CHAPTER NINE

"ALL OF PALESTINE IS HOLY MUSLIM *WAQF* LAND": A MYTH AND ITS ROOTS

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In 1988, the fledgling Islamic Resistance Movement in Palestine, Ḥamās, emerged with a new concept, manifested in article 11 of its Charter: "... The land of Palestine is an Islamic *waqf* land [endowed] for the benefit of Muslims throughout the generations and until the Day of Resurrection. It is forbidden to abandon it or part of it or to renounce it or part of it ..." This idea was further elaborated in the following Ḥamās statement: "Palestine in its entirety is *holy* [emphasis added] Muslim *waqf* land."[1] The Ḥamās view of Palestinian land thus incorporates two concepts: one, Palestine is *waqf* land; and two, as such, it is holy land. The popular Islamic concept of the holiness of Palestine was until then based on religious and historical factors, such as being regarded as 'the territory blessed by God (Allāh)'—an interpretation of Qur'ān 17:1, which identified the blessed precincts of al-Aqṣā (*alladhī bāraknā ḥawlahu*) with Palestine (originally with al-Shām) (Jabr 1999, 191; Abū 'Aliya 2000, 41), and as *arḍ al-isrā' wa'l-mi'rāj*—the territory of Muḥammad's nocturnal journey and ascent to heaven (Jabr 1999, 200). With Article 11, Ḥamās added a legal justification to the holiness of Palestine. And once the land was pronounced *waqf*, two additional attributes were added to the public discourse (the religious and nationalist discourse in general, not only that of the Ḥamās activists)—it was now regarded as holy and inalienable.

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[1] Quoted from a leaflet Ḥamās disseminated in Gaza on July 22, 2000.

65172

Even though the claim that Palestine is *waqf* land, and as such no part of it could be renounced, was commonly used in the public discourse in the context of the Palestinian-Israeli conflict over the last decade or two, its legal and historical roots have not yet been studied. One expert even wrongly claimed that this new assertion of Ḥamās was not accepted by other Islamic fundamentalist groups, and that "apparently Ḥamās itself was aware of the weaknesses of this claim" (Steinberg 2002, 148–49). As I will show below, the concept that Palestine is holy inalienable *waqf* land is not only a consistent assertion of Ḥamās, but was adopted by the official political and religious actors of the Palestinian Authority (PA) and became common knowledge amongst Palestinians and other Muslim constituencies.

My main argument in this chapter is that the Ḥamās concept is a novel politically-oriented myth, rooted neither in Islamic legal texts nor in historical practice. This myth aims to explain why Palestinians (or Muslims in general) should not cede a single inch of land to Israel or to the Zionist Jews. A myth is generally a political allegory related to events from the past or, alternatively, it is future-oriented. It is normally based on historical reality, but its original factual core is adapted, extended, interpreted and exaggerated. The purpose of a myth is basically twofold: to interpret the reality (mainly to place the present on a historical sequence) and to urge people to behave according to a particular pattern (Sivan 1990, Introduction).

The first section is an attempt to trace the legal grounding of the Ḥamās contention that Palestine is a *waqf* land and to follow the sources and authorities that Ḥamās uses to endorse its new interpretation. I compare the Ḥamās text both with earlier texts, those issued by Ḥājj Amīn al-Ḥusaynī, the Grand *Muftī* and President of the Supreme Muslim Council (SMC) in British Mandate Palestine during the 1930s, and with more recent texts, such as Jordanian and Palestinian *fatwās* from the 1990s and 2000. In the second section I demonstrate that, contrary to Ḥamās' claims, lands conquered by Islam, including Palestine, were categorized as *fay'* lands rather than as *waqf* lands (I will also explain the differences between these two systems). The third section deals with the practice of land tenure during medieval and Ottoman times. I argue there that *fay'* or *kharāj* lands, known as *mīrī* lands in the Ottoman period, were not considered holy and were transacted freely, including with non-Muslims.

In the fourth section I demonstrate that, even if we accept Ḥamās' erroneous contention that all of Palestine is holy inalienable *waqf* land, both Islamic jurisprudence on the *waqf* institution and historical practice show that *waqf* assets were, in fact, alienable. Palestinian Muslims, including religious authorities during the British mandate period, took part in transactions that altered the original purposes of the *waqf*, changed its charitable character, and even transmitted *waqf* assets to non-Muslim hands. In the conclusion, I explain how the general public, including those considered political rivals of the Islamists, accepts the new radical Islamic religious-based legal innovations.

The Invention of the Myth and Its Political Use

Article 11 of the Ḥamās Charter of 1988 states:

> The Islamic Resistance Movement believes that the land of Palestine is an Islamic *waqf* land [endowed] for the benefit of Muslims throughout the generations and until the Day of Resurrection. It is forbidden to abandon it or part of it or to renounce it or part of it. No Arab State nor the aggregate of all Arab countries, and no Arab King or President nor all of them in the aggregate, have the right to do so; nor does any organization or the aggregate of all organizations, be they Palestinian or Arab, because Palestine is an Islamic *waqf* for the benefit of the Muslim generations to the Day of Resurrection. This is its [Palestine land's] rule in the Islamic *sharī'a*. This rule applies like any other land conquered forcefully by the Muslims, since the Muslims endowed it at the time of conquest as *waqf* for the benefit of Muslims throughout the generations and until the Day of Resurrection. This [rule also] took place when the commanders of the Muslim armies, upon completing the conquest of al-Shām [Greater Syria] and Iraq, sent [a message] to the Caliph of the Muslims, 'Umar Ibn al-Khaṭṭāb, consulting him as to what to do with the conquered land, whether it should be partitioned between the troops or left in the possession of its population, or otherwise. Following discussions and consultations between the Caliph of Islam, 'Umar Ibn al-Khaṭṭāb, and the Companions of the Messenger of Allāh, peace and prayer be upon him, they decided that the land should remain in the hands of its holders to benefit from it and from its wealth; but the abstract ownership (*raqaba*) of the land ought to be endowed as a *waqf* for all generations of Muslims until the Day of Resurrection, while the [original] owners would have usufruct rights (*manfa'a*) only, and this *waqf* will endure as long as heaven and earth last. Any action regarding Palestine [lands] that contradicts this rule of Islamic law is void and those who conducted it will bear the responsibility.[2]

As far as we know, this document—the Ḥamās Charter—was the first to make this legal claim, based on what was believed to be a historical precedent according to which all the Islamic conquered territories (and not only Palestine!) are *waqf*, and therefore should remain under Muslim control. It reveals two features of the outlook of modern Islamist groups. The first is that this outlook draws on a tradition attributed to the second Caliph 'Umar Ibn al-Khaṭṭāb (r. 634–644), while at the same time ignoring other important Islamic sources and practices. This reflects, as Emmanuel Sivan noted, the Islamist tendency to idealize the age of Muḥammad and the four Righteous Caliphs (r. 622–661), "whereas all laws and injunctions produced after 660 by jurists by means of analogy (*qiyās*) and consensus of experts (*ijmā'*) are *ipso facto* suspect, for the jurists were usually more attuned to the needs of the powers that be than to the goals of the Faith" (Sivan 1990, 55, 69–70).

The second feature pertains to the maneuvering between traditional concepts and modern ideology; in our case it is the interplay between 'Umar's precedent and the modern goal of national (Islamic) territory. The fact that fundamentalist groups tend to sanctify tradition, on the one hand, and to put it in a modern ideological form, on the other, was explored by Eisenstadt. He maintained that in their approach to the old Arab and Islamic literature and holy texts, although the Islamists sanctify tradition, they have altered it from an idealistic, utopian, substantial and totalistic form to a modern ideology (Eisenstadt 2002, 9).

Before I discuss the historical roots of the Ḥamās argument, I would like to shed some light on the questions of who instigated this idea and to what extent it was accepted by the Palestinian public. The circumstances involving the drafting of the Ḥamās Charter are vague. Only a few books have been published on the Ḥamās (Shaked & Shabi 1994; Mishal & Sela 1997; Nüsse 1998; Pavlowsky 2000;

[2] The Arabic text is available at http://www.hashd.org/rr/hamas.htm. My translation deviates from that of Raphael Israeli by using the relevant legal terms (Israeli's translation is available at http://www.palestinecenter.org/cpap/documents/charter.html and taken from: Alexander & Foxman 1990).

Hroub 2000; al-Ḥarūb n.d.; Manṣūr 2003), but none discussed this issue, or even raised the question. Shaykh Aḥmad Yāsīn, the Ḥamās founder and spiritual leader, received no formal education beyond high school in Gaza. There is room to believe that neither Shaykh Yāsīn nor any of his followers drafted the Charter, but rather that Islamic experts from the Jordanian Muslim Brothers organization developed it.[3] An Islamic legal opinion (*fatwā*) published in 1995 indicates that Jordanian Islamists hold similar ideas to Ḥamās. The *fatwā* issued by Jordanian *sharī'a* experts, signed by seventeen Ph.D. holders (some of them faculty members) and two members of parliament from the Muslim Brotherhood party, refers to the question of selling Jordanian land plots to Jews. The issue was raised in the Jordanian media following reports that Israeli businessmen wished to invest in Jordanian real estate after the two countries achieved a peace treaty, and the *fatwā* was aimed at blocking such transactions. In their legal opinion, published in Ḥamās' international journal, *Filasṭīn al-Muslima* (October 1995, p. 29), the drafters refer to Jordan's land in the same category as the Ḥamās Charter of 1988 refers to Palestine:

> ... These Jordanian lands and the rest of al-Shām land is *harāj* [sic—should be: *kharāj*] lands whose abstract ownership was endowed to *Allāh* for the public benefit of Muslims. They are not the private property of any leader, regime, party, head of a tribe, or particular person. It is legally (*shar'an*) prohibited to sell *waqf* lands to the Jews, who are the enemies of *Allāh* and who desire to take it over and to expel the inhabitants of these lands.

In 1994, Zīyad Abū 'Amr, a Palestinian professor of political science at Bir Zeit University, attributed the perception of Palestine as *waqf* land to Palestinian and other Islamic movements (Abū 'Amr 1994, 27). When the Oslo peace process deteriorated during the second half of the 1990s, Yasser Arafat also adopted this idea and it was raised frequently in the Palestinian media. For example, in 1998 Fayṣal al-Ḥusaynī, who was a PLO representative to Jerusalem and a PA cabinet member, made the following assertion in a lecture and in an article he published on the peace process:

[3] Roni Shaked, who interviewed Shaykh Yāsīn for his book on Ḥamās, told me this but he did not mention it in his book.

> If you ask a Palestinian, what are the boundaries of Palestine, if he presents his Islamic outlook, then Palestine stretches from the river to the desert, it is an Islamic *waqf* land, not to be sold or traded ... (Mayor & Hussaini 1998, 10).

During Friday services on December 4, 1998, the preacher (not identified) whose sermon was broadcasted on PA Radio said: "Palestine is an Islamic *waqf* land" (*Sawt Filasṭīn*, December 4, 1998). This message was reiterated in another sermon on April 30, 1999, by another *khaṭīb*, Shaykh Yūsuf Abū Sneineh, an official PA preacher (ibid., April 30, 1998); and Yasser Arafat himself repeated these words in December 1999, as reported in the PA's newspaper (*al-Ḥayāt al-Jadīda*, December 12, 1999). The following year, the public message took the form of an official PA *fatwā*. On July 22, 2000, the very day that Arafat declined US President Bill Clinton's proposal for solving the Israeli-Palestinian conflict at the Camp David II summit, Shaykh Ikrima Ṣabrī, the Chief *Muftī* of Jerusalem and the Palestinian Territories, issued a *fatwā* ruling that it would be forbidden (*ḥarām*) for Muslims in Palestine to accept compensation or indemnification in return for their land which was seized by the Zionists when the Jewish State was created in Palestine in 1948. The *fatwā*, which was typed on the official stationery of the PA's Chief *Muftī* and signed by Ṣabrī, asserts in its first paragraph:

> Accepting compensation for land in Palestine equals its sale—both are absolutely forbidden by the *sharī'a*. Whoever accepts compensation for his assets is bound by the *fatwā* issued by the Palestine *'ulamā'* in the 1930s, which totally prohibits [such action], because the Palestine land is not 'goods' to be traded, but rather blessed and holy *waqf* land (*waqfiyya mubāraka muqaddasa*). This *fatwā* was repeatedly supported by *fatwās* issued by *'ulamā'* of the Muslim nation since it originated and until the present day.

Ṣabrī's *fatwā* went on to state that the Palestinian refugees' [physical] right of return is sacred and eternal and that "the land of Palestine will remain in the hands of those [Palestinians] who are entitled to it and *to all the Muslims until the Day of Resurrection*" [emphasis added].[4] It is unclear from Ṣabrī's wording whether the concept of Palestine as a holy *waqf* is his own ruling or whether he [wrongly,

[4] For an incorrect English translation, see "Muslim Authorities Reiterate Islamic Stance on Palestine, Jerusalem, Refugees", *Palestine Times*, Issue No. 110 (August 2000), at http://www.palestinetimes.net/issue110/index0.htm.

as will be discussed later] attributes it to the 1930s *fatwā*. Undoubtedly, both *fatwā*s, though issued sixty-five years apart, are motivated by the same purpose: to prevent the transfer of Arab/Islamic-owned lands to Zionist Jews. Before discussing the political context of Ṣabrī's 2000 *fatwā*, let us draw on the 1930s *fatwā* and compare its legal arguments to those of more recent texts.

Ṣabrī's mention of the 1930s precedent refers particularly to Ḥājj Amīn al-Ḥusaynī, the Grand *Muftī* and President of the SMC in British Mandate Palestine. Al-Ḥusaynī was deeply concerned by the increase of land sales to Jews in Palestine during the 1920s–30s, and he launched a public campaign among the Palestinian Arabs opposing the trend. In this campaign, as well as in issues related to holy places, al-Ḥusaynī was the first Palestinian leader to employ religious arguments in the context of the Arab-Jewish struggle over Palestinian territory.

In his public speeches, al-Ḥusaynī repeatedly stressed that selling land to the Jews was a sin from the Islamic viewpoint and an act of high treason. Addressing a large meeting on 29 December, 1934, al-Ḥusaynī explained, according to a British intelligence report, that since Palestinian land belonged to God it should not be sold to man (Porath 1977, 96). This argument, which was presented in a general form, with no reference to a particular legal or theological text, resembles the position of the Ḥamās Charter. One would expect to find it too in the most important *fatwā* that al-Ḥusaynī issued four weeks after the above-mentioned meeting, but in fact his *fatwā* of January 1935, which was printed at the SMC's Islamic Orphan Press (Dār al-Aytām al-Islāmiyya) and widely disseminated, highlights other arguments for explaining why Palestine land is holy and why Muslims should not sell assets to the Jews:

> ... These holy lands embody the first *qibla* [direction of prayer—al-Quds/Jerusalem], the third [sacred] Mosque [al-Aqṣā], the destination of the *isrā'* [the nocturnal journey] and *mi'rāj* [ascent to Heaven] of your Prophet Muḥammad, and its soil was molded by the blood of the Muslim righteous warriors, and by [the bodies of] many prophets, saints, martyrs, and pious forefathers, and every inch of it contains their righteous remnants and their eternal glorious deeds which sustained throughout the ages in an Islamic dimension, confirming that 'There is no God but Allāh and that Muḥammad is the Messenger of Allāh'. This holy land which embodies all of what was mentioned is a trusteeship (*amāna*) of Allah, of his Messenger and of the Muslims on their shoulders, and therefore the sale of any inch of this land to

> the Zionists is a betrayal of God and his Messenger and the entire Muslim people (or all Muslims), as well as an extinguishing of the light of Islam from the sacred land and an assistance to remove the Muslims from their territories ... (al-Ḥusaynī n.d.; see also Zu'aytar 1984, 374).

The *fatwā* was ratified by 249 *'ulamā'*, *muftī*s, qāḍīs and other officials of the SMC who were subordinated to the Grand *Muftī*. On this occasion they also issued another *fatwā* which specifically attacked the land brokers, who now were threatened with denial of Muslim burial. The latter *fatwā* referred to the entire territory of Palestine as 'the Islamic holy lands' (*al-bilād al-Islāmiyya al-muqaddasa*) without indicating the grounds for why this was so (ibid.).

Thus, although the current Palestinian Chief *Muftī* Shaykh 'Ikrima Ṣabrī mentioned in his July 2000 legal opinion the 1930s *fatwā* to support his argument regarding the holiness of Palestine, al-Ḥusaynī's *fatwā* provided different justifications for this; nor did al-Ḥusaynī argue, as does Ṣabrī, that Palestine is a *waqf* land and that those who possess it are entitled only to enjoy the right to use it.

The attributes for Palestine's holiness enumerated by al-Ḥusaynī, who himself had no education in Islamic law (Porath 1974, 191), were taken from the literature extolling Jerusalem (*faḍā'il bayt al-maqdis/al-quds*).[5] Unlike Ṣabrī (and the Ḥamās Charter), al-Ḥusaynī grounded the holiness of all of Palestine in Islamic history and heritage. The battles occurred on Palestinian soil and the Islamic prominent figures, be it those who sacrificed their lives for its conquest or those who operated, lived or were buried there, all turned it into a sanctified patrimony. Al-Ḥusaynī claimed that the Islamic conquest of the land and its history under Islam turned it into a trusteeship that Allāh, his Messenger and the successive Muslim generations obligated present-day Muslims to uphold, and this entailed a ban on transferring any of the land to non-Muslims. However, al-Ḥusaynī did not use legal claims, as Ḥamas and the PA's *Muftī* do today, that the land of Palestine is *waqf* and inalienable. Moreover, in the mid-1930s, al-Ḥusaynī himself appealed to the local Palestinian Arabs to endow their private lands as *waqf* in order to prevent their sale to the Jews. His appeal was backed by another special *fatwā* that he issued for this purpose (*al-Jāmi'a al-'Arabiyya*, January 24, 1935). Since the SMC controlled the sharī'a courts, which were entitled by law

[5] For the literature lauding Jerusalem, see Livne-Kafri 1985 and 2000; al-Wāsiṭī 1979.

to approve every transaction of *waqf* properties, the Grand *Muftī* hoped that granting the lands *waqf* status would give his SMC the legal power to control land sales. This very fact proves that in his mind Palestine was not *waqf* territory, as Islamists today claim; rather, he recognized private ownership of lands but he wished to change its legal status to *waqf*. However, Palestinian Arabs did not respond positively to his appeal.

Let us return now to the PA *Muftī*'s legal opinion of July 2000. The political context of Ṣabrī's *fatwā* was to protect his Chairman—Arafat—from allegations of relinquishing the Palestinian refugees' right of return. It was urgently issued a few hours after a similar manifesto signed by senior Islamist and Ḥamās figures was circulated in the Gaza Strip. The Ḥamās leaflet stated that:

> Palestine in its entirety is holy Muslim *waqf* land and no person, group, organization or State is authorized to concede any part of its soil to the enemy (ibid.).

The rivalry between the two Palestinian political factions—Fateh headed by Arafat and Ḥamās headed by Yāsīn—led the PA to adopt the concept that 'Palestine land is a holy *waqf*,' which was a Ḥamās innovation.

Though a relatively new argument, this notion was soon inculcated into segments of the Islamic public in Palestine and across the Muslim world. For example, Dr. Muṣṭafā Rushwān, a faculty member in one of al-Azhar's affiliated colleges, refers to Palestine as *waqf* land and cites the same argument as the Ḥamās Charter (Rushwān 2001, 46–53). Another example is a *fatwā* issued by Shaykh Yūsuf al-Qaraḍāwī, one of the most popular contemporary *muftīs*, based in Qatar, who referred to all of Palestine as *waqf* land.[6]

Between Waqf *and* Fay'

The Islamist drafters, as we have seen, base their claim regarding the *waqf* status of the forcefully conquered Palestine and al-Shām (Greater Syria) lands on an early tradition (*ḥadīth*) which refers to these lands as '*kharāj* lands.' The tradition is taken from the early Arab literature regarding conquered lands (*futūḥ al-buldān*) (al-Ḥarūb

[6] "*al-Aqṣā wa-khaṭar al-tahwīd*" dated July 24, 2001, at www.qaradawi.net.

n.d., 77) which the *Imām* transferred for the public good as *fay'*. The system of *fay'* totally differs from the institution of *waqf*.

It is worth outlining the differences between the two institutions, *fay'* and *waqf*, in order to understand the method that today's Islamists employ in adopting new interpretations and uses to early traditions. *Waqf* is a privately-initiated endowment of a completely privately-owned (*mulk*) property, based on the Islamic pious concept of charity. The endower is an individual who wishes to turn a property he owns into an eternal endowment for charitable purposes. Charitable action in Islam is based on eternal remuneration of the endower in the afterworld (Anderson 1951, 292; *EI*², s.v. *Ṣadaḳa*, 709), and therefore the founder of a *waqf* is entitled to such reward while the endowment could exist in this world forever. Hence, the ban on the sale, long-term rental or mortgage of *waqf* assets (Qadrī Pasha 1902, 3). The verb *waqafa* means 'to stop', 'to block' or 'to suspend,' implying one of the basic rules of the *waqf*: once endowed, the donated property loses its abstract ownership (*raqaba*) which, according to the Ḥanafī school of law (official school of the Ottoman state), goes to Allāh, as a metaphor for its eternal status, and the beneficiaries are entitled to usufruct (*manfa'a*) only; that is, no one has ownership rights of the endowed property. The founder of the endowment can stipulate the charitable purposes of the *waqf*, the beneficiaries and their entitlement at the time of the donation, and the rules of devolution for generations to come. He can also nominate the administrator of the endowment, as well as stipulate the conditions for future nominations and the rules of the endowment's administration.

Fay', on the other hand, is the name given to land which was conquered by the Muslims but remained in the hands of the original owners to benefit from, provided that they pay a special tax signifying that the abstract ownership belongs to the State Treasury for the benefit of the Muslim community. In order to understand how the Ḥamās Charter drafters arrived at the conclusion that *fay'* lands (all forcefully conquered lands) have the status of *waqf*, it is necessary to outline the historical development of these two institutions.

In pre-Islamic tribal society *fay'* applied to immoveable items taken as booty (*EI*², s.v. Ghanīma, 1005–6), to be divided between victors, either in fifths or fourths, the leader being entitled to one of the parts. This custom was upheld by the Prophet Muḥammad after

the battle of Badr (624), and Qur'ān 8: 42 mentions five uses for the prophet's one fifth. The Prophet actually designated his fifth for public use. The other four fifths were divided among the conquering troops (*EI²*, s.v. Fay', 869; Berchem 1886: 47–8). The Prophet's practice was part of the custom of *ghanīma* since the Qur'ānic text says: *fa'in ghanimtum* (if you take booty), and not *fay'*. The subsequent battles which ended with the surrender of Banū al-Naḍīr, and the Jews of Khaybar and Fadak led to a new precedent which involved the institution of *fay'*, as distinct from *ghanīma*. The Banū al-Naḍīr surrendered after a siege in 625, and Qur'ān 59: 7–10 states that since the victory resulted from God's interposition in favor of his Apostle, it [the entire land and not only one fifth] was *fay'* for him exclusively, to the ultimate benefit of the Muslim society (*EI²*, ibid.). In this case, the Qur'ān uses the verb *afa'a*, namely to bring back (and not the verb *ghanīma* as in the case of Badr), which indicates that the new custom marks the principle of *fay'*. Khaybar estates were left in the hands of their Jewish inhabitants who, after their surrender in 628, had to pay half of their date crops as tax to the Muslim conquerors.

The conquest of Khaybar, a Jewish-inhabited oasis, was more complicated—a matter that entailed many interpretations regarding the legal precedent in terms of land tenure, booty and taxes. It was first conquered by force (*'anwatan*) and then the Prophet reached an agreement with the local Jewish inhabitants according to which they would surrender and remain on their lands, but in the future would have to hand over half of their date and grain crops as tax to the Muslim conquerors. From a legal point of view, the pact was defective, since it did not say whether they were to remain the owners of the soil which they were to cultivate. Traditions tell that the Prophet divided the lands into plots and gave every Muslim beneficiary from among the warriors the right to collect from a particular Jewish cultivator half of the yield of his specific plot (*EI²*, s.v. Khaybar, 1137–43).

In the Banū al-Naḍīr and Khaybar precedents the foundations of the future State Treasury (*bayt al-māl*) were established. The principle was that in territories surrendered without a battle (*ṣulḥan*) the lands (completely) belong to the entire Muslim community, which may benefit from its taxes. However, when land was conquered by force (*'anwatan*), it was divided between the warriors and only one

fifth went to the Prophet (or his successors as leaders of the Muslim army and community), who could donate it for the benefit of the Muslim community (*EI²*, s.v. Bayt al-Māl, 1143–44).[7]

What joined the concept of *fay'* and *waqf* and the fate of estates acquired *ṣulḥan* and *'anwatan* was apparently the reform initiated by the Caliph 'Umar b. al-Khaṭṭāb. The urge for the reform grew as the Islamic conquests increased, and it became economically damaging to divide conquered lands between the Muslim troops. The following *ḥadīth* cited in Abū Yūsuf's *Kitāb al-Kharāj* marks the change of policy by 'Umar:

> Bilāl and his companions asked 'Umar b. al-Khaṭṭāb to distribute the booty acquired in Iraq and Syria: "Divide the lands among those who conquered them," they said, "just as the spoils of the army are divided." But 'Umar refused their request . . . saying: "Allāh has given a share in these lands to those who shall come after you" (ibid., 1141).

The tradition indicates the essence of 'Umar's new policy according to which the conquered lands (*'anwatan*),[8] and not only the lands captured after a peaceful surrender (*ṣulḥan*), belong to the Muslim community, and should not be allocated to the warriors for private ownership.

Another tradition narrating this reform tells that after al-Shām (Greater Syria) was conquered, the leaders of the Islamic camp:

> . . . wrote to the Caliph 'Umar b. al-Khaṭṭāb: This *fay'* of which we allotted you one fifth, the rest belongs to us and nobody has any share in it, following the Prophet's example . . . in [the case of the conquest of] Khaybar [referring to a different version of the above-mentioned tradition, according to which the Prophet distributed shares of Khaybar to the warriors].[9] 'Umar replied: I am not bound by what you said, rather, I shall endow it (*aqifuhu*).[10]

[7] In early Islam the difference between *ghanīma* and *fay'* was also not clear. See, for example, Sarāj and Muḥammad 2001, 168. On *fay'*, see *EI²*, s.v. Fay', 869.

[8] Lokkegaard (1978, 76) holds that in Greater Syria the towns were taken *ṣulḥan*, while the land was taken *'anwatan*.

[9] al-Khaṣṣāf (1904, 3–5) cites *ḥadīth*s maintaining that both the Prophet and 'Umar b. al-Khaṭṭāb dedicated their personal booty from Khaybar to charitable purposes.

[10] Ibn 'Asākir 1995, 2: 196–97. The Arabic text is: *Aṣāba al-nās fatḥ bil-Shām . . . fa-katabū ilā 'Umar b. al-Khaṭṭāb inna hādhā al-fay' alladhī aṣabnā laka khumsuhu, wa-lanā mā baqiya laysa li-aḥad minhu shay' kamā ṣana'a al-Nabī ṣallā Allāhu 'alayhi wa-sallama bi-Khaybar, fa-kataba 'Umar: laysa 'alayya mā qultum wa-lākinnī aqifuhu . . .*; I am grateful to Professor Amikam Elad for this reference and for his assistance.

In a second version of this tradition the last word *aqifuhu*, namely 'I shall endow it', is replaced with the words *aḥbisuhu fay'an*, meaning: 'I shall endow it as *fay*'' (*ḥabasa* is a synonym for *waqafa*, used commonly in the Maghrib). This particular version of the *ḥadīth* reflects the combination between *waqf*, or *ḥabs*, and *fay'*. The second version actually shows that the verb root h.b.s.—endow—by itself is not enough, or too general, and needs specification—endow as what? The second version of the *ḥadīth* cited above specifies 'endow it as *fay'*'.

There is also another interpretation of the verb *waqafa* in this context as meaning 'withheld' and 'refrained from dividing the conquered lands' (Ben Shemesh 1967, 24 n. 9; 112 n. 9). This is based on a literal understanding of the verb w.q.f. before the term *waqf* was used to express an endowment. Those who accept this interpretation would rule out the Ḥamās contention.

A third approach was provided by W. Heffening, who (wrongly, in my opinion) maintains that *waqf* has two meanings: one is pious endowment and the other is the fiscal system explained above as the *fay'* system (*Shorter EI*, s.v. Waḳf). In other words, one legal term—*waqf*—signifies two different institutions.

'Umar's reform created a confusing mixture, which affected the meaning of the terms. The public could no longer use the term *ghanīma* (booty) for the lands conquered *'anwatan* because they were also re-allocated for public purposes. Thus, the verb w.q.f. or ḥ.b.s. was used in this connection, because it had the connotation of an act of withdrawing the abstract ownership from a specific person and designating lands for public use. The principle of *fay'* lands was that the newly captured territories were left in the hands of the indigenous inhabitants who were entitled only to usufruct rights without the abstract ownership (*raqaba*), which was retained by the treasury. The indigenous owners were liable to pay the *kharāj* land tax (and in the case of non-Muslims also *jizya*), as a sort of tenure to the state, which was legally transferred to the State Treasury (*bayt al-māl*) (*EI²*, s.v. Fay', 869). *Fay'* lands were not actually state lands. The separation between the abstract ownership and the usufruct was only a theoretical legal device that enabled the imposition of taxes.

The inter-relationship between *fay'* and *waqf* can be explained thus: in the formative period of Islamic statehood, before the jurists attached specific meanings and rules to the various terms, denoting different institutions, the Muslims made use of different terms to express a

particular practice or, alternatively, the same term was used for different practices. The main reason for this complexity was that since the institutions followed earlier systems, they varied from one region to another and were controversial even before Islam.[11] Claude Cahen points to a very fluid use of terminology in the early generations of Islam. The example he gives is that of *kharāj* and *jizya*, which were used interchangeably and finally were determined as poll tax on non-Muslims for *jizya* and land tax for *kharāj* (*EI²*, s.v. Kharādj, 1030; ibid., s.v. Djizya, 559; ibid., s.v. Bayt al-Māl, 1143–44; Cf. ibid., s.v. Waḳf, 58). The jurists defined them and specified only at a later stage that the one meant land tax and the other poll tax. In the same manner, all kinds of pious donations were made by the first generations of Islam. They could all be included in the very general term of charity (*ṣadaqa*). Only later, with the elaboration of Islamic law, did jurists differentiate between the various kinds of donations, attaching a specified meaning, a precise definition and rules, as well as a different term to each of the charitable acts. The various kinds of charities made by the first generations of Islam were not all considered *waqf* by later jurists. Some of the early donations fell within this definition, while others were classified as gifts or ordinary charity (Cahen 1961, 45). Moreover, the first generations of Islam used derivatives of the verb w.q.f. in a fluid or loose way. Only later did the jurists attach to the noun *waqf* (and its synonym *ḥabs*) and its derivatives a specific meaning; it became a technical term implying exclusively the institution of Islamic endowment. Only those early charities, which fulfilled the rules pertaining to this specific institution, were then considered as *waqf*.

The Ḥamās and current Islamists disregard the *fay'* system and refer to 'Umar's action as *waqf* in the new form, that is, as it was shaped by jurists from the second/eighth century onwards (perhaps by making use of the first above-mentioned *ḥadīth* version, which uses the verb w.q.f., 'to endow,' without specifying 'as what' and neglecting the second version which specifies the *fay'*). The Ḥamās interpretation of that *ḥadīth* says:

> . . . The land should remain in the hands of its holders to benefit from it and from its wealth; but the abstract ownership of the land ought

[11] On the changes of tax institutions over time, see Simpson 1988, 149–50. On the differences according to regions, see Dennett 1950.

> to be endowed as *waqf* for all generations of Muslims until the Day of Resurrection, while the [original] owners will have usufruct rights only (see n. 1).

It is true that the *fay'* shared one legal characteristic with what later became the Islamic endowment institution of *waqf*—the separation of ownership and usufruct. This is, however, the only characteristic shared by the two institutions. The *fay'* came into being as a result of conquest, and taxes imposed on *fay'* lands were, in fact, the major source of revenue for the Muslim State Treasury. The *waqf*, on the other hand, was never owned by the state and never formed part of its fiscal revenues; it was employed in strict conformity with the private founder's stipulations. These particularities of the two different institutions were formulated during the first two centuries of Islam.

In sum, the basic element of the new concept is based on attributing the early Islamic *fay'* system to the *waqf*. According to the present-day interpretation, land is transferable between Muslims, who have only usufruct rights. The Islamists use the ambiguity and the multi-faceted meaning and practice of the term and institution of *waqf* in the formative period of Islam and manipulate it for their political purposes in the context of the Israeli-Palestinian conflict over territory.

State Land in Medieval and Ottoman Practice

The next question to be addressed is whether under Islamic rule *fay'* land could not be sold by its actual holders, and whether non-Muslims were excluded from acquiring rights on *fay'* or other sorts of state lands. The emphasis in this section will be on the practice in Palestine.

Cahen wrote that during the Medieval Period, *fay'* lands were viewed as quasi-*waqf*, [only] in the sense that they were devoted to the benefit of the Muslim generations to come. In other words, by using the term *waqf* in the context of land tenure, the early Muslims meant to distinguish the *fay'*, i.e., lands in which a share (from the tax revenues) was given to the public benefit, from other privately-owned lands (upon which lower taxes were imposed). Cahen, however, emphasizes that the landholders, whether Muslims or not, were entitled to absolute ownership on *fay'* lands and they could exploit them in that capacity [and conduct transactions] (Cahen 1970, 108).

Put another way, state control of these lands was limited to one major public interest: safeguarding the state's income from the *kharāj* taxes. The Muslim state of medieval times did not interfere in matters such as who the actual owner of the land was (or its beneficiary), or his religious denomination, as long as he paid the required taxes.

Granovski wrote that during the Mamluk and Ottoman periods a new kind of state-owned lands was granted to military commanders by a kind of feudal tenure (*iqṭāʿāt*). The landlord and the state received revenues from the tenant farmers. Under the Ottomans, *kharāj* lands—formerly *fay'* lands—were regarded as privately-owned, whereas only the relatively new feudal estates were considered state-owned (Granovski 1949, 322 n. 20). The new non-possessed lands conquered by the Ottomans were transferred to the State Treasury and re-allocated to cultivators in return for a payment (*tāpū*), according to the principle of *fay'* (abstract ownership of the State, and usufruct to the cultivator), but they were now called *arāʾḍī amīriyya* or, in short, *mīrī* (ibid., 16). In introducing the new *mīrī* system the state aimed to ensure the productive nature of the land (Stein 1984, 11).

All non-private and non-cultivated lands, and more importantly all sown lands, but not fruit trees and the like, were categorized as *mīrī* and were regarded as state lands. The peasants could not sell, grant or endow these lands. However, *mīrī* land was not state land in the modern sense of public land not to be sold to private individuals. It could be acquired by possession and actual working of the land for a ten-year period. In the later years of the Ottoman state, ways were found to circumvent these restrictions by the establishment of *waqf ghayr ṣaḥīḥ*, that is, an endowment of estates of the *mīrī* kind established with the special approval of the state in which the endower donated only those rights he was entitled to—usufruct rights—i.e., the revenues from the land (*EI²*, s.v. Mīrī, 125).

Gabriel Baer states that privately-owned land (*mulk*) not only existed during the successive Muslim periods in Palestine and other Muslim-controlled territories, but that the lands were liable to change owners and non-Muslims were also able to purchase them (Baer 1962, 51). Ottoman non-Muslim subjects (*dhimmīs*) could legally purchase lands, and Palestine, or Greater Syria, was not an exception. Indeed, the Ottoman Sharīʿa Court records of Jerusalem from the sixteenth century testify that Jews purchased lands and houses from Muslim buyers (Cohen & Simon-Picali 1993, 304–21; Cohen 2003, 238–396).

Foreign non-Muslims who resided in the Ottoman territory (*musta'mins*) could only purchase land following the reforms of 1856 (Baer 1962, 51), and consequently a *musta'min* became a *dhimmī* and had to pay the *kharāj* and/or *jizya*.

The 1858 Ottoman Land Law determined five categories of land, among them completely privately-owned land (*mulk*), *waqf*, and *mīrī*. *Mīrī* land could be transacted under certain restrictions, but the buyer of such land was entitled to usufruct rights only. The consent of the Sultan was required to turn *mīrī* land into *mulk* in a procedure known as *tamlīk* (Granovski 1949, 84). The purpose of this system was to ensure that the land would be cultivated, and if neglected, the state could reclaim it. It is believed that many feudal landlords succeeded in turning their *mīrī* lands into private (*mulk*) land (Heyd 1973b, 81). Thus, the land tenure reality in Palestine was that most of the *mulk* land was confined to urban sites, mostly buildings and gardens; most of the agricultural land was of the *mīrī* category (Stein 1984, 11).

During the last third of the nineteenth century the Ottoman government sold large-scale worthless lands in the plains of Palestine to entrepreneurs—among them non-Muslims—who undertook to cultivate them. For example, the lands of the Sarona colony in northern Palestine were sold to the German Templers and tracts in Umm Labs were sold to Jews who established the colony of Petaḥ Tikva (today a city). On the eve of World War I, 172 large landholders in Palestine possessed, as private owners, over five million dunams (4.425 dunams = 1 acre). One Arab family from Beirut, the Sursoqs, alone owned 230,000 dunams, incorporating a few Arab villages on the Esdraelon Plain, which they sold to the Zionist movement in the 1920s (Granovski 1949, 75). Unlike the plain areas, in the mountainous sections of Palestine private owners held only small plots, and they registered their ownership already in the second half of the nineteenth century (Gerber 1987, 80). Between 1878 and 1914 some 245,000 dunams in Palestine were purchased by individual Jews and by Jewish agencies (Porath 1977, 109).

The very fact that thousands of private Muslims—and non-Muslims—endowed their real estate in Palestine as *waqf* for the benefit of the public as well as their family members is further proof that the ownership of lands in Palestine during centuries of Islamic rule was also private. The practice of *waqf* endowment in Palestine (and elsewhere in the Ottoman state) followed the legal theory according to which the land or urban property could be donated as *waqf* by

individuals only, not by an organization or by the state apparatus as such. Even large *waqf*s for public purposes endowed by governors and other statesmen were registered as private endowments. If the land was state-owned, the official who endowed it had to receive a special decree from the Sultan (*tamlīknāme*), turning the land over for his private disposal and, in so doing, making it possible for him to legally endow it. Only the Sultan or his deputies had the right to endow *mīrī* land as *waqf*, and even if *mīrī* land was endowed for public purposes, the land itself was not the endowed property since the abstract ownership could not be transferred; only the income tax from these lands was diverted from the State Treasury to other public purposes. Consequently, no private person could endow land, unless he received a *tamlīk* (Ben Shemesh 1953, 32).

Thus, the actual situation regarding land tenure in Palestine during the Ottoman period refutes the Ḥamās claim that the land of Palestine was all state-owned or that its sale to non-Muslims was forbidden. The Ḥamās contention disregards the Islamic medieval and Ottoman practices according to which *fay'* lands could change hands and non-Muslims were not excluded from buying such lands. Even the Ottoman newly-created state land—*mīrī* land—could become privately-owned and, again, non-Muslims were not excluded. From the last third of the nineteenth century, *mīrī* lands in Palestine (and elsewhere) were sold to entrepreneurs, including Jews.

The "Holy" Inalienable Nature of Waqf*—Twentieth-century Practice in Palestine*

Even if we accept the Islamists' contention that lands in Palestine are *waqf* lands from the Islamic legal perspective, which we do not, the question arises as to whether they are holy by nature, and whether, according to both Islamic jurisprudence and practice, they are, indeed, inalienable.

The political use of the alleged *waqf* nature of all Palestine draws on two attributes of this system. The first is the claim that *waqf* land, due to the pious nature of the institution of *waqf* and of the principle of respecting the endower's stipulations as if they were the Legislator's [God's] text (*sharṭ al-wāqif ka-naṣṣ al-shāriʿ*), is holy and intact. This assertion draws on the *waqf*'s pious character as a charitable endowment usually associated with religious institutions and

holy places, since in the eyes of Muslims *waqf* is instinctively associated with basic Muslim tenets, with piety in general, and especially with the holy nature attributed to places of worship and burial.[12] True, *waqf* as an act of charity is a desired deed in Islam. However, the endowed properties *per se* have no holy nature. In a previous study I showed that what was of a pious ('holy' in the eyes of many Palestinians and Islamists) nature and should be eternal is the charitable purpose of the *waqf* and not the endowed lands or other properties (Reiter 1997a, 82).

The second principle that the Palestinian and Islamist advocators draw on is the inalienable nature of *waqf* property. Basically, *waqf* properties were regarded as inalienable. Their eternal nature stems from the principle of *waqf* as a charitable act for which the endower should be eternally remunerated in the afterworld. Indeed, in most endowment deeds (*waqfiyyāt*) known to us, the founders stressed their opposition to a property change (Anderson 1951).[13]

In spite of this principle, Islamic jurists ruled that a *qāḍī* is empowered to overrule the founder's stipulation if the property in question becomes valueless and unproductive. Their opinions developed not as an abstract theory, but as a response to actual challenges. Their rulings, thus, reflect practical problems regarding the administration of *waqf* properties and solutions that they grounded in the principles

[12] The *Waqf* al-Ḥaramayn is an example. See Hoexter 1998, 7–11.

[13] As an example, the following is a stipulation laid down in 1856/57 by the founder of a *waqf* for the benefit of a Sufi lodge in the village of Tarshīḥa in northern Palestine: "Eternal and enduring charity, whose [properties] or any part of it should not be sold, granted, mortgaged, acquired, appropriated, wasted, exchanged, transferred, abandoned, violated, ruined in any way, or transferred to private ownership of any Muslim or creature. As time passes, the more it would be assured, and as more periods elapse, the stronger it becomes, and it is protected by the prohibitions of Allāh and is defended by the might of Allāh. [The founder] seeks Allāh's gratitude, and fears Allāh's wrath. Anyone who believes in Allāh and doomsday and knows that he will go to his Lord in the afterworld should not defect this *waqf* and not change, replace or exchange it. Whoever damages this *waqf* or ruins or changes any part of it will be subjected to the curses of Allāh, of his angels and of all humankind, and he will be defeated by the mighty Qur'ān and be judged by the almighty God and his chosen messenger in the day in which no property or offspring would help, but only the one who comes to Allāh guiltless [will be saved]. Allāh, the most reliable speaker said: 'If anyone changes the bequest after hearing it, the guilt shall be on those who make the change, for Allāh hears and knows." The last phrase, citing Qur'ān 2: 181, aimed at sanctifying the *waqf* founder's stipulations and putting them on the same level as the divine revelation regarding the change of heirs and shares of a will. For the unpublished *waqfiyya* photocopy, see Reiter 1986, 152.

of Islamic law (Reiter 1996, 171; idem 1997a, 65). The two major justifications to legitimize transactions of *waqf* assets were *maṣlaḥa* or *manfa'a*—benefit for the endowment—on the one hand, and *ḍarūra*—duress regarding the physical or economic condition of the estates, on the other (Qadrī Pasha 1902, art. 133; Abū Zahra 1971, 6).

Two major methods of alienating *waqf* assets were legitimized by the jurists under these circumstances. The first was leasing *waqf* properties for long periods in a variety of forms (Hoexter 1984 and 1997).[14] The second method abandoned the interpretation of viewing the asset as an absolute perpetual element and allowed, under certain conditions, the exchange or even sale of properties as a means of ensuring the charitable purpose of the *waqf*. Thus, the *waqf*'s income could fund the charity and perpetuate the charitable nature of the endowment and satisfy its eternal nature (as opposed to the eternal nature of the properties originally endowed). The method was *istibdāl*, the exchange of a *waqf* property for a substitute property that would become *waqf*. This method was developed as an exchange for money—*istibdāl bi'l-darāhim*—which should be invested in the purchase of a substitute property for the *waqf*.

The very existence of the *istibdāl* system in the *sharī'a* and in judicial practice refutes the contention of Islamists that *waqf* land is holy. The endowed land could be exchanged or sold to purchase another property. Moreover, as I will show in the following paragraphs, long-term lease, exchange and even the sale of *waqf* real estate were common practices in Palestine and were authorized by Muslim religious authorities even when the buyers were Jews or other non-Muslims.

The following examples, showing that *waqf* land was in fact sold with the approval of established religious figures, are taken from British Mandate Palestine and from the records of the sharī'a courts in Israel. Under British rule, between 1917–48, thirty-two out of fifty-six real-estate transactions in Jerusalem involved *waqf* properties that changed hands through *istibdāl bi'l-darāhim* (Reiter 1996, 177). In most cases, the *waqf* sold unused urban land and invested the proceeds in the construction of new buildings for the *waqf* on other vacant plots in its possession, or in purchasing houses or warehouses.[15]

[14] On long-term transactions such as *ḥikr*, *ijārataṭn*, *muqāṭa'a*, and *khulū* in the Ottoman period, see Gerber 1988; Baer 1979; Clavel 1895; Mercier 1899; Abribat 1901 and Hoexter 1984 and 1997.

[15] For examples, see Jerusalem Sharī'a Court records [henceforth: Jerusalem *sijill*]

One of these transactions was a sale by the family *waqf* of ʿAlī Karīm al-Dīn al-Nammarī of a twenty-dunam stretch in Jerusalem to the English Sports Association for use as an athletic field. The qāḍī who permitted the transaction was employed by the SMC, which also approved the sale. Given the political sensitivity of selling such a large *waqf* plot in Jerusalem, it is implausible that the qāḍī, who was subordinate to Ḥājj Amīn al-Ḥusaynī, did not receive the latter's consent prior to giving his approval. Hence, al-Ḥusaynī, who ruled that lands in Palestine are a holy asset that should not be transferred to non-Muslims, did not prevent the sale of a twenty-dunam plot of *waqf* land in Jerusalem to a British foundation.

Al-Ḥusaynī, as president of the SMC, was also involved in selling *waqf* properties administered by the council[16] by the legal device of *istibdāl bi'l-darāhim*, without investing the money received to purchase a substitute property. Among these transactions was the sale of a twelve-dunam plot belonging to the al-Bira mosque *waqf*.[17] True, the land was sold to Muslims, but it lost its *waqf* status and became privately owned.

During the British Mandate period, *istibdāl bi'l-darāhim* was also used by Muslim authorities as a legal means for approving government expropriation of *waqf* land to be used for the benefit of the public (Arabs and Jews alike), for a substantial amount of money as reparation (ibid., 180). The SMC also leased to private Arab investors uncultivated agricultural *waqf* lands for long periods, on the basis of special civil contracts issued according to civil Mandatory (and not *sharīʿa*) law. The *waqf* inspector of the SMC criticized these transactions as contrary to *waqf* interests and leading to the loss of its land, but despite this criticism, the transactions took place (ibid., 187).

After 1948, Israeli qāḍīs found a technical method of using *istibdāl* to approve the selling of *waqf* assets, some of them to non-Muslims—Jews or Bahais (Layish 1966, 41–76; Reiter 1989, 21–45).

455/147/150 [vol. 455, p. 147, no. 150], 453/64/315; 453/89/210; 461/11/17; 453/87/209.

[16] In some cases, the SMC also administered family *waqfs* which the sharīʿa court had rendered to its administration due to mal-administration of their *mutawallīs*. See Reiter 1996, 140.

[17] Jerusalem *sijill*, 500/101/114. There is evidence (Israel State Archives, SMC files, P/989, file 84) that SMC officers were looking for an estate to sell in order to raise money for renovating and developing other *waqf* assets, and that the al-Bira plot was chosen for this purpose.

For example, two large urban plots belonging to the ʿAlī Pāshā *waqf* in Acre were sold to the Bahais, one in 1962 (6.5 dunams in a village east of Acre) and the other in 1974 (6 dunams in Acre's al-Majādala neighborhood).[18] In another case, the qāḍī approved the sale of a *waqf* house in Haifa without asking the price or the name of the buyer, who was a Jew. In his records, he wrote that he relied on the judgment of the *waqf* administrator's (civil) attorney, who also happened to be a Jew, and that the sale would benefit the *waqf*.[19] The attorney was interested in selling this house without committing himself to a specific purchase and the qāḍī separated between the two parts of the *istibdāl*, selling and buying, by granting the *waqf* administrator general permission to sell and specific permission to buy, and vice versa. In an interview I conducted with the qāḍī who authorized these transactions, he expressed his motivation as 'satisfying present-day economic requirements,' that is, maximizing the endowment's profits.[20] In so doing, the qāḍīs eased the restrictions on selling *waqf* assets according to market needs, even when the buyers of the *waqf* estates were non-Muslims, namely, Jews and Bahais.

In sum, the debate regarding the eternal nature of *waqf*, that is, whether the charitable purpose of the *waqf* or the original endowed properties should be preserved, was determined by medieval Islamic jurists in favor of the former one. The legal devices which authorized transactions of *waqf* estates were adapted by the qāḍīs in a flexible manner. *Istibdāl*, the exchange of *waqf* properties, was used in the last century by Muslim official authorities to legalize state expropriation of *waqf* land, as well as in exceptional cases to sell *waqf* estates even to non-Muslims. Even Ḥājj Amīn al-Ḥusaynī, who attempted to use the *waqf* system in order to prevent Palestinian Muslims from selling lands to Jews, approved both the sale and long-term lease of *waqf* lands. Perhaps the present-day Islamists and Arab nationalists who proudly base their opinion on his *fatwās* are unaware of his contribution to the loss of the status of *waqf* of large plots of land in Palestine during the Mandatory period.

[18] Acre *sijill*, *Qarārāt*, 11/83/74.

[19] Acre *sijill*, *Qarārāt*, 5/22/68.

[20] Interview with Shaykh Muḥammad Ḥubayshī, conducted on February 27, 1986.

Conclusion

The current Islamic argument that Palestine in its entirety is *waqf* land is a political myth, based on a *ḥadīth* interpretation. The new concept is threefold: first, it claims that all seventh-century conquered lands enjoy the status of *waqf*; second, as such, these lands are a holy Islamic patrimony; and, third, these lands are inalienable in the sense that they could not be sold or transferred to non-Muslims, and particularly not to Jewish Zionists. The invention of this concept by the Ḥamās during the first *intifāḍa* was driven by modern political goals: to prevent Arab moderate leaders from ceding any land to Israel and to stop Muslims from selling Arab-owned estates to Jews. When the Oslo process crumbled in the second half of the 1990s, the concept was rapidly inculcated into many Palestinians and other Muslim communities outside Palestine, and it was adopted by Yasser Arafat and the PA *Muftī*.

The new myth is based on a *ḥadīth* referring to the seventh-century Islamic fiscal reform, putting it into a present political concept involving control of land and territory and giving it a new, anachronistic interpretation. The huge body of Arab and Islamic literature contains millions of traditions that Islamists could use as 'artifacts,' to borrow Benedict Anderson's term (Anderson 1991), in the process of constructing a new myth.

Our case study sheds some light on the process of constructing a religious-based political myth by Islamist groups. It reveals the sources—*ḥadīth* literature as historical precedents, reflecting the ideal period of the prophet and the first Righteous Caliphs, and the method that they used in endorsing a new legal interpretation. This method demonstrates selectivity in choosing the traditions, according to a literal criterion, without any research into the original meanings of the early terms and institutions as long as the literal text serves their political end. The Islamists' method in this case is also based on ignoring a significant proportion of other authentic literature that reveals alternative approaches. Furthermore, it is based on an absolute disregard of the accumulative practice of fourteen hundred centuries of Muslim rule.

The Ḥamās concept regarding land tenure in Palestine reflects the Salafī orientation of authenticity, which implies slavish imitation of the past, or a contemporary reading of the past. As Sivan noted, Islamists tend to idealize the age of Muḥammad and the four Righteous

Caliphs. As this study shows, through a legal contention, the new concept of Ḥamās is narrated by present-day Islamists without indicating a particular reference to the literature. By so doing, the Islamists present their concept as an axiomatic precedent and they avoid being challenged by non-radical *'ulamā'*.

This case study explores how Islamists maneuver between two worlds, as Eisenstadt argued, between the worlds of tradition and modernism. The Ḥamās Charter presents the organization's modern ideology and political ends in the context of the current Middle East conflict. However, their modern outlook is based on tradition. Early Arab and Islamic literature (and history) is being sanctified and anachronistically re-interpreted to cope with modern challenges.

Another interesting phenomenon related to the modern myth invented by fundamentalists is the rapid process of dissemination of such a myth until it becomes accepted wisdom. In the case of Palestine, the claim that it is a holy *waqf* in its entirety was adopted by PA officials and by many Palestinian and even some Muslim religious figures, as well as the general public outside Palestine. Why was the new myth so easily and rapidly accepted and how did it become common knowledge? Moreover, how is it that an ideologically-based religious-legal myth which was constructed by the Ḥamās Islamist movement to distinguish its political goals from those of its nationalist opponent—the non-religious Fateh—has been welcomed and used in the political discourse by Fateh itself and other political rivals? Here, the actual context of the PA's *Muftī* 'Ikrima Ṣabrī's *fatwā* is important: Yasser Arafat's participation in the peace summit talks of July 2000 at Camp David was presented by Ḥamās as a surrender and a compromise on the issue of the Palestinian claim of return. As such, Arafat's political rivals charged that he was planning to cede sacred territory. Once it became clear that the peace talks collapsed (on July 22, 2000)—the PA's apparatus made use of the Ḥamās myth as a means of overall Palestinian and Islamic consolidation. The broader Islamic World now became a strategic hinterland for the Palestinians. In order to achieve political unity and to face the new challenge, the PA recruited a religiously-based myth. However, Ṣabri's *fatwā* differs from the Ḥamās text by grounding the legal opinion on a different historical precedent. Whereas Ḥamās idealizes the first century of Islam (seventh century), the PA refers to the 1930s Palestinian nationalist hero—Ḥājj Amīn al-Ḥusaynī. The rapid and wide acceptance of the new myth can also be explained

by a number of additional reasons: first, the need for Palestinian unity opposing Israeli policy since 1997, with the demise of the Oslo process; second, the fact that Palestinian society is mostly religious; and, finally, the lack of high-level Islamic scholarship, that is, the fact that Palestinian laypeople are not acquainted with the religious and historical knowledge which could refute such newly-invented myths. This particular point was even raised by senior Islamist scholars, such as the Syrian Sa'īd Ḥawwā, who referred to the ignorance in religious matters of the masses who in his eyes are being misled by official *'ulamā'*. Ḥawwā wrote that "things have come to such a point that somebody can say to the Muslims: 'This is Islam' or: 'This does not contradict Islam,' and they would always believe that" (Sivan 1990, 54). Our case study shows that what Ḥawwā attributes to the official *'ulamā'* applies to the Islamists themselves. Thus, "What is Islam?" in any particular case undergoes a process of interpretation, and the methods of interpretation vary according to the political ends of those who are engaged in this process.

in:

LAW, CUSTOM, AND STATUTE IN THE MUSLIM WORLD

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