given to Moses on Mount Sinai. Despite its name, the Oral Law is written down with pedantic precision, and in some circles, particularly among the ultra-Orthodox, it takes precedence over the Bible itself as the focus of study. The major upshot of this approach is an unwillingness to even contemplate the possibility of reassessing traditional forms and updating them to cater to changing circumstances. This is true not only with respect to the internal content of Judaism, but also to aspects of Judaism that impinge upon the Israeli-Palestinian dispute, such as biblical claims to the West Bank and plans to rebuild the Temple on the Temple Mount, as well as biblical injunctions about the treatment of the "other".

The Bible provides for harsh measures to be adopted toward the people of Amaleq and several other local groups, e.g., the Moabites. But also is insistent on dealing justly and kindly with the strangers in one's midst, offering them equal protection of the law. These are not just historical memories, but are woven into today's Judaism and Israeli culture—for instance, theological discussions as to whether the Palestinians are to be treated as Amaleq, i.e., utterly destroyed. Furthermore, over time, modifications have often been made as to the meaning of the original text. Thus,

references to positive behavior toward the stranger (in a sense, an early vision, or version, of democracy) is understood in most religious quarters, by manipulating the words, as referring not to the stranger *per se*, but only to a convert to Judaism. Since Judaism is not a missionary religion, the number of converts in Israel is negligible compared to the number of non-Jews. Hence, the original, positive message in the Bible has become diluted and even distorted.[23] This change clearly has implications for policy toward the Palestinians, as typical examples of strangers, to whom consideration, according to the biblical edict, should be displayed.

The big failing of the Orthodox in Israel is that, in choosing which aspects of tradition to stress, the tendency has almost always been in favor of a narrow and static interpretation, which normally leads on to nationalistic and reactionary positions. Often the reference group for the more moderate Orthodox wings is the even stricter application of the rules by the ultra-Orthodox, or Haredim, so that in the past two decades there is a clearly discernible inclination toward a past-oriented Judaism, one which regards change as anathema.

Thus, paradoxically, when change does take place, it seems always to be in the direction of ever more narrow interpretations. These have to do not only with matters of ritual or theology, but also with political and ideological issues. Indeed, some Haredim who actually reject the idea of Zionism and a secular Zionist state (because it precludes the coming of a Messiah who will found a theocracy), are, in their political stance, narrowly nationalistic and overly patriotic toward the state of Israel. They also often adopt xenophobic aspects of Jewish thought, because of their catastrophic experience in the Diaspora. Also included in this world outlook is a deeply entrenched anti-egalitarian approach to women (total separation of the sexes not just in worship, but also at public places, such as swimming pools, beaches and public transport). This continuing effort to stave off modernism has affected the more moderate Orthodox, who, instead of emphasizing the differences between the two differing trends, has allowed the Haredim to influence their attitudes in matters of ritual and theology.

Most significant, both groups have, in political matters, become also increasingly nationalistic. Far from being part of a middle road group holding a balance of power between left and right, as was once the case, they almost automatically align themselves with the right-wing parties. This includes fervent support, in two election campaigns, of the Likud candidates, Arik Sharon and Benyamin Netanyahu, despite the former's known "weakness" for non-kosher food, and the latter's open admission that he had violated the Seventh Commandment, which categorically forbids adultery.[24] Their direct votes for these candidates indicate the degree to which political factors take precedence over pure religious considerations, or how willing the Orthodox are to stretch the rules when it serves political expediency. Interestingly, in the present coalition there are no ultra-Orthodox parties, a fact which has led some of their leaders to accuse Sharon of betrayal.

The growth of religious fundamentalist groupings, linked with ultra-nationalist or ultra-conservative political positions, is part of a world-wide trend which has been felt in both of the other two monotheistic religions, Christianity and Islam, as well as in polytheistic Hinduism. In many countries it has had a direct effect on national politics, including in the United States, where state and religion are presumed to be hermetically separated from each other. The activities of Pat Buchanan in the Republican Party in the late 1980's and early 1990's, though ultimately unsuccessful in a bid for presidential candidacy, had an impact on the party's platform and the stances of the party faithful. Today President George W. Bush openly embraces Christian fundamentalist viewpoints.

The situation in Israel is far more complicated, partly because religious parties take an active part in Israeli politics and are creatively adept in the way they manipulate the system; partly because the stress on the constant, almost obsessive, behavioral repetition of a list of 613 commandments leads to imperative demands being made on the total body politic; and partly because, in contrast to the worlds of Christianity, Islam and Buddhism, the

Orthodox Judaism advocated by these parties is the only form of Judaism officially recognized by law. This latter point is of prime importance.

Two other religions have a close overlap between political territoriality and religious belief: Hinduism in India and Shintoism in Japan. These situations are vastly different from the Israeli situation. India is a mammoth sub-continental state, with the second largest population in the world, and has two smaller indigenous religions present in it (Jainism and Sikhism), as well as a sizable Moslem minority (today the second largest Moslem community in the world after Indonesia). In Japan, the status of Shinto was forcibly changed after the Second World War, when a theological change was imposed by their conquerors that nullified the emperor's status as sun-king, and constitutionally restricting the monarchy's official status. Furthermore, there is syncretic interchange between Buddhism and Shintoism, with a tolerance in both that allows for joint membership.

Part of the uniqueness of Israel as a state is that, unlike almost every member of the Western world, with which it is closely aligned, it is separated from this world by a deep cultural divide. Most Western countries are Christian in their orientation. Sometimes this is officially recognized (as, for instance in Britain, with the Anglican Church, or Russia and Greece, with their respective Orthodox churches, or the impact of the Catholic Church in most of the Mediterranean countries in southern Europe); in other cases, such as France and the United States, there is a constitutional declaration of separation of church and state. Because of the broad spread of Christianity throughout Europe and America, social and political factors that have their origins in Christianity are barely noticed and are taken for granted as part of the natural order of things—Sunday (the Lord's Day in many European languages) is the weekly day of rest, not Saturday, the seventh day mentioned in the Bible and honored in the modern state of Israel; Christmas Day is a public holiday, and New Year's Day, probably his date of Jesus' circumcision, marks the beginning of a new year; the Cross is a ubiquitous symbol, adopted as part of many national and

regional flags, as also by the leading charitable organization, the International Red Cross. Similarly, in Arab countries, some are officially Moslem, incorporating Islamic law, and almost all are oriented to the customs of Islam.

These are no minor matters—certainly not for a state such as Israel, which alone declares its day of rest, for the majority Jewish population, as Saturday, with Sunday as a regular working day; which celebrates its new year some time in September, as a formally religious holiday, and relates to the 1st of January as just another normal working day.

Thus, days of rest and holidays taken for granted as the normal way of the world in most countries is a cause for conscious reflection and deliberate proclamation in Israel. For observant Jews this is an inevitable response to the existence of a Jewish state; for secular Jews, it is an anomaly that is part of the social reality in which they live and operate. In other words, the majority of secular citizens of Israel, committed as Jews mainly to Hebrew culture but alienated from the religious roots of that culture, are constantly bound by the impact of the Jewish religion on their lives.

Beyond the customs and symbols mentioned, Western culture is deeply permeated by Christian themes in its art and music, its literature and drama. Indeed, Western culture cannot be understood without some minimum knowledge of the essential details of Christianity: the identity and status of Jesus, the accounts of his birth, his spiritual message, his miracles and his ministry, his death on the Cross, his resurrection three days later. The music of Bach, Leonardo's Last Supper, the architectural dominance of dignified cathedrals, the persistent presence of church spires in towns and villages, the collective celebrations of the birth of the Messiah and the solemn commemoration of his death, the Cross as a mark of remembrance and respect in cemeteries and even as military insignia (the Victoria Cross), classic and prize-winning novels based on the life of Jesus, subtle references to him in poetry and dance—these are all an integral part of the Western world, a world to which Israel basically belongs, but with which it shares no part in this fundamental, bedrock theme. On the contrary, its

part is a negative one: it represents the descendants of those who rejected the Messiah and are accused of having committed the crime of deicide.

These are not mere trivialities. Jews, as individuals and as a collective, will always be outsiders, "the other," a people apart. These are issues that Diaspora Jews have to struggle with, but Israeli Jews are not exempt from them, though the nature of their struggle is different. Most secular Jews in Israel resolve this problem with a commitment to the Hebrew language and secular Hebrew culture.

However, just as those living in "Christian" countries cannot ignore the religious aspects of their culture, so the Jews of Israel cannot ignore the religious aspects of their culture. To do so is to hand over a monopoly of the interpretation of Judaism to the Orthodox and Haredim, with their tremendous political power. Indeed, surrender of the high ground is to allow the very nature of the religion, from which secular Israelis are alienated, to penetrate deeper and further into the society and its culture. Since today this penetration includes intense involvement in major political issues—and especially the nature of attitudes to Israeli Arabs and Palestinians—this surrender of monopoly has far-reaching practical consequences. The major opposition to the Oslo peace process came at the very beginning from religious circles, whose support of the secular Likud party brought Benyamin Netanyahu into power and enabled him to halt the process.

In awareness of this factor, I have recently published a book in Hebrew showing how religion in Israel impinges on secular life.[25] This is true also of the basis of social reality in the western world (with the impact of Christianity), or even specifically Eastern Europe (with the impact of Orthodoxy) and Latin America (with the impact of Catholicism), the Arab world (with the impact of Islam), the Indian sub-continent (with the impact of Hinduism), or Eastern Asia (with the impact of Buddhism), and even China (with the impact still of Confucianism); thus it seems to me that there is a desperate need for involvement of non-orthodox Jews, for whom Jewish tradition is a source of pride and inspiration (as well

as concern in some of its more troublesome manifestations—a vengeful God, a father about to kill his son, an adulterous King David, massacres that amount to war crimes by today's standards) in attempts to provide modern, progressive interpretations to the wealth of material collated over thousands of years. Failure to do so, from a modern, liberal, humanistic and universalistic perspective, is to relinquish the arena of debate to those of a diametrically opposed world-outlook, who will use the opportunity (as they are indeed already doing) to utilize the undoubted treasures of traditional Judaism for the furtherance of their own narrow, often chauvinistic, aims.

Judaism deserves better than its present presentation in Israeli life. In any event, no amount of revisionist history, critical social studies and post-Zionist polemics can remove the "Jewish connection" from the political tangle of the Middle East, or from the cultural underpinnings of Israeli society. The basis not only of the Jewish religion, but of the Hebrew language, is the Bible, a book that has been incorporated into the cultures of both worlds with which Israel is most closely involved—the Western world of Christianity and the Arab world of Islam. The interconnections with both these successor religions are complex, especially with the former. In one way or another they impinge on Israel's actions, the actions of the Jewish state, its people constantly aware of biblical associations.

The urgent need then seems to be for a reassessment of the place of Judaism—not just as a religion, but as a total culture, as a civilization[26]—in the modern world. It must be stressed that a fuller understanding of such acts as the assassination of the Israeli prime minister in Tel Aviv and the massacre of Moslem worshippers in Hebron—both acts committed by religious fanatics in the name of their belief—could only be acquired by a sophisticated reading of the biblical texts that spurred them on. To this must be added the manner in which these texts can be misunderstood, selectively interpreted, deliberately distorted or cunningly manipulated.

It is not possible to understand the full nuances of debate in Israel over the territories, or the subtleties of governmental actions there, without an awareness of religious undercurrents. For example, the failure to reach fulfillment of the Oslo peace accords within

the five years originally assigned can be best understood by perusing an article in a leading intellectual Israeli journal, *Azure*, which appears in both English and Hebrew (*Techelet*). The journal is sponsored by the Shalem Center, financed by money from the Lauder family (the cosmetic tycoons), and represents intellectual right-wing thinking in Israel. In one of its early issues, an article appeared by David Hazoni, explaining what the word "shalom," peace, means in Jewish tradition.[27] According to Hazoni, the biblical meaning is vastly different from modern, liberal and humanistic meanings. Giving extensive examples from the Bible, the essential thrust of Hazoni's article is that peace, in biblical times, meant consolidation of the victory. Any willingness to compromise is, therefore, a negation of the Jewish spirit.

Expressions of a yearning for peace are reinterpreted to fit modern anti-peace ideology. Even Isaiah's inspiring vision of a world in which nations shall no longer know war is not spared Hazoni's revision. Every reference to peace is fine-combed to ensure that it is incorporated into his theoretical framework. A peace involving mutual understanding and concessions is castigated as a product of the Western world and in conflict with Jewish tradition. The "Jewish peace", in Hazoni's terms, is one of military triumph and political power. One cannot help thinking that if a non-Jew had represented the ethos of Judaism in a similar manner, the article would have aroused irate reactions for its anti-Semitic flavor.

Hazoni's article appeared during Netanyahu's premiership. It is known that Netanyahu's ideological position is close to that of the Shalem Center, and that he maintained close personal contacts with them, and regularly consulted with them. If Netanyahu's concept of peace is as described in Hazoni's article, much of the difficulties of the negotiations during that time can be traced to underlying ideological perceptions, stemming from selective and biased interpretations of sacred texts. Indeed, for anyone wishing to understand the breakdown of the confidence-building that was to have taken place during the five years that had been set aside for the Oslo peace process, this article should be compulsory reading.

My argument is that contentions such as these must be confronted in direct dialogue.[28] What is needed is an ongoing,

concerted effort to probe the interpretations of canonical works, and to refute arguments that clearly contradict the plain meaning of the original text, and that are devastatingly damaging when applied to the real world of today.

But refutation alone is not enough. There is also the urgent need for positive readings of well-known biblical themes, in order to enrich the culture and provide a basis for modern adaptations. For example, I see the story of the Garden of Eden, and of Eve's role in seeking to possess knowledge of good and evil, not as a "fall", but as the starting point for direct human responsibility for moral endeavors; and the story of the Sacrifice of Isaac as one that provides useful insights into generational relations, in which the climax, and the message, is not of a sacrifice but of a saving.[29]

As for the issue of peace, there is a biblical injunction not just to seek it, but to *pursue* it, a phrase that is almost never quoted by those religious leaders for whom a Greater Israel in the Holy Land has become the hallmark of their Judaism.

In terms of language, the original, positive injunction of showing concern for a stranger, because of Israel's unfortunate experience of that status in when they were slaves in Egypt, was reinterpreted by the sages to mean only a convert to Judaism.

There are manifold examples of such regressions in interpretation, which adversely affect many of the positive messages in the Bible. On the other hand, there are also scattered through the thousands of decisions made by various rabbis at different times, those that are compatible with modern ideas, and occasionally stand at the forefront of advances. A strong culture knows how to incorporate the basic idea and adapt it, if necessary, to human needs in modern society. By adopting such an attitude, Israel could become not an ethnodemocracy, but a society able to express the manner in which Judaism and democracy are compatible with each other.

The issue of strangers (*gerim*) is crucial for understanding Israeli culture and its democracy. For the Jews were not only strangers in Egypt, but, several millennia later, also strangers in Poland and Morocco, in Spain and Iraq, in Russia and Iran. As such, they

often evoked anti-Semitic responses. The degree depended on their size as a minority, the culture of the host society, the religious intensity of both groups, the nature of daily contacts. In many respects, the Jews posed a challenge to the quality of the society they were marginally part of; they were, in a sense, a "litmus paper" for measuring decency and democracy. Israeli Jews, as a majority *vis-à-vis* the Arabs, are now confronted with the dilemma which they once posed as a minority.[30] Thus their democracy, their culture, the worth of their society will be judged to a large extent by their attitude to Arabs, the non-Jews, the *gerim* in their midst.

There is a traditional Jewish saying that the work is plentiful and it is not for us to complete it; but neither are we free to desist. This is a useful theme for those who wish to see a rejuvenated Judaism as the underlying framework for Jewish culture in the modern world, and especially in the state of Israel. This saying is also useful for those who, despite the agonizing disaster ensuing from the breakdown of the Oslo accords, still believe in the possibility of peace between Israel and Palestine, and harmony between Jews and Arabs within the green line. Certain aspects can only be dealt with in the future, such as the idea of confederation and the process of full reconciliation, since these are premised on the existence of two sovereign states. But their potentiality in the future must be known at this stage.

In any event, an understanding of both the unique aspects of Judaism, and its impact on most of the issues being discussed in this book, is, I submit, essential for any search for a comprehensive resolution of the Israeli-Palestinian conflict.

FOOTNOTES—CHAPTER 5

1. See, for instance, P. Chatterjee, *Nationalist Thought and the Colonial World* (Minneapolis: University of Minnesota Press, 1995).
2. See, for instance, J.E.S. Hayward, *Governing France: The One and Indivisible Republic* (London: Weinfeld and Nicolson, 1983); at p. 21 he writes: "France is a state-nation rather than a nation-state."

3. Sammy Smooha, "Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel," *Ethnic and Racial Studies* 13 (1990), p. 389. See also his analysis in Hebrew in a recent edition of *Israel Sociology* 2 (2000), p. 565, with responses from Eyal Gross (a jurist) and 'Amal Jemal (a political scientist).

4. Benny Neuberger has adopted this approach in several Hebrew publications of the Open University, dealing with Israeli democracy and the Arab minority.

5. Ruth Gavison, "Jewish and Democratic? A Rejoinder to the 'Ethnic Democracy' Debate," *Israel Studies* 4 (1999), p. 44.

6. Oren Yiftachel, "Ethnocracy: The Politics of Judaizing Israel/Palestine," *Constellations* 6 (1999), p. 364.

7. For a broad and balanced discussion of the manifold parameters involved in the issue of ethnodemocracy, see Nadin Rouhana, *Palestinian Citizens in an Ethnic Jewish State* (Indianapolis: Indiana University Press, 1997).

8. A problematic aspect of the United State Constitution is that it contains reference to and recognition of slavery, until it was abolished by amendment to the Constitution many years later; most other countries had preceded this move. As for policies toward Native Americans, see Arnon Gutfeld, "The Deprivation of Indian Sovereignty, 1776-1781," *Israel Yearbook on Human Rights* 25 (1995), p. 169.

9. See general discussion in Leon Sheleff, *The Future of Tradition: Customary Law, Common Law, Legal Pluralism* (London: Frank Cass, 1999).

10. See, for instance, Will Kymlica, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

11. The important Basic Law: Human Dignity and Liberty, refers to Israel as a "Jewish and democratic state".

12. Wales, Scotland and Northern Ireland now have varying degrees of political autonomy; each group has tried, over the years, with differing degrees of intensity, to preserve its cultural heritage. For instance, Welsh is still widely spoken in some rural areas, but the other two Celtic languages have not fared quite so well.

13. See Milton Gordon, *Assimilation in America: The Role of Race, Religion and National Origins* (New York: Oxford University Press, 1964).

14. For an interesting and critical analysis, see Robin Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-*

1800 (New York: Oxford University Press, 1997); see also David Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997).

15. For an interesting legal analysis, see Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*," *Sydney Law Review*, 17 (1995), p. 5.

16. See, for instance, Christopher Manfred, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Norman: University of Oklahoma Press, 1963); and see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984).

17. See, in general, James Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988).

18. See, for instance, Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopedia* (London: C. Hurst, 1979).

19. In general see, for instance, Natan Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus J Nishoff, 1991).

20. But see the work of sociologist S.N. Eisenstadt, *Jewish Civilization*, *The Jewish Historical Experience in a Comparative Perspective* (Albany: SUNY Press, 1992).

21. Max Weber, *Ancient Judaism* (New York: The Free Press, 1952).

22. This power of judicial review to nullify legislation is not stated specifically, and was most likely not the intended result of the legislators. The power assumed by the judges is presumed to be inherent in the nature of the Basic Law itself (most similar to the reasoning in the famous American case of *Marbury v. Madison*).

23. This is discussed at length in my Hebrew book, *Weeds in the Garden of Eden: Biblical Narratives and Israeli Chronicles* (Tel Aviv: Ha-Kibbutz Ha-Meuchad, 2002).

24. This statement is, by no means, an invasion of privacy or even a hint of personal scandal, for the fact of Netanyahu's sexual relationship with another woman was made public, at his own initiative, by Netanyahu himself on the newscast of prime time television. His appearance did not indicate that he felt contrite at what he had done, but was a pre-emptive political ploy during a campaign for party leadership. I mention it here not in order to deprecate him, but in order to emphasize the fast-and-

loose manner in which right-wing Orthodox and ultra-Orthodox groups are prepared to turn a blind eye to explicit biblical injunctions in order to further their own narrow sectarian interests. Recent newspaper revelations about the Sharon family indicate that one of his sons, who runs the family farm, has business connections with a purveyor of pork meat.

25. Leon Sheleff, *Weeds in the Garden of Eden*, *op.cit.*

26. Mordecai Kaplan was a leading exponent of this approach. See, for instance, *The Greater Judaism in the Making: A Study of the Modern Evolution of Judaism* (New York: The Reconstructionist Press, 1960); see the especially succinct discussion of "Judaism as a Modern Religious Civilization" at pp. 451-456.

27. David Hazoni, "Plowshares into Swords: The Lost Biblical Ideal of Peace," *Azure: Ideas for the Jewish Nation* (Winter, 1998), p. 90.

28. See Sheleff, *op.cit.*, at ft. 23; see ch. 3.

29. See *Ibid,* ch. 5. For a more extensive discussion, see Leon Sheleff, *In the Shadow of the Cross: Jewish-Christian Relations Through the Ages* (London: VallentineMitchell, 2003).

30. See Leon Sheleff, "When a Minority Becomes a Majority: Jewish Law and Tradition in the State of Israel," *Tel Aviv University Studies in Law* 13 (1997), p. 115.

Chapter 6

Diaspora:
The Right of Return and the Law of Return

T HE HISTORY OF the world is, in many respects, a history of immigration. This is especially true in what used to be known as the New World, where adventurous sailors, political and religious refugees, petty criminals, dedicated missionaries and many others made their way across the ocean from Europe to serve as the vanguard of a human wave of immigrants who settled in North and South America, and in smaller pockets elsewhere. They also came from Africa, but involuntarily as slaves, so that within the last three hundred years these vast, thinly populated continents have undergone the most dramatic demographic transformation in world history. The immigrants displaced the hundreds of indigenous tribes, who were dispossessed from their ancestral lands, denied participation in the new society being formed, suffered the denigration of their culture, language and religion, and were exposed to economic deprivation and physical degradation.[1]

In recent years, tribespeople have succeeded in making their voice heard above the clang of the triumph of Western imperialism, with its advanced technology, economic power and cultural

attractions. In a world more sensitive to cultural pluralism, efforts are being made to alleviate some of the harm caused and to redress some of the wrongs inflicted.[2] These efforts can, by the nature of things, be no more than a minimum gesture, important in and of itself for its symbolic value, but with limited real substance. This is, unfortunately, the way of the world, and it is certainly an essential part of the history of the New World.

Similar processes were played out in the farthest reaches of the Pacific Ocean, as the states (nation-states?) of Australia and New Zealand were formed. In the former, total control over a whole continent was claimed, based on a precarious foothold established on its eastern shores; in the latter, the famous Treaty of Waitangi was signed, in which the Maori chiefs (in their language, as they understood the document), handed over authority to the representatives of the British Crown, who (in their language, in the translation of the same document) assumed that full sovereignty had been ceded.[3]

There are endless examples of migratory patterns leading to a change in the social and political make-up of various territories, and occasionally also to border clashes. As was mentioned in an earlier chapter, some of these population movements are centrally controlled, such as Russians moving into the Baltic states and Central Asia in order to provide a useful ballast for the imperialist designs of the Soviet Union. For some people, the very idea of perpetual movement is part of their nomadic culture: the Romani people (Gypsies) of Europe, the Bedouin in desert areas of the Middle East, (who, however, often retain contacts with certain designated areas). The "wandering Jews" moved from one diaspora to another, depending on the degree of tolerance of their hosts; while the Arabs, encouraged and fortified by religious belief, spread Islam through conquest into the Berber homeland of the western parts of North Africa.

As also noted, the city of Brussels, in the heart of Flemish Belgium, is mainly French-speaking today, the consequence of population movements over a period of a century, which changed a city with a vast majority of Flemish speakers into one in which

they are now a minority of fifteen percent. In Montreal, the French majority have made every effort to avoid a similar transformation of population proportions.

Some population transfers are the direct result of war—one of the most noted being the flight of Palestinians into neighboring Arab countries. The Arabs claim that they feared massacres, such as the one that had taken place in Dir Yassin, not far from Jerusalem. Jews refuted that the vast majority left because they had been assured by their leaders that they would be able to return within a few weeks after the Arab armies had accomplished their anticipated rout of the Israelis in their newly-created state. Furthermore, the Israeli claim is that there were areas, where Jewish leaders pleaded with their Arab counterparts to stay on after the victories of the Israeli armed forces. The truth is probably somewhere in between, probably closer to the fact that during wars, civilian populations seek to disentangle themselves from life-threatening situations. In any event, it was at that time, and because of those circumstances, that the tragedy of the Arab refugee problem was born.[4]

At the same time, the new state of Israel was attempting to cope with a refugee problem of another dimension: that of absorbing the remnants of the Holocaust in Europe who were searching for new homes to re-structure their lives. Many of them were still housed, three years after the war, in displaced persons camps in Europe. Some of them had been arrested by British security forces on the high seas, as they tried to sneak past the cordon of patrol boats preventing them from reaching Palestine (prior to declaration of the State of Israel); they had then been sent back to Europe, including to Germany, and to the more convenient nearby island of Cyprus, then still under British control.

Shortly afterwards, with the cease-fire agreement of 1949, more groups of Jewish people made their way to Israel, this time from Arab countries, especially from Iraq and North Africa. The official Israeli claim has been, over the years, that these immigrants were in essence also refugees, forced to leave their countries of birth because of the circumstances of the war. Their numbers being more or less equal to the number of Palestinian refugees, it has been

argued that basically a transfer of population took place, similar to that which often happens during wars, or sometimes even after the cease-fire: the imposed exchange of Greeks and Turks in 1922, the millions of Moslems and Hindus who, by force, choice, or policy, crossed the borders between the two newly-constituted states of India and Pakistan in 1947, the millions of ethnic Germans, who, at the end of World War II, were compelled to leave their homes in Sudetenland (Czechoslovakia), and Silesia (Poland) as well as other places with a significant German minority, and to return to their truncated and then divided ethnic homeland.

Today, there are about 20 million people living in various parts of the world as refugees, partly under the protection of the United Nations High Commission for Refugees;[5] several million Arab refugees, in camps in the West Bank and in Gaza, as well as in neighboring countries, are also dependent on United Nations assistance in a special agency set up specifically on their behalf.[6] A traditional Israel argument has been that whereas Israel devoted its abundant energy and limited resources to absorbing the Jewish refugees from Europe and the Arab countries (providing housing, employment, medical facilities and educational institutions), the Arab refugees have been deliberately left in their sorry state by the host countries for the purpose of mounting propaganda attacks on Israel. According to this argument, the refugees are the victims not just of the 1948 war, but of Arab policy in the five decades since. The contrast between the fate of the Jewish refugees and the Palestinian refugees is stressed as signaling the differing humanitarian concerns of Israel and the Arab countries for their own brethren.

An interesting twist has in recent years affected this rather simplistic picture of a population swap: namely, contentions by critical social scientists that many of the immigrants who came to Israel from Arab countries, especially Iraq, were not refugees in the normal sense of the word, i.e., people who left their homes as victims of a war situation, including the danger of being subjected to governmental restrictions because of their ethnicity.[7] On the contrary, it was in the interests of the new state of Israel to foment

trouble in Arab countries, induce feelings of fear in the Jewish population, and offer a safe passage to a new and protective homeland. This was not, the argument continues, a positive example of Zionist achievement, leading to large-scale immigration (known as "*aliyah*"—a "going-up"), but the consequence of deliberate pressures, artificially created by agents of Israel to make the situation of Jews so intolerable that the move to Israel would emerge as a preferable alternative to remaining in a hostile Arab country with an uncertain future. This argument tends to undermine the Israeli case that an exchange of population took place under war conditions and that each side—Israel and the Arab countries—should each respectively look after their own brethren. The official Israeli stance is also used to fend off the claims of the Palestinians that they have a right to return to the country from which they fled (or were expelled), to the homes that they once possessed.

The plight of the Palestinian refugees has always cast a menacing shadow over the Israeli people. It is a problem that they would wish not to have to deal with. It barely figures in the original Oslo peace agreement, and much of the anger focused on Ehud Barak in his handling of the peace process stems from his willingness to allow the topic to be raised for discussion during the peace talks. According to newspaper leaks, Barak is reported as having countenanced the return of between 50,000 to 100,000 refugees as part of his effort to be magnanimous toward the Palestinians in what he hoped would be the final negotiations. The issue causes no end of consternation in Israel, as it engenders fears of a wholesale return to Israel, which would undermine the Jewish character of the state by changing it into a real bi-national state. Undoubtedly there is also an undercurrent of unease at the thought of acknowledging any Israeli responsibility for what happened.

The anger against Barak for allowing the issue to be raised at all is typical of the narrowness of Israeli thinking, for surely, at some stage, whatever the solution offered, some discussion of the refugees had to take place. Barak's predecessors (Rabin, Peres, Netanyahu) were spared the need to deal with this issue, as they never reached the same advanced stage of the process. Whoever

was faced with final stage negotiations would have to confront the problem that the refugees posed, both for Israel and for the Palestinian leadership itself. The fact that Barak came apparently unprepared for its full ramifications, and without an appreciation of its significance for the Palestinians, is not his failure alone, but one shared by all those involved in prior negotiations.

The fact is that, despite its reluctance to accept any of the refugees back, Israel has, over the years, by deliberate decision or by default, allowed a dribble of return. In the late 1940's and early 1950's about 40,000 Palestinians were allowed back into Israel as part of a program to reunite families. Furthermore, Israel's insistence on keeping all of East Jerusalem, instead of handing the Arab residential areas back to the Palestinians, adds an additional 250,000 Arabs to the Israeli population, raising the Arab minority from fifteen percent of the total Israeli population, to about eighteen percent, a number that is fairly close to a critical mass in terms of majority-minority relations or of a bi-national state. Finally, a few months after Barak had relinquished the premiership, figures were published indicating that there are perhaps tens of thousands of West Bank Palestinians living illegally in Israel.

All these figures are merely a small percentage of the total number of Palestinian refugees. The precise number is unknown, but reaches into several millions, including into a third, and perhaps fourth, generation. One thing has to be perfectly clear: There can be no full settlement of the Israeli-Palestinian conflict without a sensible, fair and humane solution to their plight. Whatever the solution that will be finally forged, all the options have to be examined—from a wholesale right of return to monetary compensation, with a whole host of options in-between, including having simultaneous options selectively applied by different people.

It should be noted that the right of return itself involves a prior recognition of a Palestinian state, since, if such a right to return does exist by international law, it may well involve not necessarily a return to a particular residence, but to one's own

homeland and the right to live among one's own people. Thus, just as, in the long run, all Israeli long-term security policies are contingent on its confronting the reality of a Palestinian state, so, too, the existence of a Palestinian state is a prior condition for dealing with the refugee problem, and particularly the vexing question of the right of return.

A right of return to the state of Palestine, embracing nearly all of the West Bank, including much of East Jerusalem, as constituted during Jordanian rule, and all of Gaza, would solve the agonizing humanitarian problem of the Arabs and the awkward political and demographic problem faced by Israel. Till now the Israeli approach to the problem has been either to evade it or to reject outright the idea of a return to Israel, with little mention of any alternative solutions, such as compensation or a right of return to the state of Palestine.

Whether or not a right of return is embedded in international law is not at all clear.[8] While every effort must be made to minimize the suffering of people who are the victims of war, and while the victorious side cannot be casually granted all the spoils of war, the fact is that wars inevitably create changed conditions, which cannot always enable a *status ante quo* to be re-established. As already noted, ethnic Germans were made to pay a heavy price for Nazi excesses committed during the Second World War, and millions of them were forced to leave their homes outside of the nation-state of Germany *after* the war and to be absorbed into their "homeland", which soon became two Germanys. This massive transfer of population was accomplished in the flush of the Allied victory, in the knowledge of the role that ethnic Germans played in helping to crystallize the conditions for Germany's invasion of Czechoslovakia and Poland, and before the ratification of the Geneva Convention, which bans the transfer of population. Similar transfers, bigger in number, were carried out at the same time in the Indian sub-continent between people who shared a partial ethnicity, but were of differing religious faiths.[9]

Subsequent to these massive removals, and after the Geneva Convention, no specific rules were laid down as to the fate of people

dispossessed by war. Indeed, until recently, the official bodies of the world community have been far more intent on providing practical support for refugees than on formulating the precise nature of the rights of those rendered homeless because of their flight during war or civil strife. Furthermore, the possibility of starting a new life as a possible alternative seems to be the message formulated by the world community, as witnessed by the growing demands by increasing numbers of people to be granted asylum.

In practical terms, it is certainly far easier for Palestinians to be absorbed into neighboring countries with whose inhabitants they share a common language and religion than for Asians, Africans, West Indians and Pacific Islanders to be absorbed into countries in Europe, yet millions of these latter groups are successfully making the transition—either as refugees fleeing persecution, or as ordinary immigrants (legal or illegal) seeking a better life.[10] The one country that has made an effort to absorb the Palestinian refugees is Jordan, and Palestinians have made a notable contribution to its economic, political and social life, as they have done in other countries to which they gravitated, such as Kuwait.[11]

Thus, while not absolving Israel from any remaining responsibility for the Palestinian refugees, there is much validity in its argument that the Arab states have preferred to maintain the problem as a festering sore and as a convenient source of anti-Israel propaganda. The world community has made this situation possible through relief provided by its agency dealing specifically with the Arab refugees, while rarely pressuring the Arab countries to seek a political solution.

Assuming that there is a right of return, an inevitable further question arises, strictly from a legal point of view: Does the ordinary Rule of Prescription apply? In other words, with the passing of time, does a right that once existed lose some, or all, of its validity? Normally, under rules of prescription, a right may be abrogated by reason of a party's conduct, or by its passivity. From this perspective, the Israeli argument that the Arab refugees have no

rights because they were part of those who had declared war originally, has little validity. Far more important is the issue of prescription, the lapsing of a right which might once have existed. This would, of course, be based on the fact that, until the late 1970's, none of the Arab countries was prepared to enter into peace negotiations with Israel. Only then could a right come into existence, if it had not been lost because of prescription.

As part of the 1978 peace agreement with Egypt, provision was made, at Egypt's insistence, for continued negotiations over the fate of the West Bank and Gaza. Interestingly, Egypt had deliberately refrained from requesting the return of the Gaza Strip, which it had once controlled. This was its way of indicating its recognition of independent Palestinian rights. Israel, by acceding to these demands, also signaled, however inadvertently, its recognition of a future independent state, for at no stage did anyone in Israel suggest that Gaza, like the West Bank, should be handed over to Jordan.

The planned talks over the fate of the territories collapsed, due to a combination of errors and negligence. The Palestinians themselves showed no interest in any negotiations; neither, for that matter, did the Israelis, and in this atmosphere of inertia, the prospects of reaching a peace settlement faded. By the time initial talks got under way in Madrid, after the local uprising (the *intifada* of December, 1987), and then, with increased intensity, through the Oslo agreement, more than a decade had since elapsed—and over four decades since the refugee problem had originally arisen. By any normal standards of the rules of prescription, any right that might have existed had likely been abrogated.

The reason for prescription rules regarding legal rights is that situations inevitably undergo changes that cannot be easily rectified. Their existence also serves to encourage parties to attempt to resolve their differences forthwith. Of course, the beneficiary of a changed situation cannot be the recalcitrant party, but when the party claiming the right is recalcitrant, then, it ultimately pays the price for its recalcitrance—not as a punishment, but as a logical

outcome of the passage of time. In the case of the Palestinians, on the assumption that they did initially possess a right of return, this right has conceivably been lost or at least eroded. I write "conceivably", because there is not sufficient legal literature on the right of return in general, and certainly not of the prescription aspect in particular.

In any event, the issue of prescription, whatever its impact, is clearly a question that should be incorporated into any discussion of the right of return. It is possible that Israel itself might find this argument problematical, given the return of Jews to Israel after almost two thousand years. However, I do not believe that the legal and moral basis for the Zionist movement stems from preserved historical rights, but from present-day political concepts of nationalism, linked to sentimental attachments. In this respect, as I have suggested, the migration of Jews to Palestine is similar to all the migratory processes that led to the present demographical patterns in North and South America, Australia and New Zealand, with the additional factors of, on the one hand, sentimental attachments preserved over two thousand years, and, on the other, a lack of any colonial "mother country" as a protective force. The issue of rights for the Zionist movement in the modern sense of an irrevocable claim, because of biblical antecedents, is, in my opinion, irrelevant. Far more to the point, and far simpler an explanation is that if hundreds of thousands of Jews could leave Eastern Europe for America (as Irish, Italian, Polish, Greek and other immigrants had done, often displacing indigenous people), then there seems little justified objection for a smaller number (several tens of thousands) deciding to come to Palestine, with far less prospects of individual success.

Needless to say, precise legalities do not solve the human problem. Israel would do well to relate to the right of return as its Supreme Court related to the Geneva Convention, i.e., to declare its willingness and commitment to deal with the humanitarian aspect of the right. Indeed, even if the right does exist, it is still possible to mitigate its full force by offering symbolic responses and practical alternatives. Rights that exist may be foregone in

terms of attaining other objectives. Thus, a discussion of the right to return could (as even some Palestinians have conceded) involve:

1) an overall declaration by Israel of its awareness of the relevance of the problem, in the final stages of the peace process.

2) a parallel declaration by the Palestinians of their willingness to seek a reasonable compromise that will provide humanitarian solutions to the refugees, while not foisting upon Israel the obligation to absorb them. (We may be talking about several million people, given the population growth over more than half a century).

3) a joint declaration of options to be made available to the Palestinians:

   a) the return to Israel of a small, specified number, mainly within a program of family reunification;

   b) the return to the state of Palestine from Lebanon and Syria, as an expression of the right of return;

   c) the conferring of citizenship, or even of normal permanent residence, in the countries where Palestinians are currently situated;

   d) the invitation by a number of countries in various parts of the world (both Arab and elsewhere), who would declare their willingness to offer the refugees residence and citizenship.

   e) adequate compensation to be made from a fund, to be financed mainly from international sources, but to which Israel itself would make a substantial contribution (for the international community, this would be far cheaper than continued support for the refugee camps, as well as a more humanitarian solution for their plight);

   f) the granting of existing houses in the Jewish settlements (depending on the solution that is worked out for the Jewish settlers in the West Bank and Gaza, and on the assumption that a large percentage would choose to

> leave a future Palestinian state and return to within the green line in Israel)—this, in sharp contrast to the "scorched earth" policy adopted by Israel when it withdrew from Sinai and destroyed all of the houses, leaving little trace of what had been temporarily built up there.

The number of Israelis living beyond the green line, even excluding those in the eastern part of Jerusalem (which would clearly have to be treated as a separate issue) presents an awesome problem, if any idea of transferring them is to be incorporated in an overall settlement. The first Israeli leader to countenance such a possibility was Barak, who suggested in the waning days of his government that about twenty percent of Israelis living in isolated places, beyond the blocs of settlement in the map that he presented, would be re-integrated within those blocs, or would return to Israel. The proposal, leaked to the press, met with loud disapproval, and the very concept of "population transfer" was denounced as an infringement of the rights of the settlers. Sharon has hinted at similar possibilities in his many ambiguous references to "painful concessions" that Israel will have to make.

Even for those opposed to the settlements, their human aspect cannot be denied. It has to be addressed very sensitively, for, just as in the case of the Palestinians, it is, in the final analysis, the fate of human beings that is at stake. This includes families that, however rashly, have made personal decisions that affect also the lives of their children; the latter are certainly not responsible for the predicament caused by their parents' decisions.

One possible solution would be to allow the settlers to remain in their settlements, but outside the green line and inside a sovereign Palestinian state. From a security point of view, with the present level of tensions, this seems a highly unlikely solution. Yet, at least for some of the settlements in areas of regional concentrations, this could be a possibility, especially if they were granted cultural autonomy (the use of Hebrew in schools, day of rest on Saturday). Furthermore, for those in close proximity to the green line, the

possibility of border adjustments is a viable and reasonable possibility, one which could also be applied to Jewish neighborhoods in East Jerusalem.

But in the final analysis, most of the settlers are going to have to move—either involuntarily, as a result of a political agreement between the parties, or out of a choice not to live in a Palestinian state because of the risks involved, or because they prefer to live under Jewish sovereignty. Any involuntary transfer would involve dangerous possibilities of resistance, possibly of a violent nature. Moreover the sheer human rights issue of removing people from their homes cannot be dismissed lightly.

I offer two possible lines of thought: First, many of the settlers constantly remind the Israeli population (and especially their opponents) that they have chosen to live in the settlements not out of capricious individual choice, but in response to government policy and incentives. If that is so, then any subsequent change in policy, based on an overall peace agreement, should also bind them, even if they are personally opposed to that policy.

More important, however, is a second consideration: Sometimes rights are in conflict, and leaders and individuals are faced with agonizing choices as to which right is to have precedence. Such conflicts occur in many arenas. Perhaps the most difficult one of all is the clash between the sanctity of life and human dignity, in such issues as voluntary euthanasia or acute situations *in extremis*, where medical personnel are required to choose between patients in need of expensive procedures and treatments.[12]

A similar clash of principles is evident in the case of the right of settlers to remain in settlements in occupied territory, in violation of international law, and the alternative right of both the Israelis and Palestinians to reach a peace settlement, the right of the Palestinian people to self-determination, and the right of the Palestinian refugees to become ordinary citizens of their own country. Of course, any such argument is open to an almost knee-jerk response that I am being unfair or even unpatriotic towards the settlers and their supporters. But such charges have been made constantly as to any move involving *any* rapprochement with the

Palestinians or any peace settlement with the Arabs. When Rabin was still alive, there were those who sought to have him put on trial for treasonable conduct, for entering into the Oslo peace process; recently, Peres, and those who negotiated with him, have been labeled "Oslo criminals".

It should be noted that evacuation in furtherance of a peace settlement would not be unique. The withdrawal from Sinai, under terms of the peace agreement with Egypt entailed such a removal. It was accompanied by scenes of violence, threats of suicide, a hunger strike by one individual, exhortations of civil disobedience (a rabbi was sentenced to prison for such conduct), and a deep hurt that was inflicted on the body politic in Israel. But the total withdrawal was accomplished—and the person in charge of its execution was none other than the then minister of defense, Arik Sharon.

The very trauma of this experience should have made all subsequent Israeli leaders far more cautious as to any further settlements beyond the green line, but all subsequent prime ministers—from Begin, in power at that time, through Shamir, Peres, Rabin, Netanyahu and Barak—showed a lamentable lack of perception and of prescience on this issue. Furthermore, in the case of the right-wingers Begin and Shamir (as well as Sharon, while still an ordinary minister), it seems that the settlement project was actually strengthened, partly as an act of appeasement in response to the opposition of their own supporters to the peace with Egypt. (Most of the members of Begin's Herut faction refused to vote for the plan, including Shamir and Sharon, and it was only through the help of a loyal opposition from most of the Labor Party that essential Knesset approval was attained.)

Paradoxically, the only prime minister who has not allowed any new settlements is the current incumbent, the settlers' favored politician, Sharon, because a freeze was built into the coalition agreement when the Labor Party was in the government, and because condemnation of settlements has finally became part of the international rhetoric, including in the United States.[13] This has not, however, prevented unauthorized settlements being constructed with the connivance of officialdom, often with the

pretense of mere expansion of existing settlements. Recently the Supreme Court rejected a petition asking for the authorities to forthwith eliminate about a hundred such "outposts", as they are called. It is surely easier for the Israeli authorities to dismantle these outposts, which are clearly illegal, even by Israeli law, than for the Palestinian authorities to disarm all the terrorists, many of whom work in secret.[14]

Difficult as it would be to re-enact the Sinai experience, this is a policy that must be openly broached and carefully considered. When the French finally realized that Algeria was not French but Algerian—and this after a century in control, and after nearly confronting a military coup—they undertook the painful task of transferring about a million of their citizens back to the European continent. Many of these people had ties with Algeria longer and stronger than those of the Israeli settlers in the West Bank and Gaza. A further historical perspective also indicates that France's status in the world underwent a complete transformation once it was released from the constant preoccupation with its "southern territory" in North Africa. Similar positive outcomes conceivably await Israel, released from the burden of continuing its role as an occupying power.

On a smaller level, in other imperial outposts, withdrawals from lengthy occupation have always led to unpleasant personal consequences for those who, at the individual level, took advantage of a temporary favorable national situation. This applies to the British in Hong Kong, Americans in the Panama Canal Zone and Indonesians in East Timor. Whether the ethnic Chinese who were encouraged by their government to move into Tibet will also have to cope with such a problem one day is still a political unknown[15]— but then China, of Tieneman notoriety, is not a democracy, and, given its size, can yet afford to ride roughshod over international public opinion.

Recently, right-wing members of the Knesset commissioned a research project into the number of transfers that have been carried out in modern times. Their intention was to prove that their own ideological stance of transferring Palestinians out of the West Bank

into neighboring Arab countries had many precedents. However, they failed to notice the boomerang implications of their examples, e.g., Yugoslavia. The people transferred were a numerical minority, and were the latecomers to the area. The research project, intended to provide a justification for transferring Palestinians, actually provides precedents for removing Jewish settlers.

Thus, within the framework of an overall peace settlement, some Israelis are inevitably going to have to leave their settlements. The one major advantage that would accrue to the Palestinians is that they would "inherit" housing, roads and an infrastructure of resources and facilities that would be of inestimable value to the new state of Palestine in its efforts to resolve the refugee problem, and to recognize the right of return to their state of those presently living outside of the occupied territories. For instance, the many bypass roads, designed to allow Jewish settlers to avoid driving inside or near Arab towns and villages, would become the freeways of tomorrow, allowing easy link-ups with Israel itself, with Jordan to the east, with the possibility of a special road or rail link between the West Bank and Gaza going through, above or under Israeli territory for about eighty kilometers. This could possibly serve also as a useful link for the Arab people in general, enabling them to move easily between North Africa and West Asia. It could also be designed with a wide enough margin to allow for trading posts and transit facilities, which could attract people from nearby Arab and Mediterranean countries, not to mention Israelis, who could also benefit from consumer bargains, especially if the link was declared a duty-free area.

The refugee problem, then, involves recognition of a right of return mainly to Palestine itself, with compensation and international aid to facilitate the process. This in itself would provide untold economic benefits to the new state. The return to Israel would be limited to a small number, based on special criteria. The process itself would be spread over several years. Alternatively, in a revised version of the original idea of a swap, the number of Palestinians that Israel would agree to allow into territory inside the green line, could be equal to the number of Israeli settlers who

would wish to remain beyond the green line. In other words, the settlers, by cumulative and collective decision in response to a changed geo-political situation, would help determine the delicate problem of refugee claims.

Beyond such a substantive approach to the "right of return", I would suggest as a symbolic *quid pro quo*, that Israel itself cancel its Law of Return, which guarantees the right of any Jew to settle in Israel. This law is one of the first major pieces of legislation dating from the early days of the state, and its importance—for the practical impact on the new state, for the ideological implications for the Zionist movement, and for a comforting statement for captive and persecuted Jewish communities—should not be denied. It has been referred to by many of Israel's harshest critics as an example of the discriminatory underpinnings of Zionism and the state of Israel. But, given the predicament facing the remnants of the Holocaust in Europe and the tenuous position of other Jewish communities, including in the Arab world, and given the memory of Jewish persecution in different places of the world and in different periods of history, this law is an obvious example of what is known as affirmative action, of inverse discrimination.

There are always problematic aspects to such a policy, because of the obverse way in which it affects others, and so it is in the Israeli context. But, it always has positive aspects. It provides a guarantee that any Jew arriving in Israel is entitled to immediate rights of residency and citizenship, if so requested. In this sense, Israel is probably the only country in the world that allows new immigrants to vote in elections within weeks of their arrival (and the immigrant vote, especially of the large numbers of ex-Russians, was crucial in all four of the elections during the 1990's).

Several amendments have been made to the Law of Return over the years, e.g., to deny the right of immigration to proven criminals (after several had sought sanctuary in Israel, not from persecution as Jews, but from prosecution as indicted suspects) and to those with problematic health conditions. Considerable controversy has centered over the problem of defining who is entitled

to the benefits of the law, and the issue of "Who is a Jew?" has embroiled the Supreme Court in several intriguing judicial decisions with explosive political implications.[16] The present situation is that even non-Jews, by the definition of the Orthodoxy, who trace descent matrilineally, are entitled to rights of immigration and immediate citizenship if they have a sufficiently close familial relationship with a Jew. Thus, the Christian wife of a Jew and their children, who are not considered Jewish by Orthodox interpretation, are entitled to the full benefits of the Law of Return. People of this status now number several hundred thousand, most of them recent immigrants from Russia and other parts of the former Soviet Union.

Since the law has been seen by some critics as a racist one, the acceptance of non-Jews has some minor importance. However, far more significant is an idiosyncratic fact linked to the Ethiopian Jews. Because of a breakdown in contact with this ancient Jewish community, some doubt was initially expressed as to their status as Jews. This was finally resolved, but many borderline problems still remain, causing much anguish to the community. Most of all, the Ethiopian community faces enormous cultural problems and various degrees of prejudicial attitudes by officials and public alike. But the fact is that, in the modern world, the only example of an organized emigration from Africa to other parts of the world that was not done for the purpose of slavery, has been the willingness of Israel to extend its welcome to the Jews of Ethiopia. Considering the gathering in Durban in the summer of 2001 on this topic, at which controversy raged as to the racist nature of the Israel state,[17] the Ethiopian experience offers much food for thought.

In the light of the struggle that has persisted for several decades in Ethiopia's neighbor, Sudan, there is a need for the international community, and particularly the African community, to take note of the racist overtones in this struggle of the powerful Moslem north, centered in Khartoum, against the south, with its basically non-Arab population of Christians and believers in local African religions. Considering the death rate of possibly two million Blacks in the course of this ferocious struggle, with numbers worse than

the tragedies of Rwanda or Yugoslavia, the passivity of the world community is remarkable. Is this just a normal civil war, lasting already for several decades, or is it perhaps one of the most blatant ongoing examples of racism? Are the figures of the immense casualties, including non-combatants, an unfortunate and inevitable consequence of a military struggle, or are its dimensions an indication of genocide? It is difficult to know, given the lack of information—but the lack of information is itself a revealing factor.[18] When the aggressive behavior is of an Arab majority and the people seeking self-determination are black Africans, different standards seem to apply.

This is not to claim immunity for any Israeli excesses. But an obsessive concern with Israeli faults and with the Palestinian tragedy has, unfortunately, led to a callous disregard for the plight of many other groups throughout the world, including the Arab world (Blacks in Sudan, Kurds in Iraq, Berbers in Algeria, Sahels in the Morocco-occupied Sahara, women in Saudi Arabia) and to an unacceptable indifference to gross violations of human rights by their oppressors. Indeed, one wonders how difficult it would be in a large state like Sudan to implement a simple solution of dividing it into two nation-states along the centre: into a North that was Arab and Moslem, and a South that was Black and non-Moslem. In late 2002, such a proposal was finally raised hesitantly, after decades of violent struggle.

The Israeli Law of Return, no more racist than differential rules of immigration in other countries, has basically served its purpose and outlived its usefulness, even though the President of the Supreme Court recently suggested incorporating it into Israel's flexible constitutional structure. However, it seems to be as irrelevant in the world as constituted today, especially after the break-up of the Soviet Union, as it was a futile gesture prior to that. Its original affirmation was to declare that all Jews would be entitled to find refuge in Israel if they needed it, in the light of oppressive anti-Semitism in their home country. When this oppression actually took place, it was well-nigh impossible to accomplish its purpose. The heroic actions of those Jews who were prepared to suffer

imprisonment, banishment and loss of employment indicates the implacable attitude of Soviet officialdom against migration and attests to the undoubted inspiration that the Jews derived from the knowledge of the existence of the Law of Return and its welcoming and comforting message; some of them even succeeded in emigrating before the final collapse of the Soviet regime. Similarly, Israel provided a refuge to Jews escaping from the harsh military regimes in South America. And, of course, the mass immigration, in the 1950's, from Arab countries was also sustained by the Law of Return.

While there is always the possibility of a relapse into anti-Semitism in different parts of the world, now is an opportune time to reassess the impact of the law. When anti-Semitism existed in dictatorial countries, the law had little practical impact; in a more democratic world, there is less need for it, and any dangerous situation for Jews can always be resolved without activating the law itself. After all, the law obligates Israel, not the adversaries of the Jewish people. When originally legislated, as a statement of ultimate intent and of recently-acquired sovereignty, it was of historical importance. Today it has none of that urgency, nor even symbolic value. In the Israel of today, non-Jews from all over the world, particularly West Africa, Eastern Europe, Southern Asia and Latin America, make their way—some legally, most illegally— to Israel, because, like other advanced economies in Europe, North America and parts of Asia, Israel offers financial attractions for those willing to work long hours in agriculture, construction, nursing and the service industries. They come in far larger numbers than nominal Zionists living in the affluent Diaspora; they come, despite the serious security dangers, ranging from terrorist bombings in Israel's major cities to the possibilities of all-out war. (Most of them stayed right through the six weeks of nightly rocket bombardments from Iraq during the 1991 Gulf War.) So, if Israel is unable to monitor the entry of some 200,000 illegal immigrants into its territory, it hardly needs a Law of Return to provide a haven for legal Jewish immigrants, some of whom encounter the paradox of having their Jewish identity denied them by the religious

authorities. Indeed, the real issue of the Law of Return is not to decide between its continued existence as ordinary legislation, its possible enhanced status as a Basic Law in Israel's flexible constitution, or its annulment because of its practical irrelevance, but the related issue of defining who is a Jew, and who is entitled to its presumed benefits. But that is an internal issue for the Jewish people, in Israel and the Diaspora, and not a topic of major direct concern to the Israeli-Palestinian conflict.

FOOTNOTES—CHAPTER 6

1. See, for instance, Helen Jackson, *A Century of Dishonor: A Sketch of the United States Government's Dealings with Some of the Indian Tribes* (published originally in 1880, reprint in Scholarly Press, 1974); and James Falkowski, *Indian Law/Race Law: A Five-Hundred-Year History* (New York: Praeger, 1992).

2. See, for instance, Marie Leger (ed.), *Aboriginal Peoples: Toward Self-Government* (Montreal: Black Rose Books, 1994); and Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (New York: Delacorte Press, 1974).

3. See, for instance, N. Peterson and M. Langton (eds.), *Aborigines, Land and Land Rights* (Canberra: Australian Institute of Aboriginal Studies, 1983); and Andrew Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Auckland: Oxford University Press, 1990).

4. See, for instance, Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge: Cambridge University Press, 1987).

5. See Guy S. Goodman-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996).

6. See, in general, Edward Buehrigh, *The UN and the Palestinian Refugees: A Study in Nonterritorial Administration* (Bloomington: Indiana University Press, 1971).

7. See Yehouda Shenhav, "What Do Palestinians and Jews-from-Arab-Lands Have in Common? Nationalism and Ethnicity Examined through the Compensation Question" *Hagar* 1 (2000), p. 71; see also "The Jews of

Iraq, Zionist Ideology, and the Property of the Palestinian Refugees of 1948: An Anomaly of National Accounting," *International Journal of Middle East Studies* 31 (1999), p. 605.

8. For contrasting views, see Ruth Lapidot, "The Right of Return in International Law, with Special Reference to the Palestinian Refugees", *Israel Yearbook on Human Rights* 16 (1986), p. 103; and Naseer Aruri (ed.), *Palestinian Refugees: The Right to Return* (London: Pluto Press, 2001).

9. For a comparative study, see Robert Holland, Carl Bridge and H.V. Brusted, "Counsels of Despair or Withdrawals with Honour?: Partitioning in Ireland, India, Palestine and Cyprus, 1920-1960," *Round Table* 342 (1997), p. 257. For an interesting discussion of the human aspect at a later stage, see Ranabir Samaddar, *The Marginal Nation: Transborder Migration from Bangladesh to West Bengal* (New Delhi: Sage Publications, 1999).

10. A recent article bears reminder of the change that has emerged in the last few decades. Lord Lester describes the legal battle of people of Asian ethnicity, living in East Africa, and possessing British passports, to enter Britain, after being forced to leave the newly independent states of Kenya and Uganda. Hurried legislation was passed by Parliament to deprive them "of the right to enter and remain in their only country of citizenship". See his article, "Thirty Years On: The East African Asian Case Revisited," *Public Law* (2000), p. 53. These were not asylum seekers, so prevalent today, but legitimate holders of British passports (having lived in British colonies), who were denied entry because of their ethnicity.

11. The status of the Palestinians in Kuwait was seriously undermined because of the PLO's support for Saddam Hussein's attempt to destroy the state of Kuwait by unilaterally annexing it. The consequences of the 1991 Gulf War for Palestinians and others are described by Jean-Marie Henchaerts in *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995). Henchaerts writes firstly that in 1991, in liberated Kuwait, "Many of the Iraqis who had been living in Kuwait for decades were expelled as a result of the Iraqi phobia that resulted from the 1991 Gulf War. Some of the Iraqis who were expelled to Iraq claimed they would face persecution in Iraq . . . Being an Iraqi national was often the sole factor that triggered the expulsion decision without due regard to individual circumstances" (p. 138). The author then adds: "The same unfortunate fate struck the Palestinians who had found refuge in Kuwait

in preceding decades. The Kuwait government took this action because it felt betrayed by the PLO's support of Iraq . . . [Many] Palestinians were born in Kuwait and could consider it as their 'own' country" (p. 139).

12. See Leon Sheleff, "Active Euthanasia, Denial of Dignity and Medical Responsibility for Bystander Inaction," *Israel Yearbook on Human Rights* 29 (2000), p. 91. See also my Hebrew article on torture and terror in response to the Landau report in *Plilim* 1 (1991); and see ch. 8, "On Morality and Social Control", in my book, *Social Cohesion and Legal Coercion: A Critique of Weber, Durkheim and Marx* (Atlanta and Amsterdam: Rodopi, 1997).

13. Nevertheless, while new settlements have not been established, building often carries on near existing settlements—occasionally kilometers removed from the center of the settlement—in order to further stake claims on behalf of the settlement. The argument is then made that this building is intended only to cope with natural increase through birth. Sometimes different terminology is used; they are referred to as outposts (in Hebrew, *ma-ahazim*)

14. Sometimes, especially after a fatal terrorist attack, caravans will be used to create a new settlement, consisting of only a few families. The army constantly announces plans to remove these squatters, but rarely acts on this rhetoric. In fact, it provides protection for them. Finally, at the Aqaba talks, Sharon agreed to deal firmly with this issue, stating that "illegal" outposts would be removed, when, of course, *all* of them are considered illegal, even by Israeli law.

15. See A.P. Rubin, "The Position of Tibet in International Law," *China Quarterly* 35 (1968), p. 110.

16. For a good recent discussion of this issue, see the biographical study of a leading Supreme Court Justice: Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley: University of California Press, 1997), ch. 12, "Who is a Jew".

17. The conference in Durban was a textbook example of how to avoid dealing with classic examples of racism (such as suicide killings of innocent people—the conference ended three days before the September 11th attack in the United States), while focusing all attention, vitriolically and vehemently, on a convenient vulnerable scapegoat in the form of a minority outsider.

18. For a discussion of the early stages of this ongoing conflict, see Cecil Eprile, *War and Peace in the Sudan, 1955-1972* (New Abbott: David and Charles, 1974). It is revealing to compare the difference between broad and regular media coverage and public awareness of the international criminal tribunal in the Hague, dealing with the atrocities committed in Yugoslavia, with the paucity of information as to the similar tribunal in Arusha, Tanzania, dealing with atrocities committed in Rwanda. Tens of thousands of alleged violators are being held in confinement in extremely adverse conditions, while minimum progress is made in bringing them to justice. Recently, efforts were initiated to introduce traditional forms of restorative justice in order to expedite the process of adjudication and the meting out of justice.

Chapter 7

Reconciliation:
From Enmity to Amity

I T SEEMS ALMOST an obvious banality to suggest that any peace process must be accompanied by efforts at reconciliation between the parties, and that at its culmination formal procedures should be instituted to examine, clarify, reveal, document and describe the nature of excesses committed by the sides in the course of their struggles as bitter adversaries. Wars and other lesser manifestations of violence contain no built-in protections against suffering caused to innocent victims and casual bystanders, or even unacceptable harm caused to the opposing antagonists.

Unfortunately, the truth is that in the modern world of supposed certainty and rationality, most struggles have been zero-sum games, in which advantages accruing to one side are gained at the expense of depravities inflicted on the other. Unconditional surrender at the end of a war is an extreme example of such categorical climaxes. Recently, however, more subtle approaches have been developed, allowing for greater flexibility. Instead of allocating the status of victor and vanquished, reflecting mainly the outcome of the antecedent struggle, every effort is made to enable former opponents to reach an accommodation that can

provide the basis for a projected future, devoid of the former attitudes that led to the eruption of combat.

In the Oslo peace process, the hesitant handshake between Yitzhak Rabin and Yasser Arafat on the lawn of the White House, in the presence of the President of the United States and hundreds of dignitaries, and witnessed by millions simultaneously all over the world thanks to the instantaneous television broadcast, was a momentous moment, pregnant with meaning. An Israeli general, who almost thirty years earlier had commanded the victorious Israeli forces that inflicted a humiliating defeat on three Arab armies and captured East Jerusalem, the West Bank, Gaza and the Golan Heights, stood side by side with the leader of a terrorist group, El-Fatah, which bore responsibility for the death of hundreds of Israeli victims and the maiming of thousands more, and many of whose members were still languishing in Israeli prisons.

The implicit message was that both individuals were embarked on a tenuous course, aimed at overcoming the bitter hostility and the searing memories of yesteryear. The bulk of both populations seemed willing to accompany their leaders on this difficult passage into the unknown. Yet, in both camps there were ominous signs of discontent: Right-wing opposition parliamentary and extra-parliamentary groups in Israel, particularly among the settler population and the Orthodox religious leaders, expressed their reservations and warned of latent dangers; among the Palestinians, two fundamentalist Moslem groups, the Hamas and the Islamic Jihad, remained intransigent in their opposition to any attempt at rapprochement.

Although the initial breakthrough in the Oslo peace process had been achieved by secret negotiations, carried out through the good offices of Norwegian intermediaries, continued success of the difficult and delicate negotiations was to a large extent dependent on the mediation efforts of an actively involved American administration. Within five years the process was to lead to a final settlement—a period that, although unnoticed and unmentioned, was of paramount symbolic importance for Israel. The five years of negotiations would reach their planned fruition some time between

the centenary commemoration of the founding of the Zionist movement in Basle in 1897 and the jubilee celebrations of the establishment of the state in 1948.

By the time these critical dates arrived, Rabin had been assassinated by an Israeli religious fanatic and been replaced within a few months by Benyamin Netanyahu, an opponent of the process from the beginning, who was intent on procrastinating as far as possible; while a massacre in Hebron of Moslem worshipers had triggered off a series of hitherto unknown suicide reprisal bombings by Hamas and the Islamic Jihad, and led to growing Israeli suspicions as to the value of the process and growing reluctance to support it.

Shortly after the five-year period was up, Ehud Barak won a convincing victory in the 1999 election, and then set himself the goal of reaching a final settlement within the short time span still remaining of Bill Clinton's presidency. Key dates were set up for achieving certain defined goals, while the opposition warned him not to press ahead "with a stop-watch" in his hand. However, even before time ran out, the process came to a standstill at Camp David in the summer of 2000. Barak's parliamentary support became eroded, reaching its nadir when a second *intifada* broke out in October 2000.

Most significantly, a new development was outright antagonism towards Barak by the Arab electorate, who had formerly supported him wholeheartedly in the direct elections for the premiership. In reaction to the deaths of 13 Israeli Arabs, shot during widespread protest demonstrations against the killing of five Palestinians on the Temple Mount by Israeli police, the vast majority of Israeli Arabs boycotted the early special election held several months later, in which Barak was soundly defeated and Sharon was carried to victory on a slogan of peace and security ("Only Sharon can bring *shalom*").

The shootings on the Temple Mount took place the day after Sharon's much publicized visit to the site, in the company of some half-dozen parliamentarians from his party, and under the protection of hundreds of Israeli police. A few days after Sharon's

victory, the first mortars from Gaza were fired across the green line; nightly shootings at the suburb of Gilo, on the outskirts of Jerusalem, were resumed; and warnings as to further suicide bomb attacks were increasingly issued. Finally, in the summer of 2001, Sharon explained that his plans for the future involved not peace but only a state of non-belligerency, and that full security could not be guaranteed, since Israel could not be hermetically sealed off from its Palestinian neighbors. Final settlement was not even on the horizon, but hidden in some distant future.

The peace process was now in ruins. Palestinian shootings and suicide bomb attempts were evoking stepped-up Israeli responses, including an announced policy of targeted killings, in which sophisticated technology, while usually succeeding in eliminating the alleged terrorist, seemed incapable of avoiding collateral casualties, including the deaths of young children, casual bystanders and family members on innocent visits.

I am writing this in the midst of a climate of general frustration and despondency, aware of the total disparity between the vicious reality of today and the fervent hopes of previous years, between the present poisonous atmosphere on both sides, and the yet persistent, lingering belief in the need for and possibility of reconciliation. Indeed, the need is all the greater now; the blood spilled and the damage caused in recent years will constitute a significant addition to the many variables that will have to be incorporated into a reconciliation process. It may well be that a hidden factor that slowly ate away at the peace process itself, was specifically the lack of an awareness that it was necessary to move beyond the symbolic, yet perfunctory, handshake on the White House lawn to deeper and honest soul-searching that both sides would eventually have to undertake: an accounting of unnecessary errors made, irretrievable harm inflicted, dangerous hatred sown.

The major model for such reconciliation procedures at the culmination of a negotiated political settlement between former combatants is the renowned Commission for Truth and Reconciliation in South Africa.[1] This was a tremendous factor contributing to the possibility of a peaceful transfer of power from

the apartheid government to the African National Congress, involving documentation of the suffering of victims, provisions for compensation and decisions about applications for amnesty for those willing to reveal the full truth of their participation in illegal and illicit measures. The South African procedures were perhaps the most intensive and the most penetrating, but they were based on earlier procedures developed in Eastern Europe after the collapse of the Soviet Union and the communist movement, and in South America after the demise of the military dictatorships.[2] The South Africans devoted much thought to adapting these earlier procedures to their specific needs. Despite criticisms from many sources, and even some attempts at judicial intervention to stop aspects of the Commission's work (e.g., giving pardons), the overall assessment seems to be of a major contribution to the stability of the newly-constituted South Africa.

Similarly, any efforts at reconciliation in the Israeli-Palestinian conflict will require creative ideas to cope with the special situation of two separate countries involved. There is also an Arab minority in Israel which is part of the Palestinian people, and their problems must be also addressed. So would the suggestion of a confederative structure, which would involve co-operation in many difficult areas, so that a Commission of Truth and Reconciliation would not be operating in a vacuum. In fact, some sort of reconciliation procedures are a *sine qua non* for confederation.

Some indication of how difficult the process of reconciliation is may be noted in the adamant refusal on the part of Australian Prime Minister John Howard to apologize to the Aboriginal population. For the moment, official Australia has agreed only to acknowledge its errors and to express regret. Of course, legally, a request for forgiveness may be seen as an admission of guilt, involving the awesome possibilities of being sued for massive compensation. In the case of Australia, the problem is compounded by the fact of the complete turnabout that was created by a leading judicial decision, the Mabo case, in which the High Court justices basically stated that there was a need for a total rewriting of Australian history, and a reassessment of its meaning.[3]

In contrast, during Jimmy Carter's presidency the American Congress passed a resolution, the Congress Apology Law, apologizing to the Native Hawaiians for having overthrown the Kingdom of Hawaii a century before, and denying them their right to self-determination.[4] The denial of this right is, however, still in force, since Native Hawaiians today constitute only a quarter of the present population, the remainder consisting of waves of settlers who left the American mainland for the various attractions of the Pacific island.

Of some help in conceptualizing a reconciliation process in the Israeli-Palestinian context is the fact that existing expressions of conciliatory procedures are embedded in both cultures. Thus, Arab culture has the concept of *sulha*, an intricate procedure of forgiveness in which, at the local level for instance, violent conflicts between hostile neighbors are resolved.[5] These processes are particularly applicable in the most extreme cases of violence, such as murder, when the mediation powers of neutral and distinguished members of the community are utilized. Indeed, the *sulha* is most often activated the more severe the crime committed. The process is of vital importance to avoid the dangers of an escalating vendetta, in which mutual blood revenge is endlessly performed. It is in order to break the cycle of violence that the larger community becomes involved, and that leading members of the two feuding groups send out signals of a willingness to extricate themselves by negotiation from the impasse in which they are embroiled. If the negotiations are brought to fruition, a celebratory feast is held at which symbolic ceremonies are performed, and an agreed upon compensation is paid out to the injured party.

In terms of achieving an end to the ongoing violence, this process of *sulha* is far more important than any judicially imposed punishment, however harsh. Occasionally the respective families will prefer a conspiracy of silence to avoid official law enforcement and judicial punishment, preferring to handle the matter in a customary manner, aimed at first seeking vengeance and then agreeing to the payment of compensation and the restitution of

harmony in the social order. Generally, however, there will be close cooperation with the police, linked to a parallel process of *sulha*. Law enforcement officials often encourage the *sulha* in the full awareness, from prior experience, that the tensions in the community will not subside merely by the meting out of the full measure of punishment, but require the completion of the *sulha*. Where a judicial punishment has been imposed already, provisions are made to allow the prisoner to be temporarily released, under guard, for the time required for his participation in the *sulha*. There is a deep mechanism at work in the process. The greater the danger of a continuing vendetta, the more urgent the need to reconcile the parties. There is actually a connection between the intensity and likelihood of blood revenge and the accompanying social pressures and recognized procedures for restoring tranquility.

The Arab procedures are not unique, but are replicated in many other non-Western cultures. In recent years, criminologists have evinced an interest in this phenomenon, and the concept of "restorative justice" has been formulated to express the alternative manner in which many tribal and indigenous cultures, in many parts of the world, conduct their affairs.[6] Starting with informal incorporation of these customary practices, particularly in Canada, New Zealand and Australia, vis-à-vis the indigenous population,[7] the idea of seeking mediation between an alleged criminal and his victim is gradually spreading, instead of the far harsher process of criminal punishment; if the moderate procedure fails, there is always the possibility of resorting to the conventional formal application of the law.

In many respects, the tribunals set up in different parts of the world are an example of similar approaches. Restorative justice and truth and reconciliation machinery are both reflective of a widespread emerging culture. Can they be adapted to the Israeli-Palestinian conflict? And if the Arab (and Moslem) culture already has such a normative framework, what is the situation in Judaism?

Historically, the rabbinical authorities usually lacked a governmental enforcement structure. Within the Jewish community, efforts would be made to placate the sides by some

measure of reconciliation.[8] It seems to me that even biblical culture provides interesting examples of such restorative justice, of such *sulha* procedures. Of particular interest is the fact that, by sheer chance, there is a direct link between the present modern conflict and the biblical accounts.

In the Book of Genesis appear three instances of intense sibling rivalry (including vicious acts of jealousy and dispossession), which were resolved through acts of reconciliation and expressions of forgiveness.[9] The siblings involved are the first three filial generations of the patriarchs: Ishmael and Isaac, the half-brothers, both sons of Abraham; Esau and Jacob, the twin sons of Isaac and Rebecca; and Joseph, the favorite son of Jacob, and his ten older brothers, who, in a moment of cruel jealousy, rid themselves of him. The three stories are poignantly relevant examples of deep hurt being overcome by gestures of affection and forgiving. On two occasions, a full description is provided (Jacob and Esau, Joseph and his brothers), while in the first instance, Isaac and Ishmael, there is a passing reference.

This last instance, however, is the most important for modern updating, because their meeting took place at a site, in Hebron, which has become a symbol of the present conflict, as well as a site where one of the worst acts of violence took place: the Cave of the Patriarchs (*Ma'arat Ha-mach-pelah* in Hebrew), situated in the heart of Hebron, where, according to Jewish tradition, Abraham and Sarah, Isaac and Rebecca, Jacob and Leah are buried. This was the site chosen by the Jewish settler, Baruch Goldstein, to carry out his massacre of Moslems at prayer.[10]

In this particular instance, where Ishmael and Isaac meet for the first time after a separation lasting decades, in order to share the burden of burying their father, Abraham, the narration leaves maximum scope for the reader to imagine what might have transpired. However, readings of the scriptures are often overloaded with ideological biases. Even if a detailed description is provided, it is possible to interpret it in ways that seem in conflict with the original text.

This is precisely what has happened with the second story, that of Esau and Isaac, where the former is presented in most

rabbinical commentaries as a negative character, contemplating taking revenge on his brother for usurping his birthright.[11] Yet the straightforward text, without annotated comments, relates a beautiful act of reconciliation, one which is then re-enacted with the next generation by Joseph's conciliatory approach to his brothers, despite their cruelty to him. Given the impact of religious texts and rabbinical directives on the Israeli political scene, I deem it beneficial to examine these stories of the first three filial generations of the Jewish people, to see if a pattern of reconciliation may be discerned, and also to clarify how easy it is to misinterpret simple texts for ideological reasons. The Bible is an intrinsic part of Israeli culture; its impact, for better or for worse, should not be ignored.

According to the Bible, Abraham bought a plot of land from a local inhabitant, for the purpose of burying his deceased wife, Sarah.[12] She had died shortly after the two dramatic generational stories: of Ishmael (with his mother Hagar) being sent away to an unknown fate, and of Isaac being exposed to the traumatic experience of the *Aqedah*—the intended sacrifice on Mount Moriah. Later, when Abraham himself dies, these two sons come together for the first time to pay their last respects to their father and to bury him next to Isaac's mother.[13] The Bible provides no explanation of how Ishmael, after such a long absence, even knew that Abraham had died; nor does it describe how the two half-brothers related to each other in their joint bereavement. The reader is left to draw his own conclusions.

However, some indication of how they may have behaved is perhaps provided by a later meeting between two other brothers after a similar lengthy period of separation. On this occasion, it is Isaac's son, Jacob, who returns, after decades away from home, having, at his mother's behest, left home after cheating Esau, his older twin, out of the special blessing that his father wished to pronounce. Now married, with eleven sons and one daughter, Jacob is acutely apprehensive of his brother's possible vengeful reaction. He even divides his family into separate camps, so that if Esau's response turns out to be violent, at least some of the family will be saved.[14]

To Jacob's surprise, Esau welcomes him; the two brothers embrace and kiss each other. During the detailed description of this meeting, the narration specifically mentions the presence of one of Jacob's sons—his youngest favorite, Joseph—including a description of how the young boy went forward especially to greet his welcoming uncle.[15] This is a brief precis of the details of this meeting as recounted in the Bible. Yet, over the years, much religious interpretation has attempted to cast doubt on the true intentions of Esau (including attempts at plays on words, which allow for different meanings).[16] He is generally presented in a negative way, partly to absolve Jacob the Patriarch of guilt for outwitting him and deceiving his father. Jacob's actions certainly do not reflect well on him, yet the manner in which this blemish can be removed is not by stigmatizing Esau, the victim of his trickery, but by praising his willingness to forgive. The straightforward text (without the convoluted interpretations) offers an outstanding example of true reconciliation.

The importance of the scene of Jacob and Esau embracing each other should not be minimized, since the very future fate of the Jewish people into its long history may well have been determined at that moment. For witnessing the scene as a young, impressionable child was Joseph, who, several decades later, had ample opportunity to wreak his own revenge on the cruelty that his brothers had inflicted on him by plotting first to kill him, and then selling him into slavery. When the brothers came to Egypt to seek relief from a severe drought in Canaan, Joseph, now a powerful figure, second only to Pharoah, could easily have taken severe measures against them. After all, they were only his half-brothers; on their first visit, his own younger brother, Benjamin, had not accompanied them. Is it possible, is it legitimate to conceive, is it even likely, that the memory of the act of reconciliation between his father and his uncle was the key catalyst in his own forgiving behavior toward them?

If these two latter stories provide a message of reconciliation, may it not then be assumed that Ishmael and Isaac, at the graveside

of their father, also displayed similar forgiving sentiments? There is major symbolic importance to such an interpretation, for Ishmael is seen as being the progenitor of the Arab people (unlike Esau, who is more generally linked, through intricate rabbinical reasoning, to Rome and Christianity).[17] One of the most despicable acts committed by an Israeli Jew against Arabs (shooting twenty-nine of them in the back, while they were bent over in prayer), took place at The Cave of the Patriarchs, a site which, while a constant arena of tension between the Moslems and Jews living in Hebron and nearby Qiryat Arba, should really be a symbol of reconciliation between the sons of Abraham. Unfortunately, the murderer's own burial place became a pilgrimage site for extremist Jewish groups, who erected a large distinctive memorial there, until governmental authorities finally intervened to remove it.[18]

I am aware that this biblical digression may seem irrelevant in the context of a modern technological world—but even in such a world, the power of religion and symbols should not be underestimated. My own surmise is that the problems of a solution to the Israeli-Palestinian issue are made more complicated not only because of the use of religious concepts and the interference of religious authorities on both sides, but also because very little effort has been invested in attempting to refute ideologically-based religious interpretations and outright distortions of biblical texts that are used to further a particular political cause. The needed response is not to regret religious intervention or to argue for separation of religion and state, since religion is an integral part of the total conflict, but to seek to make interpretations of well-known texts compatible with modern, progressive ideas. The message of reconciliation is part of the biblical narrative. It behooves us to be aware of it and to attempt to activate it, even in contrast to authoritative religious claims, where the ideological overtones of interpretation and even cynical exploitation of the text are blatantly manifest.

In similar fashion, I believe that, even in the midst of the ugly developments since October 2000, it is the task of the academy to attempt to conceptualize ultimate goals that go beyond the daily

strife. The so-called ivory tower must be in touch not only with the sad reality of today but also with utopian prospects of tomorrow, as a beacon of hope requiring articulation before actualization.[19]

In discussing Hebron, a further factor must be borne in mind, in order to fully comprehend the Israeli position. It certainly seems ludicrous for Israel to insist on retaining a small community of some four hundred people, spread in three different areas of the town of Hebron, with its 100,000 Palestinian inhabitants. Logic suggests that when Hebron was handed over to the Palestine Authority by the Netanyahu government, the Jewish settlers should have been resettled elsewhere—or, alternatively, that they should have been fully incorporated into the town as ordinary residents. For security reasons (*their* security) this could not be done, since they are, mainly extremists in their political attitude, and lacking in any desire to reach rapprochement with their Arab neighbors. Reports in the media tell of provocative acts on their part; they are a typical example of those settlers whose actions, have, it is widely believed, helped precipitate the violence of the Arabs.[20]

For them and their supporters, Hebron is "the city of the patriarchs", with lengthy Jewish contacts to the area dating back to Abraham. After Baruch Goldstein's massacre of Moslems at prayer, Rabin had apparently considered using the tensions engendered and the shock caused to the settlers to seize the moment and remove them, at least temporarily, from their quarters. But the plan was cancelled because of fears of a violent reaction from the settlers and their supporters. The tensions between them and their Arab neighbors were then resolved by putting all the *Arabs*, still mourning their tragedy, under a curfew for several weeks.

It is not just biblical Hebron that affects modern political decision-making. Just as the Palestinians have their memories of key tragedies that history has inflicted on them, so the Israeli psyche is affected by the 1929 massacre of about seventy Jewish inhabitants of Hebron. At that time, Arab and Jewish communities lived intermingled in that city. In an organized manner, and at a pre-arranged time, a pogrom took place; later almost all the remaining Jews left the city. Like Bloody Sunday in Ireland, Sharpeville in

South Africa, or the 1919 Amritsar massacre in India, these events became entrenched in the common memory, and their ongoing impact can take precedence over rational calculations. Unfortunately, what is lacking in the Israeli consciousness is that, parallel with the violence, there were also instances of Arabs warning their Jewish neighbors of the coming violence and providing them with safe havens. If a Truth and Reconciliation Commission is set up, it would have to deal with all these different and difficult aspects of Hebron in the mosaic of Arab-Jewish contacts; but certainly the role of the Arab "good Samaritans" should be emphasized along with the violence.

The suggestion of a responsible accounting for harm inflicted cannot ignore the unique dilemmas which a full-fledged tribunal would encounter.

Firstly, there must be a mutual willingness to place the problematic aspects of each side before a joint and neutral body. Given the length of the conflict and its intensity, reaching back into pre-state times, clear restrictions would have to be placed on the nature and number of issues to be investigated. Every precaution would have to be taken to ensure that no exploitative use is made of material collected. The aim is to enable the sides to indicate their willingness to acknowledge their past errors as they affirm their intention of seeking a better joint future. These restrictions would be of special importance to Israel, because of the way it is often subjected to a barrage of criticism which other countries, with equal or worse records, are spared.

One fact has to be made perfectly clear. Even under the most favorable circumstances, the Israel public, often claiming indignantly and self-righteously that, "The whole world is against us,"— based on their perceptions of still rampant anti-Semitism— will not be eager for any such deep soul-searching. Were there to be any indication that the underlying motivation for such accounting is to further lambaste Israel, or that its findings would be utilized to do so, this would end any prospects of a reconciliation process.[21]

Because of the uniqueness of a reconciliation process involving two separate countries, the emphasis should be not only on the failings of both sides, but also on the positive aspects of cooperative endeavors or individual acts of helping behavior. Besides the above-mentioned altruism of Hebron Arabs, there have been other instances of Palestinians protecting Israelis from violent attack. On occasion, the help has been in the opposite direction. Thus, when a Palestinian terrorist was caught after a bomb explosion in Jerusalem, and there was a danger of his being lynched by an enraged mob, an Orthodox woman intervened to save him from the wrath of the crowd until the arrival of the police. Her name, act and example should be fully recorded and continually publicized.

It is larger considerations such as these, in addition to the undoubted problematics of setting up a two-state commission, that leads to the idea of seeking an alternative means of expressing reconciliation—not necessarily as an investigative tribunal, involving witnesses, cross-examination, and summation reports with recommendations, but in a more permanent, thorough and balanced manner: in the form of a museum, to be financed, designed and operated by both sides working in close unison. The ideal site for such a museum would be astride the green line, in a place accessible to a ready stream of visitors. Jerusalem itself is a possible venue (though there is already a Museum of Tolerance devoted to issues of a similar nature). The suggested museum would clearly have to be a joint project, not only with representation of Israelis and Palestinians, but also with the active involvement of Israeli Arabs. While it would probably require some degree of official recognition—perhaps as part of the terms of the proposed Confederation—absolute autonomy of those responsible for the contents would have to be guaranteed. Its funding, therefore, would best be based on non-governmental sources.

The museum could provide a historical perspective for understanding the clash between Zionism and the local Palestinian inhabitants, with parallel exhibits effectively describing the

different narratives of these two nationalist movements, with respect to their struggle against each other and against the Ottoman and British Mandatory rulers. No less than tribunals—and in some respects more—museums can play a significant role in preserving historical memory and presenting it in a meaningful manner. A museum of this nature exists in Northern Ireland; in Cape Town, South Africa, there is a particularly interesting museum comparing Nazi attitudes toward Jews with apartheid attitudes toward black South Africans. The many museums that have proliferated in recent years, devoted to specific topics, including controversial ones, or with ideological messages, should provide useful guides as to how the placement, architecture, interior design, contents of the exhibits, and related educational projects could most effectively be carried out. It could be a home for academic conferences and for regular meetings of Israeli and Palestinian youth, exposing them to the full measure of the complexities of the past history of both peoples, and making them aware of the possibilities of a future of cooperative endeavors.

There should also be no illusions as to the problematics of ensuring a fair presentation of the material, whether through a tribunal or whether through a museum. Historical evidence is never neutral; it is always accompanied by some degree of ideological propensities, or even individual biases. Representation of both sides would serve, in large measure, to counter these phenomena. But even within each side, there are differences of opinion. Within Israel itself, the right and left wings have totally different versions of how the state was established; even the terminology can be volatile, as when Israeli policy is defined as "restraint", e.g., during the 1991 Gulf War or during the second *intifada*. The word restraint ("*havlaga*" in Hebrew) raises associations of the deep rift between left and right in pre-state days, when the former chose to practice restraint in the struggle against the British, while the latter engaged in active resistance and even terrorism. Thus, even today, when the right-wing parties practice restraint (i.e., do not respond with the full power of army might), they prefer any word but "*havlaga*" to describe their policy. They will choose "*ipuq*", which means exactly

the same, but does not have the same explosive historical connotations.[22]

Even ordinary academic research can lead to intense responses. Recently a master's thesis in history, which was accepted by Haifa University with a grade of distinction, described a massacre allegedly committed by a particular Israeli army unit in the early days of the state, in a village inhabited by Arabs. Members of this unit sued the author of the thesis for libel. A compromise was reached when the student agreed to withdraw some of his more critical comments, then leaving the university to struggle with what to do with the degree conferred and the grade given—as well as many question marks as to the nature of historical truth.

One of the most interesting developments arising out of the first *intifada*, in the late 1980's and early 1990's, was the establishment of B'Tselem, a human rights organization, whose major aim is to monitor Israeli violations of human rights in the territories. Over the years the organization has built up a respectable reputation of reliability; and the numerous reports that have been issued over chosen, focused issues, are available in several languages. (As an interesting aside, it might be mentioned that one of the early field workers, a Palestinian, is now the head of a human rights organization in the area under the control of the Palestinian Authority.) The accumulated information is an important source for news reporters, academic researchers and human rights activists. It could be of inestimable value both for a tribunal and for a museum. Another Israeli human rights organization, the Public Committee against Torture, has already organized an example of a tribunal; in the course of several hours, it allowed evidence of Israeli violations to be presented to an audience of several hundred. The proceedings were filmed for possible use in television.

These are, of course, only partial expositions. And they lack the essence of true reconciliation procedures: mutuality, awareness and acknowledgment that both sides have erred and that both are embarked on a searching and honest effort to reveal all, understand as much as possible, ask for a forgiveness, and in return for a similar honesty on the other side, offer its own forgiveness. The present

tensions and accompanying violence, with the breakdown in the tenuous contacts that had been established during the height of the peace process, do not bode well for such a reconciliation process, but neither do they bode well for the resuscitation of the peace process itself. The present impasse in the peace process only makes the need to arouse awareness of ultimate goals all the more imperative. President Bush's road map, the present basis of the peace process, contains almost nothing of this nature.

One more point should be noticed about the problematics of truth and reconciliation commissions. As already mentioned, not all the political factions in South Africa were favorably disposed to the idea of the Commission and to the way it actually performed. Israel, too, has experienced the difficulty of uncovering the truth even of recent events, because of people's Rashomon-like responses, each seeing an event from a different personal perspective. On several occasions, official judicial commissions of inquiry have attempted to determine what happened in a particular momentous situation. Most of these commissions actually dealt with security issues: the Yom Kippur war, the massacre at Sabra and Shatilla, the massacre in Hebron, the assassination of Prime Minister Yitzhak Rabin, the police killing of thirteen Israeli Arabs, and the interrogation procedures used against Palestinians by the security service.[23] All of them evoked intense public debate, and their recommendations, while generally implemented by the government, were not always accepted by the public. Furthermore, when the commissions were appointed, they were limited by the terms of the mandate conferred on them by the government. Factors that lay outside this framework were not subject to their probing.

For instance, the present judicial commission examining the killing of thirteen Israeli Arabs during the demonstrations of October, 2000, is by its mandate committed only to the behavior of the demonstrators and the police, not to the larger context which precipitated the violence. The demonstrators were reacting to the killing of five Palestinians by Israeli police during demonstrations on the Temple Mount. In turn, the demonstrations on that occasion were a response to Arik Sharon's provocative visit there the previous

day. The visit was ostensibly to prove the inviolability of Israeli sovereignty over the Temple Mount, and the indivisibility of Jerusalem, in the light of what was seen as then Prime Minister Barak's vacillation on these two matters. Sharon and his fellow parliamentarians were trying to show physically that the green line and all that it signified did not exist any more, certainly not in Jerusalem.

Since the members of the commission were not given a mandate to explore the impact of Sharon's visit and the reactions it provoked, their findings will likely be truncated and will not reach the heart of the issues underlying the violence. These issues are the focus the following chapter.

FOOTNOTES—CHAPTER 7

1. For a critical analysis by a leading South African human rights lawyer, see John Dugard, "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question," *South African Journal on Human Rights* 13 (1997), p. 267.

2. See Patricia Hayner, "Fifteen Truth Commissions: 1974-1994. A Comparative Study," *Human Rights Quarterly* 16, p. 597.

3. See *Mabo v. Queensland* (1992)175 C.L.R. 1; 66 ALJR 408.

4. See Public Law 103-150-Joint Resolution of 103rd Congress, 5 January 1993. It states, *inter alia*: "The Congress, on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on 17 January 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people . . ." The resolution then "apologizes to Native Hawaiians" and adds the need to "provide a proper foundation for reconciliation between the United States and the Native Hawaiian people . . ."

5. It should be noted that some reservations have been expressed about the *sulha* because of its negative implications as to the source of the conflicts, which sometimes stem from violence linked to antiquated concepts of family honor.

6. John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

7. John Pratt, "Citizenship, Colonization and Criminal Justice," *International Journal of the Sociology of Law* 19 (1991), p. 293; and Nancy Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Canberra: Australian Institute of Aboriginal Studies, 1987).

8. For general discussion of Jewish law and its historical development, see Menachem Elon (ed.), *The Principles of Jewish Law* (Jerusalem: Keter Publishing, 1974), consisting of items from *Encyclopedia Judaica*.

9. Leon Sheleff, *Weeds in the Garden of Eden: Biblical Narratives and Israeli Chronicles* (Tel Aviv: Ha-Kibbutz Hameuchad, 2002, in Hebrew): ch. 2, based on *Genesis* 25: 7-11; 33: 1-17; and 45: 1-15.

10. The massacre in Hebron was investigated by a judicial Commission of Inquiry, headed by a former President of the Supreme Court, Meir Shamgar.

11. See, for instance, the description in Louis Ginzberg, *Legends of the Bible* (Philadelphia: The Jewish Publication Society of America, 1968), pp. 187-190, under the heading, "The Meeting Between Esau and Jacob".

12. A detailed description is given in *Genesis* 23 of the deal that was made between Abraham, a stranger in Hebron, and a local inhabitant, Ephron the Hittite.

13. See *Ibid.,* 25: 9: "His sons Isaac and Ishmael buried him in the Cave of Machpelah"—a little-noted fact, but one with far-reaching implications inasmuch as biblical themes have an impact on modern life.

14. It should be noted that at this stage Isaac is still alive, yet the Bible makes only passing mention of a meeting between the father and the son (*Ibid.,* 35:27). Then: "and he was buried by his sons Esau and Jacob" (*Ibid., ibid.,* 29).

15. *Genesis,* 33:7: "next Leah, with her children, came forward and bowed low; and last Joseph and Rachel came forward and bowed low".

16. The words "kiss" and "bite" are similar (*neshiqa* and *neshicha*)—so that, where the Bible speaks about a kiss (*neshiqa*), later interpretations suggest that the word should be bite (*neshicha*), i.e. that Esau did not kiss Jacob, but bit him. Ginzberg provides a full description of the *midrashim* (interpretive stories) that emerged to provide an alternative description

from that which appears in the biblical text. See Ginzberg, *op.cit.*, at pp. 188-190. The need to excoriate Esau is also related to the way commentators identified him with Israel's enemies over the centuries—first with the nation of Edom, then with the Roman Empire, finally with Christianity.

17. This is well described in a recent Hebrew book by Israel Jacob Yuval, *"Two Nations in Your Womb": Perceptions of Jews and Christians* (Tel Aviv: Am Oved, 2000); see also A.F. Segal, *Rebecca's Children: Judaism and Christianity in the Roman World* (Cambridge: Harvard University Press, 1986).

18. A book was also published in Hebrew praising Goldstein, based on a play on words involving his first name, *Baruch*, which means blessed.

19. A recent issue of *Israeli Sociology*, a social science journal, was devoted in part to a series of articles on the topic of reconciliation. See *Israel Sociology* 3:2 (2001, in Hebrew). Included are articles by Israeli sociologists, political scientists and jurists, some of which have been also been published in English: Nadin Rouhana, "Identity and Power in Israeli-Palestinian Reconciliation"; Gad Barzilai, "Reconciliation Between Communities: A Human Rights Approach"; 'Amal Jamal, "Mutual Recognition and Transformation of Conflicts"; Liora Bilsky, "Between Justice and Reconciliation: Thoughts about *Death and the Maiden*"; Emanuel Marx, "Compensation for Palestinian Refugees"; and Malka Rosin-Aharonson, "Political Reconciliation Between Israel and the Palestinians. The Economic Aspect".

20. For description of some of these actions, see B'Tselem, *Free Rein: Vigilante Settlers and Israel's Non-Enforcement of the Law* (October, 2001).

21. The Durban Conference on Racism served only to clarify the depth of underlying antagonism towards Israel, which extends far beyond any critique of its policies toward the Palestinians.

22. This issue of terminology arose originally not so much in connection with the Palestinian conflict, but during the 1991 Gulf War against Iraq, when, almost every night, during a six-week period, long-range rockets were aimed at Israel from Iraq, causing extensive damage. Israel did not respond; it tried to remain outside of the confrontation in order to preserve the delicately-balanced coalition with Arab states.

23.   In some instances, the head of the judicial commission was the President of the Supreme Court (Agranat for the Yom Kippur war, Kahan for the massacre at Sabra and Shatilla), or a retired President (Shamgar in the cases of the massacre in Hebron and the assassination of Prime Minister Rabin, or Landau for the interrogation procedures of the security forces) or a member of the Supreme Court (Justice Orr in the case of the killing of thirteen Israeli Arabs).

Chapter 8

Intifada:
Commissions (and Omissions) of Inquiry

E VER SINCE THE second Palestinian *intifada*, some of the opponents of the Oslo peace process have referred to those who were its architects, its negotiators, and its most fervent supporters as the "Oslo criminals". They have called for criminal proceedings to be lodged against these people or, at the least, for an official investigation to be conducted to discover who bore responsibility for the horrendous situation that ensued from the Oslo process. Israel has been exposed to a wide range of pinpointed violence, including suicide bombings, mortar attacks across the green line, small-arms firing into Gilo, a suburb of Jerusalem, to which its response—targeted killings, tank and air attacks on key buildings alleged to harbor preparations for acts of terror, incursions into Palestinian towns and villages, and kidnappings of wanted persons—has evoked an increasing barrage of internal and international criticism.

This second *intifada*—*Intifada el-Aqsa* (the name of the mosque on the Temple Mount) is vastly different from the first *intifada*. The first *intifada* led, in the long run, to the Oslo peace process, when the Labor party, elected to power under Yitzhak Rabin in 1992, began to realize that the major priority for Israel was to reach a settlement with the Palestinians. Israel's internal problems were being held hostage to the efforts, resources and debate expended on maintaining control of the territories. The first *intifada* made clear the heavy price that continued occupation would elicit. One of the little-known aspects of the first *intifada* was that it opened up new lines of communication between many Israelis and Palestinians. The *intifada* of 1987 (twenty years into the occupation) clarified the fact that not only the PLO was fighting against Israel from bases in Lebanon, Tunisia and elsewhere, but that the local population had reached the end of its tether. The Palestinians wanted an end to the Israeli military presence; they wanted an end to the continuing encroachment of Jewish settlements on their land; they wanted the right to self-determination; they wanted to take their recognized place in the community of nations.

In response to this outward manifestation of tensions that had been building up among the Palestinians, small splinter groups sprung up in Israel protesting the continued occupation, in addition to and beyond the larger and better-known efforts of Peace Now, an organization that had been calling for an end to the occupation since the late 1970's. Through these groups more personal contacts were established with Palestinian counterparts, and gradually a climate of hesitant trust was gingerly forged. These intricate layers of contacts laid the groundwork that made the secret Oslo talks possible and the actual peace process practical. The process itself was dependent on further and far more intensive confidence-building, this time at the official level, involving such complex arrangements as joint patrols in the territories of ex-PLO fighters and Israeli soldiers,[1] the return to Gaza and the West Bank of active members of the formerly banned organization, and selective

prisoner releases. When one of the major architects of the process, Shimon Peres, spoke of a "new Middle East", it involved more than just a settlement with the Palestinians. Through the process, consular and diplomatic relations of varying kinds were set up with a number of Arab states in the Persian Gulf and in North Africa.[2]

The major achievement was undoubtedly the peace agreement with Jordan. In larger political terms, the treaty meant a total revocation of any Jordanian claim on the West Bank or Jerusalem, but it meant also the inevitability of a Palestinian state in that area. This simple fact was conveniently ignored by politicians, pundits and academicians, even though in lieu of any such a solution, the only possible alternative would be a bi-national state in what was once Mandatory Palestine, an outcome that few Jewish Israelis were prepared to contemplate. Even though increasing numbers of Israelis were beginning to realize the inevitability of what formerly had been the unthinkable, at no stage during the Oslo process was an official statement made that Israel recognized the inherent rights of the Palestinian people to self-determination, a declaration that, while providing the Palestinians with their desired goal, would from then on have put the onus on them to satisfy Israel's demands for firm security guarantees. This would have changed the whole nature of the process from constant pressures on Israel to make piecemeal concessions, which in the long run are, in any case, clearly unavoidable, to serious negotiations over Israel's vital security needs. It also could have been based on a theoretical perspective of conflict resolution (rarely considered), to wit: The side making the initial moves at the end of a protracted conflict may well gain favorable advantages in the subsequent negotiations.

Even with the gradual change in attitudes, about half the population was still opposed to making territorial concession, as was reflected in the make-up of the Knesset (Israel's parliament). This was particularly noticeable during Ehud Barak's premiership; while he chalked up a convincing victory in the direct race for prime minister, his Labor party was greatly reduced in size and

made him dependent for maintaining control of the government on many of the smaller coalition parties that had formerly been part of the Netanyahu government. Thus, both within the government itself and in the Knesset, a delicate balance was in place that prevented any outright affirmation of what seemed increasingly to be the only logical outcome of the final stages of the peace process: the recognition of a Palestinian state, with its capital in East Jerusalem.

When parliamentary and public support for Barak began to collapse, he decided to go it alone and "go for broke" by offering more than any previous prime minister, in the hope of achieving an acceptable final settlement, one that would attract sufficient support in the next election or in a special referendum on the issue. The map he offered was, however, too little for the Palestinians—and too much for the Israelis. It involved retaining eighty percent of the settlements (considered in Israel a concession because of the twenty percent to be relinquished), while offering the Palestinians control of only three separate areas on the West Bank, lacking territorial contiguity because of their placement along the new border of Jewish settlements. This map, crucial for understanding subsequent developments, was not based on Israel's fundamental security needs, but on the physical reality of widely scattered settlements. It was not based on reasonable border adjustments to cater for Israeli vulnerability in certain areas, such as the narrow strip in the center of the country, but on the need to placate public opinion by minimum interference with the comfortable arrangements to which Israelis had become accustomed.

Most particularly, without sufficient prior preparation of public opinion, Barak had put the right of return and the division of Jerusalem on the table. True, there can be no final settlement without at least discussing these issues. Yet the opposition among Israeli citizens, as well as some of the coalition partners, was not willing to allow even the mention of these topics. As for the general public, Arafat's rejection of Barak's offer was seen as a sign of his duplicity. Having been offered so much more than any previous

prime minister had even contemplated, his rejection was proof positive of his unwillingness to make the same kind of difficult concessions that Barak himself had made.

While Arafat's sincerity is a dubious and problematic factor in the whole history of the complicated negotiations, there are three simple facts which the Israeli side has been unwilling to face, irrespective of Arafat's character, his ultimate motives, and the degree of his responsibility for the present state of affairs.

First, a democracy cannot, in the modern world, allow itself to maintain military control over another people without making all the necessary arrangements for early termination of its military occupation. Failure to do so will ultimately undermine the very foundations of that democracy. Second, large-scale transfer of population cannot be countenanced when it deliberately contrives to create a hodge-podge of affluent settlements amidst impoverished refugee camps. The contrast will inevitably lead to a haughty disregard of minimum neighborly behavior by the one group, and increasing despondency by the other. Third, unilateral actions taken by virtue of military power can never provide a sound basis for long-term relations. The benevolence, once claimed to be the hallmark of the early years of the Israeli occupation, will ineluctably degenerate into increasingly repressive control. In sum, briefly put, a green line signifying a border can be ignored only at the peril of dire consequences some time in the future. This is not the wisdom of hindsight. It is a simple projective prediction—and was indeed predicted by many in academic analyses, newspaper articles, political speeches.[3]

In the few months after the breakdown of the Camp David talks, tensions were constantly growing. The process was two years beyond its scheduled climax, Clinton's presidency with its extensive good offices was nearing its end, and Barak's government had lost its majority in the Knesset and was hanging on to power by manipulative parliamentary maneuvers. It was at this moment that the leader of the opposition, Arik Sharon, decided to make his

controversial and provocative visit to the Temple Mount. Ostensibly the visit was aimed as a counter-move to Barak's willingness to negotiate a possible division of Jerusalem. But beyond these larger issues of sovereignty and the status of Jerusalem and the Temple Mount, Sharon was using a sensitive matter, with deep religious overtones, not just in opposition to Barak, but also to help fend off potential opposition from within his own party—from the person he had replaced as its head, Benjamin Netanyahu.

To understand this aspect of the political drama, it is necessary to know a simple fact: The day of Sharon's visit to the Temple Mount was the day that had been previously assigned for an important announcement as to the fate of Netanyahu. He and his wife had been under police investigation for a series of actions involving alleged abuse of authority and bribery in connection with the final days of his premiership. Extensive media coverage had been devoted to this topic, and there was a possibility of the former prime minister being put on trial. Leaks to the press had indicated that the attorney-general had finally put an end to the protracted police investigation and was apparently going to close the file, while possibly reprimanding the Netanyahus for their behavior.

Such a clean ticket would open the way for Netanyahu to return to the political arena, which he had relinquished immediately after his defeat to Barak in the 1999 elections. He would also naturally be the recipient of a wave of sympathy for the ordeal that he had undergone and for the humiliating manner in which he had been treated by the police. Thursday was the day assigned for Sharon's planned visit to the Mount; it was also the day that had already been set aside for the official announcement by the attorney-general. This was probably no chance coincidence, but might have been carefully premeditated. The following day, Friday, was the beginning of the Jewish New Year, and large, festive copies of the daily newspapers would be found in most homes. Sharon's visit would compete for newspaper coverage with Netanyahu's clearance. This political consideration may be noted also in the

fact that Sharon was accompanied at the Temple Mount by almost half of the parliamentary faction of his party—precisely those who would support him in any challenge by Netanyahu.

Sharon's visit was no sudden decision taken on the spur of the moment, but was well planned in advance, as attested by the hundreds of police required to protect him and his fellow-parliamentarians. The visit was announced several days in advance, and voices were immediately raised in several quarters, demanding that the plan be quashed and suggesting that the police should ban the visit out of considerations of public safety. A prominent Jerusalem Palestinian, Faisal Husseini, warned of a possible strong reaction of Palestinians as to what would be seen as provocation. Knowledgeable of the intricacies of Israeli politics, he added that Sharon should perform his political ploys outside of Moslem holy sites. As it transpired, the visit itself passed off without bloodshed, though it was marked by angry Palestinian protest, and the subsequent media reporting gave equal coverage to Sharon's visit and to Netanyahu's clearance.[4] The balance between the two rivals, in terms of public relations, was maintained.

The following day, with large crowds of Moslem worshippers that gather every Friday for prayers at the el-Aqsa mosque, and with heightened tension in the air, there were violent clashes between Palestinians and the Israeli police, as a result of which five Moslem worshippers were killed. This was the trigger for the *intifada*.

There are those, including Barak himself, who have exonerated Sharon. It was pointed out, for instance, that his visit had gone off without casualties. However, there should have been anticipation of tens of thousands of worshippers at the mosque the next day. Many of the worshippers might have ignored the prior report of Sharon's intended visit and not bothered to respond to the call for a protest at the site, but they would certainly have seen television coverage of the event, in which Sharon and his fellow parliamentarians could barely be discerned, because of the large posse of police surrounding and protecting them. It was this massive security presence that probably made a key impact, raising anew

the question as to why the police did not intervene to prevent such the visit, when they themselves were well aware of the massive number of security personnel who would be required to preserve order at a sacred site.

There is a substantial body of opinion, including among disillusioned leftists, that holds that Arafat and his confidants wanted an outbreak of violence to further their political aims, and were only waiting for the convenient circumstances that could be used as a trigger. Sharon did no more than supply the trigger. This is a difficult argument to refute. One cannot be sure what would have happened had the visit not taken place. However, if it is true that tensions were so high and Arafat's intentions were so transparent, then Sharon's visit becomes all the more reprehensible, and the police more culpable in their failure to prevent the visit.

All of these aspects of Sharon's visit will not be methodically examined by the judicial commission of inquiry into the police killings of thirteen Israeli Arabs during widespread demonstrations that erupted in Arab towns and villages throughout Israel, following the visit and the subsequent shooting at the site. The background to the demonstrations is not part of its terms of reference.[5] In any event, commissions are no a guarantee of a fully accurate picture. Often alternative interpretations can be latched on to the findings of a commission.

It is accepted practice that serious failings in governmental operations should be exposed to comprehensive and official examination. Israel itself has a sophisticated statute, providing for official commissions of inquiry to be established by virtue of a decision by the cabinet, in which the chief justice is assigned the task of appointing the members of a commission, to be headed by a judge, generally a justice of the Supreme Court. On several occasions, the chief justice has appointed himself to head such a commission. Most of the dozen commissions that have been appointed, especially those chaired by presiding or former chief justices, have dealt with security issues: the failure of military intelligence to foresee the impending Yom Kippur War (warnings by a middle-level officer had been ignored); the massacre by Baruch

Goldstein of of Moslem worshippers in Hebron (the army claimed that it had been totally surprised by the attack); the assassination of Prime Minister Rabin by Yigal Amir, a religious law student (serious lapses of minimal protective cover at a peace gathering of over a hundred thousand were revealed); the use of torture by security personnel when interrogating suspected terrorists (leading to controversial recommendations to allow "moderate physical pressure"); and the responsibility of the Israeli authorities, headed by then Minister of Defense Arik Sharon, for the massacre perpetrated by Christian phalangists on Palestinians in the refugee camps of Sabra and Shatilla (which led to Sharon's forced resignation).

While these commissions have made a notable contribution to revealing and analyzing disturbing aspects of Israeli society, they are seriously limited in their capacity to reach a definitive determination of the issue, as they are obliged to work within the limitations of the mandate which is imposed on them. Thus, preliminary, tangential or hidden aspects are inevitably ignored or downplayed. In the controversial Landau Commission inquiry into the use of torture in security interrogations, as well as subsequent fabrication of evidence given to the courts about the manner in which confessions were elicited, no attempt was made to re-examine all those Palestinians found guilty on the basis of their confessions— even though they, too might have been elicited by such illicit means. Similarly, the full measure of the religious fanaticism of both the assailant against Moslems at prayer in Hebron and the assassin of Rabin in Tel Aviv was only peripherally dealt with, despite the overriding importance of Jewish religious fundamentalism in the motivations of these murders.[6]

Thus, commissions are unfortunately limited by the terms of reference of their mandate and are unable to probe or analyze deeper issues involved in these matters, including possible interconnections between them. For example, the posthumous adulation bestowed upon Baruch Goldstein might have encouraged Yigal Amir, Rabin's assassin, when contemplating his plan and the likelihood of being

killed by security officers in an immediate response to his opening fire. This aspect of the assassination has never been examined.

No less serious is the fact that Goldstein's suicidal act chronologically marks the beginning of suicidal bombings in Israel. The terrorist group, Hamas, immediately announced that it would seek revenge and hinted at a series of bomb attacks which were subsequently carried out—five in number—over a period of several months. These attacks undoubtedly undermined the Oslo peace process, partly because of the understandable revulsion by the Israeli public in general, but also partly because the Israeli opponents of the peace process used these terror attacks to demand an end to the peace process—one of the aims of the Hamas retaliation. It is also generally accepted that the narrow defeat of Shimon Peres in the subsequent elections was a direct result of the suicide attacks, which continued later after a leading member of the Hamas was eliminated by Israeli forces. (The Israeli authorities made no effort to hide their involvement. To the contrary, the media and the public were supplied with detailed information as to the sophisticated means used, and it may well be presumed that this unusual publicity was deliberately chosen, in order to allow the security forces the opportunity to recover some of their prestige lost after Rabin's assassination.)

As for the Agranat Commission's report on the Yom Kippur War, in which top-level army echelons were blamed for having been caught napping, a leading Israeli journalist, Amnon Kapeliouk, responded by arguing that there had been no real lapse at the security level, but that the basic premises on which the Israeli political leadership had operated were the underlying cause of the inevitable descent into a further round of combat, six years after Israel's decisive victory in the Six-Day War.[7] Complacency in the wake of the 1967 military triumph was the source of Israel's failings, as was a haughty disregard for simple incontrovertible political facts on the ground.

Similarly, the Kahan Commission, which led to Sharon's dismissal from the position of minister of defense in 1983, had

focused on only one defined aspect of the Lebanon War: the massacre of Palestinians in the refugee camps of Sabra and Shatilla (near Beirut), committed by Christian phalangists, then Israel's allies, under the watchful eyes of Israeli troops who made no effort to prevent the slaughter or to terminate it. Sharon himself was not present, but the Commission attributed indirect responsibility to him, as such a development should have been foreseen, given the wrath of the Christians at the assassination of the recently-elected President of Lebanon, who had come from their ranks.

It should be mentioned that the government under Prime Minister Begin had only reluctantly acquiesced in the demands for appointing a commission, in response to a mammoth public demonstration of several hundred thousand. Many of those demanding an inquiry into the Sabra and Shatilla massacres were also venting their anger at the war in Lebanon itself, but the events leading up to the war, unlike in the case of the Yom Kippur War, were never investigated. There is every possibility that some of the real reasons for that war had to do with internal Israeli politics (i.e., appeasing Israel's right-wing after the Sinai withdrawal[8]), and with the desire to warn Palestinians in the West Bank of similar harsh Israeli reprisals if they ever dared to support PLO activity from outside (such as hijacking airplanes, taking hostages in Israel, etc) with an uprising of their own.

It is clear that governmental commissions would have great difficulty examining such politically derived factors, and I make no specific criticism of the narrowness of the mandate given to the Kahan Commission. But the very fact of its limited nature makes it incumbent upon investigative journalists and academic researchers to complement the more cautious and focused governmental recommendations. From an Israeli point of view, the problems of the Lebanon War (known in right-wing circles by its code name, the "War for Peace in the Galilee", i.e., the northern sector of the country) relate not just to the massacres committed in 1982, but to the total tragedy of the war, including its heavy losses of Israeli soldiers in Lebanon, its exposure of Israeli vulnerability, and the dubious manner in which a limited military

operation in southern Lebanon expanded into a full-scale war, with Israeli troops reaching the outskirts of Beirut. In particular, accusations have been made (some of them leading to libel trials against journalists in the United States and in Israel) that Sharon hoodwinked Begin into a larger war than was intended—an accusation repeated by Begin's son, during a period when he was a dominant political actor as a member of the Knesset and a likely future contender for leadership of the party.

A further aspect of the war in great need of deeper examination has to do with events some years later, in 1985, when delicate negotiations were entered into for the release of three Israeli soldiers who had been captured, in return for the wholesale release of over a thousand Palestinian prisoners—some of whom were serving life sentences for terrorist acts, including murder, others of whom had held leading positions in terrorist organizations. This lopsided exchange was explained to (and basically accepted by) the Israeli public as being conducted in the recognized principle of the Jewish tradition of redeeming prisoners. However, it is far more likely that Israel was lax in its bargaining for ulterior motives; it may well have been possible to have achieved the release of the Israeli soldiers in return for a much smaller number of terrorist prisoners.

The supposition that has never been adequately researched is that the government was prepared to adopt a lenient approach toward the release of terrorist murderers (in direct opposition to long-standing Israeli policy) so as to soften Israeli public opinion regarding plans for an early release of members of what was known as the "Jewish underground" (a convenient way to avoid using the pejorative term of terrorism)—a group of 27 religious extremists, nearly all members of settlements in the occupied territories, who had been found guilty of a series of terrorist attacks against Palestinians. These activities were climaxed by a murderous attack on a Palestinian university, in which three students were killed and over thirty wounded, and the planting of bombs in cars, leading to serious physical injury to leading Palestinian figures, including the mayor of a large city. The members of the group were arrested,

perhaps slightly prematurely, before the full membership and the identity of those offering indirect support were divulged. The security forces were obliged to act speedily in order to forestall a coordinated operation in which explosives were attached to five passenger buses, owned by Palestinians and operating on the West Bank. The culprits were apprehended shortly after the explosives had been put into place and before they could be detonated. Had they succeeded, the result could well have been the deaths in one day of over 100 Palestinians.

It later transpired that one of the projected plans of the Jewish terrorists was to blow up the mosque on the Temple Mount.[9] All of the accused, including those found guilty of murder, were granted early releases from prison as a result of intense public pressure from the political right wing on their behalf, including a petition in favor of their early release signed by hundreds of thousands, and supportive statements by leading political figures, among them cabinet ministers. Yitzhak Shamir, then deputy prime minister in a coalition government, was one of the first to argue that the release of Palestinians could not be tolerated while members of the "Jewish underground" were still incarcerated. At that stage, their trial had not yet been completed, but within a few years of sentencing, all of them received drastic reductions of their sentences; the most any one of them served being seven years. Thus, it is possible that Israeli negotiators deliberately released such large numbers of Palestinian terrorists so as to create a climate of public opinion amenable to the early release of the Jewish terrorists in the so-called "underground".

This is an interesting fact, not merely as a possible interplay between the release of over a thousand Palestinians and the subsequent intervention on behalf of the Jewish terrorists, but also because of the constant critique by Israeli authorities of the lax attitude of the Palestinian Authority towards members of Hamas and other organizations, who benefit from what is known in Israel as "the revolving door", i.e., arrests, trials and early release. That door apparently also swings easily for Israeli Jews—not just the 27 "underground" members, but also for a long list of extremists

convicted for acts of violence against Palestinians. To these can be added illegal acts, including some with fatal consequences, against Palestinians, for which no one has ever been tried.[10] These are aspects of Israeli inactivity that need to be fully and properly investigated—as there is a need for similar accusations made against Palestinians to be examined by the Palestinian authorities. These examples are what I have called Omissions of Inquiry.

Linked to the problematic early release of Israeli terrorists by the pardoning authorities (the president, on the recommendation of the minister of justice) is the agonizing possibility that the leniency displayed to the "Jewish underground" and to others sentenced to life imprisonment for murder, was also a catalyst in the considerations of Baruch Goldstein and Yigal Amir—namely, that if their potentially suicidal actions should end without their demise, then there was every likelihood that, in the course of time, they, too, would be the recipients of presidential pardon. In fact, Amir himself, in the course of his trial, specifically boasted during his cross-examination by the prosecutor that he would be granted freedom within fifteen years.[11]

Briefly put, I submit that the wholesale release of large numbers of Palestinian terrorists in a lopsided prisoner exchange created the conditions for leniency toward the "Jewish underground," which then served to facilitate Baruch Goldstein's action (with the presumption that he, too, would be pardoned if he were to survive). His act then both set off the first serial sequence of Palestinian suicide bombings, and, through the adulation showered on him in extreme religious quarters, led to Yigal Amir's assassination of Rabin, the idea being that he would either become a martyr like Goldstein, or would be pardoned like the "Jewish underground." Thus, the unnecessarily lenient amnesties for Israel prisoners found guilty of violence against Palestinians may well have led to the subsequent escalation of terrorist activity by both Palestinians and Israelis.

Perhaps the most blatant of investigative omissions relates to the role of Prime Minister Arik Sharon in the events leading up

the present *intifada* in 2000, when he was still leader of the opposition.

Sharon himself was later carried into power on the wave of anger by many Israelis at the violence of the second *intifada*, in contrast to the optimistic promises of the Oslo process. But his victory was also due to a successfully organized boycott of the election by Arab Israelis, in the wake of the killing by the police of thirteen Israeli Arab demonstrators in the early stages of the *intifada*. Their rage at Barak's government over this issue found an early outlet in the boycott, which critically damaged his prospects of re-election.

The killings themselves are the subject of an official Commission of Inquiry, headed by Justice Theodor Orr, which has already divulged extremely disturbing aspects of police activity, ranging from unpreparedness for the outbreak and lack of suitable riot equipment, to serious errors of judgment by high-ranking officers and the likelihood of irresponsible, perhaps even deliberate, shooting by some of the police.

It is unlikely that the trigger effect—Sharon's provocative visit to the Temple Mount—will be fully examined, since it falls outside the mandate that has been given to the Commission. This factor will remain a disputed event—but it is not possible to witness the hundreds of policemen protecting Sharon and the coterie of parliamentarians from his party on their visit to this sacred site, without being aware how insultingly arrogant this action was, the culmination of years of Israeli obtuseness regarding Palestinian sensitivities.

The problem was not so much Sharon's visit there as an ordinary individual, but the announcements prior to the event and the massive police presence. Indeed, one of the immediate repercussions arising out of Sharon's visit was the ban on visits by Jews—partly because of the response of the Islamic leaders responsible for the site, partly because of restrictions imposed by the Israeli police for security reasons. These restrictions have been kept in force ever since, but, shortly after the most recent election in 2003, the new minister of internal security indicated that this directive would be

changed in the near future, by agreement with the Moslem authorities if possible—but if not, by unilateral Israeli decision.

Sharon is not an observant Jew, yet when, for political purposes, he visits the homes of leading rabbis who command strong control over religious political parties, he is pedantically careful to cover his head with a *yarmulke* out of respect for his hosts, even if the purpose of the meeting is only secular and political. In contrast, on the Temple Mount he rode roughshod over Moslem feelings, all in the pursuit of his own narrow political program, while ostensibly claiming to prove Israeli sovereignty over the area. Police protection does not prove sovereignty—only recognition by others can do so.

As a consequence of the *intifada*, Sharon achieved his long-awaited return to power as prime minister, after the ignominy of having being dismissed as minister of defense, some twenty years earlier, on the basis of the recommendations of the Kahan Commission of Inquiry.[12] In the wake of the breakdown of the Oslo process, the heightened level of violence, and the successful Arab boycott, Sharon was carried to victory over Barak in direct elections for the premiership. The ultimate paradox is that, within a few months of Barak's putting an end to the disastrous Lebanon War by a courageous unilateral withdrawal, Sharon, who had initiated that war, provided the flashpoint for the second *intifada*, which then led to Barak's downfall.

Politics makes for strange bedfellows—but it also makes for uncomfortable consequences and perverse paradoxes. As is said mockingly by Sharon's supporters, those who did not want him as minister of defense, now have him as prime minister. But the ultimate paradox may well be that Prime Minister Sharon, who, many years ago, spoke openly of a Palestinian state in Jordan, and who opposed all prior peace plans and treaties, become the first Israeli leader to grant, even if reluctantly, official recognition to a future Palestinian state on the West Bank and Gaza. Indeed, the acceptance of President Bush's road map by the Israeli cabinet, a week before the summit at Aqaba, was already essentially recognition of a future Palestinian state. For those who participated

in the vote, this idea of a state was deliberately downplayed. It appears in the map, but is hedged around with so many Israeli reservations that for those voting in favor, it became peripheral. More important than any firm desire to achieve this outcome was the need to avoid antagonizing the American administration and to ensure the timely transfer of the billions of dollars that were the reward for obedience to Bush's growing impatience. Apart from Sharon, still willing to refer to a Palestinian state (of unknown size and of only a temporary nature) no other ministers were prepared to adopt the new terminology of a changed political scene by referring specifically to a Palestinian state in the offing.

The ongoing impasse required a dramatic act which would be a catalyst to enable the two sides, involved in senseless and mortal combat, to break out of the deathly vice in which they are so tragically and pitifully engaged. Acceptance of the map is indeed a drama—with its farcical aspects for left-wing observers and tragic dimensions for right-wing commentators. The mere fact that somebody of Sharon's past record is involved is undoubtedly significant in itself. Whether he, the renowned soldier of yesteryear, has the political courage to persevere in direct conflict with his erstwhile supporters and his own parliamentary faction is doubtful, though it is not entirely beyond the realm of the possibility. The responsibility of government often wonderfully focuses the mind and certainly clarifies the total picture, which involves not just patriotic declarations and awareness of one's own demands and victimization, but also a minimum sensitivity to the similar situation of one's foes and the need to find an accommodation with them, short of their total capitulation and shorn of one's own self-righteousness. It also requires consideration of the unavoidable impact of realpolitik, in the form of world public opinion and American pressure.

Sharon has been assured of opposition support for any genuine efforts on his part. However, while a verbal declaration has been forthcoming, actual implementation may be delayed for as long as possible, so that the present generation can avoid having to directly

confront some of the grim implications of a peace agreement, with its need for Israeli withdrawal from the territories and possible removal of settlers. Given Sharon's advanced age, he should be able to procrastinate long enough to leave his successor with the ultimate responsibility for withdrawing from the territories; hence, the hints that the time-table of the map requires a change of key scheduled dates.

The disbanding of settlements poses awesome challenges. At the very time that Sharon was meeting with Bush and Abu Mazen, the Palestinian prime minister, a popular political television program was conducting a serious discussion on the dangers of a civil war because of opposition to dismantling the settlements, and on the possible repetition of a political assassination of any prominent politician engaged in making concessions to the Palestinians. The media reported that security forces were deeply concerned about the vitriolic rhetoric once again being resorted to by opponents of the road map, and had substantially increased their protection of the prime minister. The words, "civil war" were even being bandied about; warnings were issued that, if outposts were to be removed, some of the squatters might use their arms to open fire on Israeli soldiers.

Thus, while pressure was being brought to bear on the Palestinian leadership to take action against Palestinian extremists in Hamas and other similar organizations, the prospects of violent actions being taken by Israeli extremists was also being carefully monitored. These extremists were the very people who had enthusiastically supported Sharon in his election efforts, for they saw him, more than any other politician, as their patron who had always furthered their interests, whatever position he was holding in the cabinet—whether in the defense, agriculture, trade and industry, or housing ministries. Beyond their anger at Sharon's willingness to accommodate some of the Palestinian claims, was their sense of betrayal.

From statements made by Sharon, it is obvious that the major consideration which led to his willingness to passively acquiesce in

the idea of a Palestinian state was the cumulative impact of the *intifada*. However, in his immediate apologetics for accepting the road map, he stressed mainly the economic disaster confronting Israel, taking care not to mention the security catastrophe and its hundreds of victims. Any reference to this might lead to the conclusion that Israeli agreement to a Palestinian state was due to terrorism. Even so, he did refer to Israel's presence in the territories as "occupation", a word that caused a furor, including warnings that he should avoid repeating it, since it might have legal implications.

Sharon also indicated his reluctance to rule over three and a half million people living under that occupation, a statement that was made 36 years almost to the day after the Six Day War. It had apparently taken that amount of time, including a devastating two years of *intifada*, for the simple fact of a Palestinian presence to gain recognition. This belated awakening to reality must be welcomed, but it is doubtful if it embraces a full comprehension of all its implications.

As for the five Palestinians shot and killed during demonstrations protesting Sharon's visit on the following day, at the conclusion of the Friday prayer services on the Temple Mount, there had been earlier incidents of violent clashes at this holy site. These were not adequately investigated, nor were conclusions drawn to avoid a repetition. On one occasion, twenty Moslem worshippers had been shot dead, and many more wounded, when police opened fire in attempting to disperse demonstrators on the site. The topographical structure gives the Moslems height advantage over the Jewish worshippers gathered in the square below at the foot of the Western Wall, the highest point of which is parallel to the foot of the Moslem compound. From this vantage point, Jews down below make for easy targets for Arab stone-throwers. This is a permanent fact of geographical reality, but the police reaction to Moslem demonstrators is a flexible factor, and after the earlier violent confrontations, new police policies and techniques could have been instituted in order to avoid similar fatal consequences in the future. In the absence of such penetrating inquiry, serious

mistakes were repeated in late September of 2000, leading to the disastrous second *intifada*.

Two aspects of the surrounding circumstances surrounding the outbreak of the second *intifada* suggest possible interpretations that the official Commission will likely ignore.

First, in order to be aware of how strongly the Arabs related to the show of force at a holy site, it should be noted that, after the shootings on that Friday, the demonstrations spread to the Arab areas of Israel itself. The Arabs of Israel, caught between the demands of their citizenship and the pressures of their ethnicity, had, for the most part, not held active protests in all seven years of the first *intifada*. For the first time, at the onset of the second *intifada*, they became involved in massive numbers. The difference was possibly their belief that one of the holiest sites of Islam had been violated by a deliberate expression of political power and show of force; several commentators have pointed to this belief as a major factor precipitating the demonstrations by Israeli Arabs.

Furthermore, a few days preceding the events related here, Barak had invited Arafat to his house for dinner, together with some of his advisers and colleagues and with some of Barak's associates. The intention was, it seems, to attempt to resuscitate the peace process; a social meeting at a private home may have been just the catalyst required for resumption of further discussions, in an attempt to overcome the gap that still existed between their respective positions, to re-create an atmosphere conducive to serious negotiations, and to reconstitute the process of confidence-building. Later, it was reported that during the evening Arafat had asked Barak to prevent Sharon's planned visit in order to avoid the political struggle between Israel and the Palestinians becoming a religious struggle between Judaism and Islam. In the event, history will record that it was Sharon's visit to the Temple Mount, the compound where stand the Dome of the Rock and the el-Aqsa Mosque, that left its indelible impact on subsequent developments, while Arafat's visit to Barak's private home has become no more than a passing footnote in the annals of the conflict.

The juxtaposition of Barak's actions and those of Sharon has many other implications—and also fascinating personal aspects. The two men, both with notable military careers, apparently have a great deal of respect for each other. With the outbreak of the *intifada*, Barak made intensive efforts to entice Sharon's Likud party into a coalition government, with a prominent place assured for Sharon himself. After Sharon's visit to the Temple Mount, Barak refused to implicate him in the crisis Israel was facing. Later, during the election race between the two men, Sharon announced his intention to form a coalition government if he won, in which Barak would be his minister of defense.

Beyond these known political facts, there is a deeper connection between the two men. Sharon was the minister of defense who led Israel into the morass of the Lebanon War, which eventually involved an eighteen-year presence of Israeli troops on Lebanese soil, in a security zone along its southern border, during which heavy casualties were incurred (over a thousand Israeli soldiers were killed). The war was specifically sparked by a failed assassination attempt on the life of the Israeli ambassador in London; its declared aim was to drive the PLO out of the foothold it had set up in Southern Lebanon, with the larger purpose of providing peace and security for the people of Israel living in the northern region of the Galilee. At its outset, the war had nothing whatsoever to do with the Hizbollah. It was only Israel's continued presence there that led to the protracted debilitating struggle against this highly motivated, well-trained and liberally funded group.

When Barak was elected, he promised to withdraw Israeli troops from Lebanon within a year—by agreement if possible, by unilateral action if necessary. In the end, the withdrawal was unilateral It was opposed by those who claimed that Israel's northern border would be dangerously exposed, a prognosis that failed to materialize, with only subsequent minor infractions compared to regular rocket attacks on towns and villages in the north of Israel during the many years that the Israeli army was stationed in southern Lebanon.

However, a further objection to the hasty withdrawal was that Israel's failure there would serve as an encouragement for Palestinian

activity in the West Bank and Gaza, modeled on the success of the Hizbollah. This prognosis, seen superficially, seems to have been fulfilled, with what is now known colloquially as the "Lebanonization" of the West Bank and Gaza. However, if there is a connection between the events in Lebanon and the present *intifada*, the connection is far more subtle and indirect. It deals with surmises and an ability and willingness to see beyond the outer facade of official announcements and media reporting. It involves the kind of conjectures that cannot be carefully investigated by judicial commissions of inquiry. It involves logical inferences, perhaps ideological presuppositions, even personal musings. It has to do not with the final pull-out, but with the initial incursion. It involves the possibility of a hidden agenda.

The possible hidden agenda in this case was twofold: First, having reluctantly executed the traumatic task of dismantling the settlements in the Sinai in 1982, to the chagrin of its most fervent followers, the Likud needed a dramatic action to prove to its followers its continued commitment to its nationalist, right-wing ideology. Sharon himself, having opposed the peace agreement with Egypt, was, as the recently appointed minister of defense, charged with the responsibility of effecting the transfer of the settlers back into the green line. The attempted assassination of the Israeli ambassador in London a few months later provided just the catalyst for a successful military operation aimed at the PLO. The invasion began a few days after the assassination attempt, but by that time, the assassins were known to the British police, and it appeared that they were not members of the PLO.[13] This information was ignored, as Israeli tanks and armored vehicles crossed over into Lebanon. The invasion, then, was not just a reaction to the London incident, nor aimed only at the welfare of Israeli citizens in the north of the country, but may well have served the political need to pacify angry Likud supporters in the wake of the withdrawal from Sinai. After all, most of Begin's faction voted against the peace agreement in the Knesset, which won a majority only because of near-unanimous support by the left-wing opposition.

Second, the invasion led to a mass flight of Lebanese to the north, including the capital of Beirut, as Israeli forces moved

relentlessly onward. It is possible that this action contained a hint of what might befall a Palestinian population in the occupied territories if ever they were to pose problems to Israeli occupation forces. About this time a small, splinter right-wing movement was formed in Israel, which developed into a political party known as Moledet ("homeland"), with the idea of transferring Arabs into neighboring Arab countries as a major plank in its election platform. The party, now in an enlarged alliance, has three members in Sharon's cabinet.

It should be remembered that, at that stage, some fifteen years into the occupation, the local population was still largely quiescent. However, if this show of force was indeed the lesson intended, the Palestinians ignored it; five years later, with Yitzhak Rabin now the defense minister, and Yitzhak Shamir the prime minister in a coalition government, the first *intifada* broke out. How seriously Israel misjudged Palestinian reality may be noted by the fact that Rabin, on a mission to the United States, did not shorten his visit to monitor the disturbing happenings at close quarters. The presumption was that the violence would end even before his scheduled return.

In the course of time, there was another lesson to be learned—a vastly different one—from the Lebanese experience; not of Israel's power, but of the unavoidable limits of its power, of Israel's vulnerability, of its inability to act effectively against a determined civilian population and hit-and-run guerilla-style tactics. Barak has been blamed for exposing Israel's weakness by his hasty unilateral withdrawal. But the weakness had become blatant long before. It was the consequence of inertia and lack of foresight, of the inability to recognize the need to withdraw in time from the trap in which the Israeli army was about to be entangled, of the unwillingness to acknowledge the futility of the ongoing operation, the killing and maiming of young conscript soldiers in a pointless military confrontation. This went on until a movement initiated by four mothers of soldiers created a momentum that ultimately led to the withdrawal (not before criticisms had been made by commentators with military experience about the mothers' lack of

understanding of the complexities of the situation). Thus, it was not the hasty withdrawal from Lebanon carried out by Barak that hinted at Israeli weakness in fluid situations of non-war and non-peace, but the protracted presence there, engineered originally by Sharon, and prolonged for reasons that no longer existed, leading to the creation of an even more sophisticated enemy, the Hizbollah.

If this surmise is correct, and the Palestinians are indeed basing their actions on the precedent of Lebanon, then Sharon is now saddled, on the West Bank and Gaza, with the awesome consequences of the excesses of the Lebanon War.

Rabin, Barak and Sharon are all fascinating personalities, linked by their common past in the military to their later common involvement in politics, but they offer a sharp contrast in their characters, modes of operation and projected images. These obviously affect the nature of the political struggle because of their leadership roles. However, in the final analysis, it is not personalities that are crucial but politics—not parties, but policies.

In this regard, Israel's key problem, beyond finding ways of coping with the present violence, is not to seek a military victory, as demanded by the oft-heard slogan, "Let the army win," but to finally begin to relate to the ultimate meaning of its prolonged occupation—namely, that at the start of the new millennium Israel is the only democracy that has maintained military rule over another nation for over three decades; that during this time it has recklessly allowed hundreds of thousands of its citizens to settle in occupied territory, amidst a deprived population that has become increasingly hostile; that it failed to examine, at an early stage, the advantages of recognizing a Palestinian state, of utilizing the opportunity afforded by the 1967 war to help rectify the disaster suffered by the Palestinian people two decades earlier; that it allowed grandiose rhetoric of historical rights and religious justification to take precedence over calculated geo-political reality and sensitive human rights imperatives.

Even now, desperate irrelevancies are being touted: for instance, suggestions for a unilateral withdrawal from the territories, in order

to provide—so it is claimed—security for Israeli citizens, when full separation is a physical impossibility because of the settlements; or the hasty construction of a barrier in the vicinity of the green line, which may well hinder some acts of terror, but is already intensifying the alienation and hostility. Suggestions of this nature bear a reminder of the by-pass roads that were built throughout the territories to provide safe passage for the settlers during trips from their homes on the West Bank to their jobs and their cultural activities inside the green line. It is these roads that now, with the *intifada*, pose constant dangers to the settlers and have claimed many victims of drive-by shootings and ambushes.

There are no simple solutions to the present violence—certainly not unilateral ones, certainly not focused on immediate security needs, certainly not aimed solely at thwarting suicide bombers and hidden snipers. Today's grim reality requires innovative thinking and suggests the need for a totally new approach, a paradigmatic change of perspective. The Israeli cabinet's acceptance of the road map does not reflect this need—not merely because of the narrow majority with which it was attained, but because it was done so reluctantly, so ungraciously, as the lesser of alternative evils and not as the greater of potential good. It was not a consequence of Israeli initiative, not an expression of Israeli interests, not a creation of a new framework of analysis. It was not a brave attempt at a "peace of the courageous", which had characterized the early stages of the Oslo peace process. For that matter, it was not even only a concession to American pressure. It was, tragically, an acknowledgment of the success of the violence perpetrated against Israelis by Palestinian terror. Why else would Sharon, immediately after the cabinet vote, explain, rather pathetically, to his people that it was not possible for Israel to rule over three and a half million Palestinians? He was the one who had in the past expended every effort to help settle hundreds of thousands of Israelis in their midst, specifically in order to facilitate such rule.

The road map is now an accepted fact of a renewed peace process. However, a far superior scheme to a "road map", drawn up

by outsiders, would be a locally produced "atlas", which would outline the total picture. It would entail an opening gambit of Israel's announced willingness to recognize an independent Palestinian state on the West Bank and in Gaza, with East Jerusalem as its capital. This would not appear as a marginal item tucked away in some inconspicuous corner of a road map, but would be clearly proclaimed as the central kingpin of policy, as the clearly demarcated contours of an Israel-Palestine atlas, as an optimistic framework for co-existence. The formal proclamation of such a state, and the ensuing practical Israeli withdrawal, would naturally be linked to receiving caste-iron guarantees of Israel's security and an official Palestinian declaration of respect for its needs, with both sides making a joint commitment to constructive, neighborly interaction in the future. Since at stake is the existence, side by side, of two states, it is only logical that the first move must be made by Israel, an existing state. The consequent negotiations would then revolve mainly around Palestinian willingness to respond adequately, in their clear knowledge that permanent statehood would be gained in the entire area beyond the green line, subject only to agreed-upon border adjustments.

Negotiations should also include comprehensive discussions as to the special nature of future relations, including those topics dealing with a new approach to the status of Jerusalem, the possibility of creating some sort of confederative structure, the need for finding a suitable procedure for expressing reconciliation between the two sides, and constructive proposals for the problematic population groups of Palestinian refugees and Israeli settlers—as well as the manner in which each party will show respect and understanding for the religious heritage and national memories of the other. The good offices of trustworthy intermediaries would obviously be required to overcome inevitable difficulties that would arise. But the atlas, which would serve as the basis for direct negotiations, would be carefully designed by local leaders, including those who have built up personal confidence in the years that they worked together in an atmosphere of mutual respect for each other as individuals and of sensitive understanding of the historical

tragedies and the future aspirations of the people that their counterparts represent. There are many groups of this nature, which have maintained an ongoing dialogue despite the violence of the past few years. In a sense, such an approach would be to resuscitate Oslo. Perhaps this time, however, there would be more appreciation of its advantages; certainly this time there could now at last be honesty as to a primary goal of an independent Palestinian state. This framework would ensure that the people most concerned would be the ones most involved—for at stake are not American fortunes, but the fate of the Israeli and Palestinian people.

From an Israeli perspective—of national pride, even of patriotism—the fact of its being an Israeli initiative would restore some measure of the high regard for the state and its leaders that was evinced during the Oslo peace process. It is this that, in the long run, provides strength and security. Submissive response to outside pressure only invites a disparaging attitude—from those applying the pressure, from those who are the intended beneficiaries of the pressure, and from neutral outsiders.

A renewed Israeli initiative of this nature would have been much easier to achieve without the present *intifada*, with its growing list of victims on both sides and increasing mutual distrust. But however bleak the situation, it should not be forgotten how difficult it had been to make the initial breakthrough and bridge the chasm that had existed before Oslo. Indeed, the present breakdown is not a proof of the errors of Oslo, as claimed by its opponents, but a poignant reminder of how delicate the negotiations had been, and how fragile the process itself was—so delicate and fragile that it was also susceptible to being easily undermined or even partially destroyed by its opponents, whether Palestinian or Israeli extremists.

A solution compatible with Israel's needs will only materialize if it is based not on a reaction to Palestinian violence and American pressure, but on sensitivity to the Palestinian plight, an awareness of their legitimate aspirations and an understanding of global realities in the modern world. This has been, and still is, the real

challenge facing Israel, and its ongoing failure to measure up to this challenge is the source of its present disastrous situation.

The tragedy, for both peoples, of today's violence has arisen not from the Oslo process, but from the cumulative effects of earlier errors of yesteryear by both sides. But Israel's responsibility causes more retrospective regret, because it squandered the opportunity provided by its power, and because in doing so it reneged on many of the finer aspects of its original ideological base, and also of a rich and ancient Jewish tradition that exemplifies the democratic principle of kindness and consideration toward the stranger in one's midst—in this case, the strangers, as a people, across the green line.

FOOTNOTES—CHAPTER 8

1. An interesting research project was conducted in the Department of Sociology and Anthropology at Tel Aviv University. See Deborah Heifetz-Yahav, *From Fighters to Peacekeepers*, Ph.D. dissertation (2003).
2. Shimon Peres (with Aryeh Naor), *The New Middle East* (New York: Holt, 1993).
3. For a good general survey of different approaches that have been put forward, see Aharon Klieman, *Compromising Palestine: A Guide to Final Status Negotiations* (New York: Columbia University Press, 2000).
4. See, for instance, *Ha-aretz* newspaper, 29 September 2000.
5. The Commission headed by Supreme Court Justice Orr, has, at the time of writing, not yet issued its report.
6. See discussion of these two incidents in my Hebrew book, *Weeds in the Garden of Eden: Biblical Narratives and Israeli Chronicles* (Tel Aviv: Ha-Kibbutz Ha-Meuchad, 2002).
7. Amnon Kapeliouk, *Not by Omission: The Policy that Led to War* (Tel Aviv: Amikam Publishers, 1975, in Hebrew).
8. See, in general, Ehud Shprinzak, *The Ascendance of Israel's Radical Right* (New York, 1991).
9. This was divulged in an autobiographical account by one of the members of this terrorist group; see Haggai Segal, *Dear Brothers: The Story of the "Jewish Underground"* (Jerusalem: Keter, 1987, in Hebrew).

10. B'Tselem, *Tacit Consent: Israel's Law Enforcement on Settlers in the Occupied Territories* (March, 2001).
11. Recently a law was passed specifically excluding the possibility of the murderer of a prime minister being pardoned. This is a controversial matter, partly because it is focused on a specific individual and partly because its violation of *ex post facto* principles.
12. The Kahan Commission of Inquiry was appointed in September, 1982, to investigate the massacres carried out by Christian phalangists in Lebanon against Palestinian inhabitants of the Sabra and Shatilla refugee camps.
13. See account by the Ambassador, Shlomo Argov, *An Ambassador Speaks Out: Speeches and Writings* (London: Weidenfeld and Nicolson, 1983).