

Michigan Law Review

Volume 89 | Issue 6

1991

Palestine and Israel: A Challenge to Justice

James E. Hopenfeld

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [International Law Commons](#), [Legal History Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

James E. Hopenfeld, *Palestine and Israel: A Challenge to Justice*, 89 MICH. L. REV. 1800 (1991).

Available at: <https://repository.law.umich.edu/mlr/vol89/iss6/38>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE. By *John Quigley*. Durham: Duke University Press. 1990. Pp. v, 232. Cloth, \$42.50; paper, \$18.95.

On the eve of the Persian Gulf War, French President Francois Mitterrand made a hopeful gesture to avert the multinational war with Iraq: if Iraq withdrew from Kuwait, he implied, an "International Peace Conference" would address the problems of the region.¹ Of course, Mitterrand's efforts failed in the face of President George Bush's objection to any possible linkage with the Arab-Israeli problem, and the ensuing Persian Gulf War initially dimmed the prospects of a regional peace conference. Now, in the aftermath of the war, those prospects are suddenly brighter.²

Should a conference ensue, the Arab-Israeli conflict, and in particular Israel's conflict with the Palestinians, will likely dominate the agenda. The outcome of negotiations may depend upon whether the parties can agree on the rights of Israelis and Palestinians as a matter of international law. The problem may be an intractable one, but advocates of each position will not lack the resources of legal scholarship.³ Few international conflicts have received so much attention, and the writing continues. In *Palestine and Israel: A Challenge to Justice*, Professor John Quigley⁴ contributes the latest addition.

Quigley focuses primarily on the competing claims to the various lands of Palestine. Like Henry Cattán, author of a similarly titled

1. Ibrahim, *France Will Pursue Peace Till 16th, Mitterrand Says*, N.Y. Times, Jan 10, 1991, at A8, col. 1. On January 14, French Foreign Minister Roland Dumas formalized the appeal as a six-point initiative, under which the U.N. Security Council would "make 'an active contribution' to [a settlement of] the Palestinian issue by convening 'at the appropriate moment' an international conference to assure 'the security, stability and development of this region of the world.'" Lewis, *France and 3 Arab States Issue an Appeal to Hussein*, N.Y. Times, Jan. 15, 1991, at A12, col. 1.

2. At the time of this writing, Secretary of State Baker had gone to Israel to discuss resolving the Arab-Israeli conflict.

3. Some of the more recent and important works are N. FEINBERG, *STUDIES IN INTERNATIONAL LAW* (1979); *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS* (M. Shamgar ed. 1982); B. MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949* (1987); N. SAFRAN, *ISRAEL THE EMBATTLED ALLY* (2d ed. 1981); S. SANDLER & H. FRISCH, *ISRAEL, THE PALESTINIANS, AND THE WEST BANK* (1984); R. SHEHADEH, *OCCUPIER'S LAW: ISRAEL AND THE WEST BANK* (1985); J. STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* (1981); and J. WEILER, *ISRAEL AND THE CREATION OF A PALESTINIAN STATE: A EUROPEAN PERSPECTIVE* (1985).

4. Professor of Law and Adjunct Professor of Political Science, The Ohio State University. Quigley contributed to *PALESTINIAN RIGHTS: DENIAL AND AFFIRMATION* (I. Abu-Lughad ed. 1982), *TREATMENT OF PALESTINIANS IN ISRAELI-OCCUPIED WEST BANK AND GAZA: REPORT OF THE NATIONAL LAWYERS GUILD 1977 MIDDLE EAST DELEGATION* (1978). He has also written books about Soviet Law: H. BERMAN & J. QUIGLEY, *BASIC LAWS ON THE STRUCTURE OF THE SOVIET STATE* (1969); J. QUIGLEY, *THE SOVIET FOREIGN TRADE MONOPOLY: INSTITUTIONS AND LAWS* (1974).

work,⁵ Quigley presents a series of Zionist violations of international law as rationale for challenging the validity of the Jewish title to Palestine. Unlike Cattán, however, Quigley questions the legitimacy of the Israeli claim to Palestine by attacking Zionism itself.⁶ Zionism and the Zionist state, Quigley argues, are colonialist, racist phenomena that have aggressively deprived Palestinians of their right to self-determination.

Unfortunately, the argument founders in the midst of a polemic style and occasionally haphazard organization. Also, Quigley often fails to differentiate clearly for the reader arguments he supports from those he merely intends to explain. Perhaps most importantly, debatable characterizations of historical fact substantially undermine the strength of legal arguments dependent on historical analysis.

Despite these flaws, Quigley succeeds in exposing the ugly side of the Jewish presence in the Middle East. Post-World War II film documentaries and contemporary literature had created a romanticized image of the brave immigrant Jew who, against all odds, fought off the heathen, wicked Arabs to return to his or her desert and transform it into an Elysian paradise. Romanticized Israel recalled America's own frontier past, and the American public swooned. In radical contrast, Quigley bludgeons his audience with a litany of atrocities committed by the Jews against the Palestinians: the Jews stole, deceived, and discriminated. Quigley's legal arguments may ultimately fail to convince many readers, but at least they surface as the product of some real grievances.

The establishment and expansion of the state of Israel structures Quigley's presentation. First, the book investigates the original Zionist settlement in Palestine from inception through United Nations Resolution 181, which authorized the division of Palestine into Arab and Jewish states (pp. 1-53). Here, Quigley questions the Jews' claim to the land that would form the original State of Israel. The Jewish settlements in Palestine, he argues, can only be understood as a consequence of turn-of-the-century imperialism and colonialism. Thus, the Jews deprived the Palestinians of their legal right to self-determination from the outset. The remainder of the book, which analyzes the expansion of the Jewish settlement via the establishment of Israel, the expansion of Israel into the West Bank and Gaza pursuant to the Six Day War of 1967, the Israeli treatment of Arabs, and solutions to the conflict, builds on this claim.

Implicit in this approach, which traces the history of the Arab-Israeli conflict in order to formulate a legal argument, is that yester-

5. H. CATTAN, *PALESTINE, THE ARABS AND ISRAEL: THE SEARCH FOR JUSTICE* (1969).

6. Others before Quigley have used the same technique. *See, e.g.,* *COLLOQUIUM OF ARAB JURISTS* (1967), described and distinguished from Cattán in N. FEINBERG, *supra* note 3, at 516 n.11.

day's facts affect today's rights. Because normative conclusions concerning today's rights draw substantial strength from normative conclusions about yesterday's rights, it is not surprising that Quigley spends so much time explaining history.⁷ History creates and destroys rights. Elucidating rights ahistorically is the realm of politics and diplomacy, not international law.

For Quigley and those with whom he jousts, therefore, it is important, for example, whether or not the Jews were the aggressors in the 1948 Israeli War of Independence. If the Jews really were the aggressors in 1948, then it is easier to argue that Israel was also an aggressor in 1967, when the Israelis captured the West Bank and Gaza from Jordan in the Six Day War. In this line of argument, the Six Day War fits neatly into a pattern of Israeli aggression. If the War of Independence should be viewed as a greedy grab of territory rather than the defense of a nascent and fragile country, it is not difficult to conclude that the Six Day War was another calculated step toward establishing a "Greater Israel," and that again Israel's justifications of self-defense were manufactured. Consequently, Israel's continued occupation of the West Bank and Gaza is aggressive, and therefore illegal. Another picture of the events in 1948 might suggest a different rubric under which to place the Six Day War.

Accordingly, the debate between "pro-Palestinian" and "pro-Israeli" commentators often focuses less on disagreements over what international law is and more on characterizations of what really happened in 1948 and 1967. This is not to say that Quigley, or other commentators, do not hinge important arguments on characterizations of international law. Quigley, for example, debates Great Britain's legal obligations pursuant to the mandate it received from the League of Nations to administer Palestine after World War I (pp. 14-17), the legal status of U.N. General Assembly resolutions (pp. 47-53), ancient right as a basis for entitlement to land (pp. 66-72), and self-determination as a right or merely a principle of international law (p. 67). Ultimately, however, Quigley exerts more effort arguing over points of fact, such as whether the Jews who inhabit Israel today can truly claim to be the descendants of the Jews dispossessed of Israel by

7. Compare Professor Weiler's comments:

Despite the abundance and diversity of contributions, there is a common trait unifying much of the legal scholarship [on the Arab-Israeli conflict]. With some notable exceptions, legal writers and lawyers have tended to address past events with a view toward determining legal rights and wrongs. Thus, law and legal scholarship have been used primarily to conduct a normative evaluation of the parties' political acts and claims. This tendency of scholarly commentary derives from the very nature of the discipline. Municipal legal scholarship and law, especially in the common-law world, have long been dominated by judicial process whose main purpose has been to adjudicate between conflicting parties to determine their legal rights and duties. This post facto determination is meant, of course, to have ramifications for the future, as it is through adjudication that parties resolve their conflicts — wrongs must be undone and rights must be vindicated.

J. WEILER, *supra* note 3, at 42-43 (footnotes omitted).

the Romans almost 2,000 years ago (pp. 68-71), and characterizing the true intentions of Jewish leaders such as David Ben-Gurion (p. 42) with the apparent purpose of attributing such intentions to all of Zionism.

The crux of Quigley's legal argument is that the establishment and expansion of Israel has violated the Palestinians' right to self-determination, which in turn violates international law. If Quigley is correct that Israel was the aggressor in 1948 and 1967, the argument is strong, because each war resulted in Israel's occupation of territory outside its borders and the subsequent dispossession of thousands of Palestinians. But arguing that the *establishment* of Israel violated the Palestinians' right to self-determination is more difficult.

In order to reinforce this latter claim, Quigley characterizes the original Jewish settlements in Palestine as colonialist endeavors. The Palestinians, Quigley argues, were deprived of their land by imperialist powers such as the United States and Great Britain to serve their selfish geopolitical interests rather than moral or legal interests. In this regard, Quigley emphasizes that Zionism emerged during the colonial division of Africa (p. 6) from a minority block in the Jewish community (p. 12). The British endorsed the concept of a Jewish national home in Palestine not because they felt Jewish nationalism deserved any moral backing, but as a cynical attempt to protect the strategic interests of the British empire (pp. 8-9). Furthermore, the United Nations never would have endorsed the partition of Palestine into Arab and Jewish parts but for the American arm-twisting of General Assembly delegates and a collective consciousness of guilt for the Holocaust; there was no international, collective feeling that the Jews had a right to the land allocated to them by partition (p. 37). The original settlement in Israel, despite its background in the oppression of Jews in Europe, can only be seen as a colony; partition can only be seen as a farce.

Yet Quigley never establishes that the Jewish actions, even if colonialist, violated the Palestinians' legal right to self-determination. This failure ensues primarily from Quigley's refusal to define self-determination, or to explain how this term relates to the right to control land. Quigley never reconciles, for example, the premise that the Palestinians could claim title because they are the native inhabitants (p. 68) with his admission that physical control of a territory is an important basis for a claim of title (pp. 67, 72). Later, he suggests that possession must be peaceful and uncontested in order for title to vest, implying that control really is not important after all (p. 92). If Quigley is correct, not only does Israel hold invalid title now, but its predecessors, Great Britain (through the League of Nations) and the Ottoman Empire, never held valid claims to Palestine either: the possession by each was contested by the indigenous inhabitants. Some

might accept this argument. But if title belonged to the Palestinians all along because they are a distinct people (pp. 73-74) on their own land, does the Palestinian claim encompass parts of Jordan and Lebanon that are also predominantly Palestinian?⁸ Quigley leaves unclear just how far he would have the right of self-determination extend over territory.

Regardless of the legal status of the right to self-determination, the inquiry as to whether the right was violated turns mainly on questions of fact. For example, to support further the legal argument that the Zionists' claim to Palestine was invalid as a colonialist expropriation of territory, Quigley marshals historical evidence showing that most violence in the pre-Israel era was perpetrated by Jews with the main purpose of forcing the natives from their land (pp. 40-46). Jewish acts of terrorism receive extensive description,⁹ while Arab participation in the violence is virtually ignored.

When he does mention Arab violence, Quigley gives chronically misleading descriptions. Consider, for example, Quigley's description of the Arab posture after the passage of U.N. Resolution 141, during British preparations to leave Palestine: "The Arab Higher Committee planned no major military action before British withdrawal, now scheduled for May 1948. But local Arab irregulars loyal to the Arab Higher Committee staged armed attacks on transport convoys that carried supplies to Zionist settlements and Jewish-populated towns" (p. 40; footnote omitted).

In fact, the military leader of the Arab Higher Committee, Abdul Khader Husseini, proceeding on the direction of the Committee's leader, Haj Amin Al Husseini, had put the city of Jerusalem under siege.¹⁰ The predominantly Jewish population of Jerusalem was supplied mainly by convoys along the Tel Aviv-Jerusalem Road.¹¹ Abdul Khader, with the aid of local irregulars, persistently attacked these convoys in an effort to starve the city.¹² The operation threatened to destroy the Jewish state before it started; indeed, until Abdul Khader's

8. Approximately 1.5 to 1.7 million Palestinians live in Jordan, which has a total population of approximately 3.1 million. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 1990, at 165. Most of those Palestinians are citizens of Jordan. *Id.*

9. *See, e.g.*, pp. 40-42 (detailing the December 1947 offensive by Zionist military organizations against Arab towns and villages).

10. *See* L. COLLINS & D. LAPIERRE, O JERUSALEM! 86-88, 133-39 (1972); *see also* D. KURZMAN, GENESIS 1948: THE FIRST ARAB-ISRAELI WAR 69-75 (1970); B. MORRIS, *supra* note 3, at 61.

The Arab Higher Committee also planned and executed terrorist attacks, including the bombings in Jerusalem of the Palestine Post, Ben-Yehuda Street, and the Jewish Agency. *See, e.g.*, D. KURZMAN, *supra*, at 74-75.

11. *See* L. COLLINS & D. LAPIERRE, *supra* note 10, at 31-32, 61-62. Two other important roads, one from the Galilee in the north and the other from Negev in the south, had been completely cut off by Arab forces. D. KURZMAN, *supra* note 10, at 202-03.

12. D. KURZMAN, *supra* note 10, at 76-81.

death, the Arab raids were successful.¹³

Quigley does not mention or challenge any of these accounts. Was the siege of Jerusalem a minor operation? Was Jerusalem a "Zionist settlement" or a "Jewish-populated town?" Did the Arab irregulars really operate without any guidance from the Arab Higher Committee?¹⁴ Quigley's account may, after all, be correct, but he gives no reason for believing that other commentators have their facts wrong, or that his omissions of otherwise well-known facts are legitimate. Consequently, it is difficult to regard Quigley's historical accounts as products of objective scholarship.

After impugning Zionism and the legality of the Jewish settlements, Quigley argues that the establishment of the state of Israel, in contrast to the settlement of Palestine, had no legal basis either. Again, violation of the right to self-determination forms the gravamen of each legal argument. Here, haphazard organization has its most telling and enervating effect on the book's thesis. For example, in Part I's final chapter, Quigley presents the argument that Resolution 181 cannot justify the state of Israel — but he places his consideration of the claim of ancient title in a chapter in Part II, between chapters describing the 1948 war and his analysis of alternative justifications for the state. This scattershot presentation obscures the relation between these arguments. Perhaps a better organization would have treated these arguments in turn; this could have been done without detracting from the structural theme of land acquisition.

Quigley's first rebuttal against Israel's legitimacy seeks to undermine any claim that Resolution 181 created or justified the state. Specifically, Quigley claims that Resolution 181 lacked binding force because the U.N. General Assembly is not a world legislature (p. 47). While this is one of Quigley's more convincing passages (because it both acknowledges and confronts several arguments to the contrary), he does not address the argument's consequences later in the book, when he relies in part on other General Assembly resolutions in arguing that Israel illegally occupies the West Bank and Gaza Strip (pp. 168-73). He cites, for example, a General Assembly resolution calling for an unconditional withdrawal of Israeli forces from the territories occupied by Israel since 1967 (pp. 171-72).

Indisputably, U.N. resolutions are nonbinding recommendations

13. See L. COLLINS & D. LAPIERRE, *supra* note 10, at 218-21, 242-43. At the strategically critical juncture known as the Bab-Al-Wad (Gate of the Valley), where the road from Tel Aviv begins its ascent of the Judean hills, the charred remains of convoy trucks can still be seen strewn beside the road.

14. Quigley further confuses the issue by noting that irregulars attempted to blockade the Jewish Quarter in the Old City. P. 42. Most Jews lived outside the gates of the Old City. The siege of Jerusalem and the siege of the Old City were separate occurrences, the first of which Quigley does not even acknowledge. See D. KURZMAN, *supra* note 10, at 343-402 for an account of the separate siege of the Old City.

(p. 47-53). However, Quigley fails to move beyond this obvious truth and investigate the legal or extra-legal status of recommendations. Perhaps such resolutions do have moral force. For example, even though Resolution 181 was not binding, it might nevertheless have provided a moral basis for a subsequent declaration of statehood by Israel. While that argument might weaken the claim against Israel's legitimacy, it might strengthen claims against Israel that rely on U.N. resolutions; for example, those decrying treatment of Palestinians in the occupied territories.

Furthermore, if the U.N. resolutions had no moral force, then any subsequent claim that Israel should be reduced to its Partition borders is left practically groundless. This solution would then seem arbitrary. In any event, Israel never based its right to exist on Resolution 181 — instead, Israel claimed title by historic right (p. 66).

Quigley assails Israel's "historic right" claim, too. In essence, he argues that while the Palestinians have a right to self-determination, the Jews do not — time has extinguished the Jewish claim. This argument has a good measure of force. Despite the attachment Jews have always felt toward Israel, religious nostalgia hardly provides sufficient basis for claiming that Jews never lost legal title to Israel after an absence of a Jewish state in Palestine for nearly two thousand years. On the other hand, as the years go by, the same argument might just as well apply to the Palestinians. But Quigley refuses to explore fully this equally plausible possibility.¹⁵

Finally, Quigley argues that Jews cannot justify the establishment of Israel as a fair response to Arab aggression. Israel must be regarded as the aggressor in the 1948 war and, hence, Israel cannot justify statehood on the basis of an Arab attack on the Jews living in Palestine (pp. 73-81). Consequently, even if one accepts Israel's statehood, the territory it captured in 1948 outside of Partition lines was illegally acquired (pp. 92-93). The principle basis for this claim is that Israel fought not for independence, but for more land. A similar argument undergirds the subsequent analysis of the Six Day War in Part IV of the book.

Quigley's views of the causes of the 1948 and Six Day Wars contradict the majority of scholarship on the issue.¹⁶ For example, Quigley

15. Later in the book, Quigley admits that restoring all of Palestine to the Palestinians would be impractical, if not unjust (as an infringement of the rights of those Jews brought to live in Israel, often against their will). Pp. 211-12. He implies that enough time has passed to extinguish all of the Jews' ancient claims to Palestine — but not all of the Arabs' claims. The underlying calculus for such a distinction remains unexplained.

16. See, e.g., A. BARKER, *ARAB-ISRAELI WARS* 41-46 (1980); R. CHURCHILL & W. CHURCHILL, *THE SIX DAY WAR* 53-55 (1967); W. LAQUER, *THE ROAD TO WAR 1967: THE ORIGINS OF THE ARAB-ISRAELI CONFLICT* 241 (1968); N. SAFRAN, *supra* note 3, at 24-64. *But see*, e.g., H. CATTAN, *supra* note 5, at 91-106; S. HADAWI, *THE ARAB-ISRAELI CONFLICT (CAUSE AND EFFECT)* 5-7 (1969); D. HIRST, *THE GUN AND THE OLIVE BRANCH* 206-09 (2d ed. 1984).

appears to believe (for this is one instance where it is unclear whether the author is making his own point or explaining someone else's) that invading forces of Egypt, Syria, Transjordan, and Iraq intervened in Palestine in 1948 in defense¹⁷ of the Palestinians:

Egypt cited atrocities against the Palestine Arabs and a need to stop "Zionist terrorist gangs who persisted in attacking the peaceful Arab inhabitants." Transjordan had been "compelled to enter Palestine to protect unarmed Arabs against massacres." . . . The intervening states also stressed they were entering Palestine at [the Arab Higher Committee's] request. [p. 77; footnotes omitted]

Yet Quigley presents no evidence to back the substance of these claims. The Arab states' other motivations for invasion, such as Transjordan's limited quest to annex Jerusalem,¹⁸ are downplayed and obscured. Combined with Quigley's implication that the Jews possessed a vastly superior military force at the war's outset (pp. 38-39), Quigley's account of the war borders on the frivolous.¹⁹ It is difficult to believe that any student of the war might conclude that the Jews were not responding to an invasion of their country, regardless of the propriety of the Arab invasion. Indeed, in the weeks before the war, the Arabs had vowed to "throw the Jews into the sea."²⁰ As a result of Quigley's haphazard and dubious accounts of the Arab-Israeli wars, some relatively stronger arguments for his position languish. Most notable is Israel's responsibility for the refugee problem, which Quigley analyzes yet again as a problem born of Jewish colonialist aggression. Quigley leaves un rebutted arguments made by other scholars, such as Benny Morris, that the refugee problem's causes were diverse and depended on place and time.²¹

Finally, in addition to the parts of the book devoted to resolution of the conflict, Quigley offers an entire Part discussing Israel's treatment of the Arabs (pp. 97-150). This Part does not serve the central theme of right to territory, or even relate to it. Instead, these chapters, in presenting a laundry list of Jewish "atrocities" ranging from taking Palestinian water to the policies of the Israeli housing bureaucracy, seek to add yet more baggage to "Zionism" — the baggage of racism.

17. Quigley assumes that establishing the state of Israel was by itself an act of aggression; *a fortiori*, the "defense" of Israel was also aggressive. Thus the Arab armies "defended" Palestine.

18. King Abdullah of Transjordan did not seek to destroy Israel. See L. COLLINS & D. LAPIERRE, *supra* note 10, at 293, 384-85, 411. Indeed, Abdullah regarded the Jewish presence in Palestine as largely a positive one. *Id.* at 82. This view was shared by other Arabs, such as Syria's Emir Feisal. See J. STONE, *supra* note 3, at 138. However, Quigley omits these details as well.

19. See, e.g., N. SAFRAN, *supra* note 3, at 44-50. Quigley's implication seems to ignore sundry Arab advantages in firepower, organization, and so on, and belies Arab military successes at the beginning of hostilities. See *id.* at 50. As the war progressed, however, the balance of power clearly shifted toward the Israelis. *Id.* at 49.

20. L. COLLINS & D. LAPIERRE, *supra* note 10, at 74.

21. See B. MORRIS, *supra* note 3, at 294.

Of the seventeen (at least) instances where Quigley makes or cites comparisons of Zionism to apartheid,²² seven appear in this Part. The message is unmistakable: in oppressing Palestinians, Israel has gone beyond the mere denial of their right of self-determination. The Arab-Israeli conflict is not only about land.

Perhaps the book is therefore not about territorial rights, as it professes in the preface, but about Zionism. In a sense, the characterization of Zionism consumes this book, which is less a legal argument than an invective against Zionism. Quigley's ultimate, radical suggested solutions²³ only further this feeling. Some readers may be sympathetic to that approach. Those seeking simply to learn more about the conflict, however, will be sorely disappointed.

— *James E. Hopenfeld*

22. See pp. 21, 107, 124-25, 128, 134, 143, 148-49, 181, 183, 188, 190-91, 213-14, 216, 219, 223 & 226.

23. Quigley suggests Israel should be expelled from the United Nations (p. 223); a court should be set up to restore Palestinians to their land or provide for compensation (p. 212); a Palestinian state should be created, not only on occupied territory but also on land acquired through war (pp. 228-32); and perhaps most significantly, Israel should relinquish its character as a Jewish state (p. 213). Furthermore, Quigley suggests that not only do other nations have the right to intervene on behalf of the Palestinians — they also have an obligation to do so. Pp. 220-21. By this account, Saddam Hussein's Scud missile attack on Israel in January 1991 might actually have been legal.