

מדינת ישראל

גנץ המדינה

35

משר כבש וברית
אלאן וברית

מס' תיק

P- Elman - The Peninsula of Sinai

C. Farhi - The Gaza Strip

1971

נקודות על חצי האי סיני

מס' תיק מס' ר



ספר על רציפות עזה וסיני

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גאריד הדפסה

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of any other country for the rest of their lives. I a thought which already haunts the families of American diplomats, or they have been told quite plainly that they will never be ransomed if they are captured by terrorists. That is what happened at Khartoum when a Black September gang occupied the Saudi Arabian Embassy. The Americans refused to agree to the terms for the release of Ambassador Cleo Noel and his Deputy Chief of Mission, George Curtis Moore, who had been attending a farewell party for Moore at the Embassy. The terrorists demanded the release of Sirhan Sirhan, the killer of Senator Robert Kennedy, and a number of terrorists imprisoned in Jordan, Israel and Germany. President Nixon told a press conference in Washington that America "cannot and will not pay blackmail". The two Americans and the Belgian chargé d'affaires, Guy Eid, were then murdered. A year later the eight murderers were sentenced to life imprisonment – and set free on the same day. President Numeiri of the Sudan has since shown himself to be less compassionate when the attempts have been against himself. He has had several hundred of his opponents shot.

As far as the protection of airliners is concerned, the weapons to hand are absolute vigilance and a set of security procedures which, while adding nothing to the comfort and dignity of passengers, ensure a measure of safety. Here the Israelis are once again the most rigorous. Their airliners all carry members of the "007 Squad" who have orders to fight it out in mid-air if an El Al plane is attacked. They carry low velocity .22 pistols so that any bullets missing their targets will not cause an explosive decompression of the airliner. The airliners themselves, in a series of hair-raising experiments over the Sinai deserts, had grenades exploded in their specially strengthened fuselages to determine whether or not a grenade would be fatal to the plane in a mid-air fight. The results showed that the aircraft would survive and so the Israeli sharpshooters are prepared to do battle at thirty thousand feet even when their opponents have pulled the pins from their grenades. Once more, they are prepared to pay the price in passengers' lives.

The Israelis are equally stringent with their pre-flight security checks. Passengers must now book in two hours before flight time and this interval is taken up by a minute baggage and body search. When thick-soled shoes were fashionable the security agents could be seen using a large awl to make sure the soles were not filled with plastic explosive. Both the authors of this book have had their cameras and

typewriter tipped down to ensure that they did not conceal explosives or parts of a pistol. The result of these precautions is that travel on El Al is tiresome and frustrating – but safe from hijacking. It is because of the difficulty of smuggling weapons on El Al planes that the Entebbe hijackers chose a French aircraft. Carlos in Paris tried to destroy El Al airliners from the outside by Sam 7 rockets and, a few weeks after Entebbe, two Palestinians threw a grenade at El Al passengers waiting to board their aircraft at Istanbul – out of rage at the airline's near-impregnability.

It is interesting to note that both the Palestinians carried Kuwaiti passports and had waited in the transit lounge after flying from Libya. The price of freedom is eternal vigilance and nowhere is this more true than at airports. Entebbe only happened because of complicity at Kuwait and laxness at Athens. Given the vulnerability of large aircraft carrying over three hundred people, there can be no excuse for sloppy security – even if the passengers complain.

The Israelis have also taken the lead in protecting their embassies. Remotely controlled television cameras, reception rooms which can be turned into killing rooms, tough young men and women armed with weapons brought in by the "Diplomatic Bag", reinforced concrete and barred windows, have turned Israeli embassies all round the world into miniature fortresses. Again, that is why the terrorists have turned to indirect targets. They no longer dare attack Israeli embassies.

All these counter-measures are essentially defensive. They are reactions to actions taken by the terrorists. But there comes a time when a defence is so good it becomes offensive. The Sam anti-aircraft system of the Egyptian army, for example, was essentially defensive. But in the Yom Kippur War it assumed an offensive role by making the sky dangerous for Israeli planes for fifteen miles in advance of the front line. Under this forward-thrust umbrella, Egyptian tanks and soldiers were able to develop their offensive on the ground in comparative safety while the Israelis were forced to look for ways through or round it.

This is precisely what happens when strict anti-terrorist measures are adopted. They force the terrorists to look for other ways to achieve their objectives; they force them into the open, to take chances, to waste men and money on difficult missions; they make their enterprises much more complicated and dangerous. But this offensive -defensive posture

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a stepping stone to India, using as its base the Franciscan station at Gaza.⁶³⁾

When the Sultan threatened to destroy the Christian Holy Places if the Portuguese did not abandon their Indian voyages which menaced the entrepot trade of Egypt via the Red Sea, the Prior of Santa Katerina in Sinai journeyed to Rome to enlist the good offices of the Pope.⁶⁴⁾ In the sixteenth century the Venetians - themselves fearing, with good reason, the consequences of the opening up of the new sea routes - encouraged the Sultan to establish direct communications between Suez and India, a step which, had it been successful, would have lead to the development of the western coastal plain of Sinai, but the Portuguese entered the Red Sea and interfered with the Mecca pilgrims.⁶⁵⁾ The fiat of the Sultan clearly did not extend to the area, the centre of power having moved from Cairo to Constantinople after 1517 with the Ottoman annexation of the Mamluk sultanate and Egypt being placed under a pasha.⁶⁶⁾

(c) The Ottoman Empire

Ottoman documents extant from the sixteenth century show that the exact status within the Empire of Sinai, or more accurately the northern part of it, was not at all certain. Thus, while the whole of Sinai had apparently been included in the province of Hedjaz⁶⁷⁾, an order of the Sultan dating from the

63) Eckenstein, 165 et seq; cf. R.I.I.A., The Middle East (1950) 7 - 8.

64) Kirk, op. cit. 64.

65) Eckenstein, 172.

66) Cf. Z.N. Zeine Arab-Turkish Relations (1958) 10. In 1517, the Mamluk rulers of Egypt and Syria were removed by the Ottoman Sultan and these countries became an integral part of the Ottoman Empire.

67) Eckenstein 135

year 1577, addressed to the governor of Damascus, ordering him to procure post horses at, amongst other places, El-Arish, gives the impression that the latter lay within the jurisdiction of Damascus, but another document from the year 1594 speaks of El-Arish as "the fortress of Arish which belongs to Egypt." There is, on the other hand, some suggestion that the northern part of the Peninsula (Qatya) was militarily associated with the sanjak of Gaza.⁶⁸⁾ Indeed a late 14th century Arab writer reports that El-Arish was part of the kingdom of Gaza, along with other places further north and further west; and to anticipate, it was still so regarded during the Napoleonic exploits in the region at the end of the 18th century.⁶⁹⁾ [The confused situation was increased as a result of the political and administrative changes of 1517, referred to above.]

Be that as it may, a petition to the Sultan from the very beginning of the seventeenth century reveals how ineffective government was locally, whoever was in control. Speaking of the Damascus-Cairo road from Gaza to Qatya, "which is (covered in) six or seven days (and) is situated in the desert", the petitioner points out that between these two places "there is no inhabited place except the fortress of Arish. The Bedouin ... incessantly molest travellers who pass along the road to Egypt on this side of the fortress of Arish, near the ruins

68) U. Heyd, Ottoman Documents on Palestine 1552-1615 (1960) 126-27, 78.

69) M. A. Meyer, History of the City of Gaza (1907) 87, 101-2. Gaza was in the Middle Ages the last town in Palestine on the road to Egypt and a trade route centre with very significant military importance as well and often a bone of contention between the rival states of the region: *ibid.* 1, 91. Cf. Volney, *op. cit.* 205.

named Khan Yunis in the desert." The petitioner had some time earlier proposed to the Pasha of Egypt to enlist horsemen and restore the caravannerai at El Arish; the Pasha had been in favour of doing so and some forty horsemen had been enlisted, but the Bedouin were too numerous and the garrison too small to cope with them. The petition ends by asking for a firman addressed to the Pasha of Egypt to recruit another forty horsemen.⁷⁰⁾ We do not know what was the response. In the middle of the 18th century, the Bedouin would openly dispose of their very considerable plunder of the Mecca caravans in the market at Gaza.⁷¹⁾

There emerges from the available evidence the impression that northern Sinai along the Mediterranean coast was in some indeterminate manner a part of the Egyptian Pashilak but the precise extent of the territory so "held" is not clear.

6 An eighteenth century traveller,⁷²⁾ describing the geographical extent of Palestine which was then a part of Syria, writes that it "comprehends the whole country between the Mediterranean to the west, the chain of mountains to the east, and two lines, one drawn to the south, by Khan Yunis, and the other to the North, between Kaisaria and the rivulet of Yafa". As regards Sinai itself he has the following to say. ""This desert which is the boundary of Syria to the south, extends itself between the two gulphs of the Red Sea; that of Suez to the West, and that of El-Kaba to the East. Its breath is ordinarily thirty leagues, and its length seventy." His account of conditions in Palestine is

70) Heyd, op. cit. 185-86. Khan Yunis seems to have "arisen" at the end of the 14th century, as the Khan of an Emir of that name, and it became a well-known station on the journey through the desert Mayer, op. cit. 91.

71) Mayer, op. cit. 100.

72) Volney, op. cit. 197-98, 208.

significant in the present context. "This country is indeed more frequently plundered than any other in Syria, for being ... adjacent to the Desert it lies open to the Arabs ...; they have long disputed it with every power in it, and have succeeded so far as to obtain the concession of certain places, on paying a tribute They might even have obtained the entire possession of it, had they known how to avail themselves of their strength; but divided among themselves, they turn those weapons on each other ..., and are at one enfeebled by their disregard of all good order and government." The Arabs from the Desert were said to consist then of three tribes of Bedouin numbering between five and six thousand and dispersed in various parts of the area.⁷³⁾

We may conclude from the foregoing historical sketch that Sinai as such was never in any effective sense a part of Egypt... Certain areas - the Mediterranean coastal area in the north and the coastal plain in the south west - may have had close connections with it but the precise legal-political relation is altogether uncertain. In very earliest times, Egypt had certainly had an interest in blocking the northern road along which attack might come, and there had been religious and commercial contacts with the south-western coastal strip of Sinai. Under the Roman Empire, most of the Peninsula had been under the direct rule of Rome and only the Mediterranean zone associated with Egypt. Later the whole region, embracing both Egypt and Sinai, remained a unit but as part of the Ottoman Empire, and if administratively the northern zone was attached to the Pashalik of Egypt, it continued to be part of that Empire. For the rest,

73) Ibid. 209. See also text to note 43 above. Cf. the description given by Dean Stanley, op. cit. 136, of the raids into Palestine made by the Bedouin, "the corsairs of the wilderness".

Sinai, was a no-mans land in which no political interest was shown. The decay of the Ottoman Empire in the eighteenth century emphasized this position - an indifference to Bedouin encroachments on the settled areas in Palestine-Syria and the continuous shuffling, replacement and revolt of the local Pashas there and in Egypt.⁷⁴⁾

IV The Nineteenth Century

In the nineteenth century the disintegration and dismemberment of the Ottoman Empire entered a crucial stage, starting with the activities of Mehemet Ali of Egypt and his invasion along the Mediterranean coastal route and annexation of Syria. During the decade that Mehemet Ali was in power a certain measure of orderly government appears to have been introduced in the region, at least as far as the safety of the pilgrim routes across Sinai are concerned, by the rebuilding of the forts at Suez, Nekhle and Akaba. As against this, Sir Richard Burton bears witness to the independence of the local population. He recounts that no government at Suez dared to lay hands, let alone inflict punishment even in Suez itself, on a "Turi", whatever his offence.⁷⁵⁾

We are not concerned with the details of Mehemet Ali's exploits and all that need be noted here is the ultimate reaction, in the interplay of international relations, of the western powers to his assertions of undefined

74) Kirk, op. cit. 60 et seq. Compare the maps, *ibid.*, at 1, 17, 29, 55 and 79, which graphically portray the position of Sinai down to the nineteenth century. See also a map of the area dated 1801, now in the National Library, Jerusalem, No. 60105, which shows the frontier stretching from El Arish southwest to Sinai town. For the situation in the first quarter of the 19th century, see A.J. Rustin, The Royal Archives of Egypt and the Disturbances in Palestine, 1834.

75) Eckenstein, 185; cf. Stanley, op. cit. 25.

all-embracing rights when informed that he was to be confined to Egypt. In a despatch sent in 1839, Lord Palmerston instructs the British agent in Cairo "to remind him that he has no rights except such as the Sultan has conferred upon him; that the only legitimate authority which he possesses is the authority which has been delegated to him by the Sultan over a portion of the Sultan's dominions ...; that the Sultan is entitled to take away that which he has given; that the Sultan may properly do so, if his own safety should require it."⁶⁾

The enforced withdrawal of Mehemet Ali and the buttressing of the Sultan by the western powers led in 1840-41 to measures designed to contain Mehemet Ali to Egypt, "comprise dans ses limites connues et d'y ajouter l'hérédité sous certaines conditions".⁷⁷⁾ The Sultan's formal offer to Mehemet Ali of the terms of settlement were incorporated in an *Acte séparé* annexed to the Convention of London of July 15, 1841, between England, Austria, Prussia, Russia and the Sultan. It was in the following terms

"S.H. le Sultan a l'intention d'accorder et de faire notifier à Méhémet-Ali les conditions de l'arrangement ci-dessous: 1.
S.H. promet d'accorder à Méhémet-Ali, pour lui et ses descendants, en ligne directe, l'administration du pachalik d'Egypte, et S.H. promet, en outre, d'accorder à Méhémet-Ali, sa vie durant, avec le titre de Pacha d'Acre, et avec le commandement de la forteresse de Saint-Jean d'Acre, l'administration de la partie méridionale de la Syrie, dont les limites seront déterminées par la démarcation suivante: Cette ligne, partant du cap Ras-el-Nakhare, sur les côtes de la Méditerranée, s'étendra de là directement jusqu'à l'embouchure de la rivière Seïsban extrémité septentrionale de la Tiberias, longera le côté occidentale du dit lac, suivra la rive droite du fleuve Jourdan, et le côté occidentale de la mer morte, se prolongera de là en droiture jusqu'à la mer rouge, en aboutissant à la pointe septentrionale du golfe d'Akaba et suivra la côte occidentale du golfe d'Akaba, et la côte occidentale du golfe de

6) Paton, op. cit. Vol. II, 170, and see also 95, 101, 168.

77) Firman of February 13, 1840; Documents Diplomatiques, 7-9.

Suez jusqu'à Suez. Toutefois le Sultan, en faisant ces offres y attache la condition que Méhémet-Ali les accepte dans l'espace de dix jours, après que la communication en lui aura été faite, à Alexandrie, par un agent de S.H. et qu'en même temps Méhémet-Ali dépose entre les mains de cet Agent, les instructions nécessaires aux commandants de ses forces de terre et de mer de se retirer immédiatement de l'Arabie, et de toutes les villes Saintes qui s'y trouvent situées, de l'île de Candie, du district d'Adana et de toutes les autres parties de l'Empire Ottoman, qui ne sont pas comprises dans les limites de l'Egypte, et dans celles du pachalik d'Acre, tel qu'il a été désigné ci-dessus.⁷⁸⁾

Failing acceptance of this offer within the ten days prescribed, Mehemet Ali was offered the Pashalik of Egypt alone, with a further time limit of ten days. In either case, an annual tribute was to be paid to the Sultan, calculated according to the amount of territory over which Mehemet Ali was given administrative control. Finally all treaties and laws of the Empire would continue to apply to Egypt and the areas administered by it. Mehemet Ali did not accept either offer and eventually, after further negotiations, a firman was issued in February 1841, granting him the hereditary succession to "the government of Egypt within its ancient boundaries such as they are to be found in the map which is sent unto thee by my Grand Vizier", the Sultan remaining free to choose as Khedive any son of Mehemet Ali in the direct line.⁷⁹⁾ Under this settlement the diplomatic representation of Egypt remained in the hands of the Sultan and all international obligations entered into by the latter were binding on Egypt. No foreign loans or cessions of territory could be made without special permission of the Porte in whose name also all taxes and duties were to be levied.

The foregoing is clearly central to the present problem and a few observations on the contents of the documents cited are in place. First, it

78) Gelat Vol. II, pp. 460-61; Documents Diplomatiques pp. 2-4; Hurewitz Vol. I, p. 117.

79) Documents Diplomatiques, 10; Hurewitz, Vol. I, 121.

was accepted by all parties that whoever "ruled" Egypt did so as a vassal of the Sultan and not in the formal sense (nor in the 1840's in a practical sense, as the events show) as an independent sovereign. What this meant was spelled out in a firman of 1867 addressed to Ismail Pasha. "Seulement l'administration intérieure de l'Egypte et par conséquent les intérêts financiers, matériels et autres du pays ayant été confiés au gouvernement du Vice-Roi, il a paru nécessaire d'accorder au Gouvernement Egyptien la permission de faire tous les règlements ou institutions qu'il croirait nécessaires dans ce but, sous formes d'actes spéciaux d'administration intérieure. Tous les traités souscrits par Mon Gouvernement impérial devront, comme toujours, être exécutés en Egypte. Mais le Khedive a toute autorisation de conclure avec les agents étrangers des conventions spéciales relatives aux douanes, à la police des sujets étrangers, au transit et à la direction des Postes."⁸⁰⁾

Secondly, the Sinai Peninsula was treated as the southern part of Syria (as it had largely been treated under the Roman Empire and later) distinct from the Pashalik of Egypt. It would follow, thirdly, that the final settlement granting the hereditary government of Egypt to Mehemet Ali must necessarily exclude *prima facie* Sinai from "the ancient boundaries such as they are to be found on the map" sent to him. All doubt would be set at rest on this point if such map were available but some mystery attaches to it and, unless it still reposes in the Egyptian or other archives, it appears to have vanished. As we shall see, later there is good reason to believe that this map did not shew Sinai, or the major part thereof, as falling within the ancient boundaries of Egypt.

80) Gelat, Vol. II, 485; see also a confirmatory firman of 1869, *ibid.* 486-87.

On the basis of the firman of 1841, Egypt could not in law claim unequivocal sovereignty or right of possession to Sinai, since subject to the reference to "the ancient boundaries" that was retained by the Sultan. On the other hand, by the end of the century some sort of Egyptian claim to or special connection with Sinai seems to have emerged. Such claim or right, if it was more than one to an administrative division of an Empire of which Egypt itself was part, could not, it is suggested, be asserted in law with absolute assurance on the basis of cession or otherwise. How then did this claim arise during the nineteenth century, how far was it internationally recognized and in what practical manner was it asserted? If the claim was always, until the First World War, merely that Sinai was part of Egypt administratively by arrangement with the Sultan, the question then is how exactly was it dealt with when the Ottoman Empire finally collapsed and disappeared as an international entity? In any event, if, as has been already been suggested, Sinai was to all intents and purposes a terra nullius, claim to it would need to be based on effective occupation.

The first point that can be established beyond all doubt is that until about 1880 if not later the (at least) titular sovereignty of the Sultan over Egypt whatever the extent of the latter, was formally asserted and internationally recognized. On each occasion of a change of khedive, as in 1873, 1879 and 1892, the Sultan issued a firman confirming the succession, which except for that of 1892 spoke of "Egypt and its dependencies" or "tel qu'il se trouve fourmé par ses anciennes limites et en comprenant les territoires qui y sont annexé",⁸¹⁾ but without giving any further particulars. The reference to the "ancient borders" is not necessarily or solely directed to

81) *Documents Diplomatiques*, 17, 23; Hurewitz, 174 et seq.

Sinai. It should be remembered that to the west and south of Egypt on the African continent there were imperial possessions not intended to be included in Egypt. Here also the boundaries were not clearly defined and indeed in the latter half of the century there was a movement of active expansion in both these directions, partly, if not mainly, at the instigation of the British, but this is not a matter that concern us here.

The sole significant mention of Sinai occurs during the abortive military revolution in 1879, when a distinguished British archaeologist, Palmer, who had earlier made a survey of Sinai, was sent to pacify the Bedouin of the Peninsula and enlist their support for the Khedive. Whether he was successful may well be doubted since he was very soon ambushed and murdered.⁸² It is difficult really to understand why it should have been necessary to send this "mission" unless the intention was to secure the eastern front and the Suez Canal zone and so contain the revolt to Egypt proper. Whatever the explanation, the incident does not bear witness to any effective Egyptian presence in Sinai.

By this time, the Suez Canal had become an internationally important factor. Throughout its length the Canal was intended to traverse Egyptian territory only. For this reason and because the Acts of Concession of 1854, 1856, and 1866 were made with a private individual, no international act was involved which required the approval of Constantinople. Since, however, Egypt yielded or limited certain of its territorial or other rights, the parties agreed that the concession required the Sultan's confirmation, with whom in fact Egypt left the final decision, and the final act of 1866 was thus ratified by the Sultan. This ratification, as does also that of the famous 1888 Convention, assumes

¹⁶ 82) Eckenstein, 190.

17 the complete legal sovereignty of the Ottoman Empire over Egypt.⁸³⁾ Throughout the negotiations and in the Acts themselves Sinai was not expressly mentioned.

Reversing its original indifference or even opposition, Britain had purchased in 1875 a considerable block of Suez Canal shares and its influence and control in the area generally had become more and more direct and effective. Its motivations are not far to seek - to exclude or contain every other great power from the Middle East - and in this respect there was considerable value in maintaining the anomalous relations between the Sultan and the Khedive. England was interested in controlling the sea coast and the communications system on the Canal, and provided this was assured it did not really matter to England whether Egypt was independent of the Sultan or how the whole area might be disposed of in the event of a total collapse of the Ottoman Empire.⁸⁴⁾ As it turned out, under the pressure of internal and external circumstances, Britain took over the military and indeed governmental occupation of Egypt in 1882 after the Arabi revolt.

The suppression of that revolt mainly by England and France led more immediately to a note of protest from the Porte to the French with regard to a proclamation by them and the English restoring the Khedive's authority. "Nothing ... justifies the collective communication ... especially since Egypt forms an integral part of the possessions of H.I.M. the Sultan and since the power confirmed upon the Khedive for the maintenance of order and public security ... comes essentially within the rights and prerogatives of the Sublime Porte". In his protest at this infringement of Turkish sovereignty over Egypt, the Sultan was

17 83) B. Avram, The Evolution of the Suez Canal Status (1958) 21-27; M. Khadduri, "Closure of the Suez Canal" in The Middle East Crisis ed. J.W. Halderman (1968) 33 Law and Contemporary Problems, 148.

18 84) See Lord Salisbury's dispatch to the British agent at Constantinople of October 16, 1879, reproduced in Hurewitz, 191 et seq.

supported by Russia, Italy, Austria and Germany. As a consequence in its circular instructions to its representatives with these States the British Foreign Office suggested that an exchange of views should take place as to the best way of dealing with the maintenance of the respective rights of the Sultan and Khedive.⁸⁵⁾ In fact nothing seems to have been done and the British occupation became a fait accompli, tacitly recognized by the other powers.

The juridical position of Egypt vis-à-vis the Ottoman Empire continued unaltered,⁸⁶⁾ and there is no reason to suppose that the now dominant Britain questioned, at least in a formal sense, that position. Again in all these negotiations and communications no mention is made of Sinai. In the Anglo-Turkish Convention of 1887 regarding Egypt, the Suez Canal and the Sudan (the subject matter is itself significant), which Egypt did not sign since it was not an independent state, Article 2 states that the Khedivate comprised the territories set out in the imperial firmans concerning Egypt.⁸⁷⁾ The same vague reference to the territories or ancient provinces of Egypt indicated in or marked on plans annexed to earlier firmans appears once more in the firman of 1892 issued on the accession of a new Khedive Abbas Hilmi.⁸⁸⁾

The accession of Abbas Hilmi was the occasion of some differences of opinion over Sinai,⁸⁹⁾ which demonstrate the imprecise legal position and show the Sultan claiming clearly sovereign dispositive rights over the Peninsula.⁹⁰⁾

19 85) Hurewitz, 195 et seq. On the 1882 position of Egypt in the Turkish Empire, see H.W.V. Temperley, History of the Peace Conference of Paris (1924) Vol. VI, 193.

20 86) Survey of International Relations, 1925, Vol. X 197.

21 87) Hurewitz, 201: cf. Avram, op. cit. 32.

22 88) Documents Diplomatiques, 27.

23 89) Gelat, 484, 510 et seq.

24 90) See H.F. Frischwasser-Ra'anana, The Frontiers of a Nation (1955) 35-36.

This claim was resisted, for obvious reasons successfully, by the English who seemed to act in the whole matter as if they were in the unrestricted occupation of Egypt. The exchange commences with a telegram dated the 8th of April 1892 from the Sultan to the Khedive.

"Il est à la connaissance de Votre Altesse que Sa Majesté le Sultan avait autorisé la présence à El-Wedjh, Meulh, Deba et Akaba, sur le littoral du Hedjaz, ainsi que dans certaines localités de la presqu'île de Tor-Sinai, d'un nombre suffisant de ~~saptihs~~ placés par le gouvernement égyptien à cause du passage du Mahmal égyptien, par voie de terre. Comme toutes ces localités ne figurent point sur le carte de 1257 [1841] remise à feu Méhémet-Ali pacha et indiquant les frontières égyptiennes, El-Wedjh a, par conséquent, fait dernièrement retour au ~~villayet~~ de Hedjaz, par Iradé de Sa Majesté Impériale, comme lui ont fait retour dernièrement les localités de Daba et Muellah. De même, Akaba aujourd'hui est également annexé au dit ~~villayet~~, et pour ce qui est de la presqu'île de Tor-Sinai le statu quo est maintenu et elle sera administrée par le Khédivat de la même manière qu'elle était administrée du temps de Votre grand-père Ismail pacha et de Votre père Méhémet Tewfik pacha."

To this, Baring, the British agent in Cairo, reacted five days later but he did so by taking up with Constantinople what at first sight seems to be a minor verbal difference of two firmans.

"Monsieur le Ministre, I have the honour to enclose a copy of the Turkish text of the Firman issued by His Imperial Majesty the Sultan to His Highness the Khedive, which has been communicated by the Sublime Porte to Her Britannic Majesty's Ambassador at Constantinople, from whom I received it yesterday; a French translation is also annexed. Your Excellency will observe that the present Firman contains a passage respecting the limits of Egypt which does not occur in the Firman issued to His Highness the late Khedive Mehemet Thewfik Pasha dated the 19 Chaban 1296 [1879]. In the French translation of that document His Imperial Majesty the Sultan states that he entrusts to the Khedive 'le Khédivat d'Egypte, tel qu'il se trouve formé par ses anciennes limites et en comprenant les territoires qu'y ont été annexés'.

The present Firman states that 'e Khédivat d'Egypt avec les anciennes limites indiquées dans le Firman Impérial en date du 2 Rabi-Akher 1267 A.H., /1841/ ainsi que sur la carte annexée au dit Firman, et les territoires annexés en conformité du Firman Impérial en date du 15 Zilhedjé 1281 [1865] A.H. a été conféré à toi'. I am instructed by Her

Majesty's Principal Secretary of State for Foreign Affairs to draw your Excellency's attention to this discrepancy and I am to request that you will inform me officially whether any communication in explanation of it has been made to the Egyptian Government by the Sublime-Porte."

It is noteworthy that even before the firman of 1879 there had been a verbal change in the 1841 formula. In a firman of 1866 to Ismail Pasha, which incidentally modified the order of succession, the phrase was "le Gouvernement de l'Egypte avec les territoires qui y sont annexé et qui en dependent", but there had been no protest by anyone; England, of course, was then not particularly interested. Why precisely the discrepancy should now have caused concern must lie in the contents of the above telegram, which manifested a claim on the part of Constantinople to dispose of areas in Sinai. It is pretty clear that the 1841 map did not include Sinai, or the larger part thereof, since the reference to such map would seem to be the only material difference between the 1879 and the 1892 formulae. This explanation emerges from the reply of the Turkish Foreign Minister to Baring on the 13th April.

"Monsieur le Ministre. J'ai reçu la dépêche que vous m'avez fait l'honneur de m'adresser, en date du 11 de ce mois, pour me transmettre une copie, en langue turque, avec sa traduction en français, du Firman d'Ivestiture de S.A. le Khédive. Vous voulez bien, en me signalant que le passage relatif aux limites du Khédivat n'est pas conforme à celui contenu dans le Firman Impérial du 19 Chaban 1296, me demander si le Gouvernement Khédivial a reçu de la Sublime-Porte des explications à ce sujet. Je suis heureux d'être à même de vous annoncer, Monsieur le Ministre qu'effectivement à la date du 8 de ce mois, S.A. le Grand-Vizir a transmis, à S.A. le Khédive, par le télégraphe, un Iradé de S.M.I. le Sultan lui confiant, comme à ses prédecesseurs, l'administration de la péninsule du Mont-Sinai. Cet Iradé, dont vous trouverez ci-joint copie, donne entière satisfaction à S.A. le Khédive qui s'est empressé de faire parvenir à S.M.I. le Sultan l'expression de sa gratitude."

The reply of Baring sets out the position fully and needs no comment.

"I have the honour to acknowledge the receipt of Your Excellency's note of today's date, in which ... you communicate to me the Turkish text and French translation of a telegram addressed, on the 8th instant by the Grand Vizier of His Imperial Majesty the Sultan to His Highness the Khedive, informing His Highness that, in so far as the Sinai Peninsula is concerned, the statu quo is maintained, and that it will continue to be administered by the Khedivate. Your Excellency is aware that no alteration can be made in the Firmans regulating the relations between the Sublime Porte and Egypt without the consent of Her Britannic Majesty's Government. It was on this account that I was instructed in invite Your Excellency's attention to the insertion in the present Firman of a definition of boundaries which differed from that contained in the Firman issued to His Highness the late Khedive, and which, if read by itself appeared to imply that the Sinai Peninsula would for the future depend administratively not on the Kedivate of Egypt, but on the vilayet of the Hedjaz. The telegram from the Grand Vizier, which Your Excellency has done me the honour to communicate to me, makes it clear however, that the Sinai Peninsula - that is to say, the territory bounded to the East by a line running in a South Easterly direction from a point a short distance to the East of El-Arish to the head of the Gulf of Akaba - is to continue to be administered by Egypt. The fort of Akaba; which lies to the East of the line in question, will thus form part of the vilayet of the Hedjaz. Her Majesty's Government signified to the Sublime-Porte some weeks ago, through Her Majesty's Charge d'Affaires at Constantinople, their willingness to assent to this arrangement. Under these circumstances, I am instructed to declare that Her Britannic Majesty's Government consent to the definition of boundaries contained in the present Firman, as supplemented, amended and explained by the telegram of the 8th instant ... which they consider as annexed to and as forming part of the Firman and that they entertain no objection to the official promulgation of the Firman with the addition of the above-mentioned explanatory telegram. I am to add that Her Majesty's Government cannot admit that any existing territorial rights or claims are in any degree affected by changes which have been introduced into the language of the Firman, or by their acceptance thereof. I have been instructed to address this Note to Your Excellency, as well as my Note of the 11th Instant, in order to place on official record the view maintained by Her Majesty's Government throughout the negotiations to which they have been a party on this subject, and which have now been brought to a close".

The whole incident seems rather obscure even on the terms of the documents cited. One likely explanation that may be offered is that, at least prior to 1892, the Egyptian administrative frontier within the Empire ran from Rafia to the town of Suez, forming the northern triangle above-mentioned. The rest of Sinai, east and south, was part of the Hedjaz province. The effect of 1892 was therefore that a claim to extend the line to the Rafia-Akaba position was forcibly asserted. However that may be, Baring's unilateral assertion of the frontier line claimed by the British was neither assented or objected to by Turkey⁹¹⁾, but that it was considered by the latter still to be an open question is apparent from the events of 1906 examined below.

The position at the end of the Nineteenth century may be summarized in the following way. As between the Khedivate and the central authorities of the Ottoman Empire, the former was in certain internal respects independent but its powers derived from the Sultan and upon accession of each Khedive these powers were renewed and confirmed, at times perhaps with minor modifications.⁹²⁾ Over this relationship hovered the special position of Britain which to all intents and purposes was paramount. What is especially important for our present purpose is that nominal Egyptian administration of Sinai is first established, under British pressure, in 1892.

The northern frontier of the Sinai area of administration thus ran along the line indicated in the document last cited above.⁹³⁾ The question whether

91) Ibid. 39.

92) Cf. A. Colvin, The Making of Modern Egypt (1906) 18.

93) See the map in N. Verney and G. Daubmann, Les Puissances Etrangères dans le Levant en Syrie et Palestine (1900) 1, where the straight line from El-Arish to Akaba is denominated "Frontière de la province tributaire d'Egypte."

Sinai was under Egyptian administration, however, remained a matter of dispute as appears from a despatch which Lord Cromer sent to the British foreign office in May 1906.⁹⁴⁾ The occasion was a further attempt by the Turks to assert their sovereign rights, which was sparked off by the presence of Egyptian troops under command of a British officer at Akaba, which they declared to be an unwarranted interference in the affairs of countries under Turkish sovereignty.⁹⁵⁾ Cromer reported that the Sultan appeared to be under the impression that the arrangement based on the above telegram of April 8, 1892, was limited by a previous understanding of the British, according to which "the administrative boundary between Turkey and Egypt should run in a straight line from El-Arish on the Mediterranean to Ras Mohammed, a headland on the Red Sea, a short distance from the mouth of the Gulf of Aqaba." Some such suggestion had in fact been made in prior correspondence. Cromer reported that he himself had expressed a strongly adverse opinion to the adoption of this suggestion but in any event he thought that the above telegram, which stated that as regards the Peninsula of Ter-Sinai the status quo was to be maintained, settled the point. However, the Turks apparently read this telegram somewhat differently, that the Peninsula consisted of the territory south of a straight line, Akaba to Suez, that north of this line the Egyptian frontier was traced from Rafia to Suez and that it followed that the area bounded on the north-west by the Rafia-Suez line, on the south by the Suez-Akaba line and on the east by the Akaba-Rafia line fell within Turkish territory. The Turks, nevertheless, had been prepared to compromise by drawing a line from Rafa to Ras Mohammed, thus making the whole western shore of the Gulf of Akaba Turkish.

⁹⁴⁾ Cmnd. 3006

⁹⁵⁾ Frischwasser-Ra'anan, op. cit. 39.

Cromer concluded by observing

"In reporting to you the claims advanced ... as above stated, I had the honour to point out that the dispute no longer turned on a local question as to the possession of Taba and a few other places in the neighbourhood of Aqaba, but that we now had to deal with a deliberate attempt to carry the Turkish frontier and strategical railways to Suez on the banks of the Canal; or that if, on the other hand, the Ras Mohammed-Rafeh line (proposed ... as a compromise) were adopted, the Turkish frontier would be advanced to the neighbourhood of Nekhl, i.e., within easy striking distance of Egypt, and that, as Ras Mohamed is on the Red Sea outside the narrow entrance to the Gulf of Aqaba, thus Gulf would practically become a mare clausum in the possession of Turkey and a standing menace to the security of the trade-route to the East.

I had the honour to submit that the question had not ceased to be merely local; that it was of the highest importance to British, Egyptian and general European interests to prevent Turkey from carrying out the programme which she had now announced, and that the extension of this programme would obviously constitute a serious menace, not merely to the liberties of Egypt and the Khedivial ^{dynasty}, but also the freedom of transit through the Canal."⁹⁶

Cromer's dispatch is highly significant. It confirms what has already emerged in the foregoing pages, that until the cutting of the Suez Canal and the appearance of the British in the region, Sinai apart from its Mediterranean strip, was not an important zone but in fact a backwater of which little or nothing was thought, said or done, an open territory lying between Egypt and Palestine-Syria. British preoccupations with the Canal and considerations of empire and trade had now rendered it of military and strategic importance and the further the boundary was pushed north and east the better. These were the only reasons which motivated the drive to keep Constantinople out of the area and, because of Britains special position in Cairo, to make it part of Egypt.

⁹⁶ Cf. also Cromer *Modern Egypt* (1908) Vol. II, 267-69. On the position of Rafa as being on the frontier, see the remarks attributed to Sir Archibald Murray, the British Commander in Egypt, by D. Lloyd George, *War Memoirs*, Vol. II, 1082. And of see below text to notes 107a and 107b.

To return to the events of 1906, a British ultimatum for the immediate delimitation of the frontier was supported by representations made by the French and Russians (the international alignment of the great powers was already taking shape) backed up by Royal Navy movements in the Mediterranean. Various diplomatic steps were taken in the course of which the Turks, with some justification, contended at one stage that frontier demarcation was unnecessary and inexpedient between what were in effect two parts of the same Empire. They also asked for a British Declaration that the Sultan's sovereignty would be respected. Britain's reply to this was that it had never contested this sovereignty but if that was "regarded as incompatible with British occupation and our right to intervene in Egyptian affairs, our whole force would be used to uphold our position; we did not intend to make this incompatible with the Sultan's suzerainty, unless he himself made it so."

The Sultan finally gave way in face of this ultimatum and a boundary commission set to work. Even then disputes broke out and at one point the Turks ventured unsuccessfully to revive their old claim up to Suez. Cromer summing up the matter makes an interesting revelation. "In face of the resolute attitude of His Majesty's Government, the attempt was abandoned and the Sultan's government fell back, with a certain show of logic on the claim that the Sinai Peninsula did not comprise geographically or otherwise the territory situated north of the Suez-Aqaba road and south-west of the Rafah-Suez boundary of Egypt proper, territory which most English and Foreign maps marked as Turkish" (emphasis added).

In the annual report on Turkey for 1908 G.H. Fitzmaurice confirms the importance of the events of 1906 above-described. He writes "The net result ... is that the Sultan had been compelled officially to admit that the term 'Sinai Peninsula', the administration of which has been confined to the Khedive in

virtue of the telegram of the 8th April 1892, comprises the triangle of territory situated between the line from Rafeh to Suez (i.e. the frontier of the Vilayet or Province of Egypt proper) and the line following the pilgrim road from Suez via Nske to Akaba, forming the northern boundary of the Peninsula of Sinai

31 technically so called⁹⁷⁾ (emphasis added).

If the lines mentioned above are traced on the map, there exists a discrepancy between Cromer and Fitzmaurice.

It must be emphasized that the Convention of 1906 which "settled" the matter is expressly stated to concern the fixing of an administrative line between the Vilayet of Hedjaz and Governorate of Jerusalem and the Sinai Peninsula, the boundary pillars of which (when erected) would be under the protection of both the Sultanate and Khedivate and the Convention provides that people living on either side should continue to have their ancient water and property rights.⁹⁸⁾ The events of 1906 set at rest the doubts about 1892 incident, and in fact are taken by some people to be the occasion when Sinai, other than the Rafa-Suez-Mediterranean triangle, first really came under Egypt administratively subject to Turkish sovereignty.⁹⁹⁾

On this aspect of the question, attention must, on the hand be paid to

31 97) On the whole incident see Gooch and Temperton, British Documents on the Origins of the War, Vol. V, 189-95; V. Chirel, The Egyptian Problem (1921) 54; L.M. Blumfield, Egypt, Israel, and the Gulf of Aqaba (1957), 199 et seq. For the precise demarcation line as finally agreed, see the Rafa Agreement of Oct. 1, 1906, in Gelat Vol. V, 368 et seq.

31 98) Gelat, Vol. V, 368 et seq.

31 99) R. Meinertzhagen, Middle East Diary, 1917-36 (1959) 18-19. Meinertzhagen was Chief Political Officer for Palestine and Syria on Allenby's staff 1919-21, responsible to the British Foreign Office and thereafter a member of the Colonial Office. *ibid.*, 24, 97. He returns in later years to the point made in the text here and above at p. . Thus in 1948 he notes "When I was in Sinai during the First War, I discovered the sovereign boundary between Egypt and Turkey runs from Rafa to Suez" *ibid.*, 237. See also at 270 (1954), 316 (1956) and p. 335 (1957). His view was adopted in 1957 by Lord Soulbury in a letter to the Times. Meinertzhagen himself also wrote a letter in the same vein. Apparently neither letters evoked any denial; *ibid.* 324-25.

the fact that on the Young Turks' side the idea of revanche was nursed. Soon after coming to power in 1908, one of their leaders informed the French ambassador that "Egypt is for me ... what Alsace-Lorraine is for you"; and in 1910 a German diplomat reported that Turkey had been seriously considering an attack on Egypt ever since the building of the Hedjaz railway.¹⁰⁰⁾ On the other hand, note should be taken of Law No. 15 of 1911 on the administrative and judicial organisation of the district of Smal enacted by the Egyptian authorities.¹⁰¹⁾ The provisions of this law are under sec. 1 made to apply to the whole of the Peninsula except the area of the district of El Arish and localities of the "Sources de Moïse" and of El Tor, a limitation which is highly significant. Secondly the administration of the area, it was provided by sec. 2, should continue to pertain exclusively to the Minister of War who was to exercise all powers of each Minister; he would appoint a Governor to act under him. The Minister's powers were to include "legislative" powers (sec. 4). The whole tenor of the Law is of a military occupation character.

V. The Twentieth Century

The eve of the First World War brought in its train a number of fundamental changes. The position in 1914 was that while British interests and the presence of British forces in Egypt constituted the effective basis for Britain's control of the area, from the legal aspect Egypt remained a part of the

¹⁰⁰⁾ Frischwasser-Ra'anana, op. cit., 35.

¹⁰¹⁾ J. A. Watheler and R. G. Brunton Codes Egyptiens et Lois Usuelles en vigueur en Egypte (1920) Vol. II 649-53.



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Jerusalem, February 1971

P. ELMAN

THE PENINSULA OF SINAI

IN

INTERNATIONAL LAW

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The purpose of this study is to try to establish the position and status of the Peninsula of Sinai in international law, more particularly in relation to the States bordering on it. As will emerge in the sequel, Sinai, in many senses and speaking very broadly, is somewhat of the nature of res nullius. Thus a central problem will be whether any single State can firmly and indisputably lay any claim of right to the whole or some part of the Peninsula that compels recognition in the light of the received rules and principles of international law, and if more than one State can do so, how the rival claims are to be mutually accommodated

I The Relevant Rules of International Law

Clearly, the first essential is to determine what international law has to say in respect of the kind of situation that confronts us here.

In the first place, as one writer has put it,

La vérité est qu'aucun état n'a droit à telle ou telle étendue de territoire. Il peut en acquérir par les procédés que le droit réglemente. Mais aucun règle ne vient en fixer les limites. Les frontières, produit de la histoire sont le résultat des faits et du temps.¹⁾

On the other hand, "a state which has actually exercised sovereignty

Abbreviations:

Documents Diplomatiques = Documents Diplomatiques Concernant l'Egypte de Mehemet Ali jusqu'en 1920, Réunis par l'Association Egyptienne de Paris (1920).

Eckenstein = L. Eckenstein, A History of Sinai (1921).

Gelat = Répertoire général de la législation et de la administration Egyptiennes, 1840 -1908. ed. P. Gelat (1909)

Hurewitz = J.C. Hurewitz, Diplomacy in the Near and Middle East: A Documentary Record, 1953-1914 (1956).

Jarvis = C.S. Jarvis, Yesterday and Today in Sinai (1938)

1) M. Sibert, Traité de droit international public (1951) Vol. I, 699.

over a territory, should keep the territory, abstract title notwithstanding."²⁾ Nevertheless although at any given moment of time, the extent of a State's territory may be an acknowledged fact which few will venture to dispute or challenge, the historical aspect of the matter and the relevant rules of international law remain important, either because the occupations and acquisitions of the past may themselves be of a character that gives rise to serious differences over precise boundaries,³⁾ or because international relations are not in the nature of things immutable and the facts by which they are controlled, may change in the passing of time.

(a) Modes of Acquisition

The traditional treatment of the modes of acquiring territory is to group them under occupation, accretion, cession, conquest and prescription. This classification is not entirely logical nor does it serve a really useful purpose.⁴⁾ Oppenheim adopts a different approach, distinguishing broadly between original and derivative acquisition.⁵⁾ The first consists of an intentional appropriation which does not involve interference with the rights of any other State; it requires that the territory in question should not be subject to any other sovereignty at the material time. The second covers a variety of operations, such as succession, exchange, cession and prescription. For the present purpose, it is largely immaterial which classification is more logical and more serviceable, since both call for an enquiry into the historical

2) D.P. O'Connell, International Law (1955) Vol. I, 487

3) Cf. J.L. Brierly, The Law of Nations (1949) 143

4) D.H.N. Johnson, "Consolidation as a root of title in international law", (1955) Camb. L.J. 215, 217.

5) Oppenheim, International Law (8th ed. 1955) Vol. I, 546 et seq. Cf. Johnson, loc. cit.

and factual background, and more importantly both apply the crucial test of effective occupation; that is to say, title to territory under modern international law does not merely rest on the fact that a State has territory at its apparent disposition but on the fact that it exercises the functions of a State in respect of such territory in a manner appropriate to the physical and temporal circumstances and to the extent necessary for fulfilling the obligations of a State under international law.⁶⁾

(b) Occupation

As Kelsen puts it,

The boundaries of the State are determined according to the principle of effectiveness The exclusive validity of a national legal order extends just as far as this order is firmly established, i.e. is, on the whole, effective; as far as the national legal order is permanently obeyed and applied.⁷⁾

Thus, the term "occupation" is used here not in the sense of a mode of acquisition but as a quality which must accompany any occupation to afford it recognition under international law.

It is important to observe even if only parenthetically, that while "occupation" as a mode of acquisition goes primarily to territory which is res nullius, it has also been applied first to territory inhabited by a native population whose community is not considered to have risen to the status of a State⁸⁾, and secondly to the hinterland of an occupied sea coast⁹⁾, both of which are matters to be borne in mind

6) C.H.M. Wladock, "Disputed Sovereignty in the Falkland Islands Dependencies", (1948) XXV B.Y.B.I.L. 324.

7) Kelsen, Principles of International Law (1952) 213.

8) Oppenheim, op. cit., Vol. I, 554 et seq. Cf. Visscher, Théories et Réalités en Droit International Public (1955) 253.

9) Oppenheim, op. cit. Vol. I, 559 et seq.; Waldeck, op. cit. 317, 334-35.

in this study. The same extension may be postulated of Oppenheim's concept of original acquisition.

The content of the notion of "effective occupation" requires brief examination since by itself it is too vague for practical application. No firm general rules, however, can be propounded, to which effective occupation must be manifested, its features and nature, seem to depend on time and place (as well as, it may be added, the attitude of the tribunal called upon to decide the particular dispute that may have arisen). The tendency, nevertheless, is to give finality to and sustain the stability of existing territorial arrangements.¹⁰⁾ These propositions still do not carry us very far and the cases must be examined to yield guidelines which may assist.

Rather than the mere taking of physical possession and the exclusion of others, what is necessary is a positive and continuous exercise of the functions of a sovereign government, both in its internal and external aspects. Peaceful and continuous internal government administration involve the establishment of a responsible local structure of authority capable of maintaining and insuring the regular exercise of its powers¹¹⁾ à titre de souverain and not in any other capacity.¹²⁾ In view of the modern means of communications, actual physical settlement and presence is not always necessary. The fact of control rather than its method is determinative. Provided that governmental authority is effectively asserted within and throughout the territory claimed, occupation is established. Thereafter, it requires to be continu-

10) H. Lauterpacht, The Development of International Law by the International Court (1958) 240 et seq.

11) See the Declaration of the Institute of International Law, 1888 cited in C.G. Hyde, International Law (1947) Vol. I, p. 343; Kelsen, Op. Cit., 208-9

12) Y. Blum, Historic Titles in International Law (1965) 124 et seq.

ously maintained and exercised in like manner. The element of continuity is particularly important where no previous established order of things existed.¹³⁾

The cases, however, seem to indicate that if for one reason or another control cannot be exercised in a fashion which is normal where territory is fairly densely populated and already possesses some form of administration, manifestations of authority intermittent in space and sporadic in time may also be good to support effective occupation.¹⁴⁾ Thus, where territory is remote or small or incapable of accommodating more than a small or transitory population, a rudimentary organization may be all that is required, provided responsibility for the exercise of local administration is assumed and such administration is in fact carried out as and when occasion demands.¹⁵⁾

Occupation must also be accompanied by an absence of protest by other States, but this is a relative matter since only when a State becomes interested will any motive or occasion for it to protest arise.¹⁶⁾

One aspect of the problem of occupation, to which allusion has already been made, warrants more detailed consideration. The hinterland and contiguity doctrine was for very obvious reasons in vogue during the colonial period of the 19th Century; its invocation by the colonial powers was useful for marking out areas for future occupation and warning off others. Fashions have changed since then and during the present century the doctrine has been given up. The geographical element, however, still remains, pertinent but merely as one of a member of

13) Per Judge Haber in the Palmas Island Case, cited in Waldock, op. cit., 321-21 O'Connell, op. cit. 476; Blum, op. cit. 102 et seq.

14) Blum, op. cit. 112, 118 et seq.

15) Waldock, op. cit. 336

16) O'Connell, op. cit. 419.

various elements governing a particular situation. In the British Guiana-Brazil Boundary Arbitration, decided at the beginning of this century, it was held that although effective possession of part of a region may notionally confer a right to the acquisition of sovereignty over the whole thereof, it cannot do so where either owing to size or topographical configuration the region cannot *de facto* be regarded as a single unit.¹⁷⁾

The leading principle here is that the area to which the legal effect of occupation extends is the area actually and effectively occupied, notwithstanding the extravagant claims and assertions that may be and are often made in this regard. To maintain a settlement of appreciable dimensions on a sea coast is not necessarily to control areas remote in distance or otherwise.¹⁸⁾ For political and security reasons some reasonable extension will be recognized. Proximity may also in certain circumstances raise a presumption of fact that a particular State is exercising sovereignty over outlying territory in which there is no noticeable expression of its governmental activities, but the presumption is rebuttable on failure to provide evidence that sovereignty has been asserted for a period of time during which some display thereof would ordinarily be called for.¹⁹⁾ The length of such period of time will have to be considered later, but for the moment we may pause to consider a modern case, highly relevant in the present context, in which the question of proximity or contiguity arose.

17) Waldoock, *op. cit.*, 317, 334-35; O'Connell, *op. cit.* 475.

18) Oppenheim, *op. cit.* Vol. I, 559 et seq; Myde, *op. cit.* 332 et seq; Brierly, *op. cit.* 145.

19) Waldoock, *op. cit.* 334-335.

In the Legal Status of Eastern Greenland (1933)²⁰⁾ between Norway and Denmark the Permanent Court of Justice found that for many centuries Greenland had been regarded as a Norwegian possession by virtue of a number of settlements on the south-west coast, which were originally made by people of Norwegian origin but had long since been destroyed by the native Eskimos. The memory and tradition of this Norwegian settlement persisted although there was no resumption of intercourse between Greenland and Norway until the early part of the 17th century when a revival of interest took place and Greenland came increasingly to be visited by whaling fleets. In the 18th century a new colony was founded by missionaries and a trading concession was granted which lead to the setting up of trading stations along the west coast. Certain legislative and administrative acts which were effected referred to more than the area actually colonized. In 1814 Norway and Denmark were separated; Norway was ceded to Sweden but Greenland and some other territory were expressly excepted from the arrangements agreed upon, that is to say, formal sovereignty (if any) was presumably retained by Denmark. During the 19th century, the whole of the east coast was explored by the Danes and a number of trading concessions granted by the home government. From 1814 Denmark had also entered into a number of bilateral and multilateral commercial treaties from which Greenland was excluded in explicit terms. The first Danish settlement occurred only in 1894 and in the years following a series of decrees extended the limits of the colonized area. In 1921 as a result of the establishment of a Danish trading mission and hunting station Denmark declared the whole of the country formally linked with it under the Danish administration of Greenland. Then in 1925 Denmark enacted legislation regulating hunting and fishing and thereafter divided Greenland into provinces and reserved all commercial activity to itself. It also supported hunting expeditions and authorised and encouraged scientific missions engaged in mapping and exploring the country. Since 1915 Denmark had sought international recognition of its position in Greenland, and Norway had shown an inclination to refrain from contesting Danish sovereignty.

20) The facts are taken from Hyde, op. cit. 339-41; Cf. O'Connell, op. cit. 473 et seq; Brierly, op. cit. 144.

In the result, the court held that Denmark was to be regarded as having since 1814, displayed authority over the uncolonized part of the country and Norway's assertion that Greenland was terra nullius was rejected. Danish sovereignty was thus upheld though the degree of actual control geographically and substantively was small. Among the facts which the court treated as most significant were first those acts of a legislative nature, "The most obvious form of the exercise of sovereign power," performed by Denmark; secondly, Denmark's original formal sovereignty on partition from Norway; and, thirdly declarations from certain other States that they would not object to the recognition of Denmark's sovereignty over the whole area. Norway's plea that all this was intended only to have effect in respect of the settled regions was rejected.

According to one authority,²¹⁾ the East Greenland case merely confirms the tendency shown by the Permanent Court in the Palmas Island case (1928) and the Clipper-ton Island case (1931) to require very little in these circumstances by way of display of authority if the intention and will to act as sovereign is unimpeachable; "indeed in the case of uninhabited territories little more than lip service is paid to the requirements of physical control." Such an approach is probably part of the wider "policy" of non quieta movere, but while this policy may have its rightful place in the normal course of events it must yield in special circumstances.

The requirements of evidence of occupation may be more stringent where the disputed territory is not remote and geographically unfavourable. In the Minquiers and Ecrehos case (1953)²²⁾, in which England and France disputed a group of islands off the Normandy coast, some habitable and some merely rocks, the International Court of Justice found for England, irrespective of any previous French interests, on proof that the English authorities had held inquests, registered deeds, levied rates, taken a census, built works and exercised criminal jurisdiction. International law, it was affirmed, does not recognise title to territory devoid of concrete manifestation.²³⁾

21) O'Connell, *op. cit.* 473.

22) *Ibid.* 474

23) Cf. E.C. Wade in (1955) 40 *Trans Gratius Society*, 97 - 106.

As already indicated, the exercise of governmental powers as the basis for a territorial claim has in addition its external aspect, responsibility under international law vis-a-vis other States. This is a matter which has not received much attention from international lawyers but it deserves consideration in all cases of disputed territory, for if international law is to be asked to set its seal on an acquisition of territory to "legalize" it, the State thus enabled to perform sovereign acts in relation to the territory should of necessity have to abide by its obligations in all respects to other States under international law and assure them the accepted minimum of rights and protection.²⁴⁾

(c) Prescription

For reasons which will become apparent later, reference must also be made here to the rules relating to prescription and cession as modes of acquisition. Prescription is a means of acquiring territory which is nominally subject to the sovereignty of another State. Since one of its essentials is express or implied acquiescence, it demands a stricter proof of continuous, uninterrupted effective occupation and a relatively long period of such occupation without patent positive opposition.²⁵⁾ Implied acquiescence may be summed up in the maxim qui tacet consentire videtur dum loqui potuit ac debuit,²⁶⁾ but, as has already been observed, absence of protest is a relative concept. Prescription is thus a vague source of title; generally most frontiers existing at a given moment of time are accepted because they have existed *de facto*. There are no fixed rules as to the length of possession or

24) Cf. Kelsen, *op. cit.* 209.

25) D.H.N. Johnson, "Acquisitive Prescription in International Law" (1950) XXVII, B.Y.B.I.L. 347, 349, 353-54; O'Connell, *op. cit.* 487 *et seq.*

26) Cf. Blum, *op. cit.* 124 *et seq.*

as to the bona fides thereof.²⁷⁾ A State cannot, however, acquire title in this manner if, notwithstanding it is administering the territory, it admits the sovereignty of another State thereover, since such an admission acts as an estoppel to a claim of prescriptive title; that was the situation in the case of Cyprus in respect of which Great Britain had acknowledged Turkish sovereignty under a treaty of 1878,²⁸⁾ and that, as will become evident, is the situation in Sinai.

Prescription as a mode of acquisition and occupation as a quality of the modes of acquisition are clearly linked concepts,²⁹⁾ and probably the link is closest with regard to the time element. Such rules as pertain to prescription may assist in determining the length of continuity of occupation or assertion of sovereignty already dealt with. The authorities, however, reveal a complete lack of agreement - immemorial time, more than a century, fifty years, a long time, a reasonable time.³⁰⁾ The conclusion must be that the time element will once again vary with the facts and circumstances of the case and not only as regards the existing occupier but also as regards such other States as may be involved.

(a) Cession

By contrast, cession requires an actual transfer by one State to another by way of bilateral agreement.³¹⁾ The transfer need not apparently be specifically expressed; it may be implied under a general renunciation of all right and title to

27) Oppenheim, *op. cit.* Vol. I, 576.

28) Johnson, *op. cit.* 344

29) Cf. O'Connell, *op. cit.* 487.

30) See Johnson, *op. cit.*, 357, 354; J.B. Moore, *International Law Digest*, Vol. I, 297.

31) Oppenheim, Vol. I, 547; Sibert, *op. cit.* 893 *et seq.*

territory described in very broad and imprecise terms indeed, as happened in the case of Germany after the First World War, as well as with Turkey, as will be shown later.³²⁾ In the case of Germany, the territory so renounced was subsequently parcelled out with some particularity. So far as concerns Sinai, the matter, as we shall see, was quite different.

(e) Uti posseditis

For the present purpose, mention must also be made of the principle of uti posseditis. This principle was first invoked by the Spanish and Portuguese American colonies in the early 19th Century³³⁾ to claim succession to the territory of their former sovereigns, which had been under the administrative control of the claimants. Uti posseditis is, however, not recognized as an institution of international law. In the Guatemala - Honduras Boundary Arbitration (1933) an attempt to apply the principle was unsuccessful on the grounds that it was not always possible to trace the precise lines of division of the former administrative units. The artificiality of the results produced rendered it inapplicable except in the most general sense. The tribunal proceeded to fix boundaries according to three criteria, the facts of actual possession, the bona fides of possession and the relationship of the territory occupied to that which was as yet unoccupied.³⁴⁾

32) Hyde, op. cit., 359-60 (note 4), 385.

33) O'Connell, op. cit. 491; Blum, op. cit. 341, citing A. Guani, "La Solidarité dans l'Amérique Latine" 8 Hague Recueil (1925) Vol. III, 207, 293: "les pays forment notre continent ont domination et sont considérés comme possesseurs des territoires qui leur appartenaient respectivement ... au moment de la déclaration d'indépendance [in 1810] conformément aux limites ... que les couronnes d'Espagne et du Portugal avaient assignées à leurs provinces".

34) O'Connell, op. cit. 491-92.

(f) Frontiers

Finally, a word about the different types of frontiers that exist. Two main categories, natural and artificial, may be distinguished.³⁵⁾

(i) Natural frontiers may be determined by geographical features; but the caprices of nature are not always definitive and indisputable political concepts, especially where such features are not clearly demarcable but consist of an extended area such as a desert. Another form of natural frontiers is that which is based on ethnic or national considerations. These have played an important role in modern times but they are not readily applicable where a multiplicity of ethnic groups exist or where the ethnic grouping is not of an extent that gives rise to a claim to separate independence. The matter also depends upon the consent of the local population, which presents difficulties as to the method of determining such consent.

(ii) Examples of artificial frontiers are those conditioned by strategic and military motives, not always or necessarily following geographical features although tending to do so. In view of the scientific and technological advances, as well as political developments and changes of modern times, these need not be constant.

At any given moment of time frontiers bear a legal character. They are the result of past historical facts of varying antiquity. Whatever the original mode of acquisition of the area they embrace, their exact demarcation is normally governed by a combination of factors, no single one of which will have been or remains decisive. In many areas of the world, history, population concentration

35) Cf. Kelsen, op. cit. 213 and Sibert, op. cit. 697 et seq.

and the general social and political situation have combined to create a position in this regard which is today more or less stable, but there are clearly also areas which for a variety of reasons are marginal and where the situation is still fluid and where any frontiers to be drawn still depend upon a consensual balance of the legal, physical and other factors mentioned. The occasion for attempting such a balance has in modern times usually been the cessation of military hostilities.

It follows from the foregoing that in order to determine what is the international position of the Sinai Peninsula it is necessary to establish whether any State has come into and remained in occupation of it, in the sense of exercising over the whole positively, continuously and responsibly under international law the functions of government (legislative, administrative and judicial acts, economic organisation and regulation) by sovereign right and without significant protest by others, if not with their active recognition, for an appreciable period of time; whether, if it be the case that such State has only been in effective occupation of part of the Peninsula, it is entitled to claim the rest for good political and security reasons; and whether any of the boundaries of Sinai are natural or artificial. To answer these questions one must consider the geographical, historical, legal and other pertinent factors, and decide whether singly or together, they yield a clear cut answer; and if not, that is, if Sinai is a marginal area, which of these or other factors are or should be operative in trying to arrive at some result that will accommodate the parties concerned and insure a relatively just solution in the light of such principles as international law has to offer in this field.

II The Geographical Aspect

The name "the Peninsula of Sinai" now connotes the roughly triangular region projecting into the Red Sea and bounded on the west and east by the Gulfs of Suez and Akaba respectively. The name, it is noteworthy, used to be applied to the mountainous area of the south alone³⁶⁾ and it is not clear when it came to denote the whole of the triangle, a fact which must be born in mind when Sinai is referred to in the historical literature. The northern limits, the base of the triangle, are not defined by any clear geographical feature, although obviously part must at its furthest lie along the Mediterranean coast; part has been said to be the Palestinian frontier,³⁷⁾ meaning thereby the relatively recent political frontier about which more will have to be said later, but this is an artificial notion.

Opinions differ as to the "affiliation" of Sinai. An official source says that though politically part of Egypt, geologically it is mainly a fragment of Arabia,³⁸⁾ while an archaeologist asserts that geographically it belongs to Egypt and ethnologically to Arabia,³⁹⁾ and a more recent traveller claims with greater specificity that whilst politically it is a province of Egypt and has affinities historically and racially with Arabia, geographically it is the stepping-stone between Africa and Asia and geologically it is unique.⁴⁰⁾ The last description is perhaps the most accurate but a closer look at the area from the physical aspect may assist in dispelling doubt.

36) Eckenstein, 1.

37) British Naval Intelligence Division: Geographical Handbook Series - Western Arabia and the Red Sea. (1946) 43.

38) Ibid. 43.

39) Eckenstein, 1.

40) J.M.C. Plowden, Once in Sinai (1940) 7.

Three main zones can be distinguished.⁴¹⁾ In the north, following the Mediterranean coast there is a zone of drift sand, broadening from Rafia, on "the political borders of Palestine", as it proceeds and becomes coterminous with the Suez Canal, on the other side of which it continues across the north of Egypt proper. This zone is supposed to be Shur (desert) "that is before east of Egypt on the way to Asshur", according to Gen. xxv, 18, or "that is ever against on the borders of Egypt", according to 1 Sam. xv, 7, indicative, incidentally, that it was not thought to be part of Egypt in Biblical times. The frontier mentioned, which begins at Rafa (a point of no particular interest apart from this fact), or more accurately just south thereof, and runs south to Akaba is featureless and the boundary marks which exist or existed at one time were miles apart and need or needed a surveyor to determine exactly which is or was Sinai and which Palestine.⁴²⁾ Nothing in this zone made or makes it clearly and exclusively a part of Egypt or for that matter Palestine. As one 18th century traveller put it in the days before the Egyptian "presence" became a matter of attention: "Beyond Gaza there are only deserts. It must not, however, be understood that the country becomes suddenly uninhabitable; we still continue, for a day's journey, along the sea coast, to meet with some cultivated spots and villages. Such is Kan-Younes, a sort of castle, in which Mamleuks keep a garrison of twelve men. Such also is El-Arish, the last spot where water which can be drank, is to be found, until you arrive at Salaiha in Egypt."⁴³⁾

41) Eckenstein, 1-2. Cf. the detailed description in A.P. Stanley, Sinai and Palestine (1864) 7th seq. and particularly the map inset at 5.

42) Jarvis, 8.

43) M.C.-P. Volney, Travels through Egypt and Syria in the Years 1783, 1784, 1785. (1789) Vol. II, 206; Cf. A.A. Paton, A History of the Egyptian Revolution (1870) Vol. I, 245: "A desert of sand and gravel, mingled with salt lakes ... intervenes between Egypt and Syria". Wadi El-Arish is assumed to be the Brook of Egypt mentioned in Num. xxxiv, 5, as a south west border of the Promised Land Cf. Gen. xv, 18; Ezek. xlvi, 19.

South of this zone of drift sand, a second zone of increasing elevation is to be discerned. For the most part a waterless and barren plateau, it is known as "the plain of wandering" - the wilderness of Paran of the Bible - and was crossed until relatively recent times by the two pilgrim land routes to Mecca one being the Suez-Akaba route along the southern edge of the zone⁴⁴⁾ and the other running from Gaza southwards to the solitary Nekhl, a central point in the zone. These pilgrim routes have for a considerable time not been used.

Proceeding further south, we come to Sinai proper, the Tur. Except for the narrow coastal plain on the Red Sea (Gulf of Suez) side it is a mountainous and generally deserted area. The mountain ranges which cross it do not form a natural feature that may usefully serve as a political frontier because beyond them lies the sea. One or two points along the narrow south-western coastal plain, El-Qaa, have in the past served as stations on the pilgrim sea route or been commercially exploited.

Nothing in either of the latter two zones abruptly marks them off in a physical sense from each other or together from the Mediterranean zone in the north. Taking the three zones together, there is difficulty in maintaining settlements and communications from any of the accessible parts. The chief centres of cultivation - oases of dates and cereals - are concentrated in the north at El-Arish, El-Auja, Nekhl and Themsid, and in the plain of El-Qaa in the south. Apart from these, nomadism is the principal way of life.⁴⁵⁾

44) Stanley, op. cit. 8.

45) W. B. Fisher, The Middle East (1956) 456.

Were we to come to the problem de novo, Sinai could possibly be treated as a unit, "'the great and terrible wilderness' which rolled like a sea between the valley of the Nile and the valley of the Jordan", most completely separating Palestine from Egypt.⁴⁶⁾ In the realities of the modern world, however, such an extensive no-man's-land cannot exist, and a more precisely defined frontier line is a compelling necessity. A logical solution could be found on the Suez Canal as the most obvious "natural" land limit and at the sea which, so to speak, chooses itself. The alternative would be to pick upon some entirely artificial boundary running broadly north-south or east-west across the Peninsula and having regard to strategic and military considerations, as presumably may have once been the case with the Rafia frontier. We do not, however, come to the problem unfettered. By reason of its geographical position, northern Sinai has acquired importance as the historical link between Asia and Africa, and that historical importance, reinforced in the last century by the cutting of the Suez Canal, has its restraining effect in this regard.

III The Historical Background

The fact that the Mediterranean zone has since ancient times been a major highway has given a fluid character to the "international" status of Sinai.⁴⁷⁾ Not less than forty-five invading armies have moved across it, going to or from Egypt.⁴⁸⁾ Until the modern presence of Egypt in the area in most recent times, no attempt had been made to define the land frontier of Sinai.⁴⁹⁾ Indeed, the

46) Stanley, op. cit. 113.

47) Jarvis, 1, 128; Fisher, op. cit. 455; P.K. Hitti, History of Syria (1951) chs. XLVII, XLIX.

48) Jarvis, 63.

49) Cf. J. Stone, The Middle East under Cease Fire (1967) 6, Col. 1.

Arabian Peninsula is depicted by one modern Arab authority as including the steppe and desert part of Sinai only, corresponding roughly to the first and second zones above mentioned,⁵⁰⁾ whilst on the other hand a modern traveller reaffirms an older statement that the ancients included in Arabia, Petraea,⁵¹⁾ that is, the north-west region of Arabia, the whole of Sinai.

(a) Ancient times.

The ancient Egyptians probably never held any part of the Peninsula in any effective sense. From the First to the Twelfth Dynasties there is archaeological evidence of religious and commercial links with Serabit and Maghara in the south-west. Then for centuries all Egyptian traces cease. A revival of interest took place when expeditions were resumed to these places during the Eighteenth Dynasty (c. 1700-1400 B.C.E.) and a chain of forts guarding the route to Palestine and Syria, largely along the Mediterranean Coast, was set up.⁵²⁾ With the close of the Twentieth Dynasty, the Egyptian presence once again disappeared. Thereafter evidence becomes available of Nineveh holding sway in Sinai; we know from the Bible that the northern Mediterranean road was trodden by both the Egyptians and the Assyrians in their imperial rivalries.⁵³⁾ Later historical and archaeological records yield Nabatean traces, at least along the Mediterranean Coast, in the Second Century B.C.E., and further in the interior. The Nabateans were a

50) P. K. Hitti, History of the Arabs (1960), map at 16.

51) Plowden, op. cit. 2; Cf. Volney, op. cit. 209.

52) Eckenstein, 30, 52, 63; Western Arabia and the Red Sea 214.

53) S. N. Fisher, The Middle East (1959) 13; Eckenstein, 83.

recognized people, distinguishable from their neighbours.⁵⁴⁾

The pattern that emerges, of political and military activity centred on the north with the rest of the Peninsula by and large in "darkness", is confirmed by the fact that during the period of Roman rule, the "frontier" between Egypt and Asia began at Raf . ran in a westerly direction, then turned sharply south towards a point near to the present Suez town. This coastal province belonged to Egypt; later it was included in the Alexandria patriarchate. Its main cities were El-Arish and, west of it, the now non-existing Ostracine and Cassium. The rest of the peninsula was in Asia.⁵⁵⁾

(b) The Middle Ages

The collapse of the Roman Empire from the 5th century onwards paved the way for the Moslem conquest of Syria, Palestine and Egypt. So far as Sinai is concerned, and indeed for most of the area from Arabia to Egypt and from the Red Sea to the Jordan, there is evidence of generally prevailing lawless conditions.⁵⁶⁾ The Arab conquest of Egypt in the 7th Century, dictated by strategic and economic factors, came from the north-west along the Mediterranean coast road, the traditional international highway of the ancient world. In the story of the advance of the general of the Khalif Omar in 639-40 along this route, there are indications that El-Arish was on or close to the "frontier" which divided Egypt from Palestine, although the first fortified place, the key to eastern Egypt, was at El-Farama.⁵⁷⁾

54) Eckenstein, 86.

55) Ibid. 91-95.

56) Ibid. 106 et seq., 134.

57) Hitti, op.cit. 160-61.

Arab occupation of Egypt had its consequences for Sinai. The drive to establish direct communications with Medina led naturally to the opening-up - or better the re-opening since, as has been indicated, there are earlier traces of settlement - of the south-western coastal strip of the Peninsula; in particular Ter became a customs station.⁵⁸⁾ By the beginning of the 10th century the interior Suez-Akaba pilgrim road to Mecca was already well established. These apart, the precise status and extent of Sinai in the early Middle Ages was a matter of conjecture over which, as one medieval Arab geographer says, there was much speculation.⁵⁹⁾ Perhaps this lack of knowledge is of little consequence since at this period the whole eastern Mediterranean area was under Arab rule and precise demarcation lines, if any, between its various parts were not of particular practical importance or necessary.

Contemporary sources from the period of the Crusades show that European travellers in the Holy Land, desiring to proceed further south into Sinai, took as one of their routes from Cairo the journey by sea. In Cairo they would obtain a firman from the Sultan to establish their peaceful intentions in the eyes of the Bedouin, which might appear to suggest that the latter recognized in some vague sense the suzerainty of the central authorities in Cairo. On the other hand, it is also witness to the "independence" of the Bedouin. One writer affirms that throughout the Mamluk period (1250-1577) the Bedouin were complete masters of

58) Eckenstein, 143. See the route taken by Dean Stanley from Suez to Akaba via S. Katerina, in the middle of the 19th century. Stanley, *op. cit.* 64 *et seq.*

59) Mukaddasi, A Description of Syria Including Palestine, tr. Guy le Strange (1886) 64-65. "It has been said, that the history of the Peninsula is confined to the history of the Exodus" until the Christian era. Stanley, *op. cit.* 48-50.

Sinai, acknowledging only the nominal authority of the Sultan,⁶⁰⁾ and we may legitimately relate this situation back to the earlier period. Alternatively, Europeans might go from Jaffa or Jerusalem to Gaza and then by camel into the interior via Nekhl, their journey being facilitated by a Franciscan establishment in Gaza,⁶¹⁾ apparently without reference to Cairo and in direct touch with the Bedouin.

Mention of Sinai proper is, however, very infrequent in the late Middle Ages. It appears to have been for the most part an unknown area, sandwiched between Egypt and Syria (including Palestine). The revolution in Egypt in the thirteenth century which replaced the feeble Arab Sultanate by the aggressive Mamluks, a mixture of Turkish, Mongolian, and Circassian stock, merely involved a dynastic change in the rulers of the entire region, which continued until the sixteenth century. The new rulers soon lost their early vigour and what-ever control they might have exercised gave way from the middle of the fourteenth century to a state of pillaging and raiding the settled areas of the region; the Bedouin, for instance, sacked Jerusalem in 1480. Nor was orderly rule assisted by the continual revolts of the local governors,⁶²⁾ another result of weak central government. Although Sinai is not mentioned, we can a priori assume that conditions there were, as in earlier periods, marked by an absence of any central state control.

The Church is reported to have tried to obtain a foothold in Sinai as

60) Eckenstein, 163.

61) Ibid. 56 et seq.

62) G.E. Kirk, *A Short History of the Middle East* (1952) 50 et seq.

Ottoman Empire, ultimately limited in its powers by Turkish overlordship. This limitation was at least nominally recognized by all, even Britain.¹⁰²⁾

Almost immediately upon the outbreak of war, the anomalous position of Egypt was replaced by one equally anomalous. First, the "ruling" Khedive was deposed by the British and a potentially more pliant person installed with the title of Sultan, and Egyptian foreign affairs were brought under immediate British control. Secondly, a British Protectorate was proclaimed, under which the rights over Egypt, whether of the Sultan or of the late Khedive, were forfeited to the British Crown. This move was regarded as "a natural development which would involve no change of British policy and would be comprehended without difficulty by the Egyptians."¹⁰³⁾ The suzerainty of Turkey over Egypt was expressly terminated, the Egyptian obligations to Turkey under the different firmans of the previous century were abolished and Egyptian subjects abroad became entitled to British consular protection.¹⁰⁴⁾ This turn of events was partly motivated by earlier reports of disquieting movements of Turkish troops, though Turkey was not yet at war and had in fact declared its neutrality, but (more particularly relevant to the present purpose) by rumours of consignments of arms and gold intended to equip and subsidise the Bedouin of south Syria and Sinai for an attack on Egypt.¹⁰⁵⁾

102) Lloyd, Egypt since Cromer (1933) Vol. I, 192 et seq. and 376 et seq.

103) Ibid; Temperley, op. cit. 195-96; Chirol, op. cit. 120 et seq.

104) Hurewitz, Vol. II, 5; Avram, op. cit., 64; D. Lloyd George, op. cit. 1073-75, 1081-83.

105) G. Antonius, The Arab Awakening 137.

The Protectorate was recognized by the other Entente powers, but doubt has been expressed whether this recognition was by itself sufficient in law to transfer to Britain the rights and prerogatives of the Sultan and the Khedivate, in the absence of the consent of all the other signatories of the London Convention of 1840 and the Paris Treaty of 1856, the latter of which had affirmed the principle of maintaining the integrity of the Ottoman Empire. The Protectorate was in fact imposed unilaterally and whilst *de facto* Turkish sovereignty was suspended, *de jure* it remained in effect.¹⁰⁶⁾

According to the view of one authority,¹⁰⁷⁾ we may say that the position of Britain was that it certainly had or claimed effective residual sovereignty in the sense of possessing the ultimate capacity of disposing of the territory in question and of exercising plenary powers, which it did not share with any other state, including Egypt, either jointly or severally or within defined spheres of competence. To demonstrate this proposition we can project the matter both backwards and forwards from 1914 by citing two incidents to which others will be added later. First, in 1902, Joseph Chamberlain proposed at a meeting with Herzl that the latter investigate the possibilities of the El-Arish area and Sinai generally for Jewish settlement. The proposal received a positive response and might have been adopted but for Cromer's objections not, be it noted, on the grounds of Egyptian or Turkish sovereignty but very practically because settlement in this area would require the diversion of sweet water from the Nile and that

106) Avram, *op. cit.* 64; Cf. Chirol, *op. cit.* 120 et seq.; M.S. Amos, "Martial Law in Egypt, 1914-1923", (1925) XLI L.Q.R. 263.

107) O'Connell, *op. cit.*, Vol. I, 353-54; Cf. Note on "The Anglo-Egyptian Treaty of Alliance, 1936" in (1937) XVIII B.Y.B.I.L. 82-83, 85-86.

could not be spared.¹⁰⁸⁾ Secondly, at the end of the First World War, Egypt was not permitted to appear officially at the Peace Conference since it did not have the status of a belligerent power.¹⁰⁹⁾

The rivalry of Britain and France in the eastern Mediterranean also leads to the conclusion that Sinai was in the opinion of these powers freely disposable or likely to be so upon the ultimate break-up of the Turkish Empire, and in particular in connection with the political and diplomatic manoeuvring over railway concessions in the area. Referring to the situation existing in 1915 at the time of the McMahon-Hussein correspondence, the principal British delegate on the Anglo-Arab Committee in 1939 said: "It can be stated as a fact that at the time of the correspondence France claimed the Mediterranean littoral as far south as the Egyptian border". It is quite clear that this border was the Canal Zone or atleast El Arish, with the adjoining desert eastwards being then regarded as an effective military barrier provided no railways connections were built with the northern system in Syria proper.¹¹⁰⁾

No purpose will be served by going into the military campaigns in the region during the First World War. It is sufficient to point out, first, that

108) J. Amery, The Life of Joseph Chamberlain (1951) Vol. IV, 262 et seq; Th. Herzl, Complete Diaries ed. R. Patai (1960) Vol. IV, 1360 et seq; Ch. Weizmann, Trial and Error (1949) 120-21. The Imperial "attraction" of the El Arish scheme is brought out by L. Stein, The Balfour Declaration (1961) 23-26, in particular note 88. Stein notes that according to British Foreign Office documents the Turkish Government also raised objections and doubts were expressed whether the Imperial Firman, which was supposed to be the ultimate source of the Khedive's authority, empowered him to grant a charter for the setting up of a largely autonomous Jewish "colony." Sir Ronald Storrs, Lawrence of Arabia: Zionism and Palestine (1940), 46, note 1, mentions the fact that in 1911, three Jews were dissuaded by the British Agency in Cairo from buying land between Rafa and El Arish.

109) Lloyd, op. cit., Vol. I, ch. XIX.

110) Stein, op. cit. Chap. 2; E. Kedourie, England and the Middle East (1956) 32-34.

Turkey's "invasion" and occupation of northern Sinai in 1915 was not illegal; secondly, military operations were confined to the north and more particularly to the Mediterranean zone, along which the British counter-attack was launched until it could fan out on entering southern Palestine; and thirdly, no fighting Egyptian troops were engaged, the contribution of Egypt being to provide a labour force for ancillary works, such as road making, pipe laying and railway building.¹¹¹⁾ Sinai was "conquered" and "occupied" by British troops under Allenby, without the participation of Egyptian forces.¹¹²⁾

Neither are we concerned here with the tortuous negotiations which lay behind and gave rise to the MacMahon Letters and the Sykes-Picot Agreement, but a brief glance at certain aspects of these documents seems to be relevant both in what they say and in what they omit to say. In his letter of July 14, 1915 the first in the series,¹¹³⁾ which Hussein the sheriff of Mecca sent the MacMahon, the region in which the Arabs claimed independence is described. The main concern throughout appears to be the northern boundaries and, as emerged later, the respective spheres of influence of England and France. In the south, claim is made to the area bounded by the Indian Ocean, excluding the colony of Aden, and in the west, the limits are the Red Sea and the Mediterranean. The vagueness of these southern and more particularly western boundaries is significant and, as we shall see, typical of all the manoeuvring that subsequently took place; *Prima facie* an area bounded by the Red Sea and the Mediterranean would include the

111) Cf. S.N. Fisher, *op. cit.* 364-65; Lloyd, *op. cit.* 230 *et seq.*; Chirol, *op. cit.* 130; Antonius, *op. cit.* 152; Eckenstein, 192 *et seq.*; Lloyd George *op. cit.* 1083.

112) See Meinertzhagen, *op. cit.* 18-19, 237, 324-25, who even goes so far as to argue that sovereignty vested in England by right of conquest during the First World War.

113) Reproduced in Hurewitz, Vol. II, 13 *et seq.*; E.W.P. Newman, The Middle East (1926) 287 *et seq.*; Cf. Antonius, *op. cit.* 414 *et seq.*; Stein, *op. cit.* 267.

intervening land mass. MacMahon's reply and the subsequent exchanges contain no further reference to this boundary. The impression is that it was left, perhaps deliberately, imprecise, a fact which in itself is of some importance; one map illustrating the position shows Sinai as lying outside the region claimed by Hussein but its border with Palestine-Syria is shaded off as if to indicate that the precise line was unknown;¹¹⁴⁾ The British government later claimed that Palestine as such was not included in the area of Arab independence.¹¹⁵⁾ Bearing in mind the broad aims of British policy and the "expendability", so far as Britain was concerned, of large chunks of this area in accordance with such policy, evidence of which has already been presented,¹¹⁶⁾ as well as the physical and other characteristics of the Peninsula and Palestine, the imprecision is not very surprising.

The Sykes-Picot Agreement of May 16, 1916¹¹⁷⁾ was inevitably concerned with the demarcation of the British and French spheres further north; France had indeed replaced Turkey as the rival of Britain in the area but at a greater distance from Egypt.¹¹⁸⁾ No mention is made in the Agreement of Sinai, where Britain from its position of strength in Egypt probably felt secure especially as the area contiguous to the north of Sinai (Area B) was in effect allocated to her u

114) Hurewitz, Vol. II 161. See generally, Kedourie, *op. cit.* chap. 2.

115) Generally on the Franco-British rivalry and its concern with the northern and eastern frontiers of Palestine, see Frischwasser-Ra'anana, *op. cit.* Chap. III - V.

116) Cf. the annexation of Akaba to Transjordan by the British in 1931 though claimed by Saudi Arabia, *ibid.* 30.

117) See Newman, *op. cit.* 288-89; Hurewitz Vol. II, 18 *et seq.*; Documents on British Foreign Policy 1919-39, 1st Series, Vol. IV, 241-45 and 340-49; cf. Lloyd George, *op. cit.* 1085-87; Stein, *op. cit.* 257-58, 363-64.

118) See R.I.I.A., The Middle East (1950) 23-24.

private agreement with France in 1918 to replace the international administration originally contemplated,¹¹⁹⁾ with the result that there was no need to set down any exact line.

Under the Sykes-Picot Agreement, Area B which stretched on the north from Gaza to the Dead Sea was allocated to Britain as part of her imperial realm. The "Brown" area still further to the north which included Jerusalem, Haifa and Acre, was given over to British internal administration with certain transit rights reserved to France. This arrangement clearly reflects the awareness that had been steadily growing that in the British Imperial Scheme Area B was very important because of its adjacency to Egypt and the Suez Canal. Whereas earlier it had been assumed that the almost desert Sinai was a sufficient bulwark, equivalent to a fortified frontier, behind which Egypt and the Canal lay safe, experience of war had shown this not to be so axiomatic. With France pushing south it was imperative for Britain to interpose a further buffer, so to speak, as a natural extension in every sense of the Sinai barrier; the Balfour Declaration and the Mandate may be regarded as a modified application of this policy.¹²⁰⁾

Behind all this was Britain's presence in Egypt, which was treated as a matter *de facto*, if not *de jure*, about which there was or could be no dispute. This may be the reason why all the diplomatic exchanges between the powers leading to the Peace Treaties, the conversations with the Zionists and the treaties themselves are significantly silent on the question of Sinai and the boundaries of the Egyptian-Sinai complex.

Thus, the Feizal-Weizmann Agreement of January 3, 1919, in speaking of definite boundaries between the projected Arab State and Palestine, takes the southern border as self-evident. A tract on a larger Syria, prepared at the

119) *Ibid.* 26.

120) Cf. Antonius, *op. cit.*, 261-62.

instigation of Feizal, sets out as a "a fundamental law" regarding the extent of the proposed kingdom of Syria that the boundary should comprise "la mer Rouge jusqu'à la ligne El-Acaba, Rafje et la mèr Méditerranée à l'ouest", which appears to be the "accepted" Sinai frontier. On the other hand, at a meeting in Downing Street on September 19, 1919, Feizal claimed that the MacMahon Letters gave as boundaries "the Persian Gulf and the Red Sea As regards to the west coast it included everything." This was interpreted by the Deputy Chief Political Officer of the Egyptian Expeditionary Force, who was present, to include the Red Sea, the boundaries of Egypt and the Mediterranean. This interpretation is echoed in a statement appearing in an official publication of the British Foreign Office, ^a handbook prepared for the use of the British delegation at the Paris Peace Conference: "In the south the boundary between Egypt and Syria ... follows an arbitrary line drawn from slightly west of Rafa on the Mediterranean to slightly east of Taba ... on the Red Sea In modern usage the expression 'Palestine' has no precise meaning but is taken as being equivalent to Southern Syria" (emphasis added).¹²¹⁾ The arbitrariness of the line also becomes evident from the conclusion drawn in a memorandum prepared by Herbert Samuel in March 1915 when, after Turkey had entered the war on the German side, the military and political question of the land approaches to the Canal on the east became more pressing than it had been. The memorandum was circulated among some of Samuel's Cabinet colleagues and it concludes that the only satisfactory arrangement would be a British protectorate since Britain could not safely accept a common frontier with any European power (including its ally, France) at El Arish.¹²²⁾

121) F.O. Handbook, Syria and Palestine, 2, cited in Stein, op. cit. 45 note 3.

122) Stein, op. cit. 109, 133.

The minutes of a meeting on the question of Palestine between a British military representative and Zionist leaders in London in July 1919 makes no mention of frontiers, although Weizmann, writing to Israel Zangwill on October 10, 1914, says "I have no doubt that Palestine will fall within the sphere of England. Palestine is a natural continuation of Egypt and the barrier separating the Suez from the Black Sea and any hostility which may come from that side It will be the Asiatic Belgium."¹²³⁾ In a memorandum dated September 26, 1919, of the discussions between a British diplomatic official in Paris and members of the Zionist Organization over the possible drafts for a Mandate for Palestine, the boundaries provision is left blank or vague in its operative parts.¹²⁴⁾

So far as one can ascertain, there are only two documents emanating from Jewish circles that deal in any particularity with the southern boundary of Palestine. First, an unofficial Zionist pressure group centred around the journal "Palestine" claimed in one of its issues in 1918, apart from access to Akaba, an amicable arrangement with Britain to incorporate the El Arish region.¹²⁵⁾ Secondly, at some point in Zionist deliberations, the suggestion had been made for fixing the frontier along the El-Arish-Akaba line, but this suggestion was for one reason or another not attractive to Britain.¹²⁶⁾

In a memorandum sent in 1919 by the Zionist Organization to the Supreme

123) Cited in Stein, op. cit., 127. The point made by Weitzmann may well explain Zionist silence over the southern boundary of Palestine. Just prior to the Balfour Declaration, as well as after it, there was much speculation about Jewish Palestine forming a British Dominion: *ibid.* 283, 315, 381, 450, 553, 624.

124) Documents on British Foreign Policy, ubi supra. 294, 330-37, 395-404, 428-39, 571.

125) Frischwasser-Ra'anana, op. cit. 89.

126) *Ibid.* 105-6.

Council at the Peace Conference, it was proposed that this frontier should be agreed upon with the Egyptian Government (read, the British). "The details of the delimitations, or any necessary adjustments of detail, shall be settled by a Special Commission on which there shall be Jewish Representation".¹²⁷⁾ The memorandum went on to add that the boundaries were sketched with "the general economic needs and historic trends of the country in mind". The geographical extent of Palestine should be as large as possible. Access to the Red Sea was imperative.¹²⁸⁾

Perhaps most significant is the reply which Balfour gave in an interview he had in Paris on June 24, 1919, with Felix Frankfurter and Brandeis, at which Lord Bustace Percy was also present. Brandeis was speaking about the economic elbow room and the boundaries of the proposed Jewish State. He assumed, he said, that the southern and eastern boundaries would raise internal British questions (in contrast, we may point out, to the northern boundary in which France also was interested, so that presumably a solution could be arrived at without international involvements and complications). Balfour agreed that that was the case as to the southern boundary but questioned whether it was so as to the eastern boundary (where we may remember British commitments existed to the Arabs).¹²⁹⁾

That the southern boundary of Palestine was regarded by the British as a matter internal to themselves is brought out further by the absence of any reference to it in a policy memorandum which Balfour sent from Paris to Lloyd George on

127) Hurewitz, Vol. II, 45 et seq. See also Meinertzhagen, op. cit. 13-14, writing of a meeting he had with Weizmann on January 29, 1919, when the latter suggested that the southern frontier of Palestine should be agreed with Egypt. Meinertzhagen comments on the historical and religious claims of the Jews to Sinai.

128) Frischwasser-Ra'anana, op. cit. 108-9.

129) Documents on British Foreign Policy ubi supra 1276; cf. Amos, op. cit. 270-71.

June 26, 1919 in which he discusses the settlement with Turkey. After recapitulating the general policy of severing the Arab-speaking parts of the Ottoman Empire and putting them under Mandatories, he goes on to observe that he was aware that there were some unsettled frontier questions and he would ask that so far as the Great Powers were concerned these should be settled with regard rather to economic than to strategic considerations. Whilst he enters into some detail in illustrating these views of his in so far as they impinged upon the northern and eastern boundaries of Palestine, he says nothing about the southern boundary.¹³⁰⁾

All this no doubt accounts for the fact that the Palestine Mandate speaks of "the territory of Palestine, which formally belonged to the Turkish Empire, within such boundaries as may be fixed by the Principal Allied Powers under Article 22 of the Covenant of the League of Nations".¹³¹⁾

As a more recent observer has pointed out, the inclusion of Palestine in the British imperial scheme was "to provide an 'adequate bridghead' on the east bank of the Suez Canal and to enable the development of the Port of Haifa, which was seen as an important potential link in the imperial system of communications".¹³²⁾

One may suggest that in the total scheme of things Palestine was regarded as an extension of the northern zone of Sinai, the most important part

130) Documents on British Foreign Policy ubi supra 301-2. See also the remarks by Lord Curzon at a meeting of the Eastern Committee of the War Cabinet at the end of 1918 (cited in Stein op. cit. 610-612) that "Palestine is really a strategic buffer of Egypt" and that the time may come when "the Canal will have to be defended - as it has been in this war - from the Palestine side".

131) Hurewitz, Vol. II, 106 et seq.

132) J. Marlowe, Arab Nationalism and British Imperialism (1961) 18; cf. Meinertzhagen, op. cit. 67-68, 115, 135.

so far as concerned the Suez complex. That this was so is perhaps indicated by the fact that in the years immediately after the cessation of hostilities the whole area of the eastern littoral of the Mediterranean, including Sinai, was officially administered as Occupied Enemy Territory under control of the British military authorities in Cairo,¹³³⁾ and, as we shall see, by a number of other economic-strategic arrangements that continued in later years. It would appear that war experience in Sinai made the British aware that the Peninsula was no longer an adequate barrier for the Canal Zone,¹³⁴⁾ and the line had to be pushed further off. As the events demonstrate the process has on the logic of the facts no term until accommodation becomes urgent by the assertion of rival claims. The "progress" from the Sykes-Picot Agreement to the Palestine Mandate is only explicable on these grounds.

The British view of things is well indicated by the manner in every respect in which the frontiers of Palestine were treated by Col. R. Meinertzhagen, the political officer in Cairo, in his memorandum to Curzon in November 1919, in which he sets down what later came to be known as the Meinertzhagen Line. After pointing out the necessity for giving Palestine sufficient grain-producing territory by including areas east of the Jordan, and the necessity of Palestine having also control of the Jordan valley as a whole and the lower waters of the Jordan tributaries flowing from the west, he adds "Access to the Red Sea, though now of small importance to Palestine, will mean a great deal in the future for an industrial country which desires direct access with India and the Far East. The southern boundary can well remain the old Turkish-Egyptian boundary from the

133) Documents on British Foreign Policy ubi supra chap. 2.

134) Frischwasser-Ra'aman, op. cit. 58-59. See note 130 above.

Gulf of Akaba to Rafa. In proposing such a boundary, no effort has been made to introduce arguments of a strategic value.¹³⁵⁾

When we turn to the various Peace Treaties a similar picture emerges. First, it should be repeated that Egypt did not appear officially. The British Protectorate over Egypt was officially recognized by the U.S.A. in April 1919 and by the ex-enemy powers with retroactive effect by virtue of Articles 147-149 of the Treaty of Versailles, 1919. The possible legal shortcomings by reason of its originally unilateral nature of the Protectorate, until then only recognized by Britain's war allies, were thus partially remedied. The most significant factor was Turkey's attitude. At first, the Turks had shewn some reluctance to commit themselves. In a memorandum to the Supreme Council in June 1919, they stated that "the Ottoman Government is quite willing to enter into negotiations at the proper moment with the Government of His Britannic Majesty with a view to define clearly the political status of Egypt."¹³⁶⁾ The Treaty of Sevres of 1920 in which Turkey not only renounced right and title in and over Egypt but recognized the British Protectorate and which in one or two of its provisions dealt with the question of frontiers, was left unsigned by the Turks and remained abortive.

Secondly, it may be noted that at the London Conference in the early part of 1920, at which the treaty with Turkey began to take shape, no firm decision was reached on Palestine except an understanding that the Mandate should go to Gt. Britain, and in this regard part of a synopsis of a draft treaty read: "Palestine, the boundaries to be defined in accordance with its ancient limits of Dan to Beersheba ...", a definition that was neither discussed at San Remo nor appears in the treaty.¹³⁶⁾

135) Documents on British Policy, ubi supra
Ibid. 533-35; Meinertzhagen, op. cit. 25, 62-63.

136) Stein, op. cit. 658 ff.

Thus, whilst as regards Syria and Mesopotamia, provision was made for a frontier commission under Article 94 of the still-born Treaty of Sèvres, in the case of Palestine Article 95 does not mention any such commission but merely speaks of Palestine "within such boundaries as may be determined by the Principal Allied Powers".

It was only in the Treaty of Lausanne in 1923 that Turkey finally renounced generally all her rights and titles regarding the territories beyond her frontiers as fixed by the Treaty; here also, "The future of these territories being settled or to be settled by the parties concerned" (Article 16), and more particularly in connection with Egypt and the Sudan (Article 17) with a proviso that "any questions arising from the recognition of the State of Egypt shall be settled by agreements to be negotiated subsequently in a manner to be determined later between the Powers concerned. The provisions of the present Treaty relating to territories detached from Turkey under the said Treaty will not apply to Egypt" (Article 19).

The significance of the proviso and the last sentence is difficult to determine. Which were the Great Powers concerned and what were the territorial provisions that did not apply to Egypt? Were all these special measures for Britain to meet her special relationship under the Protectorate? However that may be, what is important is that Article 17 extinguished Turkish sovereignty over Egypt and its "dependencies" without transferring it either to Egypt itself

or to Britain.¹³⁷⁾

The "dependencies" were in law, it may be urged, left hanging in a void. Occupation of Sinai, which was the effect of the 1914 Protectorate and the War, did not displace or transfer sovereignty. An occupant is entitled to exercise military authority but does not acquire sovereignty unless and until the territory involved is ceded by a Peace Treaty or simply abandoned without cession or acquired by subjugation or annexation.¹³⁸⁾ The Protectorate had not changed the seat of legal sovereignty and the extinguishment or abandonment without cession to any other party might mean that Sinai could pass to Egypt under the *uti posseditis* doctrine, if available. But this has in fact, so far as one can see, never been suggested and in any event the doctrine is not recognized under international law in any certain manner. Subjugation is in the circumstances beside the point and there was clearly no annexation, at least in express terms. The whole question seems to have been left to the power-interplay of British and Egyptian interests and claims but that does not mean that no other adjacent State has no interest in the matter.

Accordingly, what requires attention now is the question of Anglo-Egyptian relations and how these were resolved, if at all, so far as concerned boundaries. Again, we are not concerned with the complicated events and negotiations that mark these relations but with the final results such as they were. In 1922, Britain by unilateral declaration terminated the Protectorate and recognized Egypt as an independent sovereign State, reserving however to itself the security of British imperial communications in Egypt, the defense of the country against

137) Hurewitz, Vol. II, 59 et seq., 84-85, 120 et seq.; Survey of International Affairs for 1925, Vol. I, 197-98; id. for 1937, Vol. I, 583, note 2; (1937) XVIII B.Y.B.I.L. 86; Lloyd, op. cit., Vol. I, chap. XIX; Chirol, op. cit. 244 and 296; Avram, op. cit. 66-67.

138) McNair, Legal Effect of Law (1948) 320.

foreign interests and minorities and the Sudan. No delineation of frontiers was given in the declaration but the reference to security of communications can, in view of all past history, mean only one thing, control of Suez and the land to the east, that is, Sinai or some part thereof.

While Egypt thus acquired and came to exercise a greater measure of independence than before, independence was by no means complete. Indeed, it has been said that the designation of Egypt as an independent sovereign State was little more than a diplomatic fiction and was so treated by other States.¹³⁹⁾ The reservations continued for long to be a firm point with the British since the security of communications at which they were aimed was regarded as a vital British interest, all of which entailed the continuous presence of British military forces.¹⁴⁰⁾

The relations between Egypt and Britain could not, however, be stabilized in this manner. The former never accepted the validity of the reservations and various attempts were made in 1924, 1927 and 1930 to negotiate a new treaty to settle matters outstanding between the two countries. In the first of these a significant proposal was made by the British to take a lease of the territory between the Suez Canal and the south-west frontier of Palestine, embracing the whole of Sinai.¹⁴¹⁾ It is obvious, in view of the stance that

139) Hurewitz, Vol. II, 100 et seq; (1937) XVIII B.Y.B.I.L. 87; Survey of International Affairs for 1925 Vol. I, 195 et seq; Avram, op. cit. 68 - 69; Temperley, op. cit. 204, cites Milner's designation of the 1922 Declaration as a determined statement of a British Monroe Doctrine over Egypt. Cf. Lloyd, op.cit., Vol. II, 381-82, who mentions that in 1920 the establishment of a cantonment at Kantara or some other place in the Canal Zone was suggested.

140) Hurewitz, Vol. II, 128 (dispatch from Ramsey MacDonald to Allenby in October 1924).

141) Lloyd, op. cit., Vol. II, 395 et seq.

Britain had taken in the preceding thirty years, that it could not but acknowledge in this way some Egyptian "right" to Sinai and at the same time try to preserve its strategic economic and military interests. The offer, however, was not taken up and ultimately a treaty of preferential alliance was signed by the parties in 1936. Apart from ending the British occupation of Egypt as such, recognition of the latter as a sovereign independent State and assuring to Britain occupation of the Canal Zone for at least twenty years and within defined geographical limits, nothing is expressly said which is relative to our purpose.¹⁴²⁾ It seemed to be assumed that Egypt's newly granted sovereignty extended over Sinai. The northern boundary of the latter was an artificial line drawn on the map and tracing its origin, at the earliest, back to 1892 or more probably 1906. But because of its very artificiality the line was not fixed. The Palestine Partition Commission of 1938, for instance, appears to have been ready to push it even a little further north.¹⁴³⁾ By the same token it might be drawn further south, since it is highly fortuitous and possesses no obvious geographical warrant. Nothing clearly marks off the south-western horn of the Fertile Crescent and it vanishes into the Sinai Desert, so much so that while Sinai may on one ground or another (but none, as we have seen, at all decisive) be regarded as Egyptian territory, it might just as well be termed Egyptian Palestine, as one commentator has put it.¹⁴⁴⁾

142) Hurewitz, Vol. II, 203 et seq; J. Marlowe Anglo-Egyptian Relations, 1800-1956 (1956) 444-47; Avram, op. cit. 69-70.

143) Cmnd. 5854, 107 (para. 229).

144) The Middle East and North Africa, 1968-69, 317-318; A.M. Hyamson, Palestine under the Mandate, 1920-1948 (1950) 24; R.I.I.A., The Middle East (1950) 301.

The denunciation of the 1936 Treaty in 1951 before it had run its full term and the final withdrawal of British troops in 1954 subject to certain overflying facilities and other minor rights that Britain retained, do not change the overall picture.

The armistice that ended Egyptian-Israel hostilities in 1949 bears witness indeed to the indeterminate nature of the frontier. Whilst Article III provides for the withdrawal of Egyptian forces in the Al Faluja area beyond the Egyptian-Palestine frontier, Article V expressly states that the armistice line is "not to be construed in any sense as a political or territorial boundary and is delineated without prejudice to the rights, claims and position of either Party ... as regards the ultimate settlement of the Palestine question". The armistice line is what it says it is, an armistice line across which armed forces may not pass. Article VI, it is true marks out the Gaza-Rafa area but only, we may suggest, as part of the Armistice and again not as a permanent settlement.¹⁴⁵⁾

It may be observed that during the nineteenth century, the sanjak of Gaza (which included Khan Yunis, Majdal and Faluja) was part of the vilayet of Jerusalem, the southernmost of the three administrative divisions into which Palestine was divided, the others being the sanjaks of Acre and Nablus, parts of the vilayet of Beirut. Jerusalem was controlled directly from Constantinople. Again, during the Mandatory period, Gaza was one of the six districts in Palestine governed by a British district commissioner.¹⁴⁶⁾

145) Hurewitz, Vol. II, 300 et seq.

146) N. Raphaeli, "Gaza under Four Administrations", 9 Public Administration in Israel and Abroad (1968) 40, 42-45. Raphaeli cites M.A. Meyer, History of the City of Gaza (1907) 7, that Gaza was never reckoned as a part of Egypt; and according to U.A.R., Gaza, Springboard for the Liberation of Palestine (Cairo, 1962) 5 "it is the only part of Palestine which still preserves its Palestinian character;" cf. A. Granett, The Land System in Palestine (1952) 333, n. 5.

From the Egyptian point of view, the Armistice did not result in a state of peace; it was a mere interruption in the state of hostilities. Israel, on the other hand, claimed that it was a preliminary step in ending a state of war.¹⁴⁷⁾ In the years that followed, this difference of opinion had most immediate relevance to the question of the Suez Canal. Even if, taking a strict legal view, there was no state of war in 1949 which was brought to an end by the Armistice, the latter by its very terms kept the question of the Sinai frontiers open.

At a different level, we may note that the Pan-Arab nationalist movement from its beginnings in the middle of the last century was and remains armed as much at the liberation of the Arab-speaking peoples of all sects and religious and ethnic groupings from their own social and economic backwardness and from western domination as it is at a revival of an Arab empire from the Atlantic to the Indian Ocean and that, though Egypt may be the pacemaker for this movement, in many vital respects Egyptian nationalism is more centred on itself and at variance with the rest. It does not always reside comfortably with the other Arab-speaking regional movements, divided as it is from these in point of cultural and economic development as well as in matters of religious sectionalism.¹⁴⁸⁾ What all this means in terms of frontier drawing is speculative but it certainly does not point to any pre-given lines or to any firm "natural" claim on the part of Egypt to the Peninsula.

147) Avram, *op.cit.*, 122 et seq.

148) See generally R.I.I.A., *The Middle East* (1950) 16-19, 31-34, 52-56, 62 et seq. Cf. W. Burdett, Encounter with the Middle East (1970) 48-52, 137-38.

The situation generally seems to be therefore that Egypt has never had any clear legal claim in its own independent right to Sinai. There is no need to rehearse the events of 1841, 1892, 1906, 1914, 1922, 1936 or of more recent times. Reviewing the history of the region the most that can be said is that Egypt's connection with the north-west Mediterranean coastal plain has from many aspects been a close one. But, by the same token that is also true of its northern neighbour. In any event the boundaries separating the two have never been as clear as they might. For the larger part of history, the Sinai Peninsula has clearly formed a no-man's-land between them. It is only towards the end of the last century that the situation seems to have started to change and since 1936, that is, for just over a generation, Egypt as such has, so to speak, occupied the area. The exact character of that occupation therefore requires examination in order to determine whether if it is of such an effective nature as may in the absence of any manifest legal title afford Egypt with firm exclusive rights in the present state of international law.

VI

Egypt in the Sinai Peninsula

We may first recall the evidence in this regard already set out that above which demonstrates until well towards the end of the last century there is little to indicate any effective internal or external governmental control and administration on the part of any State whatsoever. Secondly, we may observe that even for the last three-quarters of a century there is a notable dearth of at least published information on conditions in Sinai. Such lack of information is highly and significantly pertinent. The same is true of the very little

little that was found upon the entry of the Israel Defence Army in June 1967.¹⁴⁹⁾

First as to population the indigenous population is Bedouin but their precise number is still doubtful notwithstanding attempts at a census by the I.D.F. At least three different estimates have been given in the past. One for the period before 1930 puts it at around 25,000; another, some little time later, at between 5,000 and 6,000; whilst a more recent estimate is 33,000 but, and this is important, of these 26,000 were said to live in the northern part from Tih Plateau to the Mediterranean,¹⁵⁰⁾ essentially the coastal zone about which much has already been said above, leaving a figure of 7 - 8,000 for the rest of the Peninsula. The last two estimates seem to be near the truth, since according to the census taken by the I.D.F., the population of the coastal strip between Rafiah and El Arish amounted to about 34,000, excluding nomads. No census was taken of the Peninsula proper, mainly because of the smallness of the population. According, however, to the Egyptian census of 1960 the population of the whole of Sinai was about 50,000.¹⁵¹⁾ Assuming that no drastic changes occurred between 1960 and 1967 (and if there were any, they would have presumably affected the non-nomadic population as a result of the entry of the Israeli forces into the region), the entire nomadic population is not more than about 16,000 over the whole of the Peninsula.

149) Such information is derived in large part from conversations held with officials of the Civil administration in Gaza and N. Sinai.

150) Jarvis, 8; Plewden, op.cit. 8; E. Marx, Bedouin of the Negev (1967) 4-5. The last confirms Volney, cited above at note 73, that there are three major tribal confederations, some groups of which have never left the area and have indeed been rejoined since 1948 by those who had. This may account for the increase in population in the figures given by Marx.

151) Census of Population, 1967, No. 1 (Jerusalem 1967) XX and XXII; cf. S. Gazit, The Occupied Territories (in Hebrew) 3.

The area of Sinai is estimated at about 23,500 sq. mls. The principal, if not the only, town was said earlier in this century to be El-Arish, where until the British occupation of Egypt the Turks had maintained a Besnian-Albanian military garrison.¹⁵²⁾ There is no reason to doubt that El-Arish retains its relative pre-eminence. Ter on the Gulf of Suez had once been important as a station on the Pilgrim sea route and as a port for the Indian trade but the discoveries of the sixteenth century had reduced to a negligible spot; after the First World War its population numbered not more than 1,000.¹⁵³⁾ Nekleh, once the great centre of the pilgrim land routes and before the First World War the capital of the Province and the seat of the Governor, was "killed" by the Palestine railway across northern Sinai and the opening of a direct pilgrim route by sea from Suez.¹⁵⁴⁾

The apparent prominence of El-Arish is also testified by the fact that under the Electoral Law of 1883 it was, of all the possible places in Sinai, named an electoral district sending like other districts one delegate to the Legislative Council and like most other districts (Caire sent 4 and Alexandria 3) one delegate to the General Assembly of Notables.¹⁵⁵⁾ On the other hand, it was one of the areas expressly excluded in 1903 from the operation of the Recruitment and Military Service Law of 1902, whereunder the Minister of War might by order so exclude a locality, if satisfied that, owing to the general unsuitability of the population for military service, the number of recruits to be obtained would not be sufficient to justify the carrying out of recruiting operations in the

152) Jarvis, 3-4.

153) Ibid. Cf. J.L. Burckhardt, Travels in Arabia (1829) Vol. II, 352-53.

154) Jarvis, 5.

155) Gelat, Vol. III, 336, 340, 347-48.

locality or for any special reasons, such exclusion was necessary.¹⁵⁶⁾ Later, in the early years of this century, in pursuance of a policy of strengthening its position among the Beduins in Sinai, Britain introduced a system of active policing and small scale economic assistance. Significantly, these steps were a contributory factor to the crisis of 1906, during which Turkey tried to reassert its rights.¹⁵⁷⁾

The military importance of Sinai was according to one observer rather negligible, since before 1914 the authorities had decided that in the event of invasion Sinai was to be evacuated because of supply difficulties and because it was thought - wrongly in the final event - that no considerable force could come from Palestine to operate against the Canal. At that time the area was not in fact occupied by British troops but was patrolled by a few Sinai Arab policemen and administered by a British officer from Nekleh. The latter retired to Suez immediately upon the Turkish invasion in 1915.¹⁵⁸⁾ Passing over quickly the intervening period for lack of facts, we may note that prior to 1967 the military presence of Egypt in Sinai was conspicuous by its absence.¹⁵⁹⁾ Egypt had relied on Israel's pacifism; the UNEP itself numbered fewer than 700 men for the whole of Sinai. The only other Egyptian military activity that needs to be noted is the naval blockade of the Suez Gulf and the Tiran Straits in recent years, but this must be construed as contrary to international law, from which no inference can

156) Ibid, Vol. I, 189, 207. But see E. Kedourie, op. cit. 34, note 1, on the British mission to survey Sinai just before 1914; Stein, op.cit. 56 note 38.

157) Frischwasser-Ra'anana, op.cit. 37-40.

158) Jarvis, 7-8.

159) Burdett, op.cit. chap. 5 *passim*.

can be drawn in the present context.¹⁶⁰⁾

El-Arish was under a law of 1883 one of the police districts of the Cairo division, with its own inspector of police.¹⁶¹⁾ The size of the force then available does not emerge from the contemporary documents at hand, but much later, after the First World War, it was said to consist of 145 mounted and 104 unmounted men, along with a Camel Corps of unspecified number, divided into four sections quartered in El-Arish, Kuntilla, Shott and Tor, as well as a Car Patrol at Kuntilla. The disposition of these forces are significant since the Camel Corps and Car Patrol were, it appears, a military and not a police force and commanded by British Officers in Cairo.¹⁶²⁾ In the 1930's a traveller in the area, seeking advice from an English officer at Suez Town before setting out on her journeys through Sinai was told to consult with the local Arab police about arranging police posts along her route, which she did, "but I must say at once that (excepting Taba) that was the first and last I heard of them".¹⁶³⁾

El-Arish was not a seat of the Mixed Tribunals of first instance set up under the Capitulations system but in the last two decades of the nineteenth century was included in the area served by the Tribunal first at Alexandria and then at Mansourah. More importantly, it does not figure at all in the list of places where "indigenous" tribunals of first instance were established in 1904.¹⁶⁴⁾ According to one observer, the Egyptian government, realizing that it could not administer a wilderness like Sinai and maintain public security by ordinary police

160) It is perhaps significant that when Sharm El Sheikh was captured by Israel, the Tiran Straits were found not to be mined and Egyptian craft in the vicinity. Two coastal guns were found a considerable distance away. *ibid.* 339.

161) Gelat, Vol. III, 815.

162) Jarvis, 75; Plowden, 14-15.

163) Plowden, *op.cit.* 17.

164) Gelat, Vol. III, 457, 482-483.

methods, passed legislation in 1911 which gave over the trial of disputes to the local tribal "organizations" according to usage and custom, with the usual tribal responsibility as among themselves as well as vis-à-vis the government. This also appears to have been the situation since 1948. Under the British Protectorate cases were reviewed as and when necessary by the (British) governor residing at El-Arish and then by legal experts at headquarters in Cairo¹⁶⁵⁾ but under the Egyptians that was not the case except for the El Arish area.

As regards general governmental activities, a picture of neglect or indifference of the country as a whole is presented, even during the period of the British Protectorate. "Journeying across the wide stretches of the country, which were formally a wilderness and are now a desert", it was reported soon after the First World War, "one wonders if a wise government could not impose restrictions which would stop the destruction of the undergrowth and regulate the water-supply (T)he Bedawin, the present inhabitants of the peninsula, live in a state of semi-starvation. Their various means of subsistence have steadily grown less with the centuries".¹⁶⁶⁾

After the First World War, Sinai became part of the Occupied Enemy Territory Administration. But if Sinai was indeed part of Egypt, this arrangement appears highly anomalous. Some time later a new department, the Frontier Districts Administration, was created to administer Sinai and the western desert and other areas in Africa. In Sinai, this Administration was, however, in evidence only

165) Jarvis, 40 et seq, 78 Eckenstein, 107-8; Plowden, op.cit. 61. Cf. E. Robinson, Biblical Researches in Palestine, Sinai, and Arabia Petraea, (1841) Vol. I, 206-7.

166) Eckenstein, 7. Allenby in a report to the Council of Four in March 1919 drew the following picture if Faisal raised the standard of revolt: "A rising of the Bedouins [in the east of Jordan] would bring us also the tribes of the Sinai Peninsula and serious trouble would certainly break out in Egypt and the Sudan. In such a case I shall be totally unable to handle the situation with the troops at my disposal": cited in Kedouri op.cit. 137.

along the coastal area of the Gulf of Suez.¹⁶⁷⁾ There is almost no evidence in the printed sources even for the last two or three decades of any activity in the main Sinai area that one normally associates with government.¹⁶⁸⁾ Such evidence as is available refers to what has been called "inhabited" Egypt,¹⁶⁹⁾ that of the Nile Valley and more recently the Canal Zone, and so far as concerns the Peninsula is confined to the northern and south-western coastal areas. Thus, it is reported that during the British Protectorate three schools (two for boys and girls) were maintained at El-Arish, one school at Kantara and two schools at Tor, and dispensaries at Kuntilla, Cossema and Nekhle.¹⁷⁰⁾ According to figures published some twenty years ago government expenditure on Sinai as an administrative division constituted 0.1% of the total in 1937 and 0.2% in 1947.¹⁷¹⁾

During the period of Egyptian rule since 1948, the U.A.R. was divided into 25 administrative regions of which Sinai was the twenty second. At least in 1960, local government institutions existed only in first 21 of these regions. The remaining four, including Sinai, were Frontier Regions administered through a Military Commander by the Ministry of War; these regions were alike in being predominantly desert areas, populated mainly by Bedouin.¹⁷²⁾ At El-Arish, however, a local council was at least in existence, consisting of 20 persons appointed

167) Jarvis, 70 et seq; Plowden, op.cit. 14-15.

168) See, for instance, Ch. Issawi, Economic History of the Middle East, 1800-1914 (1966); W.R. Polk and R.L. Chambers, The Beginnings of Modernization in the Middle East (1968), dealing with urbanization, education (cf. Jarvis, 19) and transport (but see Jarvis' introduction to Plowden, vii); G. Baer, A History of Land Ownership in Modern Egypt 1800-1950 (1962); G.S. Saab, The Egyptian Agrarian Reform 1952-62 (1967); Report of the U.K. Trade Mission to the Egyptian Region of the United Arab Republic (1960)

169) R.I.I.A., The Middle East, 1950, 139.

170) Jarvis, 73,82.

171) The Middle East, 1947.

172) Middle East Record, 1960, 494, from a report in Al Ahram of June 27, 1960.

by the Arab Socialist Union, 6 by various Ministries at Cairo and 3 by the Military Commander. It is not clear how this council functioned and what were its powers. The applicable law in the El Arish district and possibly further afield in Sinai was enacted by the Egyptian authorities, except for the so-called "Desert Regulations" of 1917 which were continued and included special provisions connected with smuggling and frontier matters, the operation of military government and the like. A magistrate's court with two judges appears to have functioned at El Arish as a military court attached to the frontier police, with a right of appeal to Cairo. Rafa which lay astride the frontier itself was divided into an Egyptian sector and a Palestinian sector belonging to the Gaza Strip. The former was under the jurisdiction of an Egyptian military court. For the rest of the Peninsula, there were no courts or even police stations. The only authority that manifested itself was the occasional presence of Egyptian military personnel. Disputes, as we have said, were settled according to traditional tribal procedure and custom by the Bedouin themselves. A frontier and customs post was maintained at Rafa but according to all accounts such post need not have existed so far as the collection of customs duty is concerned.

Only a little more information is available about the railway system of but it does not alter and in fact confirms the picture drawn above, the Egyptian "concentration" on the Mediterranean and Suez coastal plains. Until the First World War, the whole Peninsula was entirely neglected in point of communications. After the Turkish move towards the Suez Canal was repulsed in February 1915 and the British went over to the offensive, the construction of a military railway was commenced, starting from Kantara in January 1916 and reaching El-Arish by January 1917, Rafa a month later and then Gaza; Jerusalem was reached in June 1918 and Haifa by the end of that year. In the wake of Allenby's advance a second

line was laid which reached Rafa in April 1918.¹⁷³⁾ These lines were independent of the Egyptian State Railway System. They belonged originally to the British War Office. In 1922, the War Office, wishing to be relieved of responsibility for the railway, handed it over to the Colonial Office. Ultimately management of the railways passed to the Palestine Railways Administration under the Mandatory power. At first the latter had had the free use of the section from the "Palestine" frontier to Haifa but later purchased it, whilst continuing to operate the Kantara-Rafa section for the British government on a profit-sharing basis, an arrangement which seems to have ceased only in 1947-48.¹⁷⁴⁾ The kilometrage of the line was marked according to that of the Palestine Railways right down to Kantara, the western terminus; the rolling stock was also Palestinian.¹⁷⁵⁾ Apart from this line, there also existed in Sinai a short line of some ten km. and two very minor branches of 1000 M. and 500 M. built by the Sinai Mining Company of London in 1924 and 1925 to serve the manganese mines worked at Ombougma in the south-west and carrying the ore to Abu Zenima for shipment to Suez.¹⁷⁶⁾ No mention has been found of any road system.¹⁷⁷⁾

Likewise, a small reservoir system for land irrigation was built, apparently in 1950, in the El-Arish area. Mention is also made of a number of lake fisheries at Sabkhet El Bardawil off the north Sinai coast. The oil deposits at

173) The second link was closed down in 1922 owing to the cessation of military traffic.

174) L. Wiener, L'Egypte et ces chemins de fer (1932) 565-66; Hyamson, op.cit., 41-42; Report of Anglo-American Committee of Enquiry 1945-46, Vol. III, 853; Annual Reports to the League of Nations on the Administration of Palestine and TransJordan, till 1938 and thereafter Annual Statistical Survey till 1947; Jarvis, 6.

175) Wiener, op.cit. 567-68; Meinertzhagen, op.cit. 114.

176) Wiener, op.cit. 572 et seq.; cf. Ch. Issawi, Egypt in Revolution; An Economic Analysis (1963) 209-211.

177) Report of U.K. Trade Mission (note 141 above) 34; R.I.I.A., The Middle East (1950) 187. Even before 1914, oil in the Negev was already of interest to American, British and French elements; Frischwasser-Ra'anan, op.cit. 40-41.

Sudr, Abu Rudeis and Balaim along the south west have only been exploited since the Second World War.¹⁷⁸⁾

The Sinai Mining Company above-mentioned was in the 1930's the only European controlled venture to mine ores in Sinai. Manganese was first discovered at the beginning of this century at Ombougma but its commercial exploitation only began in 1912.¹⁷⁹⁾ No other reference to any sort of mining has been found. In ancient times, copper and turquoises had also been mined in this district - Serabit and Maghara, in the vicinity of Wadi El Firan - but in modern times this had ceased, although a thirty years concession was granted in 1900 to an English company for the exploitation of precious stones (mainly turquoises) and all other minerals (not bituminous which were subject to an earlier concession) to be found in the Peninsula.¹⁸⁰⁾

VII Conclusions

What conclusions can be drawn from the evidence presented above? Without going too far back into history, we may say that for the past three or four centuries the whole of Sinai was a part of the Turkish Empire, just as Egypt was. Evidence exists that the triangle on the Mediterranean Coast with its land frontier stretching from Rafa to Suez town was in some manner affiliated to Egypt. The firmest evidence of the connexion, such as it is, dates only from about the middle of the nineteenth century. But we must always have heed of the

178) Issawi, op.cit. 133,319; id. Egypt at the Mid-Century (1954) 105; Report U.K. Trade Mission (note 168 above) 27,36, which also mentions a projected radio beacon at Tor; R.I.I.A., The Middle East (1950) 140.

179) Plowden, op.cit. 59. All the very substantial, though costly, modernizing initiated by Khedive Ismail (1863-79) were confined to the Nile Valley; the same is generally true of the Cromer administration. R.I.I.A., The Middle East (1950) 154-56.

180) Western Arabia and the Red Sea (note 37 above) 214; Eckenstein, 3; Gelat, Vol. III, 490 et seq.

warning note sounded by Judge Huber in the Palmas Island case (1928), that "a juridical fact must be appreciated in the light of the law contemporary with it and not with the law in force at the time when a dispute in regard to it arises or falls to be settled."¹⁸¹⁾ The connexion of this triangle with Egypt must therefore be viewed in the light of Ottoman suzerainty, until the end of the First World War.

At about the end of the last century Egypt was also "confided", under British pressure, with the administration of the Peninsula. The suzerainty of Turkey, however, remained and the territorial boundary between Palestine and this area of administration in Sinai was disputed and never conclusively resolved as long as the Ottoman Empire remained an international entity. Moreover, the scope and effectiveness of such administrative acts as were carried out, even under the British Protectorate, were not very significant, taken as a whole and in any event were so carried out in the name of Turkey.

Upon the break-up of the Turkish Empire at the end of the First World War and its renunciation under the Treaty of Lausanne 1923 of rights and titles to certain largely undefined territories, including Sinai, a void was created because there was no formal disposition of Turkish sovereignty either by cession or annexation or in any other formal manner as happened with other Turkish territories which were placed under a number of mandates or otherwise "legally" disposed of. The diplomatic fiction of Egyptian independence "granted" by Britain in 1922 and its extensions in 1936 and 1954 did not and does not alter the formal situation. The abstract title to Sinai still remains outstanding to be acquired by one or other mode recognized under international law.

181) Cited in E.C. Wade, op.cit. 100.

The assumed north-eastern frontier of Sinai, Rafa to Akaba, (or that existing prior to 1967) was patently entirely artificial. During Turkish dominion, this artificiality was of little international consequence by reason of that very dominion which even Britain recognized if only in form. Throughout the period of British control of Egypt, coupled later with the British Mandate in Palestine, this artificiality continued to be of very small importance in real terms. Britain was present on both sides of the line; its presence was in a sense symbolised by control of the connecting railway system, significantly enough, not from Egypt but from Palestine. Even Annex II to the Egyptian-Israel Armistice of 1949 acknowledges the artificiality of the line then established by describing it as "a straight line marking half the distance between the Egyptian-Palestine and TransJordan-Palestine frontiers".

Assuming, however, that title to Sinai somehow passed in 1923, to whom did it go? Not to Egypt which not only was not a signatory of Lausanne but did not even appear officially at the Peace Conference. The only country that could claim title to the whole of Sinai (or perhaps that part other than the northern triangle) was Britain by right of conquest. There was nothing in the Anglo-Egyptian Treaty of 1936 or in the other documents marking the gradual withdrawal of Britain from the area, which granted or ceded Sinai to Egypt or to any other State. If anything, title by conquest remains notionally with Britain or, as may well be the case, Sinai was abandoned in contemplation of law. The question therefore is whether any State has since 1936, or perhaps better since 1954 when the British finally departed, acquired the territory. The most likely candidate on the facts of the situation appears to be Egypt but again on the facts it may be asserted that Egypt has not acquired any title by prescription (the period since 1954 must on any count be too brief for this purpose). Cession

is, as indicated, out of the question. And annexation clearly does not arise as that is a process which regularizes conquest after war, which is accompanied by formalities.¹⁸²⁾ Nor can any claim be advanced, if at all, under uti possidetis unless it meets, as the present case does not, the three criteria laid down in the Guatemala - Honduras Boundary Arbitration of 1933 - the facts of actual possession, its bona fides and the relationship of the territory occupied with that unoccupied. Even if it is conceded that Sinai is a marginal case, in the sense above indicated, the same criteria, and principally the first two which constitute effective occupation are, it is urged, also to be applied.

The facts of actual possession have on the available evidence been, to say the least, minimal both in extent and degree. So far as they may indeed be indicative of the effectiveness of occupation, they have not been bona fide by reason of being of a nature intentionally and directly hostile to a neighbouring State, the most prominent and in the context of sovereignty the most determinative of them being the attempts to exclude the passage of ships through so-called territorial waters.¹⁸³⁾ Such acts constitute a breach of international obligations and, as we have already seen, one important feature of effective occupation is the assurance of a minimum of protection of the rights of other States under international law; ex iniuria non oritur ius. On the other hand, to try and justify these acts on the grounds that Egypt has been in a state of war or of hostilities with Israel since 1948 is self-defeating since that would leave the international position of Sinai still completely open and undecided.

In this event Israel could now well claim the Peninsula by right of conquest and

182) Oppenheim, Vol. I, 566 et seq.

183) Cf. Meinertzhagen, op.cit. 240, 257, 259-60, 264, 270, dealing with some post 1948 incidents.

subjugation. In any case the hostile and other acts and activity on the part of Egypt have not been continuous, uninterrupted or carried out for any "reasonable" length of time. And where hostile, they have evoked almost instant protest as, when and to the extent that was possible and required. Acquiescence cannot therefore be pleaded.

Even the unhostile governmental and administrative acts of Egypt, for what they are, have been confined as far as one can gather, to a single and relatively small area, the northern Mediterranean coastal triangle, and to a far lesser degree the south western strip along the coast of the Gulf of Suez. It is perhaps true that historically the former has been closely associated with Egypt but it has also its near connections with the land beyond towards the north. Assuming that Egyptian activity in these two areas amounted to effective occupation, it could not, it is submitted, be projected under the contiguity principle to the rest of Sinai because of the latter's size and physical configuration, even on the basis that the entire Peninsula constitutes, as it were, an organic unity. For the larger part, Sinai has been, we may repeat, a marginal no-man's land, "a region which through the years had the dual function of being a buffer of empty space in peacetime and a battleground of convenience in war".¹⁸⁴⁾

Its Bedouin population has been concentrated in the north. But if anyone, that population may make claim to the area, were it not for the fact that its social and communal organization is an historical relic which does not lend itself, even apart from economic viability, to independent political statehood. One writer who knew the area has said "The Arabs of Sinai! A handful of nomads ignorant and careless of sovereignty and only wishing to be left alone in peace".¹⁸⁵⁾

184) Burdett, op.cit. 118.

185) Meinertzhagen, op.cit. 19-20.

The East Greenland case which might be called in aid strongly to advance the Egyptian argument is clearly distinguishable, if only because there original legal title clearly rested in Denmark. Furthermore, the maxim of non quieta movere which may have partly motivated the tribunal in that case is not of invariable application, especially, it is suggested, where any frontier that may be drawn must of necessity be artificial and conditioned by economic, strategic and other pragmatic considerations. The area is not remote, although parts of it are inhospitable; and far more vital, pertinent and consistent acts of effective occupation, and for a far longer period than obtains in the present case, must be demonstrated to support an Egyptian claim.

"Since, in the case of termination of war through the simple cessation of hostilities, no treaty of peace embodies the conditions of peace between the former belligerents, the question arises whether the status which existed between the parties before the outbreak of war the status quo ante bellum should be revived, or the status which exists between the parties at the time when they simply ceased hostilities, the status quo post bellum (the uti possidetis) can be upheld. The majority of writers correctly maintain that the status which exists at the time of cessation of hostilities becomes silently recognised through such cessation, and is, therefore, the basis of the future relations of the parties. This question is of the greatest importance, regarding enemy territory militarily occupied by a belligerent at the time hostilities cease. According to the correct opinion, it can be annexed by the occupier, on the ground that his adversary, through the cessation of hostilities, has abandoned all rights he possessed over it. On the other hand, termination of war through cessation of hostilities does not dispose of claims of the parties which have not been settled by the actual position of affairs at the termination of hostilities, and it remains for the parties ¹⁸⁶⁾ to settle them by special agreement or to let them stand over".

The concept of "effectivity" is resorted to in international law" in order to find in it the justification for an established order or for the purpose of

186) Oppenheim, op.cit. Vol. II, 598-99; cf. Stone, op.cit. 13.

advocating ... a principle for the solution of a conflict of legal claims." The latter, "dynamic effectivity", relieves the tension between fact and law in favour of a new juridical situation and renders the law more responsive to social realities; subject always to the limitations inherent in the rebus sic stantibus principle and the desirability of prohibiting the use of force, it may go so far as to produce a new title to new territory.¹⁸⁷⁾ It is submitted that this notion of "dynamic effectivity" - even assuming, which is not the case, that there was an established order of things and a sure existing title that the use of force was wholly unilateral - is peculiarly apt to the situation in Sinai.

There is good authority for saying that the 1949 Armistice between Egypt and Israel left all the boundaries of the latter undetermined. While the cease fire or armistice line - essentially a provisional military demarcation line - does not in principle create an international boundary, it may establish a possessory right which will lead to an international boundary, in the absence of a boundary treaty or adjudication, by the principles of prescription and of general recognition. A demand for the withdrawal of Israel to the 1949 line can only be justified in law on the grounds that the Sinai Peninsula is the territory of Egypt and that, as we have seen, is very far indeed from having been satisfactorily proved. In any event the rule of international law which forbids the maintenance of armed forces without the consent of the State on whose territory the armed forces are maintained yields in those cases where it is otherwise required by defensive necessities and so long as peace and security are not

187) L. Gross, Book review of De Vissches, Les Effectivités du Droit Public International (1967) in (1969) 63 A.J.I.L. 844.

restored.¹⁸⁸⁾ In this regard it is also noteworthy that Resolution No. 242 of the Security Council of 22 November 1967 does not state that all Israeli forces are to be withdrawn or to what point that must be done. Nor, it has been argued, does such a withdrawal necessarily imply an Egyptian advance or a determination of the territorial sovereignty of the area. In line with past practice, the Resolution contemplates the possibility of establishing a demilitarized zone.¹⁸⁹⁾

188) Quincy Wright, "Legal Aspects of The Middle East Situation" in The Middle East Crisis ed. J.W. Halderman, (1968) 33 Law and Contemporary Problems, 17, 24. Cf. Shabtai Rosenne, "Directions for a Middle East Settlement", *ibid.* 51,59.

189) Rosenne, *op.cit.* 60-61; cf. L. Gross, "Passage through the Gulf of Aqaba", *ibid.* 130.

C. FARHI

THE GAZA STRIP

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I. Historical Background

The long history of Gaza stretching far back into the past is still relevant for themes which writers in different periods have repeatedly stressed: that Gaza has always been of prime strategic importance in the military history of the region, and that it has never been considered a part of Egypt.

Leaving aside the Israelite (1200-539 B.C.) and the Persian (539-332 B.C.) periods, upon its capture by Alexander the Great Gaza became

"a Hellenistic city whose fate is closely identified with the fortunes of the Western world ... but it never loses its importance as the strategic point on the high road between Asia and Africa."

Largely destroyed by Alexander Jannaeus in 96 B.C. for political reasons, the city was rebuilt by Pompeii, an event which inaugurated the Roman Period. With the final collapse of Rome around 600 A.D. it came under Moslem rule which lasted until the middle of the eleventh century. Subsequently it was taken over by the Crusaders (1096-1300), to be followed by four centuries of Turkish rule extending with short breaks until the First World War.

In each of the above periods Gaza was the key to wider conquests. At the end of the last century Maspero in his classic work The Struggle of Nations stated that

No corner of the world has been the scene of more sanguinary engagements or has witnessed century after century so many armies crossing its borders and coming into conflict with one another. Every military leader who, after leaving Africa was able to seize Gaza and Ascalon became at once the master of Southern Syria.
2)

- 1) Mayer M.A., History of the City of Gaza (1907) 44.
- 2) Maspero M., The Struggle of Nations (1896) 135.

And Norman Bentwich, writing in more recent times, concludes that

"Gaza ... has many times caused a check to invaders progress. For centuries it was a centre of struggle between the Philistines and the Hebrews and even Alexander the Great ... had to lay regular seige to it. A thousand years later Omar, the Arab, found it a greater stumbling block than Jerusalem and Saladin had to make his greatest efforts before he wrested it from the crusaders who had established there one of the chief fortresses of the Latin kingdom. The Tartar hordes razed its walls and citadel but Gaza remains of great strength and strategic importance.

Here a ridge runs across the coasal plain, and the army that has passed it may sweep along the Valley of Sharon till it reaches Haifa.

A single modern example underlines the military importance of Gaza. The battles for the city constituted one of the turning points in the British campaign in the region during the First World War. After a disastrous beginning the caputre of Gaza in July 1917 contributed considerably to the collapse of the Turks in the Middle East.⁴⁾

An historian of Gaza writing of ancient times observes that,

Although at various times of its history Gaza came under Egyptian rule, it was never reckoned as part of Egypt but rather as a city of Syria, Palestine or Phoenicia ... Ptolemy reckoned it as belonging to Judea, and Strabo assigned it to Phoenicia, a narrow strip of land along the sea between Gaza and Antilibanus and towards the Arabians is called Judea ... Herodotus refers to Gaza as the city of the Syrians, Stephen of Byzantium calls it a Phoenician city and says that in his day it belonged to Palestine, though it had formerly been part of Egypt. Marcus Diaconus (4th Century A.D.) says that in his time it was in the district of Filastin ... but during the crusades it was a fief Sufficient has been said here to show that with its geographic position the city was generally reckoned with Syria rather than with Egypt.⁵⁾

3) Bentwich N., Palestine of the Jews (1919) *passim*.

4) Lloyd George War Memoirs Vol. II (1938) 1086-92.

5) Mayer, *op. cit.* 7.

The situation was the same at the end of the 18th Century. According to one traveller,

Palestine is a district independent of every Pachali. Sometimes it has governors of its own who reside in Gaza. The situation of Gaza by fitting for the medium of communication between two nations, has rendered it at all times a town of some importance.

It has however shared in the general destruction and notwithstanding its proud title of the capital of Palestine, it is no more than a defenceless village people at most by only 2,000 inhabitants.⁶⁾

It is noteworthy that right down to the beginning of the 19th century Gaza had a Jewish community. In the 7th and 8th century of our era it was for "the Jews of southern Palestine ... a kind of capital during the period in which they were excluded from Jerusalem."⁷⁾ In the 14th century, the community included immigrants from France and Germany, and in the following century it was described as a cosmopolitan city, numbering among its inhabitants Ethiopians, Arabs, Egyptians, Syrians, Indians, Jews and Eastern Christians. At about the same time, Meshullan of Volterra, an Italian Jew, noted that the Jews had a monopoly of wine production. In 1641, another Jewish visitor, Samuel ben David, found about 100 Jewish owned shops, a synagogue and a Khan. Again in 1733, there is a record of a large synagogue. On the suggestion of Napoleon a native divan was established and the Jews fled the city and by 1811 none were left.⁸⁾

Turkish rule of Gaza was momentarily interrupted by revolt in 1763 and its occupation by Ali Bey in 1766 but within a decade it had returned to Turkish rule. The city was next captured in 1799 by Napoleon, fully aware of

6) Volney, Travels through Egypt and Syria, 1783, 1784, 1785 200.

7) Parkes J.A., History of Palestine (1949) 94.

8) Mayer, op.cit. 93, 101, 163.

its strategic importance as the outpost of Africa and the doorstep of Asia. Subsequently in 1801 the French withdrew in compliance with their Convention with the Ottoman Empire.⁹⁾

Under Mehemet Ali (1832-1840) Gaza fell within the orbit of Egypt, as part of his occupation of Palestine. Once, however, his initial prestige as a champion of Islam had passed its peak, Palestine fell into open rebellion (1834). A modern Arab scholar sums up the situation in the following manner.

It would be a mistake to assume ... that Ibrahim Pasha (the son of Mehemet Ali Pasha) was admired everywhere in Syria and Palestine in 1831 as a savior. The Royal Archives of Egypt ... show that Ibrahim Pasha was regarded with antipathy in almost all circles in Syria and Palestine [The people] accepted his rule unwillingly and under stress of circumstances.¹⁰⁾

More particularly, a relatively large number of Moslem theologians were imprisoned or banished for active opposition to the Egyptian administration, apparently due to the feeling that Mehemet Ali did not really represent the interests of Islam. To a considerable extent, anti-Egyptian sentiment was conditioned by the absence of a clear-cut grant of power to Mehemet Ali by the Sublime Porte. The Royal Archives of Egypt apparently contain nothing beyond a simple firman assigning the Government of Egypt, Arabia, Syria and Crete to the Pasha in 1833. Specifically in "the region of Gaza the bedouins had taken power into their own hands and the whole country side was infested with their bands."¹⁰⁾

9) Gelat P. Répertoire Général Annoté Vol. II, 423 - Convention entre l'armée française du Cairo et l'armée turco-anglais pour l'évacuation de l'Egypte par les français.

10) Rustim, Asad J. The Royal Archives of Egypt and the Disturbances in 1834 *passim*.

With the end of Mehmet Ali's adventures in Palestine in 1840, the Turks were restored to the whole of Syria including Palestine and with it Gaza. "In an incredibly short time the evacuation was complete and the last traces of the Egyptians were lost in the desert sands and the last town in Palestine (i.e. Gaza) went into the hands of the Turks."¹¹⁾

After 1840 the region was divided by the Turks into three sanjaqs, Gaza being part of the sanjaq of Jerusalem, controlled from Constantinople. The Gaza area included Khan Yunis, Majdal and Faluja with a total population of 82,000, the city itself having some 6,000 inhabitants, including 33 Jews. Until 1887 the sanjaq of Jerusalem belonged to the vilayet of Syria but it then acquired independent status with direct responsibility to the Ottoman Minister of Interior. Some few years later, when autonomous local government was introduced, Gaza received its first municipal council (1893).¹²⁾

Thus Gaza was within Palestine. It did not figure in the boundary disputes between England and Turkey at the end of the 19th Century and the beginning of the present century. When in 1906 the Turkish Sultan yielded to the British ultimatum and continued the frontier on the Rafah-Tabah line, reducing the territory of Turkish Palestine by several thousand miles as comparable with its area in 1892 or earlier, Gaza clearly remained in Palestine.¹³⁾

In the years immediately preceding the First World War, Gaza was one of the important points in the struggle for economic power centering on the railways. The French Railway scheme before 1914 called for a rail line

11) Mayer, op.cit. 103.

12) Raphaeli N., "Gaza Under Four Administrations", (1969) 9 Public Administration in Israel and Abroad 1968, 40, 41-42.

13) Frischwasser-Ra'anan, H.F. The Frontiers of a Nation (1955) 40. See above p.

along the coast which would have gone through Gaza. The French also intended to connect their Jerusalem-Jaffa line with the Transjordanian branch of the Hejaz Railway. The Turks expressed a willingness to acquiesce if the French would build a strategic line from Ramle to the Egyptian frontier. On the eve of the War complex negotiations were in progress between France, England, Germany and Turkey, in which all of the parties had conflicting aims.

"As a result Asiatic Turkey was to all intents and purposes partitioned into economic and political spheres of influence Only one area remained under dispute - Palestine and the adjacent parts of Lebanon, Transjordan and the Hejaz. Here France hoped to extend her railway system via Galilee, Samaria and Judea towards the Egyptian frontier She wanted to secure the ports from Beirut to Jaffa Britain aimed at preventing foreign control of a region so close to her Egyptian possessions and wanted to convert Palestine into a buffer zone for the Suez canal."¹⁴⁾

II. The Palestine Mandate

The history of Gaza from 1914 to 1948 is part of the history of Palestine and the Mandate. A detailed study of the latter lies outside the scope of this paper. As regards Gaza, however, the essential point is to determine whether or not sovereignty over the territory was ever established by any State.

Speaking in the House of Commons on March 14, 1957 the Foreign Secretary of Great Britain said flatly that no country had legal sovereignty over the Gaza strip.¹⁵⁾ The roots of this statement go back to the First World War. Even before the Sykes-Picot Agreement of 1916 and before the capture of Palestine from the Turks, the English had been engaged in various plans for the

14) Ibid. 56.

15) House of Commons Debates Vol. 566, Col. 1320.

disposition of the entire region. The MacMahon-Hussein correspondence gave certain assurances in this direction but whether or not these included Palestine has been the source of a long and bitter controversy. New light has now, however, been shed, from which it is unquestionable, first, that Palestine was never intended to be included and that the Sherrif understood and accepted this, and secondly that the whole agreement depended upon an Arab uprising coming to the aid of the British and this never occurred.¹⁶⁾

Under the Sykes-Picot Agreement, Palestine was divided into three areas, one in which British interests dominated, one in which French interests were paramount and the so-called Brown Area under International Control. Gaza was situated in the Brown Area. The Sykes-Picot Agreement was obviously not the last word. The vicissitudes of Anglo-French rivalry and the changing notions about the whole Middle East left the problem of Palestine still unresolved by the end of the War. In 1919 Balfour noted that by then the whole concept of the region had changed from one in which the Great Powers would control territories to a concept of a national existence of yet ill-defined nations,

The language of the Covenant assumes or asserts that in regions we are discussing ... there are in advanced chrysalis state 'independent nations' sufficiently developed to demand 'provisional recognition' each of which is to be supplied with a mandatory till it is able to stand alone. Where and what are these independent nations? Are they by chance identical with Syria, Mesopotamia and Palestine? If so the coincidence with the Sykes-Picot Agreement is truly amazing, for no such idea was in the minds of those who framed it. They started from the view that France had ancient interests and aspiration in Western Syria; that Britain had obvious claims in Bagdad and Southern Mesopotamia; that Palestine had a unique historic position and that if these three areas were to be separately controlled, it was obviously expedient that none of the vast and vague

16) Friedman, I "The MacMahon-Hussein Correspondence and the Question of Palestine", (1970) S Journal of Contemporary History 83.

territory lying between them, which had no national organization
should be under any other foreign influence.¹⁷⁾

As part of the International Zone, Gaza might have been considered
by Balfour as part of that "vague territory", but this seems unlikely in view
of its historic relationship to Palestine.

Balfour continued to elaborate the theme.

In other words when they made the tripartite agreement they never
supposed themselves to be dealing with three nations already in
existence, ready for 'provisional recognition' only requiring
the removal of the Turk, the advice of a mandatory and a little
time to enable them to 'stand alone'. It never occurred to them
that they had to deal at all with nations in the modern and
Western sense of the term. With the Arab race, Arab culture and
Arab social and religious organizations (to say nothing of Jews,
Maronites, Druses and Kurds) they knew they had to deal. But
this is a very different thing.

From today's perspective, this statement illustrates the wide gulf
between pre First World War and post First World War thinking, although
attitudes developed in the earlier period continued to colour the attitudes
of the 'ruling class' in the Mandate period and explains the general confusion
in which the Mandate was established.

The only certain starting point in any consideration of the present
status of the Gaza strip is the fact that prior to the coming into
force of the Treaty of Lausanne on August 6, 1924, the strip was
part of an area which was formally Turkish territory. It is true
that Palestine had in fact already on July 24, 1922 been placed
under British Mandate but applying the doctrine that an enemy cannot
be deprived of territory *pendente bello*, it is clear that Turkey
did not validly lose her title to the area until she renounced it
in terms of Article 16 of the Treaty of Lausanne. Thereafter it

17) Woodward, E.L. and Butler R. Documents on British Foreign Policy Vol. IV,
No. 242 Memorandum by Mr. Balfour Respecting Syria, Palestine and
Mesopotamia, 132187/2117/44 Aug. 11, 1919.

is difficult to determine the devolution of sovereignty over the area. Turkey did not identify the parties in whose favour she renounced the title; though reference was made to the fact that the future of the area was being settled by the parties concerned. Who these parties might be was not indicated, but since the Mandate for Palestine had already entered into force "the parties concerned" ¹⁸⁾ must presumably have been the parties to the Mandate Agreement.

With respect to this interpretation of the situation, it may be of interest to note the changes made between the draft of Article 16 at the Lausanne Conference of 1922 and the final article as it appears in the Treaty. The draft is as follows:

Turkey hereby renounces all rights and title whatsoever over or respecting all territories situated outside the frontiers provided for in the present Treaty Turkey recognizes and accepts the measures which have been or will be taken respecting the attribution, independence or any other regime ¹⁹⁾ of these territories.

The final article reads:

Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty ... the future of these territories ²⁰⁾ ... being settled or to be settled by the parties concerned.

The above interpretation would have been much stronger if the draft article had been the final article. The significance to be given to the change is difficult to assess and it is outside the scope of this paper.

At each stage of the treaty making procedure between Turkey and the Allied Powers there appears to have been an increasing vagueness as to

18) Lauterpacht E., Note on "State Territory" (1957) 6 I.C.L.Q. 513.

19) Records of Proceedings Lausanne Conference on Near Eastern Affairs 1922-1923 Turkey (No. 1) 1923, Cmd. 1814.

20) Treaty of Peace with Turkey, Treaty Series No. 16 (1923) Cmd. 1929.

precisely what was meant. At the London Conference on February 21, 1920, there was an understanding that the Mandate should be assigned to Britain and that the boundaries of Palestine were to be defined in accordance with its ancient limits of Dan to Beersheba. At the San Remo Conference some two months later on April 25, 1920, the Supreme Council agreed upon the terms of the Article relating to Mandates to be inserted in the Turkish Treaty. So far as Palestine was concerned it included the Balfour Declaration.²¹⁾

The Palestine portion of the Mandates' article agreed upon by the Supreme Council appeared as Article 95 in the Treaty of Sèvres. That Treaty was, however, never ratified by the Turks who were outraged by some of its other sections and this led to the Greco-Turkish War.²²⁾ In the final Treaty of Lausanne, Article 95 was replaced by the progressively more vaguely worded Article 16 cited above.

It is to be noted, however, that Article 17 of the Treaty of Lausanne dealing with Egypt is more definite.

The renunciation by Turkey of all rights and titles over Egypt and over the Soudan will take effect as from the 5th of November 1914.

There can be no question that Gaza was not included in the provisions relating to Egypt but in the amorphous territory of "limitrophe countries" referred to in Article 16. It was part of the British Mandate, assigned by the Supreme Council of the Allied Powers in 1920, approved by the League of Nations in 1922, which took effect in 1923.²³⁾ This was not a little the

- 21) Stein L., The Balfour Declaration, (1961) Chap. The San Remo Conference.
- 22) Schevill F., History of Europe (1952) 785.
- 23) Anglo-American Committee of Inquiry, A Survey of Palestine, *passim*.

result of British action during the War itself. The British Army took over the administration of Gaza shortly after its capture in 1917. When the Turks submitted in October 1918, the British military authorities enforced a de facto partition. An Occupied Enemy Territory Administration (O.E.T.A.) was set up which, it has been pointed, politically influenced the post war settlement.

The interior of Syria and Transjordan should according to the 1916 agreements have been divided into "Zone A" and 'Zone B' with Arab governments under French and British protection respectively. Instead, Allenby established one unit in the area O.E.T.A. East, under the administration of Feisal O.E.T.A. South which included the 'Brown Zone' of Palestine (and therefore Gaza) should have come under Anglo-French rule ... Allenby however set up a ²⁴⁾ purely British Administration in the area.

British Military Occupation of Palestine lasted for two years, until a Civil Administration was established in July 1920. ²⁵⁾

Administratively Gaza was one of the six sub-districts of Mandatory Palestine, 13,689 sq. km. in area, with an aggregate population in 1922 73,887 (16,722 urban). Between 1922 and 1931 the population increased by 42% and between 1931 - 1944 by 52%, the urban population being at the last date 33,160. There was a growth in the Jewish population from 330 to 421. ²⁶⁾

Mandatory supervision extended to every aspect of local government. It has been described by Edwin Samuels who was intimately associated with the administration there.

In the local district hierarchy, I was number three and given a fascinating job - the supervision of all local government Eight Arab town had municipal status My work involved ...

24) Frischwasser-Ra'anana, op.cit. 95.

25) Ashbee C.R., Jerusalem 1920-1922, 3.

26) Anglo-American Committee of Inquiry, op.cit.

supervision of council elections and approval of their laws, budgets and senior staff appointments. It also involved close liaison with the district officer in each subdistrict and all the local department representation in the Southern District - police, health, education, public works, agriculture and even the judiciary.²⁷⁾

The Annual Reports on Palestine and Transjordan describe in detail all of these aspects of Mandatory Administration.

Of special interest is the treatment of land settlement. In 1930 the Gaza subdistrict was declared a Land Settlement Area. This should have opened the way to Jewish settlement. The question of availability of State Lands for Jewish settlement was raised in 1930 and the British took it under consideration.²⁸⁾ That no lands were made available, is clear from the report of the British in their answer to the Jewish proposal in 1938 to include an area of the Gaza subdistrict in the partition plans. The Palestine Partition Commission recommended that this area not be assigned to the Jewish state basing its recommendation on the absence of Jewish population.²⁹⁾ In 1940, after the MacDonald White Paper of 1939, the Land Transfer regulations were promulgated regulating the transfer of lands in certain zones. Gaza was placed in Zone A, where transfer of lands were prohibited except to Palestinian Arabs thus effectively sealing off Jewish settlement.³⁰⁾ On the practical side therefore we find the Mandatory authorities administering Gaza and far from promoting Jewish settlement in the area despite the availability of States Lands, at

27) Samuels E., A Lifetime in Jerusalem (1970) 83.

28) Annual Report: Palestine and Transjordan 1930.

29) Palestine Partition Commission Report October 1938 Para 238.

30) Esco Foundation, Palestine, 137.

first discouraging it and later prohibiting it.

Perhaps more to the point of this study is how the Mandate affected the question of sovereignty. This is far from clear. Oppenheim does not answer or even attempt to answer the question, rather he notes that widely differing views were held upon the subject "Where does sovereignty in respect of the mandated areas lie?" and, citing authorities worthy of respect, lists the following answers:

- (i) in the Mandatory;
- (ii) in the Mandatory acting with consent of the League;
- (iii) in the principal allied powers;
- (iv) in the League of Nations;
- (v) in the inhabitants of the mandated area but temporarily in suspense.³¹⁾

The Mandatory system, it has been observed, "is a creation of post war agreements, and the only source of interpretation are the Covenant of the League of Nations, in particular Article 22 and the various mandates which have been drawn up in later years." Neither the Covenant nor the other documents contain any reference to the transfer of mandated territories. Article 22 of the Covenant specifies that for Type A Mandates (and Palestine was designated and accepted by Britain as a Type A Mandate) that

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principle consideration in the selection of the Mandatory.

31) Oppenheim, International Law Vol. I (Seventh Ed. 1948) 202.

This article does not provide for self determination by the inhabitants of the Mandated territories.

It seems to be a matter of some doubt whether the populations under Mandate have a right of self determination. The assumption ... that they have such a right appears to be dictated by sentimental rather than legal considerations. In law there is no provision for a plebiscite to be held in the mandated territories before a transfer can take place. Art. 22, subsection 4 might perhaps be responsible for the misinterpretation in that it says 'the wishes of these communities must be a principal consideration in the selection of the mandatory.' But this provision is no more than a moral obligation put upon the League before it distributes mandates at all There are however still stronger reasons to support the view that a plebiscite in the mandated territory would be outside the law. It is left to the discretion of the mandatory power and the League when a mandate shall terminate.

Theoretically consent of the League had to be unanimous.³²⁾

The question of sovereignty in relation to Mandatory territories is beset with many difficulties. Each of the views listed by Oppenheim can be countered by logical objections. It has been convincingly argued that sovereignty does not lie with the inhabitants of the areas, and it can be argued that sovereignty does not lie in the International Organization that set up the Mandate on the ground that it is composed of many members who were certainly not "the parties concerned" in whose favour Turkey renounced sovereignty. As to the sovereignty of the Mandatory Power, one international lawyer states flatly that "it is clear that the mere fact that the Mandate to administer Palestine had been given to Britain did not convey sovereignty to her. Indeed it was one of the prime objects of the Mandate system that the administering authority should not be sovereign."³³⁾ Oppenheim supports this

32) Honig F., "International Law and the Transfer of Mandated Territories", (1936) 28 J. of Comparative Legislation and International Law 204.

33) Lauterpacht E., Jerusalem and the Holy Places (1968) 13.

view stating that "Germany and Turkey divested themselves of all rights of ownership is clear. That the mandatories had not acquired all of those rights is equally clear Under this system these detached territories were not in the ownership of any State."³⁴⁾

Thus sovereignty might be considered to be in abeyance or simply non-existent. Sir Arnold McNair in his separate opinion on the International Status of South West Africa States has said that "Sovereignty over a Mandated Territory is in abeyance, if and when the inhabitants obtain recognition as an independent state, as has already happened in the case of some Mandates, sovereignty will revive and vest in the new State."³⁵⁾

Once the possibility of a vacancy or vacuum in sovereignty is recognized then the situation in Palestine in 1948 is one which can readily be seen in such terms. Whatever may have been the notional intention of the General Assembly at the moment of the adoption of the Partition Resolution on the 29th of November 1947, the early British withdrawal, the Arab rejection of the solution, the creation of the State of Israel and entry into Palestine of the neighbouring Arab States with a view to crushing Israel, all led to a situation of such juridical confusion as to exclude any tracing of an orderly devolution of sovereignty.³⁶⁾

The lack of intention to turn over the Gaza strip to Egyptian control and to transfer sovereignty is equally evident in the circumstances of the termination of the Mandate as described in the British White Paper on "Palestine - The Termination of the Mandate". While plans at the UN Special Session were still being discussed, the English took the position that in the absence of agreement by both Arabs and Jews, they would not undertake to

34) Oppenheim, op. cit. 193.

35) I.C.J. Reports 150.

36) Lauterpacht, op. cit. 41.

enforce any UN plan and they intended simply to withdraw all British forces by the 1st of August 1948.³⁷⁾

The consequent occupation of Gaza by the Egyptian was thus a simple belligerent occupation of Gaza which gave rise to no rights of sovereignty.

If then there was no legal warrant for the Arab invasion of Palestine in 1948 aimed at the destruction of Israel, two consequences follow. First by reason of the illegality of the conduct no Arab state could rely upon its physical occupation of any part of Palestine as a valid foundation for filling the sovereignty vacuum Egypt was not entitled to assert sovereignty over the Gaza strip.

Questions of sovereignty are quite independent of Armistice Agreements.³⁸⁾

The Armistice Agreement signed February 24th, 1949 plainly states in Article 11

No provision of this agreement shall in any way prejudice the rights claims and positions of either party hereto in the ultimate peaceful settlement of the Palestine question.

And Article 5(2) provides that

The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary and is delineated without prejudice to rights, claims and positions of either party to the armistice as regards ultimate settlement of the Palestine question.

The latter Article is not found in the other Armistice Agreements.

"There has been some speculation as to the possible legal significance of the absence of this clause in any but the Egyptian-Israeli armistice agreement. Does it mean that in other agreements the demarcation line can be assimilated to an international boundary" but by implication not in the instance of the Israeli-Egyptian frontier?³⁹⁾

37) Palestine - Termination of the Mandate (British White Paper, May 15, 1948).

38) Lauterpacht, op. cit. 45.

39) Brook D., Preface to Peace - The U.N. and the Arab-Israel Armistice Agreement (1964).

III. The Egyptian Occupation

Throughout the entire period of its control of the Gaza Strip since 1949, Egypt has never made any claim to it as part of her territory. The early years are marked by some confusion and it was not until 1955 that the Egyptians passed a law trying to clarify the situation, entitled "A Law Concerning the Issue of a Fundamental Law for the Region Placed under the Supervision of the Egyptian Forces in Palestine". The title speaks for itself with reference to the Egyptian's own concept of their relation to the region. In 1962, a Constitution was proclaimed for Gaza, Article 1 of which states that "The Gaza Strip is an indivisible part of the land of Palestine."

Prior to 1955 the titular government in Gaza might be considered to have been, as it was in fact, in the hands of the Egyptian military authorities or in the hands of an exile Arab Palestinian government headed by the ex-Mufti of Jerusalem. The picture is not clear nor are the authorities wholly consistent. One of them notes that

The problem of who shall govern the remnant of Palestine (Gaza and the West Bank) has never been satisfactorily solved The government of the former Mufti of Jerusalem - the All Palestine Government - has had a tenuous existence. Hajj Ami had a falling out with the Egyptians and moved his apparatus from Cairo to Beirut while the Egyptians set up an independent government in Gaza in 1959, also in trust for the Palestinians.⁴⁰⁾

Another records the creation of the All Palestine Government of Gaza.

"An attempt by the Arabs of Palestine to develop momentum through creation of a government with temporary headquarters in Gaza did little more than highlight the division within the Arab league. Hajj Amin Husanyi (Mufti of Jerusalem) favoured it as a means of

40) MacDonald R.W., The League of Arab States (1965) 87.

reinstating himself as head of the Palestine movement. Arab leaders agreed to formation of the government provided that the Mufti had no part in it The Cabinet was elected on October 1st and the Mufti was elected President although opposed by the Arab League. King Abdullah saw 'in the Gaza Government a threat to his own ambitions and flatly refused to recognize it.' Iraq recognized the Gaza government on October 12th and Syria and Lebanon followed suit.⁴¹⁾

Still another authority has pointed out that

Though Egyptian representatives at the UN often referred to the Gaza strip as 'Egyptian controlled territory', Egypt actually never annexed the Gaza Strip. It was treated as occupied territory provisionally administered by the Egyptian military authorities. Thus in September 1955 the Cairo Court of Administrative Jurisdiction states that the Gaza Strip was outside Egyptian territory and that the Egyptian authorities were exercising a 'kind of control over part of the territory of Palestine.'⁴²⁾

According to undocumented authorities, the Egyptians after the Armistice maintained the old 1906 Boundary line between Palestine and Egypt, cutting Rafiah in two. Rafiah was not united but remained a frontier station. In the southern section Egyptian law applied. In the northern section of the City, Palestinian Mandate law continued to apply as it did in the whole of the Gaza Strip, subject to regulations introduced by the Egyptians. In June 1948, an order laid down that all courts in the Region should continue to operate in accordance with the laws, ordinances, orders and directives already issued. In December 1949, normal courts were established. Magistrates Courts were to sit in Gaza with power to sit in Khan Yunis, the District Court was in Gaza, as were a special court for serious offences and a Supreme Court. "Each of these Courts shall have the powers

41) (1949) 3 Middle East Journal 64

42) Fisher C. and Krinsky F., Middle East in Crisis (1959) 52.

prescribed in the Laws of Palestine and in orders issued by us the Governor
43)
General/."

The whole civil government of Gaza was formally independent of Egyptian government but in fact under the direction of the Egyptian Governor General who was the Military Governor of the area. For example, the Director of Municipal and Rural Affairs was a local resident, appointed by the Governor General, but he received his instructions from the Governor General. The same situation seems to have applied to the other departments of government. There was at all times a military force of considerable numbers of Egyptians in the Strip.

At least one modus vivendi was concluded in the early period, following the Armistice between Israel and the Egyptians. On February 24, 1950, "With a view to avoiding the possibility of friction between local inhabitants in certain localities of Gaza and Rafia ... the undersigned acting on behalf of their respective governments have agreed to the following provisions." The operative parts deals with the area to be patrolled by Israel and that controlled by Egypt.⁴⁴⁾

Treating Gaza as foreign territory caused immediate economic problems in the Strip. The movement of persons and goods across the military frontier from Gaza into Egypt was subject to delay and difficulties and the burden of high import tariff inherited from the Mandatory Government was maintained.

The custom border was strictly guarded until 1955, and the adverse balance of payments was a drain on local cash resources. By 1950, local currency in the

43) Gaza Official Gazette, Vol. 1, 17.

44) UN Doc S/1264, 24 Feb. 1950.

Strip had dropped to 7 Egyptian pounds per head of population or about 1/3 of the average holding in Egypt. The shrinking money supply was a serious factor.

Unskilled wages dropped from 30 piastres a day to 10 or 12, a reduction of 2/3.⁴⁵⁾

It was only in 1959-1960, a full ten years after the armistice, that the UAR began to plan economic projects, including afforestation, road building, distribution of agricultural land in the Rafiah area and light industries.⁴⁶⁾ These were accompanied by the political developments which culminated in the Gaza Constitution. In December 1959, a Palestine National Union was set up in an effort to organize the inhabitants of the Strip in a Palestine national entity. Following a Congress of the PNU it was announced that the UAR authorities were considering the possibility of holding general elections to replace appointed officials.⁴⁷⁾

In January 1960, the first (and last) elections of the PNU took place in the Gaza Strip. Suffrage extended to men only, and 334 candidates out of 935 were elected by 53,224 votes. The Egyptian Military Governor expressed admiration of the "electoral awareness of the Palestinians" and promised suffrage for women. He said the final objective of the election was to create a free public opinion and prepare for the fight for liberation.⁴⁸⁾

On the military side an effort was made to form a Palestinian Army unit. A Palestinian Division in the Gaza Strip had been gradually built up by the Egyptian Army before 1956, commanded by Egyptian 8th Division officers, but it was destroyed in the Sinai Campaign. Reorganized in 1957 as the Palestine Brigade, it made symbolic

45) Baster J., "Economic Problems in the Gaza Strip", (1955) 9 Middle East Journal 323; Cohen A., Israel and the Arab World (1970) 55.

46) (1960) Middle East Record, (The Palestine Question)

47) (1961) Middle East Record, PNU and Elections 112

48) Ibid. 136.

appearances at Egyptian parades.⁴⁹⁾

Thus the stage was set for the Gaza Constitution of 1962.⁵⁰⁾ An examination of this Constitution is pertinent. The preamble is a piece of typical propaganda.

Palestine is a cherished part which cannot be separated from the great Arab homeland and its people are free Arabs from the very midst of the great, free Arab nation.

Britain, the country which occupied Palestine and later was chosen as the Mandatory Power, laid its imperialistic plans to erect a strange, inimical being in the middle of the Arab nation, in order to rend its unity by promising the Jews to establish a country for them on the relics of Arab Palestine. It included this promise under the seal of its Mandate and deprived the Arab people of a national government to represent them and receive its authority from their will. In the month of August 1922 it issued a Constitution to serve these aims, which the Arabs refused and in reaction to which they rose in continuous and bloody revolutions until Britain handed over the land of Palestine to the Zionist gangs. Following this, events took place which turned Palestine into a gaping wound in the Arab being and entity, causing great pain to every Arab

Since the United Arab Republic has been helping and aiding people in the Gaza sector until they achieve their victory, which will be soon, and in so doing it issued Law No. 255 for 1955, envisaging the basic system of the Gaza Sector.

And since the requirements of development and the course of events necessitate the availability of a new constitutional system which will meet the aims and hopes of the Palestinian people, the following has been decided:

49) Ibid. 161

50) The Gaza Constitution published in English in (1963) 17 Middle East Journal 156.

There follows the 74 substantive sections of the Constitution. Any impartial view of these must lead to the conclusion that in providing actually for complete Egyptian control, it belies the rhetoric of the preamble.

The Governor General is appointed by the President of the United Arab Republic (Art. 18). The Executive power is vested in the Governor General and an Executive Council of 11 members (Art. 15), composed of the Directors of the various Departments and appointed by the Minister of War of the United Arab Republic (Art. 24). On the legislative side, where the will of the Palestinians is supposed to find expression, a Legislative Assembly is set up, composed of the Governor General, the Executive Council, 10 members to be selected by decree of the Governor General from among properly qualified Palestinians (Art. 30). Thus we have a total 22 members appointed by the Egyptians, 12 of whom can be Egyptians as there is no provision that the Department Directors must be Palestinians. An additional 22 members are to be chosen by the elected members of the local councils of the Palestine National Union in accordance with rules, conditions and system of election issued by the Governor General (Art. 30).

Despite this stacked Legislative Assembly a number of other provisions are included to assure the Egyptians that under no circumstances will legislation be passed of which they do not approve. Thus, in case of a tied vote, the faction which includes the Chairman (the Governor General) prevails. Moreover, after a law has been passed it is to be sent to the Governor General for ratification and if he does not ratify it, the Legislative Council cannot reconsider it during the current session but can only take it up again in the following session and there it must receive a 3/4 vote of all the members (Arts. 20-21). However, to make doubly sure, the Legislative Assembly only meets when convened by the Governor General (Art. 38). The latter has the further power at any time to suspend a session for two months (Art. 37). The members of the Legislative Assembly

have no right to interfere in affairs coming within the competence of the Executive Authority or the Judicial Authority (Art. 45) and therefore do not have any control or even supervisory or investigatory powers with respect to the Executive.

Direct control over financial matters control was assured by a provision that the State Audit Department of the U.A.R. should audit government accounts in the Gaza Strip (Art. 68). With respect to the Judicial Authority, the President of the Supreme Court was to be appointed by the President of the U.A.R. and the other judges by the U.A.R. Minister of War. It is, however, to be noted that Palestine Mandate Law as amended and not Egyptian law is to be the local law (Art. 69)

As we have seen the Egyptians have made no claim to Gaza. Nor do they have any historical or other basis for such a claim. As a writer not antipathetic to Egypt has recently observed,

"There were practically no historical, cultural, racial or other ties between Egypt and Palestine. To the inhabitants of Syria and Transjordan, Palestine was part of their own land; to an Egyptian it was country as foreign as America is to England. The Arab inhabitants of Palestine were bound to the inhabitants of Transjordan by common habits of life, and by frequent intercourse across the artificial and newly created frontiers which had been erected between them. There was no such common bond except that of language between Palestinian Arabs and the Egyptians.⁵¹⁾

Not only the Egyptians but the rest of the Arab world have considered the Egyptian presence as an occupying presence, either as a welcome trustee or as an occupying power, depending on the view of the observer.

Although the Egyptians have declared themselves both internally and internationally as holding the territory in trust for the Palestinians, that did not stop them

51) Marlowe J.A., History of Modern Egypt (1954) 328.

from treating the Strip as freely negotiable territory during the Anglo-Egyptian negotiations of 1950-1951, when they offered Gaza to the British as a military base instead of Suez.

"I believe that within the framework of Arab-Israeli Armistice - declared Muhammed Bey Salah-Al-Din to Sir Ralph Stevenson on 3 August 1950, 'we can agree from the political and legalistic standpoints to move your striking forces to the Gaza Strip without difficulty and without need of complicating matters with another question which is very hard for public opinion in Egypt to imagine, viz., concluding peace with Israel."

Prime Minister Nahhas Pasha was the first to suggest, in talks with Field Marshal Slim, that the British establish a base in the Gaza Strip for mobile units within easy distance of the Suez Canal Only a few months earlier the Egyptian Government claimed that it was holding this sliver of territory in trust until Palestine in its entirety could be restored to the Arabs.⁵²⁾ The British turned down the Egyptian offer.⁵³⁾

IV Gaza: 1956 -1957

It seems appropriate to deal with this 'incident' in some detail. Two basic points emerge from the diplomatic wrangling surrounding the withdrawal of Israeli forces from Gaza. The United States maintained a highly legalistic approach to the possible scope of U.S. or U.N. activity in light of the Armistice Agreement. As Eden notes, "the United States could not have taken up so legalistic an attitude if the security of its

52) Hurewitz J., Middle East Dilemma - Background of U.S. Policy (1953) 100.

53) Anthony Eden in his memoirs Full Circle (1960) 56 states that Gaza was ruled out by the absence of a harbour and of fresh water supplied. Hurwitz, *ibid.*, notes that the British Ambassador argued that such a move would be militarily and politically impossible unless there was peace between Egypt and Israel.

own continent had been at stake".⁵⁴⁾ In the U.N. the United States representative stated that with respect to the Gaza Strip it is the view of the United States that the United Nations' General Assembly has no authority to require of either Egypt or Israel a substantial modification of the Armistice Agreement, which as noted, now gives Egypt the right and responsibility of occupation.⁵⁵⁾

In the second place, the United States in effect simply treated the Israeli conditions on withdrawal as non-existent. In March of 1957, those conditions which included the condition that military and civilian control would be exclusively by UNEF and that this exclusive control would be maintained until a peace settlement or a definitive agreement had been reached on the future of the Gaza Strip - were brushed aside by Mr. Lodge in his famous reply:

The United States also takes note of the declaration made in the statement of the representative of Israel. We do not consider that these declarations make Israel's withdrawal conditional. For the most part the declarations constitute, as we understand it, restatements of what has already been said by the Assembly or by the Secretary General in his reports, or hopes and expectations which seem to us not unreasonable in the light of prior actions of the Assembly.⁵⁶⁾

Events followed each other with great rapidity. Hammarskjold's statement of February 22 had given weight to Israeli's hope that its position would be taken into account.

The Secretary General states with confidence that it is the desire of the Government of Egypt that the take over of Gaza from the military

54) Eden, op. cit. 572

55) Documents on International Affairs, 1957 "Statement by Mr. Lodge, General Assembly March 1, 1957, Royal Institute of International Affairs 208 - 209.

56) Survey of International Affairs 1956-1957, Royal Institute of International Affairs, 156.

and civilian control of Israel ... in the first instance would be exclusively by the UNEF ... Furthermore with reference to the period of transition such other arrangements with the United Nations may be made as will contribute toward safeguarding life and property in the area. 57)

On March 14th, two weeks after withdrawal was announced, Mr. Lloyd, then Foreign Secretary of Great Britain, said in a House of Commons Debate,

"But the latest news is disturbing. It appears that agitators in the Gaza Strip have been inciting the local population Nevertheless it appeared at one time that the Egyptian government without consulting the U.N. has declared their intention of taking over the Gaza civil administration forthwith. They have appointed a general as the Egyptian administrative director and complained to the Secretary General that UNEF was exceeding its function I believe that the latest information which has just reached me, has not made it quite so clear that it is the intention of the Egyptian Government to take over the administration.

Questioned by Richard Crossman whether he had any comment to make on the report that Dr. Bunche had observed that he was perfectly willing to collaborate in the take over of the civil administration by Egypt.

Mr. Lloyd replied that Dr. Bunche had categorically denied that he ever made such a statement. Mr. Lloyd summed up the situation in Gaza as follows:

The facts about the Gaza Strip seem to me to be these. No country has legal sovereignty. By the Armistice Agreement of 1949 the Gaza Strip was not demilitarized. Egypt was left in military occupation. Since then, until October 1956, Egypt exercised de facto authority but the provisions of the Armistice Agreement were of course dictated solely by military considerations and other matters were excluded from its scope. During the recent hostilities, Israel captured the area.

57) Documents on International Affairs 1957 (note 55 above) 200.

The other relevant fact is that from the Gaza Strip there have taken place over a period of years, what would appear to have been organized fedayeen raids across the border into Israel. His Majesty's Government is, as we have frequently said, that we thought Israel should withdraw from the Gaza Strip, but we hoped that there would emerge a constructive solution. And the solution which we have favoured has been the placing of the Strip from the military and civil point of view under some form of international control

.... We believed that the Strip should be made a United Nations responsibility that is still the view of His Majesty's government.

I am afraid that the position of the United Nations cannot be stated in such simple terms. Anyone who has tried to study the various reports and resolutions will agree with me on that point. In fact, I might also almost say that the first prize seems to be for ambiguity.

Mr. Lloyd concluded by quoting with approval from a leading article in the London Times of the March 12th.

The United Nations - fumbling, divided, fearful of responsibility - left the gates to Gaza open and Egypt has driven a horse and cart through A great opportunity has been missed. For years Gaza was the hot-bed of disturbances If it could have been administered as a whole by the UN for some time ahead there would have been far greater security against raids and counterraids between Israel and Egypt." 58)

Mr. Lloyd's hopes like the American assurances were hollow indeed. On March 16th, two days after the Hammarskjold assurances, the Egyptian governor entered the Gaza Strip. Lt. Col. Burns, the commanding officer of UNEF notes "there was no definition of how long in the first instance would endure".

58) Houses of Commons Debates (note 15 above)

As to Mr. Hammarskjold, "he was certainly disappointed. Whether he was deceived also, only he and those who gave him assurance on behalf of Egypt can say."⁵⁹⁾

59) Burns E.L.M. Between Arab and Israeli (1962) 270.