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Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination

John Strawson*

Cults like post-modernism, discourse analysis, New Historicism, deconstruction neo-pragmatism transport [scholars] into the country of the blue, an astonishing sense of weightlessness with regard to the gravity of history and individual responsibility fritters away attention to public matters and public discourse. The result is a kind of floundering about that is most dispiriting to witness, even as society as a whole drifts without direction or coherence. Racism, poverty, ecological ravages, disease and an appallingly widespread ignorance: these are left to the media and the odd political candidate during an election campaign.

Edward Said¹

I. Orientalism and Law in Palestine and Israel

Modern law has been the product of the international confluence of the European Enlightenment and European Colonialism. As law took shape in the intellectual framework of modernity, colonialism became the main mechanism of its circulation and consolidation. Law's inheritance in the postmodern and postcolonial world is stamped with the signs of this triumphant if inglorious journey.² While colonialism has withered, a postcolonial world has taken shape in which the world replicates elements of the

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1. EDWARD W. SAID, *CULTURE AND IMPERIALISM* 366-67 (1993).

2. See PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* (2001).

old order through which the West assumes a centrality against the periphery of the ex-colonies. However, this is not necessarily a geographical phenomenon, as much as a discursive one in which the media, information technology and the academy become the mediums of transmission. In this, law is an important site of imagery and representation which attempts to bestow legitimacy on the metropolitan center as a center of the legal order. Edward Said's *Orientalism*³ offers us a methodology to deconstruct this discourse, and in this essay, I want to review its application to the very site which spurred his intellectual quest and which remains his commitment, Palestine.

The Palestinian-Israeli conflict has proved to be one of the most intractable and inflammatory disputes of our time.⁴ It stretches back to the nineteenth century and its political and legal aspects become interwoven with critical historical moments, the First World War, the Second World War, the Holocaust, the anti-colonial movement and the Cold War. For more than the past year, the escalation of violence has not only brought tragedy to both peoples but also has been woven into the international crisis created by the September 11, 2001 attacks on New York, Washington and Pennsylvania. Now for the first time, the conflict cannot be contained as regional and assumes international implications. The legal issues of self-determination, human rights and the law of war lie at the heart of the problem not as passive legal doctrine, but as I shall argue as contested narratives.

The legal status of Palestine and the legal discourses within Palestine itself present an array of complexities at almost every level. In the past century, Palestine experienced the rule of the Ottomans, British, Jordanians, Egyptians and the Israelis. At the same time, it has been the site of hybrid legal structures and legal personalities such as the Jewish Agency under the British Mandate and the Palestinian Authority since the implementation of the Oslo

3. EDWARD W. SAID, *ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT* (1978).

4. See AVI SHLAIM, *THE IRON WALL: ISRAEL AND THE ARAB WORLD* (2001); See also NICHOLAS BETHEL, *THE PALESTINIAN TRIANGLE: THE STRUGGLE BETWEEN THE BRITISH, THE JEWS AND THE ARABS, 1935-1948* (1980).

Agreements.⁵ In this *mélange* of legal systems and plethora of colonialisms, the Palestinian narrative has been constituted.

Edward Said's contribution in *Orientalism* and *Imperialism and Culture* has been to develop a methodology of postmodernist textual deconstructive techniques while retaining a sense of the "gravity of history." Without undermining the power of texts themselves and the discursive imagery they produce, Said permits a degree of intentionality to the author who, if not fully alive in the conventional sense, is at least contextualized. In this manner, texts and their authors maneuver not only in the parameters of meaning, but within a politico-historical field. This interplay between text and context is built through a subtle, although uncomfortable amalgamation of Foucault and Gramsci in the early passages of *Orientalism*. In his explicitly political works concerning Palestine, *The Politics of Dispossession*,⁶ *Peace and Its Discontents*,⁷ and *The End of the Peace Process*,⁸ Said's rhetorical style advances committed politics that builds on his theoretical work demonstrating the clear relationship between texts, representations and policy choices. In his autobiography, *Out of Place*,⁹ he contextualizes his own identity and location which helps his readers plot an uneasy path between the postmodern and the political. Law is not Said's central concern, although all his references to law are pregnant with insight. His apparent passing reference to the legal work of the eighteenth century Orientalist, Sir William Jones, as being of "symbolic significance in the history of Orientalism" is such a moment.¹⁰ Said provides us with a methodology which offers us a way of interrogating the discourse and connecting it to politico-

5. There are three main texts: Israel-Palestine Liberation Organization Declaration on Interim Self-Government Arrangements, Sept. 13, 1993, International Legal Materials, Vol. 32 (1993), 1525; Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, International Legal Materials, Vol. 33 (1993), 622; Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Sept. 28, 1995, International Legal Materials, Vol. 35 (1995), 650. For a commentary, see GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* (2000).

6. EDWARD W. SAID, *THE POLITICS OF DISPOSSESSION: THE STRUGGLE FOR PALESTINIAN SELF-DETERMINATION 1969-1994* (1994).

7. EDWARD W. SAID, *PEACE AND ITS DISCONTENTS: GAZA-JERICHO, 1993-1995* (1995).

8. EDWARD W. SAID, *THE END OF THE PEACE PROCESS: OSLO AND AFTER* (2000).

9. EDWARD W. SAID, *OUT OF PLACE: A MEMOIR* (1999).

10. SAID, *supra* note 3, at 78. The relevance of Said's work to law has sometimes been controversial. See ELIZABETH ANN MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* 1-17 (1999).

historical contexts. This essay will focus on the idea of settlement and self-determination in the Palestinian-Israeli conflict. Legal narratives emerge from a variety of sources apart from formal texts and doctrines; they arise in the popular media, scholarly work and in the legal justifications for political policies.

II. Discourses of Locations

Locations are complex political issues and this paper's title is necessarily an ambiguous invention into thought: "Israeli settlement" and "Palestine" are constructed through discourse as well as space. Each term is contested within a location constructed through colonial experience, contemporary history and war, which situate the terms uncertainly within the postcolonial. In each case, we slip between discursive circulation of representations and the gravity of events. Each discourse articulates new boundaries and with them allocates new identities in which depressing and problematic binary opposites become so mimetic that they are repressed beneath the rubble of rhetorical excess; liberation/oppression; return/Diaspora; settlement/expropriation. The locations of Israeli settlement and Palestine have occupied legal narratives in a particular way since the British occupied Palestine in 1917, constituting an almost fantastic concentration of colonialism in its final phase. The specter of sovereignty confronts the struggle for self-determination for nine decades.¹¹

The term "settlement" in Israeli history is a powerful one coming from the Hebrew "*Yishuv*" in the phrase "*Yishuv Ertetz Yisreal*" meaning the settlement of the land of Israel.¹² This expression became commonly used for the Jewish community in Palestine from the late nineteenth century. The continued use of the term for Israeli settlements on the West Bank, Gaza and East Jerusalem constitutes a significant discursive linkage. It signifies both a sense of permanence and insecurity at the same time. It is a brittle term which the Israeli regime appears only recently to have grasped as it attempts to persuade the world's news media to use

11. For a discussion of the legal issues of Palestine and Israel until 1990, see JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* (1990). For a review of these issues since the Oslo Agreements, see RAJA SHEHADEH, *FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES* (1998).

12. For a discussion of this a review of a useful summary of the academic debate, see DEBORAH S. BERNSTEIN, *CONSTRUCTING BOUNDARIES: JEWISH AND ARAB WORKERS IN MANDATORY PALESTINE* 3-10 (2000).

other phrases such as “Jewish Neighborhoods.”¹³ Yet *Yishuv* is so firmly inscribed into the legal discourse that the term “settlements” appears in each text of the Oslo Accords.¹⁴ As Geoffrey Aronson points out, “settlement before and after [1948] was the product of as-yet unfinished consolidation of Jewish sovereignty in Palestine.”¹⁵ He continues, “in Israel’s view, security, sovereignty and settlement are inextricably linked. The security achieved by Israeli settlement according to this calculation is essentially an existential concept rather than a military imperative.”¹⁶ The Israel government web site places the current settlements in the West Bank and Gaza within this perspective, claiming legal gloss from the Mandate of the League of Nations;

Jewish settlement in the West Bank and Gaza Strip territory has existed from time immemorial and was expressly recognized as legitimate in the Mandate for Palestine adopted in 1922 by the League of Nations, which provided for the establishment of a Jewish state in the Jewish people’s ancient homeland. Indeed, Article 6 of the Mandate provided as follows:

The Administration of Palestine, while ensuring that the rights and positions of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in cooperation with the Jewish Agency . . . close settlement by Jews of the Land¹⁷

The insecurity expressed in the legal grounds is underlined by the claim that the Mandate provided for a Jewish state whereas it provided for a Jewish National Home, a purposely ambiguous term to avoid the use of the legally recognized concept of state. Indeed even the Zionist movement¹⁸ appeared to accept this reality. A year before the Mandate came into effect at the 1921 Zionist Congress in Carlsbad, the main resolution adopted argued that the aim was

13. There have been many such moves but for the latest, see Robert Fisk, *CNN caves into Israel over its reference to illegal settlements*, THE INDEPENDENT, Sept. 3, 2001, at 9.

14. For the background to these negotiations of the Accords, see URI SAVIR, *THE PROCESS: 1,100 DAYS THAT CHANGED THE MIDDLE EAST* (1998).

15. GEOFFREY ARONSON, *SETTLEMENTS AND THE ISRAEL-PALESTINIAN NEGOTIATIONS: AN OVERVIEW* 3 (1996).

16. *Id.*

17. Ministry of Foreign Affairs of the State of Israel, *The Terror Intifada: The Current Wave of Palestinian Violence*, available at <http://www.mfa.gov.il/mfa/go.asp?MFAH0i9o0> (last visited Sept. 3, 2001).

18. For an instructive discussion of the Zionism, see AMNON RUBINSTEIN, *FROM HERZL TO RABIN: THE CHANGING IMAGE OF ZIONISM* (2000).

The determination of the Jewish people to live with the Arab people on terms of unity and mutual respect and together with them make a common home into a flourishing community, the up-building of which may assure each of its peoples an undisturbed national development.¹⁹

This proposition appears in stark contrast to the narrative as it is developed on the web site. It illuminates a more complex history of Zionism than the essentialist presentation by the current Israeli government. The resolution is quite startling in advancing the idea of a “common home” which can accommodate, and indeed promote, two national projects. This extract of the resolution is quoted in a letter from the British Colonial Secretary, Winston Churchill, to the Arab Delegation from Palestine. Churchill, through his official, Schuckburgh, is attempting to assure the Palestinians of the limited character of the Jewish national home. He underlines this by explaining “it is contemplated that the status of all citizens of Palestine in the eyes of the law shall be Palestinian, and it has never been intended that they or any section of them should possess any other juridical status.”²⁰ In an earlier letter, the British government is keen to poor scorn on the idea that they call “exaggerated interpretations” and “unauthorized statements” about the Balfour Declaration representing its policies. The British reject the idea of “wholly Jewish Palestine,” arguing “phrases have been used such as that Palestine is to become as ‘Jewish as England is English.’” “His Majesty’s Government,” the letter continues, “regard any such expressions as impracticable and have no such aim in view. Nor have they at any time contemplated . . . the disappearance of the Arabic population, language or culture.” Churchill explains that the Balfour Declaration only committed itself to the creation of a Jewish national home “*in Palestine*.”²¹ [Italics in the original]. The British government attempted to finesse the meanings of the Balfour Declaration so as not to antagonize the Palestinian Arab population during this

19. Resolution of the Zionist Congress held September 1921 referred to with Approval by Colonial Secretary Winston Churchill in correspondence with the Arab Delegation from Palestine in 1922; see ABRAHAM TULIN, BOOK OF DOCUMENTS SUBMITTED TO THE GENERAL ASSEMBLY OF THE UNITED NATIONS RELATING TO THE ESTABLISHMENT OF THE NATIONAL HOME FOR THE JEWISH PEOPLE 29 (1947). It is great significance that the Jewish Agency chose this extract to be included amongst the 42 documents that they selected to bring to the attention of the UN and the Special Commission on Palestine at a critical moment in the campaign for Jewish self-determination in Palestine in the world body.

20. *Id.*

21. *Id.* at 28-29.

correspondence. However, any number of textual interpretations does not escape the decisive policy implication of the creation of a Jewish national home. While the 1921 Zionist Congress obliged the British government, neither the British nor the Zionists quite understood that constituting a new political entity within a country of necessity would transform that society.

The text of the Mandate becomes quite critical as it re-cycles the apparently vague formulations of the Balfour Declaration by which the Palestinian majority is transformed into a marginal legal entity. It is this language which affords the Israeli Foreign Ministry a degree of comfort, especially in the reference to the Palestinian as merely "other sections of the population." The entire Mandate never refers to the Palestinians as a people at all, preferring such phrases as we see above and more widely known "existing non-Jewish communities."²² The Mandate marginalized the identity of the Palestinians, enshrining this in law. Whereas the Jewish population (80,000 in 1922) has a clear identity, the Palestinians (90% of the population) were merely "non-Jewish" or "other." In this way, international legal discourse dispossessed a people of their identity which opened the way for others to dispossess them of their land. While the named Jews were promised a close settlement of the land, the unnamed Palestinians were granted the elusive right that their position would not be prejudiced. The Israeli Ministry of Foreign Affairs explains what that means in the current situation.

"Many Israeli settlements have been established on sites which were home to Jewish communities in previous generations, in an expression of the Jewish people's deep historic and religious connection with the land." The text continues, "Israeli Settlements have been established only after an exhaustive investigation process under the supervision of the Supreme Court of Israel, designed to ensure that no communities are established on private Arab Land." It therefore concludes, "settlements themselves are not intended to displace Arab inhabitants, not in practice do they do so."²³

All this is argued in the context that Israel is not bound by the Fourth Geneva Convention (1949) as (1) the West Bank was not under the settled sovereignty of a state when Israel occupied it in 1967²⁴ and therefore Israel's presence is not technically an

22. See John Strawson, *Mandate Ways: Self-Determination in Palestine and the "Existing Non-Jewish Communities,"* in SANFORD R. SILVERBURG, *PALESTINE AND INTERNATIONAL LAW* (Ed., 2001).

23. The Terror Intifada.

24. See ALLAN GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* (Ed. 1978).

occupation and (2) settlements are not a forced change in the population balance as Palestinians are not removed and Israelis move of their own free will. In addition, as the Palestinians have signed the Oslo Accords and as these stipulate that Israeli settlements will be discussed in the permanent status talks, the Palestinians have accepted the “disputed” character of the territory and, in effect, agreed to the continuing building of settlements, “the building of homes has no effect on the status of the area.” These tendentious legal arguments aside, the narrative emerges, almost part messianic, with talk about deep historic and religious connections with the land and the frankly banal statements about home building. These are, however, encoded within a legal narrative that has been inherited in large part from the British Mandate.

The argument that Israeli settlements are not built on Arab private land is a reference to the fact that most land in Palestine is not held as privately owned land (*mulk*) but as *miri* or state land. This category of land was clarified during Ottoman rule with the Land Code of 1858. As a result, when the Israeli Foreign Ministry claims that Arab private land is not available for settlement, it is merely announcing that *miri* land indeed is.²⁵ The British Mandate authorities effectively liberalized the process of expropriation of land and extended the categories in any event. In particular, the British gave the military power to expropriate all categories of land for security reasons merely by the issuance of a certificate by the relevant commanding officer.²⁶ It is under these British modifications of Ottoman law that the Israeli seize land in the occupied territories,²⁷ forcibly removing people from their homes, destroying agricultural land and thus forcibly expelling populations. Even in areas formally controlled by the Palestinian Authority, Israel has used its military incursions during the Al-Aqsa Intifada to destroy Palestinian homes. Between April and September 2001, some 227 homes have been bulldozed in Gaza. On August 27th alone, 23 homes were demolished in Rafah leaving 138 people without shelter.²⁸ As a building can be destroyed so land can be

25. See RAJA SHEHADEH, *THE LAW OF THE LAND* 11-30 (1993).

26. See FREDERIC M. GOADBY & MOSSES J. DOUKHAN, *THE LAND LAW OF PALESTINE* Ch. XIX (1935). The text has been recently reprinted (Holmes Beach: Gaunt, 1998). The entire book is a master-piece of how colonial regimes occupy legal systems.

27. See John Strawson, *Britain's Shadows: Post-colonialism and Palestine*, in TAREQ Y. ISMAEL (Ed.), *THE INTERNATIONAL RELATIONS OF THE MIDDLE EAST IN THE TWENTY-FIRST CENTURY* 203-25 (2000).

28. See Middle East Socialist Network (MESN), at <http://www.egroups.com/>

acquired for continuing settlement [incomplete sentence]. The destruction of homes in Rafah and in places in the West Bank and Gaza is connected to creating a better security for the settlements. The current Israeli military action is driven by the existential impulse to secure the settlements.

Since the occupation of the West Bank, Gaza and East Jerusalem in the 1967 war, Israel has built some 170 settlements in the West Bank with a population of about 200,000, a further 16 in Gaza with a population of about 7,000 and further 10 settlements in East Jerusalem with a population of about 180,000. Spatially, the settlements dominate hills and are located in circles around all major Palestinian towns. In East Jerusalem, they take the appearance of Crusader Forts dominating the East of the city and effectively cutting off the 200,000 Palestinians of East Jerusalem from the West Bank. Settlement building and their populations have expanded dramatically in the years since the signing of the Oslo Accords (in 1993 the West Bank settlement population was 115,000) with the highest rises taking place under Labor led governments (Rabin-Peres 1992-1996 and Barak 1999-2001). The settlements dominate the countryside of the West Bank and the big Palestinian cities like Nablus (population 200,000) where settlements and Israeli military installations can be seen from the city center. In a pervasive sense, settlement is ever-present through the major system of Israeli roads, which crisscross the West Bank and Gaza connecting each Israeli outpost. A virtual Israel is perched above Palestine which gives the Israelis who use the roads a sense of being at home while simultaneously condemning the Palestinians below to a physical and psychological sense of being under occupation. The central presence of the Israelis and the marginality of the Palestinians mimic the legal narratives of the Mandate as it is inscribed in spatial realities or as some Israelis more attuned to positivism put it create "facts on the ground." The connection of the settlements to the settlement of the 1920's and 1930's in the mind of the Israeli regime legitimize each other. The case for the creation of the state of Israel was inextricably connected to the settlement of the land through the pioneers (the *halutzim*) who through their physical occupation provided the structure for Jewish immigration and the creation of a significant population, which claimed the right to self-determination. This claim was recognized through the United Nations General Assembly Resolution 181 (1947), which partitioned Palestine into two states. Settlement

precedes sovereignty. The methods which achieved settlement and sovereignty in the past are thus sanctified and woven into a story of heroism in which the land is redeemed and that redemption receives approval. This narrative becomes so fundamental to the idea of national that its repetition is reaffirmation.

It is, perhaps, due to the relative failure of land settlement during the Mandate that the current Israeli narrative attempts to glamorize a past. In 1939, the British government's figures on Palestine land transfers reveals that 6% of the countryside land was in the land of Jews and that Jews number some 9% of the rural population.²⁹ From these statistics, it emerges that 83% of the Jewish population were urban, thus undermining the myth of the return to the land despite the provisions of the Mandate and well placed misgivings of the Palestinian population. The aggressive reconnection of current settlement activity in the West Bank with this past is connected to the insecurities of legitimacy, rather than a confidence born of past success. The legends of redemption of the land by heroes in past generation is deployed to good effect and the studied ambiguity of the legal language of the past becomes an able collaborator in the perpetuation of the myth. The power of the text palliates the inadequacies of a historical record while it establishes a legal register of the present. Moreover, it creates a convenient bridge from British colonialism to Israeli occupation. The occupation of Palestinian land after 1967 is set alongside the buying of Palestinian land under the British Mandate. In the Mandate days, the Jews saw themselves having to fight the British in order to be able to buy land so that they could establish the national home. In this the Jews are portrayed as weak immigrants (many refugees which was quite accurate) struggling against a major imperial power. Land obtained was "liberated." The transfer of this representation to occupation serves the purpose of constituting Palestinians and today's Israeli's as merely replaying the decades-old land conflict on the basis that the territory is legally disputed.

III. Palestinian Narratives

For Hanan Ashrawi, speaking for the Palestinians, this situation constitutes an "ongoing *Nakba* [catastrophe], a most intricate and pervasive expression of persistent colonialism, apartheid, racism and victimization." She explains,

29. See ABRAHAM TULIN, *Facts and Figures Concerning the Palestine Land Transfer Regulation*, in BOOKS OF DOCUMENTS 19, 197 (Ed. 1939).

More than half a century ago [53 years], The Palestinians as a people were slated for national obliteration, cast outside the course of history, their identity denied, their very human cultural and historical reality suppressed. We became victims of the myth of a land without a people for a people without a land whereby the West sought to assuage its guilt over its horrendous anti-Semitism and by the total victimization of a whole nation. Zionism sought to implement its agenda by exclusivity by usurping not only the lands and rights of the Palestinians. But also by confiscating their utterance and distorting their historical narrative.³⁰

It is significant that it was in the period of the rise of the consciousness of right of self-determination in the 1950's and 1960's that saw the nadir of the Palestinian position. It is against this background that makes Ashrawi's comment about the "confiscation" of the Palestinian voice all the more significant. It was during these two decades that, while the United Nations General Assembly elaborated the law on self-determination, this confiscation took place. The place of Palestinian self-determination in the contemporary history of international law provides an example of the difficulties that peoples in the international community face, as the norms and doctrines of international law are changed around them. For the Palestinians, the clarifications of international law neatly intertwine critical moments.³¹ The League of Nations and the United Nations are specifically involved in establishing the legal status of Palestine and Israel. In the days of the Mandate, international law did not provide for the legal right to self-determination, as it divided peoples into different levels of "civilization" according to which international legal rights were awarded to those regarded as most advanced. The typology of civilization, and the allocation of subsequent legal rights, depended entirely on a register constructed by the West and led by the Imperial powers. As Rosalyn Higgins points out, even the United Nations Charter, despite the aspirations contained in article 1, provided for an international regime for non-self-governing territories (under the Trusteeship Council as provided for in

30. Hannan Ashrawi, Address at the Non-Governmental Organizations Panel at the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerances, Durban, South Africa (Aug. 28, 2001).

31. See PAUL J.I.N. DE WAART, *THE DYNAMICS OF SELF-DETERMINATION IN PALESTINE: PROTECTION OF PEOPLES AS A HUMAN RIGHT* (1994).

chapters 11 and 12).³² According to Higgins, the legal right of self-determination emerges in the 1960's.³³

The Palestinian narrative remains suspended between the *nakba* of the 1940's and of the 1950's and 1960's as the Palestinians, as a people, are transformed into the category of refugees by the United Nations. This is compounded by the acquiescence of the international community that not even the Arab State in Palestine, as provided by General Assembly resolution 181, will come into being. This meshes with the international realization of the *Shoah*³⁴ and its connection to the creation of the State of Israel. As Said comments

Unquestionably the moral dilemma faced by anyone trying to come to terms with the Palestinian-Israeli conflict is a deep one. Israeli Jews are not the white settlers of the stripe that colonized Algeria or South Africa. They are correctly seen as the victims of a long history of Western, largely Christian, anti-Semitic persecution that culminated in the scarcely comprehensible horrors of the Nazi Holocaust. To Palestinians, however, their own role is that of victims of the victims. This is why Western liberals who openly espoused the anti-apartheid movement . . . and many other political causes of that kind have shied away from openly endorsing Palestinian-self-determination.³⁵

The Palestinian narrative is thus trapped several times over in a legal terrain strewn with human rights abuses and war crimes. The voice of the Palestinians is caught in a great wind of multiple injustices, wrought in Europe and by Europe in its colonial projects. Palestinian calls for justice and for the legal right of self-determination are set alongside Jewish appeals for justice in which the Jewish voice has become that of the Israeli state. The narratives of both peoples are not only entwined but also are subsumed by a grand architecture of political and legal representations,

32. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 111-28 (1994).

33. The key texts being: the 1960 Declaration on the Granting of Independence to Colonial Peoples and Territories United Nations General Assembly Resolution 1514 (XV) and the 1970 Declaration on International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, United Nations General Assembly Resolution 2625 (XXV). Both of these instruments are recognized as sources of law by the International Court of Justice in the Namibia Case (1971), and the Western Sahara Case (1975).

34. SHOAH, HEBREW FOR HOLOCAUST; See MARTIN GILBERT, THE HOLOCAUST: THE JEWISH TRAGEDY (Fontana/Collins, eds., 1986).

35. SAID, *supra* note 8, at 271.

the Palestine Liberation Organization and the State of Israel. It is not merely that the Palestinian narrative is stolen, but that the Jewish narrative too becomes politicized to a high degree. European colonialism has consolidated itself in the discourses of the modern Middle East in an extremely concentrated form.

IV. Israel and Colonialism

What I called for in *Orientalism* was a new way of conceiving the separations and conflicts that had stimulated generations of hostility, war and imperial control. And indeed one of the most interesting developments in post-colonial studies was a re-reading of the canonical cultural works, not to demote or to dish dirt of them, but to re-investigate some their assumptions, going beyond the stifling hold on them of some versions of the master-slave binary dialectic. Edward Said.³⁶

The renewed discussion of the colonial content of Israel's narrative is an important moment. Colonialism has a different trajectory in Palestine than in other imperial possessions. The narratives of occupation are more complex. Herbert Samuel explains his emerging interest in the future of Palestine during the First World War. "I soon arrived at a definitive conclusion," he writes,

that if, as we anticipated the war ended in a victory for the allies, Palestine ought undoubtedly to be separated from the Turkish Empire; that the opportunity should be taken to facilitate the establishment of a great autonomous Jewish community there; and that it should be under some form of British Protectorate.³⁷

Samuel explains that the idea of a Jewish State was "impractical, in the conditions that prevailed, five-sixth of the population of Palestine being Arabs." As a consequence, he favored "the establishment under British control together with the fostering of Jewish immigration, and the conferment upon then new Jewish community in Palestine of the broadest autonomy that practical conditions would allow."³⁸ Samuel, who became the first High Commissioner when the Mandate took effect in 1922, had according to his own account, been advocating this policy in the British cabinet eighteen months before the well-known Balfour

36. EDWARD SAID, *ORIENTALISM* 352-53 (1995).

37. HERBERT SAMUEL, *GREAT BRITAIN AND PALESTINE* 12 (London: The Second Lucien Wolf Memorial Lectures, 1935).

38. *Id.* at 15.

Declaration in November 1917. Indeed, the Declaration itself—which takes the form of letter to private individual, Lord Rothschild—essentially communicates Samuel's conclusions. Colonialism and Zionism have become essentially connected as the Jewish national movement sees its interests in the extension of the British Empire to Palestine. Whereas colonialism meant for most peoples a denial of national identity—and its reconfiguration in Imperial interests—for Jews colonialism was to be its constituting agency. Zionism's debt to British colonialism is deeply buried in a fundamental denial. In this narrative, the British become a colonial oppressor against a people seeking self-determination, freedom and sovereignty.³⁹ The end of the Mandate becomes the War of Independence that occupies a critical place within the national Israeli myth.⁴⁰ The British heritage, in the legal context, has received the attention of Israeli scholars in recent years although so far there has been a muted reaction.⁴¹

The articulation of this narrative is central in the discussion of settlements as it was a Colonial power that created the protectorate under which Jewish nationalism is able to flourish. This is not a straightforward process without its contradictions. The British Mandatory authorities and the Westminster government had no consistent policy towards Palestine and became irritated with each side. The Peel Commission was vicious in its criticisms of the administration, but in part, this was embedded in the twists and turns of British policy on Jewish immigration, land sales from Palestinians and others to Jews and more fundamentally on what the objective of the Mandate was. Nonetheless, despite the policies which the *Yishuv* fought for particularly on immigration, the context of the Mandate created the framework in which Jewish political and legal identity developed. It was the Mandate that gave Jews the first quasi-national political institutions with legal powers—the Jewish Agency. Indeed, it was this body that was to become active in international relations too. It was the nucleus of the Israeli state, developing executive and legislative branches and importantly overseeing the creation of the *haganna* (its defense

39. Most eloquently expressed in: MENACHEM BEGIN, *THE REVOLT* (1979).

40. For a contemporary discussion of various aspects of this period, see 29 *ISRAEL L. REV.*, *THE WAR FOR PALESTINE: REWRITING THE HISTORY OF 1948* (Eugene L. Rogan & Avi Shlaim eds., 2001).

41. See Asaf Likhovski, *In Our Image: Colonial Discourse and the Anglicization of the Law in Mandatory Palestine*, 29 *ISRAEL L. REV.* 292-359 (1995); and RONEN SHAMIR, *THE COLONIES OF LAW: COLONIALISM, ZIONISM AND LAW IN EARLY MANDATE PALESTINE* (2000).

force). Colonialism proved an effective tool in constituting institutions that facilitated the emergence of a national narrative. Israeli nationalism is born as form of protected nationalism. It is this relationship to colonialism and its subsequent history of, in turn, being reliant on Russian, French and American arms—and U.S. financial subsidies—that produce the impulse of an aggressive independence.

Jewish nationalism develops in the womb of British colonialism. From the earliest days of the British occupation, Weizman, the head of the Zionist Commission strikes up a friendly relationship with General Allenby. As Tom Segev recounts, this sensitive friendship meant that Weizman advised Allenby not to be seen with him in public in Jerusalem.⁴² The problematic relationship between the fetus and the womb was recognized at an early stage. The complexities of relations between the British and the Jewish population extend to family connections. Edwin Samuel, for example, was the British liaison officer to the Zionist Commission. His father, Herbert Samuel received regular reports on the most critical issues years before he became High Commissioner.⁴³ In this period (1917-1920), the British military authorities contained a variety of views on Zionism, Arab nationalism and Palestine in general. Many in senior positions were wary of Zionism and indeed of local politics as a whole. It would be wrong, therefore, to assume that there was some conspiracy between the British and Jewish nationalism. In reality, the ambiguity of the situation suited both sides as in Weizman's care in not walking in Jerusalem with Allenby shows. Roland Storrs, the Governor of Jerusalem, sums up the British attitude to Arabs and Jews: "I am not for either of them but for both. Two hours of Arab grievances drive me into the Synagogue, while after an intense course in Zionism, I am prepared to embrace Islam."⁴⁴

The ambiguity between British and Jewish nationalism is further confounded in the peculiar character of the colonial rule in the form of the Mandate. According to Norman Bentwich, the most senior legal figure in the first decade of British rule, "of the Palestine Mandate it must be said that, if the Mandate system has not been evolved for other purposes, it would have to had to be created for the government of this little land."⁴⁵ British rule thus

42. TOM SEGEV, *ONE PALESTINE COMPLETE: JEWS AND ARABS UNDER THE BRITISH MANDATE* 85 (Haim Watzman trans., 2000).

43. *Id.* at 90.

44. *Id.* at 92.

45. NORMAN BENTWICH, *THE MANDATE SYSTEM* 21 (1930).

masqueraded under special form of alleged international rule. Amongst this contradictory framework, Jewish settlement began to grow. Between 1917 and 1939, the Jewish population rose from about 80,000 to 390,000. As the settlement grew, so the Jewish proto-government institutions grew in authority and significance. The settlement took place within Palestine and amongst the Palestinians.

A decade before the Balfour Declaration, Yitzhak Epstein wrote: "Among the grave questions raised by the concept of our people's renaissance in their own soil, there is one that is more weighty than all the others put together. This is the question of our relations with the Arabs. It has not been forgotten, but rather has remained completely hidden"⁴⁶ It remains hidden within Israeli discourse as the Palestinians are constructed as somehow out of place. The Palestinians appear as a detached and moveable people who do not even live on every centimeter of their own territory, indicating a lack of affinity with it. "There is no reason," writes Benjamin Netanyahu, "why every lonely cluster of Arab houses should need to claim autonomy over the entire mountain on which it is perched."⁴⁷ The Israeli Foreign Ministry echoes this sentiment in attempting to answer the question, why are there more Palestinian than Israeli casualties. "It should be stressed that in order to confront the Israeli soldiers, the Palestinian rioters must leave their residential areas and go to the outskirts of their towns and villages."⁴⁸ Again, according to the Foreign Ministry, the reason that there have been so many child casualties, is that the "Palestinian Authority has even taken to providing transport for children to violent flashpoints."⁴⁹ In the Israeli account, Palestinian location is constructed as tenuous. The hidden question from a century before hovers over the Israeli presence.

V. Zionisms, Palestinian Nationalism and Identity

Levinas clearly privileges dichotomy: there would be first of all a realist Zionism, more political and, perhaps, "inadequate to the prophetic ideal." Perhaps, more inclined to the current nationalism, this political Zionism would explain, in pre-

46. AVI SHLAIM, *THE IRON WALL: ISRAEL AND THE ARAB WORLD* 1 (2000).

47. BENJAMIN NETANYAHU, *A PLACE AMONG THE NATIONS: ISRAEL AND THE WORLD* 352 (1993).

48. Israeli Foreign Ministry, *The Terror Intifada: The Current Wave of Palestinian Violence*, available at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAHOi900>.

49. *Id.*

Hitlerian Europe and sometimes still today, a reticence on the part of certain Jews who align themselves with a “universalist finality.” A second Zionism would be more open to the eschatological vision of a holy history, or else and indeed through this—a politics beyond the political—to what Levinas calls a “political intervention.”

Whether or not one endorses any of these analyses of the actual situation of the state of Israel and its political visibility (and I must admit that I do not always do so), the concern here is incontestable: *on the other hand*, to interpret the Zionist commitment, the promise, the sworn faith and not the Zionist *fact*, as a movement that carries the political and its other; and *on the other hand*, to think a peace that would be purely political.

Jacques Derrida⁵⁰

In an extraordinary display of unintended optimism, Edward Said suggested that 2000 would be a year of peace treaties between Israel and Syria and a permanent arrangement with the Palestinians.⁵¹ His argument, however, was that the injustices that power relations would encode into these treaties would spell disaster in the medium term. As it happened, 2000 was marked by the new intifada. After the collapse of the Camp David talks,⁵² it became clear that Israel was not even prepared to recognize the creation of a Palestinian state on the 22% of Mandatory Palestine that has remained in Arab hands after the 1948 War. The occupation of 1967 was to remain fixed in certain respects.

At the 2000 Camp David talks, the Israeli offer to the Palestinians has been described as accommodating 90% of the Palestinian demands, and therefore, the intifada is but another illogical outburst of Oriental fury. On the right of Israeli politics, the intifada is a confirmation that Palestinian and Arab demands are always unreasonable and threaten the existence of Israel. While on the left, the intifada is constructed as a grave disappointment that the Palestinians have not lived up to their expectations as quiescent partners. In this context, it is instructive

50. JACQUES DERRIDA, ADIEU TO EMMANUEL LEVINAS 78-79 (Pascalie-Anne Brault & Michael Naas trans., 1999).

51. EDWARD W. SAID, THE END OF THE PEACE PROCESS: OSLO AND AFTER XI-XII (2000).

52. See *Trilateral Statement on the Middle East Peace Summit at Camp David*, available at <http://www.mfa.gov.il/mfa/go.asp?MFAH0hn10> (last visited Nov. 1, 2001).

to reflect on what the offer of the Israelis was at Camp David and latter at Sharm el Sheikh and Taba. Under these proposals, the new Palestinian state would have no borders with any other country but Israel, as Israel would control the Jordan Valley (adjacent with Jordan) including the coast and waters of the Dead Sea. It would retain all of Jerusalem and annex about 9% of the West Bank to Israel where most of the settlers live. This annexed territory would cut the West Bank into two and provide Israel with a corridor linking its military positions in the Jordan Valley at the beginning of the Dead Sea. Further, swathes of territory would remain Israeli in the North and South of West Bank. In Gaza, the Israeli wanted to keep their settlements and set up an Israeli military zone at Rafah on the boarder with Egypt.⁵³ Far from a viable Palestinian State, it appears that the Camp David proposals would have constituted an entity with about 50% of the West Bank and 70% of Gaza with some special arrangements on Jerusalem. The rest of the West Bank would have been subject to negotiation over the next twenty years.⁵⁴ Both at Camp David as in other negotiations, the Israeli's have stipulated that any state must be demilitarized and that sovereignty over water and the air space must remain with Israel.

These negations between Israel and the Palestinians have stalled and the situation was exacerbated with the election of Ariel Sharon as Prime Minister in February 2001. However, the question for postcolonial discourse must be how do we assess these negotiations in the first place? What is that we are seeing in these events? The point that Hanan Ashwari so eloquently made about the colonial character of the occupation is central. The colonialism of the present places these negotiations into a high problematic context. As a consequence, it appears that the law was drafted not to provide a basis for a just resolution of a dispute, but to become a mechanism for securing and legitimizing the fruits of conquest. The law was drafted to provide a doctrinal blessing. In the frisson of the present, the Oslo Accords reappear as colonial instruments through

53. These proposals are not secret although Bill Clinton and the Israeli's did not provide any maps during the negotiations, from the summer of 2000 to January 2001. The Palestinians did, however, produce a map on the basis of the Israeli "offer." For this map, see Phil Reeves, *Arab Nations Add Their Voices to the Chorus of Despair*, THE INDEPENDENT, Jan. 5, 2001, at 14.

54. See Robert Malley, *New York Review of Books*, Aug. 9, 2001, available at <http://www.nybooks.com/articles/14380> (last visited Feb. 19, 2002). Robert Malley was President Clinton's Special Assistant for Arab-Israeli Affairs and participated in the talks.

which the occupied agree to certain terms of the occupation.⁵⁵ The instruments stand against those of former centuries all over the colonized world in the Americas, Australasia and Africa. Through the Oslo instruments, the Palestinian leadership agreed to leave five issues for future negotiations, including Israeli settlements. In addition, and quite critically through the means of the Interim Agreement, they agreed to the division of the West Bank into three areas, in which one, Area A, the Palestinians would have exclusive control. As a percentage of the West Bank, this began as 3% in 1995, but by 2000 had become 20% constituted of scattered areas around the six major population centers. While the Palestinians control the civil administration of a further 20% of the West Bank, the Israeli military still circulate freely in 80% of the West Bank and 30% of Gaza. As Said points out, the Palestinians were lured into agreeing to a new basis for the occupation, and one in which they would play their part in its administration. In his account, the PLO leadership receives official titles (Ministers, commanding officers, governors) but these have about the same status as local rulers in colonies of old. The colonial practice of obtaining the involvement of the colonized in own government and law can be seen in the way in which the Oslo process works. When the colonized work within the boundaries set by the occupying power for participation in government they are seen as abiding by good governance, but any resistance to such limitations is seen as backsliding. Thus, the Palestinian Authority's refusal to arrest activists at Israel's bidding is referred to as a breach of the agreements and the occasion for the campaign of Israeli assassination of these people.

A circle of colonialisms forms the context for the narrations of Israeli settlements. The connections between the Zionist project of the late nineteenth century, British foreign policy, the Mandate, the role of the United Nations in 1947 and today's Israeli settlements in the West Bank, Gaza and East Jerusalem are intimately woven into Palestinian and Israeli political and legal discourses. The declaration of the State of Israel in 1948 proves to be a declaration of intent to create Israel rather than the recognition of an act achieved. Despite the fact that between May 14, 1948 and June 6, 1967 no Israeli government even argued that Israel had any claims to the land occupied by Jordan and Egypt—not even East

55. See EDWARD W. SAID, *PEACE AND ITS DISCONTENTS: GAZA AND JERICHO 1993-1995* 1-18 (1995).

Jerusalem⁵⁶—as soon as the occupation took place, Jerusalem was “unified” and the rest of the territory was treated as “liberated.” The Six-Day war, it appears, unleashed both political and religious irredentism that surpassed normal political considerations and led directly to the continuing *Nakba* that Ashrawi talks about.

However, the continuing *Nakba*, in Ashrawi’s account, continues “by confiscating their utterance and distorting their historical narrative.” The idea of the confiscation of the Palestinian narrative is complex as the process of confiscation comes from multiple sources. The political and legal discourses of intertwined lineages—colonial, Zionist, the *Shoah*, Arab nationalism, the United Nations—all impinge on this process. The weight of the events of the *Nakba* in 1948 did appear to wipe the Palestinians from the map, as British Mandate Palestine came under the control of Israel, Jordan and Egypt. However, as Rashid Khalidi argues,

Even amidst the appalling conditions that affected the Palestinians, and the fragmentation that had beset them following the losses of their homes, the first stirrings of a reconstitution of an independent Palestinian identity were already taking place. In the refugee camps, the schools and the universities where Palestinians congregated in the years after 1948, we find the beginnings of a pre-history, as it were, of a new generation of Palestinian national groups and movements which started clandestinely in the 1950’s and emerged into the open in the mid-1960’s.⁵⁷

What Khalidi alludes to is the way in which the Palestinians themselves took charge of their narrative following the *Nakba*. This self-narrative grew from the cultural arena into the political one. In a strange way, the Palestinians collectively are an early example of Spivak’s observation, “we see the postcolonial *migrant* become the norm thus occluding the native once again.”⁵⁸ All Palestinians have been turned into migrants. Even those who have stayed in historical Palestine find themselves under the administration of Israel, Jordan and Egypt. For the refugees⁵⁹ in other countries beyond Palestine, they at least take a historical memory

56. See Motti Golani, *Jerusalem’s Hope Lies Only in Partition: Israel Policy on the Jerusalem Question, 1948-1967*, 31 INT’L J. MIDDLE EAST STUD. 577-604 (1999).

57. RASHID KHADIDI, *PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS* 170-80 (1997).

58. GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARDS A HISTORY OF THE VANISHING PRESENT* 256 (1999).

59. On the refugees, see BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM 1947-49* (1987).

that remains, but for those who remained in the actual place they bear witness to the catastrophe. The Palestinians who remained in Israel itself lived under military rules and saw hundreds of villages destroyed.⁶⁰ Worse, for decades this population was seen by much of the Arab world as collaborators with the enemy, as they had not left the land. From many physical spaces, the Palestinians become the migrant self-narrators of their identity. Whereas as others in the colonial/postcolonial space have to combat their representations and re-presentations (to follow Spivak's division of labor between the political and the cultural), the Palestinians are in a more problematic space where their identity appears erased. There is perhaps one identity that was assigned to them from the United Nations General Assembly and is that of "Palestinian Refugees" (note the plural mimicking the plural of "non-Jewish communities" in the League of Nations Mandate).⁶¹ It would take a further 26 years before the U.N. General Assembly on behalf of the international community brought itself to recognize the Palestinians as a people with the right to self-determination.⁶²

The representation of the Palestinians at all constitutes an intrusion into the postcolonial. Whereas Ashrawi sees the narrative as confiscated, the Israelis see the emergence of the Palestinian identity as a violent challenge to their legitimacy, as a negation of their identity. Israel and Jordan, between them, had effectively removed the Palestinians from scene.⁶³ It is all the more ironic that the Israeli victory in the 1967 war, which re-united British Mandatory Palestine, constituted the most decisive spatial advance not just the project of a greater Israel, but also for Palestinian nationalism. In a moment of military supremacy, Israel brought itself head-on into an existential collision with its national Other, the Palestinian national project. To the annoyance of the Israeli leadership, and Golda Meir in particular, this forced them to articulate the words Palestinian, as they denied their existence. Despite its contradictions, this was a strange triumph for the Palestinian national movement in the moment of its greatest defeats since 1948. Denial can become a comforting affirmation.

60. See NUR MASALHA, *A LAND WITHOUT A PEOPLE: ISRAEL, TRANSFER AND THE PALESTINIANS 1949-96* (1997).

61. See G.A. Res. 194, U.N. GAOR, 3d Sess., (1974) December 11, 1948 and the commentary on this in PAUL J.I.M. DE WAART, *THE DYNAMICS OF SELF-DETERMINATION IN PALESTINE: PROTECTION OF PEOPLES AS A HUMAN RIGHT* (1994).

62. G.A. Res. 3236, U.N. GAOR, 29th Sess., Nov. 22, 1974.

63. See AVI SHAIM, *THE POLITICS OF PARTITION: KING ABDULLAH, THE ZIONIST AND PALESTINE, 1921-51* (1988).

The physical building of Israeli settlements, therefore, takes place in a new context for the Israeli national narrative. From 1917, the *Yishuv* were weak in numbers and dependent to a large part on British Imperialism. The direct struggle of land and immigration has been conducted through a proxy political war with the British. In 1947 and 1948, the diplomatic struggle in the United Nations and the military struggle against the British and the Arab military forces takes place against the disaster of the *Shoah*. The realization of Israel takes place in the context of weakness, disaster and horror. British and allied equanimity in the face of the *Shoah* let alone the treatment of Jewish survivors became entwined with this realization, as undoubtedly that guilt is displaced to Palestine. It is against this background that the Israeli narrative takes on its heroic nature of liberation; not so much a liberation from a colonial regime as affirmation of survival against the Nazis. In the elision between the *Yishuv's* struggle against the British and Palestinian nationalism with resistance to Nazi genocide, a fateful politic is welded. In this context, Nazism has to be seen as the last and most destructive phase of 1000 years of European anti-Semitism. The Western constructions of the East merge with the construction of the Jew. Whereas the East is a disordered and backward space, the Jews are disordered Other within. Palestinians and Israeli Jews are thus condemned to a relational existence in both space and representation. The claim for legal rights becomes encoded with the narratives of this past. In the context new international situation and the much-discussed coalition against terrorism, the Palestinian-Israeli conflict assumes a highly ambiguous place in the configuration of international relations. International law, far remaining above the political fray, is deeply compromised in the search for doctrine which can adequately square the circle of the legitimate use of force by victims of injustice. Edward Said's work offers us a way of interrogating the discourses of competing legal narratives. Law's power lies not in its instrumental effectiveness but in its ability to provide arguments for contesting parties. Wisdom in law is the ability to construct the competing arguments in a relational form. In the Palestinian-Israeli conflict, it remains an urgent task.