VOLUME 32, NUMBER 2, SPRING 1991

International Law and the Territories

Michael Curtis*

In "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," Adam Roberts warns that "the language of law can become a language of right and wrong, of moralistic reproach."[1] The frequent result of this process, he explains, is a facile application of general rules without a deep understanding of situations that are unique.[2] His admonition might well apply to the article "The Relevance of International Law to Palestinian Rights in the West Bank and Gaza" by Richard A. Falk and Burns H. Weston, which has more the fervor of political advocacy than the circumspection of international law. Falk and Weston appear primarily concerned with "mobilizing as much international pressure as possible" rather than clarifying the legal landscape.[3] No doubt, customary and conventional international law have often been used to buttress tendentious political positions, and it would be unrealistic to expect otherwise. The fundamental problem with Falk and Weston's argument is that it is infused with an animus that exceeds the usual boundaries of scholarly discourse while paying scant attention to the realities of the Arab-Israeli conflict.

The authors continually employ selective and intemperate language when referring to Israel. For example, while they stop short of arguing that the Israeli occupation of the West Bank and Gaza can be equated with Iraq's unprovoked aggression against and occupation of Kuwait, they still use the word "invasion" when referring to Israel's defensive actions in June 1967 against imminent Arab attack. The authors speak of the "harsh character" of Israel's administration in the territories over the last twenty-three years and "the failed responsibility towards the Palestinian people."[4] Their analysis of Israeli action includes allegations of "tortious and/or criminal responsibility,"[5] "prolonged and oppressive Israeli occupation,"[6] "abusing the populations of the West Bank and

* Professor of Political Science, Rutgers University.

1. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 45 (1990).

2. *Id.*

3. *See* Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991).

4. Falk & Weston, *supra* note 3, at 144.

5. *Id.* at 146.

6. *Id.* at 151.

HeinOnline -- 32 Harv. Int'l. L. J. 457 1991

Gaza in systematic and severe ways,"[7] "inhumanity toward the Palestinian inhabitants,"[8] "crimes against humanity,"[9] and violations "of principles of criminal accountability laid down at Nuremberg in 1945."[10] Moreover, Falk and Weston identify Israel's "unlawful policies and practices" in the occupied territories as the principal cause of the violence. In contrast, they describe those engaged in violent attacks on Israeli civilians as "exiled liberation forces outside Israeli-controlled territory."[11]

The article's use of the history of the Arab-Israeli conflict reflects the same sententious spirit. Scholars may reasonably differ about the policies and actions of different Israeli governments or, more specifically, about the causes of the flight of Arabs during the 1948–49 war. Few, however, would regard the writings of the extreme left-wing Simcha Flapan as sufficiently authoritative to warrant Falk and Weston's reliance on them for proposing the existence of "a persisting debate about the attack by the Arab armies in 1948."[12] Falk and Weston refer to the Arab armies' invasion of the newly created state of Israel in May 1948, which led to the occupation of the West Bank and Gaza by Transjordan (later Jordan) and Egypt between 1949 and 1967, as "acts of *alleged* unlawful aggression" [emphasis added]. Their version of these events contrasts not only with the perceptions of contemporary U.N. officials, but also with the documented contemporary view of the Arabs themselves. Trygve Lie, then Secretary-General of the United Nations, saw the same event as "the first armed aggression which the world had seen since the end" of World War II.[13] The U.N. Commission on Palestine reported on April 10, 1948 to the General Assembly that Arab opposition to its partition plan of November 1947 "has taken the form of organized efforts by strong Arab elements, both inside and outside of Palestine, to prevent its implementation."[14] Moreover, in Amman in May 1948, the heads of

7. *Id.* at 152.

8. *Id.* at 156.

9. *Id.*

10. *Id.* at 137.

11. *Id.* at 143.

12. *Id.* at 136.

13. TRYGVE LIE, IN THE CAUSE OF PEACE 174 (1954). Mr. Lie called the Arab invasion "armed defiance of the United Nations," and maintained that the Arab states "openly proclaimed their aggression by telegraphing news of it to United Nations Headquarters." *Id.* at 173. He reported that on February 6, 1948, the Arab Higher Committee representative wrote to him that "[t]he Arabs of Palestine . . . will never submit or yield to any Power going to Palestine to enforce partition. The only way to establish partition is first to wipe them out—man, woman and child." *Id.* at 165.

14. YEHUDA Z. BLUM, FOR ZION'S SAKE 76–77 (1987). The justification by the League of Arab states of Arab aggression against Israel was rejected by the Security Council as a violation of Charter obligations. U.N. Doc. S/p.v. 302 (1948). Andrei Gromyko, Soviet representative to the U.N., said in May 1948 that Arab states "have resorted to such action as sending their

HeinOnline -- 32 Harv. Int'l. L. J. 458 1991

the Arab governments who had sent forces into Palestine talked of "the final offensive which was to sweep the Jews into the sea" and of "how the Jewish property would be divided."[15]

The characterization of Israel as "the most flagrant country in the world" in its defiance of international agreements appears as black humor at a time when Saddam Hussein threatened to "burn half of Israel," while "annexing" and depopulating Kuwait. The truly serious violations of human rights in many of the U.N. countries, including Cambodia, China, Cuba, India, and Iran, appear to have escaped the attention of Israel's critics.

While Falk and Weston buttress their advocacy of a legitimate Palestinian right of resistance, and of a Palestinian state, with their skewed version of historical and contemporary experiences, their article lacks any consideration of the true nature of the Arab-Israeli conflict and regard for the realities of Middle East politics.[16] It would be helpful to put their presentation in the context of a more developed analysis of political relationships in the Middle East.

---

troops into Palestine and carrying out military operations aimed at the suppression of the national liberation movement in Palestine." BLUM, *supra* at 78. Emile Ghoury, Secretary-General of the Arab Higher Committee, stated in the *Beirut Telegraph*, September 6, 1948, that "the fact that there are refugees is a direct consequence of the act of the Arab states in opposing partition and the Jewish State." Even more strongly, Abu Mazer wrote in March 1976, in the P.L.O. journal in Beirut, *Falaskin al-Thawra*:

> The Arab armies entered Palestine to protect the Palestinians from the Zionist tyranny, but instead they abandoned them, forced them to emigrate and to leave their homeland . . . . For 17 years, the Arab radio stations broadcast their intention of returning the refugees to their homes. They did not throw the Jews into the sea, nor did they return the refugees to their homes.

The memoirs of Khalid al-Azm, prime minister of Syria in 1948–49, are unusually revealing. In them, he explained, "[w]e [the Arab governments] doomed a million Arab refugees, by calling on them and insisting that they abandon their land, their homes, their work and their occupations, and we made them unemployed and homeless." KHALID AL-AZM, MUDHAKKIRAT KHALID AL-AZM 386–87 (1973), *quoted in* BERNARD LEWIS, SEMITES AND ANTI-SEMITES 270 (1986).

15. ALEC KIRKBRIDE, A CRACKLE OF THORNS 162 (1956).

16. Another author has addressed these issues, which he has phrased as follows: "Does Israel have a right to exist? The State of Israel has lived since its birth—and even before its birth—under the pressure of that question. And that question was preceded by another question: Do the Jews have a right to exist?" CONOR CRUISE O'BRIEN, THE SIEGE 25 (1989). Arab leaders have made their views quite clear. The Arab League's resolution of April 1, 1950 forbade any member state "to negotiate the conclusion of a unilateral peace or any political, military, or economic agreement with Israel, or to conclude such peace or agreement." *See* HUSSEIN A. HASSOUNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES 256 (1975). This policy of nonrecognition of Israel and rejection of peace with it was reaffirmed by the Khartoum Summit Conference of Arab states held in August 1967. The Arab League's most effective weapon against Israel has been the boycott, imposed *before* 1967 and the occupation of the territories. The boycott is both primary and secondary, since it is aimed not only at Israel and companies doing business with Israel, but also at those who "sympathize" with Israel. In addition to denying Israel's right to trade, the Arab League and most of its states refuse to include "Israel" on their maps.

HeinOnline -- 32 Harv. Int'l. L. J. 459 1991

First, it needs to be reiterated that the core of the Arab-Israeli conflict remains what it has been for some seventy years, the implacable opposition by Arab states, except Egypt since 1979, to the Jewish presence in the Mandate area of Palestine and, since 1948, to the existence of the state of Israel. The Palestinian question, on which so much international attention has been focused by successful, relentless pressure, is derivative from that central problem. President Sadat was the first Arab leader to acknowledge that once the legitimacy of Israel had been recognized, the Arab-Israeli conflict could readily be resolved by peaceful negotiation. Even if the level of rhetorical vehemence has been reduced in recent years, no other Arab leader has so far publicly and unequivocally recognized Israel's right to exist, or has been willing to enter into face-to-face negotiations. As recently as October 1990, the Arab League reaffirmed the inalienable Arab and Palestinian right to the city of Jerusalem—which had, in fact, never been the capital of an Arab Palestine or even of an Arab district—as the capital of the independent State of Palestine.[17] It also voted to continue financial support for the intifada and to continue the "confrontation" with Jewish immigrants into Israel, as well as announcing that it was blacklisting all airlines and shipping companies taking them to Israel. The Arab economic boycott of Israel remains a fact, as does the propaganda war and vilification of Israel.

Moreover, to argue, as do Falk and Weston, that the end of Israel's occupation of the territories "comports"[18] with future peace and stability in the Middle East ignores the more significant threats to that peace and stability: Iraqi possession of nuclear, biological, and chemical weapons in light of its demonstrated willingness to use unconventional weapons; Syrian brutality against its own population as well as against other Arabs, and its formidable military arsenal of combat aircraft, missiles, tanks, artillery pieces, and armored carriers; the erratic bellicosity of Libya; rising Islamic fundamentalism; internal discord in Lebanon; the intense rivalries for leadership of "the Arab nation"; increasing tensions within Jordan; and the general political fragility of all the authoritarian and nondemocratic Arab regimes.

---

17. This ignores the significance of Jerusalem for Jews. Amos Elon writes: "Among the many vanquished capital cities of the ancient world, only Jerusalem survived in the imagination of her exiles and in that of their descendants from generation to generation." AMOS ELON, JERUSALEM, CITY OF MIRRORS 33 (1989). For over a century, Jews have been the largest group in Jerusalem; in 1947 there were 100,000 Jews and 60,000 Arabs. The centrality of Jerusalem for the Jewish people as both its major holy city and its historic capital is compelling in a manner that is not similarly true for non-Jews, for whom the city does not have the same religious uniqueness and political significance. In addition, Jews have had a continuous presence in Jerusalem for over 3000 years. ALICE L. ECKARDT, JERUSALEM: CITY OF THE AGES 15–16 (1987); JAMES PARKES, WHOSE LAND? A HISTORY OF THE PEOPLES OF PALESTINE 230, (1970).

18. Falk & Weston, *supra* note 3, at 157.

HeinOnline -- 32 Harv. Int'l. L. J. 460 1991

Israel is often unfairly held to a higher moral standard than that to which other countries are held. Even if Israelis might resent these expectations, they would not want to be judged by the norms of behavior—assassination, murder, public floggings, brutality against citizens, violence—frequently exhibited in neighboring Arab countries.[19] Nor would most Israelis want to be excused for injustices that Israel has perpetrated. But to castigate Israel in Falk and Weston's terms is not only to employ a dubious moral standard, one not exhibited in practice anywhere else in the world, but also to excuse the serious and flagrant violations of international law by Arab states as attempts to redeem Arab honor or erase Arab shame, as the natural consequence of their rage and frustration, or as the result of the politics of despair.

Objective analysis of the relevance of international law to the present issue might profitably start from the premise that the international bodies on which Falk and Weston depend for support of their argument have for many years adopted a double standard, prejudicial to Israel and aligned with Arab positions on the Arab-Israeli conflict.[20] These bodies have subjected Israeli actions and policies to minute scrutiny and, prompted by a self-interested coalition of Arab and Communist countries until 1990, have automatically condemned Israel by an avalanche of resolutions in the United Nations.[21] That the United Nations has focused its attention disproportionately on Israel, while generally ignoring other countries' blatant human rights violations, detracts from any legitimacy the resolutions might have as evidence of international law.[22]

A recent example of the United Nations' inconsistency reflects its general anti-Israel proclivities. An initiative by Sweden to discuss in the United Nations the violations of human rights in Myanmar, which have included the murder of some 10,000 people, was blocked in

19. *See, e.g.*, DAVID PRYCE-JONES, THE CLOSED CIRCLE (1989).

20. *See* MOSES MOSKOWITZ, THE ROOTS AND REACHES OF UNITED NATIONS ACTIONS AND DECISIONS (1980); *cf.* PETER R. BAEHR & LEON GORDENKER, THE UNITED NATIONS: REALITY AND IDEAL (1984).

21. *See* HARRIS O. SCHOENBERG, A MANDATE FOR TERROR: THE UNITED NATIONS AND THE PLO (1989); THOMAS M. FRANCK, NATION AGAINST NATION (1985); Michael Curtis, *The United Nations, Zionism and Racism*, 1 GLOBAL AFFAIRS 57 (1986). The Security Council was able to pass 12 resolutions during 1990 calling for Iraq to withdraw from Kuwait, largely as a result of a change in attitude by the Soviet Union. Cordial relations with the U.S. over arms control, foreign trade, and American investment were more significant than its insistence on ideological differences, its preservation of its empire of satellite countries, or its continued use of the U.N. as a battleground on behalf of its client states. Changes in the U.N. have mirrored the changes in the world, particularly the economic and internal problems of the Soviet Union and the new mood in U.S.-Soviet relationships.

22. Sir Hersch Lauterpacht, concurring in the South West Africa Voting Procedure Advisory Opinion of 1955, stated that "decisions of the General Assembly . . . are not legally binding on the members of the United Nations." 1955 I.C.J. 67, 115 (Lauterpacht, J., concurring).

HeinOnline -- 32 Harv. Int'l. L. J. 461 1991

November 1990 by Third World countries.[23] By contrast, since 1967 literally hundreds of resolutions and drafts dealing with Israel have come before the General Assembly, and seventy-eight have been voted on in the Security Council.

After the quick condemnations of Israel over the Temple Mount incident on October 8, 1990, even Anthony Lewis, not known for his frequent approval of Israeli actions, felt compelled to ask, "What country, after all, would welcome any inquiry by an international organization that had assailed the very basis of its existence?"[24] Indeed, some U.N. members have attempted to make Israel a pariah among nations.[25] In February 1991, the U.N. Commission on Human Rights voted to condemn Israel for violations of human rights in the West Bank and Gaza. At the same session, it decided not to take any action on human rights violations in Afghanistan and Cambodia. Ironically, Iraq, a blatant human rights violator, was a member of that Commission. Moreover, at the February 8, 1991 meeting of the Commission, the Syrian representative, Nabila Chaalam, urged the members to read an Arabic book, *The Mazah of Zion*, which purports to prove the blood libel accusation that Jews kill non-Jews and take their blood to make bread and thus that Zionism is racist.[26]

It is undeniable that, concerning Israel, the United Nations has been more a political battlefield than a court of justice or a reasonable legislative assembly. On November 10, 1975, the General Assembly adopted Resolution 3379, which equated Zionism with racism.[27] The adoption of this resolution surely marked the lowest point yet reached in U.N. practice.[28] It is worth recalling the response of the British literary critic, Goronwy Rees: "There were ghosts haunting the Third Committee that day; the ghosts of Hitler and Goebbels and Julius Streicher, grinning with delight, to hear not only Israel, but Jews as such denounced in language which would have provoked hysterical applause at any Nuremberg rally."[29] On the passage of the resolution, Paul Johnson commented that "almost without exception those in the majority came from states notable for racist oppression of every conceivable hue."[30] The U.N., according to Ambassador Moynihan, had become the arena for "the terrible lie."[31]

23. N.Y. Times, Nov. 25, 1990.

24. Anthony Lewis, *The Wages of Fear*, N.Y. Times, Nov. 5, 1990, at A21, col. 5.

25. *See* BLUM, *supra* note 14, at 9, 80.

26. International Herald-Tribune, Feb. 14, 1991. *The Mazah of Zion* was written by Mustafa Tlass, Syrian Minister of Defense, and was published in 1985.

27. U.N.G.A.O.R. 3379 (xxx), Nov. 10, 1975.

28. *See* DANIEL PATRICK MOYNIHAN, A DANGEROUS PLACE 181–85 (1978).

29. Goronwy Rees, *Column*, 46 ENCOUNTER 29, 30 (1976).

30. Paul Johnson, *The Resources of Civilization*, 90 NEW STATESMAN AND NATION 532 (1975).

31. MOYNIHAN, *supra* note 28, at 198.

HeinOnline -- 32 Harv. Int'l. L. J. 462 1991

That international bodies dominated by an anti-Israel alliance continually link Zionism to racism hardly establishes the truth of the proposition or makes it a norm of international law. Those genuinely interested in the use of international law to help resolve political conflict might be expected to strive for repeal of the infamous charge. Similarly, international lawyers might have taken the lead in opposing the attempts over the last eight years of the Palestine Liberation Organization, Arab states, and their allies to revoke Israeli credentials at the U.N.[32] Corrective application of international law is required not simply because the attempts are malevolent, but also because they are counter to article 2 of the U.N. Charter: "[The U.N.] is based on the principle of the sovereign equality of all its Members."[33]

I. WAR, ARMISTICE, AND PEACE

A. *Arab Belligerence and Israel's Right to Hold the Territories Until Peace Is Made*

Any analysis of the Israeli actions discussed by Falk and Weston ought to take account of several factors: the original aggression against Israel, the continuing Arab call for the elimination of Israel, the emergence of a significant Islamic extremist movement, and the nature and actions of the Palestine Liberation Organization.

The first relevant factor is that, except for Egypt since 1979, all the Arab states that engaged in aggression against the new state of Israel in May 1948 have still not made peace with Israel. The four Armistice Agreements, with Egypt, Lebanon, Jordan, and Syria, were concluded in 1949 without prejudice to "the rights, claims, and positions" of the parties in peaceful negotiation and were to remain in force until a peaceful settlement between the parties had been reached. While the Agreements are transitional, to be ultimately replaced by definitive peace treaties, there is nothing temporary about them.[34] The demarcation lines become political or territorial borders unless revised by mutual consent.

The Canadian-sponsored Resolution 62, of November 16, 1948,[35] was to be the juridical basis for the Armistice Agreements of 1949,

32. *See* Malvina Halberstam, *Excluding Israel from the General Assembly by a Rejection of Its Credentials*, 78 AM. J. INT'L L. 179 (1984); Mala Tabory, *Universality at the UN: the Attempt to Reject Israel's Credentials*, 18 ISR. Y.B. HUM. RTS. 189 (1988).

33. U.N. CHARTER art. 2,(1).

34. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 44 (1988).

35. Canadian Resolution, U.N. Doc. S/1079 (1948). The Resolution called for an armistice, demarcation lines "beyond which the armed forces of the parties shall not move, and such withdrawal . . . as will ensure the maintenance of the armistice during the transition to permanent peace in Palestine." *Id.*

HeinOnline -- 32 Harv. Int'l. L. J. 463 1991

which in turn were to be the sole juridical basis for a settlement of the Arab-Israeli conflict.[36] The four agreements were designed to bridge the gap between a ceasefire and an ultimate peace settlement, and as such, final borders and refugee repatriation were omitted from discussion. Since the 1967 war, the Arab states, with the exception of Egypt, have either been in a state of cease-fire and disengagement agreement (Syria), cease-fire (Jordan), war (Iraq), or cease-fire because treaty negotiations were never ratified (Lebanon). It is symptomatic of the U.N.'s bias that it has found Israel not to be "a peace-loving state,"[37] when the former Arab aggressors have made no efforts to resolve the conflict peacefully or to accept Israel as a state. Nor has the U.N. ever condemned the Arab aggressions against Israel or the terrorist actions of the P.L.O. and other Arab groups.

Israel's present occupation of the West Bank and Gaza was brought about by attempts by Arab states to change the Mideast map by threatening Israel with annihilation in 1967. In 1967, Egypt closed the straits of Tiran, proclaimed a blockade of Eilat, forced the removal of the U.N. Emergency Force from the Sinai, and replaced the peace-keeping forces with its own combat troops.[38] These actions, coupled with Jordan's unprovoked attack on Jerusalem, demonstrate that Arab aggression is the cause of Israel's occupation.[39] Because it was the result of Israel's legitimate actions taken in self defense, the occupation cannot be regarded as illegal. Schwebel has argued that a state "may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense."[40] By this standard, the Israeli conquest of Arab and Arab-held territory constituted defensive action rather than aggressive conquest. Similarly, Rosalyn Higgins has argued that "there is nothing in either the Charter or general international law which leads one to suppose that military occupation, pending a peace treaty, is illegal."[41] Therefore, Israel is legally entitled to remain

36. *See* ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 61 (1978).

37. G.A. Res. Feb. 5, 1982 and Apr. 28, 1982.

38. INDAR JIT RIKHYE, SINAI BLUNDER 16 (1980); 1 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING 345–49 (1969).

39. *See, e.g.*, NADAV SAFRAN, FROM WAR TO WAR (1969); CHAIM HERZOG, THE ARAB-ISRAELI WARS (1982); Amos Shapira, *The Six Day War and the Right of Self-Defence*, 6 ISR. L. REV. 65–80 (1971).

40. Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 345 (1970). Schwebel writes that "the distinctions between aggressive conquest and defensive conquest, between the taking of territory legally held and the taking of territory illegally held, become no less vital and correct than the central principle [that there shall be no weight to conquest] . . . itself." *Id.* at 345. The general expectation of international law is that military occupations last a short time, and are followed by a state of peace. *See* Eugene V. Rostow, *Bricks and Stones: Settling for Leverage*, 202 NEW REPUBLIC 19 (1990). Security Council Resolutions 242 and 338 have called on the Arab states to make peace with Israel.

41. Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1, 8 (1970).

HeinOnline -- 32 Harv. Int'l. L. J. 464 1991

in the territory it now holds and to protect its security interests therein until new boundaries are drawn in a peace settlement.[42]

Further, since the Arab states' use of force in 1948–49 against Israel was illegal, Jordan's subsequent annexation of the West Bank on April 14, 1950, which was unacceptable to and unrecognized even by the Arab League, could not give Jordan any legal title to the territories.[43] The principle *ex injuria jus non oritur* (out of a wrong, no right can arise) prohibits Jordan from benefiting from its unlawful aggression.[44] The Jordanian annexation had no basis in international law, for territorial change, as Elihu Lauterpacht has argued, cannot properly take place as a result of the unlawful use of force.[45] Belatedly, King Hussein on July 31, 1988 severed all legal and administrative ties with the West Bank.

A Jordanian military official governed the West Bank from 1948 to 1950, at which point it was illegally annexed and made a part of the Hashemite Kingdom. While it occupied the West Bank between 1948 and 1967, Jordan arrested thousands of West Bank residents including prominent local leaders, curbed political activity, brutally suppressed riots, barred Jews completely from the Old City of Jerusalem and from the Hebrew University and Hadassah Hospital, destroyed most of the Jewish quarter in the Old City, as well as several synagogues, and destroyed tombstones in the cemetery on the Mount of Olives.[46]

In contrast to Jordan's annexation of the West Bank, Egypt made no similar claim on Gaza. Between 1948 and 1967, an Egyptian military governor ruled the area, with all laws of the British Mandate remaining in force. Like Jordan, however, Egypt committed human rights violations during its occupation. Inhabitants of the Gaza Strip were denied citizenship of the occupying power, and were not allowed to work in Egypt. Strict censorship was imposed, and no elections were held.[47]

B. *The P.L.O. and Its Continued Rejection of Israel*

In addition to the persistence of hostile relations between the Arab states and Israel, a second factor needs to be taken into account: the

42. *See* Schwebel, *supra* note 40, at 345–46; JULIUS STONE, ISRAEL AND PALESTINE 120 (1981).

43. The Political Committee of the Arab League declared on May 15, 1950 that the Jordanian annexation was a violation of the League resolution of April 1950, which preserved the independent status of the Palestinian territories. *See* HASSOUNA, *supra* note 16, at 39.

44. *See* JULIUS STONE, NO PEACE, NO WAR IN THE MIDDLE EAST 39 (1969); STONE, *supra* note 42, at 52.

45. *See* ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 52 (1968); Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

46. *See* BLUM, *supra* note 14, at 99.

47. *See* O'BRIEN, *supra* note 16, at 448.

HeinOnline -- 32 Harv. Int'l. L. J. 465 1991

nature and intentions of the Palestinian Arab population and of the P.L.O., which claims to be its sole legitimate representative although never formally chosen or elected. The ultimate objectives of the PLO remain ambiguous, but certain factions glory in proclaiming their hostile intentions regarding Israel and engage in belligerent actions matching their words. The PLO continues to include organizers of some of the most brutal terrorist actions to date: Abul Abbas and Abu Nidal are both P.L.O. members in good standing.[48]

Advocates for the P.L.O. argue that at its Palestine National Council [P.N.C.] meeting in December 1988, it implicitly accepted the existence of Israel by accepting Security Council Resolution 242. One problem with this argument is that Arafat is a master of ambiguity.[49] At this stage, it remains unclear whether the P.N.C. statement was indeed an implied recognition of Israel or whether it was the minimum formula necessary to open dialogue with the United States. More important than the frequent contradictory statements of P.L.O. leaders on the issue is the continuing refusal of the P.L.O. to repeal or amend its National Charter. Almost half of its thirty-three articles imply that Israel should not exist.[50] The Charter still calls for "armed struggle . . . [as] the only way to liberate Palestine" (article 9), wants to "repel the Zionist and imperialist aggression against the Arab homeland, and aims at the elimination of Zionism in Palestine" (article 15), sees "the partition of Palestine in 1947 and the establishment of the state of Israel as entirely illegal" (article 19), and requires "all states to consider Zionism an illegitimate movement, to outlaw its existence, and to ban its operations" (article 23).[51] The P.L.O.'s definition of self-determination would appear to require the end of Israeli statehood.[52]

48. The most notorious feat of Abul Abbas was organizing the hijacking of the Italian cruise ship, the Achille Lauro, in October 1985. Abu Nidal was responsible for the attempted assassination of the Israeli ambassador in London in June 1982. Despite Yasir Arafat's renunciation of terrorism in December 1988, all the factions comprising the P.L.O. have been involved in terrorist operations against Israel and its citizens.

49. *See generally* JANET WALLACH & JOHN WALLACH, ARAFAT: IN THE EYES OF THE BEHOLDER (1990); JULIAN BECKER, THE PLO 226 (1984).

50. *See* YEHOSHEFAT HARKABI, THE PALESTINIAN COVENANT AND ITS MEANING 11 (1979).

51. Palestinian National Charter as revised by the Fourth Palestine National Council, July 1968, *reprinted in* HARKABI, *supra* note 50, at 61, 74, 76, 90; HARKABI, PALESTINIANS AND ISRAEL 49–69 (1974).

52. Yasir Arafat demonstrated the truth of this observation recently when he expressed his support of Saddam Hussein's aggression against Kuwait, stating that "Iraq and Palestine together represent a common will. We will be together side by side, and after the great battle, God willing, we will pray together in Jerusalem." Assoc. Press, Jan. 1990. The Palestinian identification with Saddam Hussein suggests that their interest is less in Israeli withdrawal from occupied territory than in the total destruction of Israel. A prominent Palestinian on the West Bank observed, "The war has increased support for Saddam tremendously. People now see him as an underdog, or as some almost mythical figure from Arab culture and history." Editorial, THE NEW REPUBLIC, Feb. 11, 1991, at 8. It was Arafat's refusal to condemn a terrorist attack on an Israeli beach in May 1990 that led the U.S. to suspend the dialogue with the P.L.O. that it had started in June 1990.

HeinOnline -- 32 Harv. Int'l. L. J. 466 1991

C. The Threat of Islamic Fundamentalism

A third factor neglected by Falk and Weston is the increasing and menacing threat posed, in the territories as elsewhere, by Islamic fundamentalists—the Islamic Jihad in Gaza and the Islamic Resistance Movement (Hamas) in the West Bank.[53]

Islamic Jihad, largely responsible for the outbreak of the intifada in December 1987, has urged the destruction of Israel. Its spiritual leader, Sheik Assad Tamimi, deported for his incitement of violence, has proclaimed, "the killing of the Jews will continue . . . killing in God's name until they vanish," and has stated that his task was "instigating the nation to jihad for the liberation of all of Palestine."[54] These threats cannot be ignored or treated as mere rhetoric, since the stabbing deaths of Jews in the Jerusalem area in 1991 appear to have been committed by Islamic fundamentalists.

Hamas, the military wing of the Moslem Brotherhood, has gained strength in the West Bank, with increasing numbers of students among its supporters. This parallels the growth of the Islamic Movement in Jordan where, in November 1989, the Brotherhood and other Islamic groups gained thirty-two out of eighty seats in the Jordanian Parliament. The Movement now exerts pressure on the Jordanian Government to support the cause of Palestinian Moslems, especially in Jerusalem.[55]

During the intifada, sabotage, riots, knifings, car torchings, and provocations have become familiar experiences. Hamas has urged Palestinians to kill Israeli soldiers or Jews, to burn Israeli forests and agricultural fields, and to escalate bloodshed. Its covenant is revealing, including alarming passages such as the following:

> Our struggle against the Jews is very great and very serious. The IRM is but one squadron that should be supported . . . until the enemy is vanquished and Allah's victory is realized. It strives to raise the banner of Allah over every inch of Palestine . . . Palestine is an Islamic land. The Zionist plan is limitless. After Palestine, the Zionists aspire to expand from the Nile to the Euphrates . . . . Their plan is embodied in the *Protocols of the Elders of Zion*.[56]

53. *See* ARTHUR R. DAY, EAST BANK/WEST BANK 46–51 (1986); Ifrah Zilberman, *Jordan's Temple Mount Role*, Jerusalem Post, Nov. 17, 1990, at 9.

54. *Quoted in* Anti-Defamation League, *Islamic Fundamentalism in the West Bank and Gaza*, 1990 INT'L NOTES 1.

55. *See* Zilberman, *supra* note 53, at 9. In a statement on June 2, 1991 rejecting all peaceful solutions to the Arab-Israeli conflict, the Brotherhood in Jordan reiterated that "jihad is the only way to liberate our lands from the grip of the enemy . . . . Our struggle is with the Zionist entity . . . we urge Arab and Muslim rulers to reject peace initiatives." Jerusalem Post, June 3, 1991.

56. *Quoted in id.* at 2.

HeinOnline -- 32 Harv. Int'l. L. J. 467 1991

Fundamentally anti-Semitic, Hamas proclaims that the Jews, "our enemies," were behind the French Revolution, the Communist Revolution, and the two World Wars, as well as the United Nations and the Security Council which now "enable them to rule the world."[57] The Palestinian Moslem Brotherhood urges the creation of a Palestinian Moslem state as a first priority of the Palestinian Moslems. It rejects the P.L.O. claim to represent the Palestinian people, regarding it as a diaspora organization, and rejects as well the P.L.O. desire to establish a secular state. During the intifada, the military arm of the Brotherhood, Hamas, has challenged the P.L.O. for the loyalty of the Palestinian population, especially the young.[58] The rivalry between Hamas and the P.L.O. centers on "who [has] the authority to set the rules for the ongoing strike in the territories."[59] In the battle between the two in Nablus on June 3, 1991, in which uzis and pistols were used as well as knives and axes, fifteen people were injured.

D. Palestinian Support for Iraq and Saddam Hussein

A fourth relevant factor to consider in evaluating Israeli actions is Palestinian behavior and rhetoric, as manifested both by its leadership and by mass demonstrations in support of Saddam Hussein's aggression against Kuwait in August 1990. These actions ought to lead advocates of the Palestinian cause to reexamine their premises. Falk and Weston mention a P.L.O. "tilt"[60] to Iraq on the occasion of the Iraqi aggression, but they vastly understate the enthusiastic support and cooperative efforts given initially by the P.L.O. and by Palestinians in general, including Israeli Arabs.[61] It is a sad commentary on the role of the P.L.O. not only that it sent Saddam Hussein valuable information on Kuwait's financial holdings and hailed Saddam as the leader of the Arab nation, but also that three of its major groups actually helped Iraq police and control Kuwait.

Politically, the P.L.O. has disgraced itself and lost credibility as an interlocutor in the peace process. It has also lost any moral basis for its political demands for self-determination and for an end to Israeli occupation. By supporting Saddam Hussein, the P.L.O. has failed to uphold the principle of self-determination for an Arab people; has positively supported the ending of that self-determination and the elimination of the existence, legitimacy, and sovereignty of an Arab

57. *Quoted in id.*; *see also* ZE'EV SCHIFF & EHUD YA'ARI, INTIFADA 237 (1990).

58. Ifrah Zilberman, *Hamas: Apocalypse Now*, Jerusalem Post, Jan. 12, 1991, at 11.

59. SCHIFF & YA'ARI, *supra* note 57, at 9.

60. Falk & Weston, *supra* note 3, at 130.

61. *See* Christopher Walker, *Arafat Takes Tumble*, The London Times, Aug. 25, 1990, at 5; Richard Owen, *Painful Economic Shock for Saddam's Palestinian Admirers*, The London Times, Aug. 27, 1990, at 5.

HeinOnline -- 32 Harv. Int'l. L. J. 468 1991

state; has approved the occupation of Arab territory and control of an Arab population by another state; and has not objected to the removal and displacement of Kuwaiti citizens or to the theft of their property.

This approval of the Iraqi aggression has been compounded by spurious attempts to blame Israel for Iraq's actions. For example, Yasir Abd-Rabbo, Assistant Secretary-General of the Democratic Front for the Liberation of Palestine, has stated that "the Palestinian people, with all their factions, today stand on the side of the people of Iraq and its leader President Saddam Hussein, in their confrontation against the brutal imperialist-Zionist onslaught they are facing."[62]

Once again, the Palestinian leadership has demonstrated its political ineptitude. In the past, Palestinian spokesmen have invariably made the wrong choice among the options available at any given time. They chose not to participate in the legislative or advisory bodies during the British Mandate period between 1922 and 1948. They preferred Hitler to Britain in World War II. The Arab Higher Committee rejected General Assembly Resolution 181 of November 29, 1947, the partition resolution that would have allowed the creation of an Arab state alongside a Jewish one. The leadership, paradoxically, now demands at least those boundaries it rejected in 1947. They have refused opportunities for a compromise solution since then, at least until the Palestine National Council meeting of November 15, 1988. Even then, they qualified their intransigent position in an equivocal and ambiguous fashion.

During the recent Gulf crisis, Arafat's position was not exactly tempered. On February 26, 1991 he proclaimed that "Iraq was the defender of the Arab nation, of Muslims, and of free men everywhere."[63] For him, "the mother of battles is for the mother of causes: the much beloved Palestine."[64] As late as March 10, he was blaming Israel for the Gulf war, and a few days later told the *New York Times* that he saw himself and the P.L.O. as "more popular than ever."[65] More people are likely to accept the derisive view of Prince Bandar ibn Sultan, Saudi Ambassador to the U.S., who dismissed Arafat as "a clown."[66]

The decision by Arafat to back Saddam Hussein estranged the P.L.O. from supporters in the Arab world and eroded sympathy for it among Western nations.[67] It has also affected the behavior of Palestinians in the territories. The uprising "appears moribund, no longer

62. Israel News Agency, Oct. 31, 1990.
63. N.Y. Times, Feb. 26, 1990.
64. Jerusalem Post, Feb. 10, 1991.
65. N.Y. Times, Mar. 15, 1991.
66. L.A. Times, Feb. 22, 1991, at 8.
67. N.Y. Times, Feb. 13, 1991, at 16.

HeinOnline -- 32 Harv. Int'l. L. J. 469 1991

able to rouse the Palestinian people or to influence outside opinion . . . the Palestinians are now turning the violence against themselves."[68] These murders of Palestinians by fellow Palestinians, which numbered over 400 as of June 1991, have been largely ignored by human rights activists, who are much more eager to investigate and report alleged Israeli violations. Despite the lack of interest of human rights activists, some leading Palestinians have begun to voice concern over these killings. At a meeting of a group of Palestinian academics, journalists and trade unionists on June 11, 1991 in East Jerusalem, Dr. Yussuf Abu-Samra of Bir Zeit University called the murderers "fascists."[69] Other speakers warned of the criminal elements in the intifada.[70]

II. THE QUESTION OF SELF-DETERMINATION

Legally and historically, advocates of Palestinian self-determination have at best a dubious moral claim. Under prevailing standards of international law set out by the International Court of Justice and the United Nations, the right to self-determination does not a fortiori confer a right to statehood.[71] Moreover, an objective historical analysis of the political situation in the Mandate area justifies Israel's holding the occupied territories until agreement on a mutually acceptable resolution of the matter. Finally, Palestinian claims for self-determination appear morally hypocritical and politically untenable in light of the P.L.O.'s continued refusal to negotiate a peaceful solution to the problem and its reprehensible support for Iraq's invasion of Kuwait.

A. *The Legal Question of Self-Determination*

Numerous U.N. Resolutions and the 1966 International Covenants on Civil and Political Rights, and Economic, Social, and Cultural Rights, endorse the principle of self-determination.[72] Both covenants proclaim: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." Upheld in

68. N.Y. Times, June 12, 1991, at 5.
69. Daily News Bulletin, JTA, June 12, 1991, at 2.
70. *Id.*
71. Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict: Meaning, Myth, and Politics*, 21 J. INT'L. L. & POL. 465 (1989).
72. International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1967); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967).

HeinOnline -- 32 Harv. Int'l. L. J. 470 1991

the 1971 *Namibia* decision of the I.C.J.,[73] the principle now appears to be regarded as customary international law.[74]

Nonetheless, international law does not answer the question of whether "self-determination" necessarily results in the creation of an independent state. The *Western Sahara* case[75] defines self-determination as the free and genuine expression of the will of the people in a particular territory.[76] However, in Judge Dillard's words, "it may be suggested that self-determination is satisfied by a free choice, not by a particular consequence of that choice or a particular method of exercising it."[77] Thus, in many cases throughout the world, whether with the Kurds in Iraq, the Bretons in France, the Basques in Spain, the Sikhs in India, or the various peoples in the Soviet Republics and the minorities within those Republics, identifiable "people" do not possess autonomous states of their own.[78] Indeed, the reality of international politics is that most U.N. states deny self-determination, in the broader sense of granting statehood, to their ethnic, religious, cultural, and political minorities.

It is a tribute to a relentless and well-organized political campaign that, of all the claims for self-determination that might be put on the international agenda, the question of the Palestinians, whose identity has only recently been formulated, has achieved the highest priority. Between 1948 and 1967, neither Jordan nor other Arab states called for Palestinian self-determination since they saw the Palestinians, and for the most part the Palestinians saw themselves, as part of a larger Arab nation rather than as a distinct racial, religious, or ethnic group. Certainly, the Palestinian identity evident during the last thirty years was not conspicuous when, during World War II, Abdullah of Transjordan planned a confederation of Arab states in which the area of Palestine would be under his jurisdiction.[79]

The myth that Jews in Palestine unjustly displaced "the Palestinian people" may be widely espoused, but official documents before 1947 generally spoke of "Arabs in Palestine," not of a "Palestinian people."[80] Though some Arab journalists and politicians spoke of a Palestinian

73. Legal Consequences For States Of The Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Advisory Opinion of June 21).

74. STONE, *supra* note 42, at 18.

75. Western Sahara, 1975 I.C.J. 12 (Advisory Opinion).

76. Halberstam, *supra* note 71, at 470; MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS (1982).

77. Western Sahara, *supra* note 75, at 123.

78. Halberstam, *supra* note 71, at 468; Michla Pomerance, *Self-Determination Today: The Metamorphosis of an Ideal*, 19 ISR. L. REV. 321 (Summer-Autumn 1984).

79. KING ABDULLAH, MY MEMOIRS COMPLETED 89–90 (1978).

80. STONE, *supra* note 44, at 14–15.

HeinOnline -- 32 Harv. Int'l. L. J. 471 1991

national movement in the 1920's, the people in the area did not consider themselves a separate Palestinian people per se. Rather, they historically identified themselves with the larger Moslem or Arab world (Qawmiya) or with the Syrian nation. Only with the creation of Israel and the Arab exodus from the occupied territory did a Palestinian national consciousness develop.[81]

Arab states have used the Palestinian cause as a tool to advance their struggle against Israel. Disguised as an effort to promote Palestinian self-determination, the Arabs have launched four wars, organized an economic boycott against Israel and a secondary boycott against those trading with Israel, and created the P.L.O. in 1964. They have vilified Jewish history, fomented antisemitism, and used the United Nations as an instrument for political warfare and as a mechanism through which schools in the West Bank could use textbooks with blatant antisemitic material.[82]

Nevertheless, the United Nations continues to advocate Palestinian self-determination as if the Palestinians were an identifiable nation deserving of statehood. While the issue of Palestinian self-determination is conspicuously absent from Security Council Resolutions 242 and 338, it has been addressed and endorsed in a series of General Assembly resolutions starting with 2535B (XXIV), December 10, 1969[83] and 2672C (XXV), December 8, 1970.[84] These resolutions eventually led to the elevation of the P.L.O. to observer status at the U.N. Finally, on December 15, 1988, the U.N. designated the P.L.O. as "Palestine," without prejudice to the continuing functions and status of the P.L.O. as an official U.N. observer.[85] By granting the use of the name "Palestine," and in so doing creating the presumption that "self-determination" implies the existence of an independent state, the U.N. has prejudiced the outcome of negotiations over the conflict. As explained above, the presumption of statehood is unwarranted under international law. There is no basis for asserting that "Palestine" qualifies as a state under international law,[86] and

81. LEWIS, *supra* note 14, at 186.

82. BLUM, *supra* note 14, at 50–52. It was indicative of this Arab prejudice that after the 1967 Six Day War a considerable proportion of the textbooks used in the schools in the Palestinian refugee camps which were under U.N. auspices inculcated racist antisemitism. The report of a three member commission on the issue presented to UNESCO on April 4, 1969 was never published. LEWIS, *supra* note 14, at 220.

83. *Id.*

84. Roberts, *supra* note 1, at 77.

85. General Assembly Res. 43/177 (Dec. 15, 1980), carried by a 104-2-36 vote, acknowledged the State of Palestine by the Palestine National Council, and designated "Palestine" to be used in place of the "P.L.O." in the U.N. system.

86. *See, e.g.*, Editorial Comment, *Admission of "Palestine" as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response*, 84 AM. J. INT'L. L. 218–30 (1990) (authored by Frederic L. Kirgis).

HeinOnline -- 32 Harv. Int'l. L. J. 472 1991

attempts by the U.N. General Assembly to treat it as a state reveal the continuing bias against Israel in the United Nations.

B. The Mandate Period

The history and politics of the region during the Mandate period undermine Palestinian claims to self-determination and statehood. Falk and Weston's dismissal of Eugene Rostow's assertion of the continuing validity of the British Mandate boundaries in Palestine is disingenuous.[87] Rostow's general argument here and elsewhere[88] is that the last generally recognized "sovereign" in the occupied territories was the Ottoman Empire. No such recognition was given to Jordan's annexation of the West Bank in 1950. From a legal point of view, Rostow argues that the West Bank and Gaza are unallocated parts of the British Mandate, since the Mandate was not terminated when Great Britain resigned as the mandatory power. As Rostow explains, the Mandate ceased to be operative as to the territories of Israel and Jordan when those states were recognized by the international community. But its rules still apply to the West Bank and the Gaza Strip, which have not yet been allocated either to Israel or to Jordan, or become an independent state.[89] On the basis of Security Council Resolution 242,[90] Israel may administer the territories until its Arab neighbors make peace and acknowledge Israel's right to live in peace within secure and recognized boundaries in return for Israel's withdrawal from the occupied territories.

Apart from a brief redrawing of the boundaries under the Crusader Kingdom, the Mandate provides the only redefinition of Palestinian territory since the Romans established a Palestinian province after the destruction of the original Jewish state. Even the P.L.O. in article 1 of its National Charter defines Palestine as "the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland," and in article 2 insists that "Palestine, with the boundaries it had during the British mandate, is an indivisible territorial unit."[91] Thus, the logic of the P.L.O.'s own rhetoric indicates that the organization has staked a claim not only to the area west of the Jordan river but also to the three-quarters of the Palestine Mandate area which in 1922 Britain separated from the rest, and which became the emirate of Transjordan.

87. Eugene Rostow, *"Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. IN WORLD PUB. ORDER 147 (1979).
88. *See* Rostow, *Bricks and Stones*, *supra* note 40.
89. *Id.*
90. U.N. Security Council Resolution 242 (Concerning Principles for a Just and Lasting Peace in the Middle East), U.N. Doc. S/Inf/22/rev. 2, at 8 (1967).
91. Palestinian National Charter, July 1968, *reprinted in* HARKABI, *supra* note 50, at 28, 33.

HeinOnline -- 32 Harv. Int'l. L. J. 473 1991

From the 1922 decision to create the Arab emirate of Transjordan, two conclusions can be drawn. First, the British sharply reduced the land available for "the establishment in Palestine of a national home for the Jewish people" promised in the Balfour Declaration of November 2, 1917. Second, even before its evolution into Jordan, Transjordan, which represented three-quarters of the area the P.L.O. claimed in its Charter, could be legally regarded as the embodiment of Palestinian self-determination.

C. The Political and Moral Context

The Arab states' continuing refusal to accept the existence of the state of Israel and to negotiate a peaceful resolution to the Palestinian problem justifies Israel's current occupation of the areas in dispute. The Arab states cannot expect to return to the partition plan formulated by the United Nations in 1947. Reflecting historic Arab hostility toward Jewish immigration and the formation of a Jewish national home, the Arab states and representatives of the Palestinians consistently refused to accept opportunities for conciliation during the Mandate period and rejected the compromise formula for partition of the area as proposed in General Assembly Resolution 181 (II) of November 29, 1947.[92] Resolution 181 called for the establishment of both a Jewish state and an Arab state and would have created a *corpus separatum* in Jerusalem. The Arab Higher Committee and the Arab League rejected the partition idea. On May 15, 1948, the armies of five Arab states attacked the newly declared State of Israel. After such an aggressive attempt has failed, can international law sanction a return to the *status quo ante bellum*? Can an offered transaction once refused still be available once the party that repudiated it now thinks it advantageous after more than forty years? In view of the Arab-Israeli wars, continuous aggression against Israel since 1947, and demographic changes in the area, the viability of a demarcation plan designed decades ago is questionable. Considering the conflict between the P.L.O.'s assertions of proper territorial sovereignty and Israeli statehood, to what exact area would Palestinian self-determination or statehood refer?[93] Perhaps the primary question is whether the destruction of Israel is still an inherent part of the agenda of Palestinian advocates.

The claim for Palestinian self-determination must be adjudicated in the context of the political realities in the Mandate area. Any definitive settlement must account for Israel's genuine security concerns while overcoming the refusal of Jordanian and self-elected Palestinian rep-

92. O'BRIEN, *supra* note 16, at 163, 172, 182, 227, 281; BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947 - 1949, at 19–29 (1987).
93. POMERANCE, *supra* note 76, at 22.

HeinOnline -- 32 Harv. Int'l. L. J. 474 1991

resentatives to sit at the negotiating table. Because both the Jordanians and Palestinians ironically saw the 1978 Camp David Accords as lacking validity under General Assembly Resolution 34/65B of November 29, 1979, they refused to participate in negotiations planned pursuant to the accords. The Palestinians also spurned an Israeli proposal in April 1989 for a vote in the territories to elect Palestinian representatives who would negotiate with Israel. The fundamental problem remains that the status of the West Bank and Gaza is unclear both politically and legally. According to international law and pending settlement of the territorial questions, Israel is entitled to hold the disputed areas.

Moreover, the opportunism of the P.L.O.'s claims for self-determination is best demonstrated by the moral hypocrisy exhibited by the P.L.O. and its advocates in supporting the violence and repression of Iraq. Although no principle of international law requires that a party to a conflict have clean hands, the claim of the PLO and its supporters for Palestinian self-determination has little moral validity in light of their support for Saddam Hussein's attempt to end Kuwaiti self-determination and their acceptance of Iraq's brutal attempt to squash self-determination efforts by and in support of Iraq's Kurdish population.

III. THE TERRITORIES SINCE 1967

In their blanket condemnations of Israeli actions in the occupied territories, Falk and Weston paint a bleak picture. While no one doubts that certain acts of the Israeli administration or of particular Israeli citizens may merit criticism, Falk and Weston lose sight of the fact that the record is more than merely crimes and misdemeanors. Because they do not discuss the full twenty-three year history of the occupation, Falk and Weston fail to see Israeli religious tolerance and protection of holy places, the socio-economic advances Israel has brought to the region, and the general freedom that the population of the occupied territories enjoys.

Since 1967, Israel has protected and cared for the holy places of different religions. By contrast, when Jordan controlled the West Bank between 1948 and 1967, thirty-four synagogues were destroyed and Jews were barred from Jerusalem, from the Western Wall, the holiest shrine in Judaism, and from the Mount of Olives, where hundreds of Jewish graves were desecrated.[94]

Under Israeli occupation, the Islamic holy places in Jerusalem have been under the control of Islamic authorities, the Wakf. Israel has

94. *See* BLUM, *supra* note 14, at 99; ECKARDT, *supra* note 17, at 135–36.

HeinOnline -- 32 Harv. Int'l. L. J. 475 1991

permitted people of all faiths free access to and freedom of worship in these areas and has continued to respect the sanctity of Moslem and Christian holy sites, and there have been no incidents of desecration. Moreover, Israel freely allows Moslems to undertake the Hajh pilgrimage to Mecca.[95] Paradoxically, in the face of such Israeli tolerance, radical Islamic groups have used the Temple Mount as a place for distributing intolerant literature, as a center of political activity during the intifada, and as a sanctuary for cover during clashes with the police.[96]

Not only has Israel permitted and protected religious freedoms, but it has also stimulated significant economic, medical, and educational progress in the occupied areas. A simple comparative analysis of the West Bank and Gaza before and after 1967 bears this out.

Under Israeli control, the occupied territories have experienced substantial economic growth. In 1967, unemployment in Gaza stood at 40% and in the West Bank at 10%. Since then, the opening of the labor market in Israel, the creation of vocational training centers, and the employment and education of a larger number of women have all reduced unemployment while increasing employment opportunities. In 1967, some 90% of the homes in Arab neighborhoods in Jerusalem did not have running water; now almost every home is connected with the city water system. The standard of living, per capita GNP, and private consumption have all increased in the territories during the occupied period.[97]

Medical conditions have also improved, as malnutrition, the incidence of communicable diseases, and the high mortality rate of the pre-occupation period have all declined. Since 1967, the areas have witnessed a marked improvement in the treatment of heart disease, cancer, and kidney problems. Clinics have been established, as have maternal and child health-care centers and immunization programs. Moreover, the territories have benefited from improved hospital facilities, many of which are linked with those in Israel proper.[98]

The population of the occupied territories also has much greater access to educational opportunities. In 1967, over half the adults in the territories had no formal education, and only nineteen percent had nine or more years of school. Now, most of the population has attended

95. 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS 50 (Meir Shamgar ed. 1982).

96. Shlomo Slonin, *Why Israel Had to Say No*, Jerusalem Post, Nov. 6, 1990; Zilberman, *supra* note 53, at 9.

97. ISRAEL MINISTRY OF DEFENSE, JUDEA, SAMARIA, AND THE GAZA DISTRICT: A SIXTEEN-YEAR SURVEY 1967–1983, at 3–5, 13–35 (Nov. 1983); DON PERETZ, THE WEST BANK: HISTORY, POLITICS, SOCIETY, AND ECONOMY 106–14 (1986).

98. Briefing, Israel Ministry of Foreign Affairs, Jerusalem, Jan. 15. 1988, at 3.

HeinOnline -- 32 Harv. Int'l. L. J. 476 1991

school, and fourteen years of free schooling are available in state schools. Apart from limits on books containing anti-Jewish propaganda, Israel has not interfered with school syllabi set by local educational personnel. In 1967, there were no universities. Now, five universities, six colleges, and three teacher-training schools exist, all of which have the fullest academic freedom anywhere in the Arab world.

Ironically, some of the educational centers have become focal points of political discontent. Bir Zeit University has become a center of ideological ferment, and its cafeteria has been described as "the most vibrant and important political club in the territories."[99] In schools, demonstrations and stone-throwing have become a tradition. Schoolchildren "celebrate by playing hooky en masse . . . and by throwing stones at passing Israeli vehicles."[100] Schools are the natural place for a demonstration to begin because of the large numbers of children gathered in one place.[101]

Social and economic problems remain in the territories, as in all societies, but it is inappropriate to characterize the situation as intolerable or one of unbearable suffering. And it is difficult to depict the administration of the occupied territories as suppressive of civil and human rights, especially when residents have ready access both to the media, including American television, and to the courts. Admittedly, the core of the present discontent in the territories is not motivated primarily by social and economic dissatisfaction, but those who justify a "right of resistance" or the use of violence might take into account the various efforts by the Israeli government to improve the condition of Palestinians living in the territories.

IV. INTERNATIONAL LAW, HUMAN AND HUMANITARIAN RIGHTS

In order to evaluate the Israeli record on political and humanitarian rights in the occupied territories fairly, it is necessary to acknowledge the hostile political climate in the region, as well as Israel's genuine efforts to protect the norms of international law.

A. *Human Rights in a State of War*

International law properly distinguishes expectations about the exercise of human rights in normal and abnormal situations. In a paper dated October 28, 1981, Jordan's Permanent Representative to the

99. SCHIFF & YA'ARI, *supra* note 57, at 213.
100. Daoud Kuttab, *A Profile of the Stonethrowers*, 17 J. PALESTINE STUD. 15 (Spring 1988).
101. *Id.* at 16.

United Nations, Hazem Nuseibeh, pointed out the confusion in U.N. parlance between human rights in times of quiet and human rights in times of war. Nuseibeh asserted that each condition required a different legal regime.[102]

International conventions have codified the distinction between norms of human rights in normal and abnormal times. In abnormal circumstances, such as during a belligerent occupation, international law permits qualification of the human rights outlined in the Universal Declaration of Human Rights[103] and in the International Covenant on Civil and Political Rights.[104] Regardless of the legal validity of Resolution 181, the ensuing four decades since the adoption of that resolution have made its implementation impractical.[105] Both the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land[106] and the 1949 Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War ("Geneva IV"),[107] the principal embodiments of the law of belligerent occupation, allow an occupant to take measures to ensure that it is protected from hostile acts.

One example of the distinction between civil rights in times of war and peace is that in times of war international law permits internments and administrative detentions if necessary for security purposes in times of war. Article 78 of Geneva IV states that "if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."[108] Moreover, in the 1961 case of *Lawless v. Ireland*, the European Court of Human Rights ruled that international law permitted the use of administrative detentions in times of emergency.[109]

Consistent with international legal precedents, Israeli authorities have made a number of administrative arrests. Moreover, the practice of administrative detentions is permitted by article 64 of Geneva IV.[110]

102. Letter from Prince Hassan to the Secretary-General Proposing New International Humanitarian Order, U.N. Doc. A/36/245 (Oct. 30, 1981).
103. Dec. 16, 1966, 999 U.N.T.S. 3.
104. International Covenant on Civil and Political Rights, *supra* note 72.
105. Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 34–35, 350–54 (Theodor Meron ed. 1984).
106. Done at the The Hague, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 43 (A. Roberts & R. Guelff 1982) [hereinafter ROBERTS & GUELFF].
107. Done at Geneva, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 271.
108. Geneva IV art. 78, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 298. *See also* J. PICTET, COMMENTARY: IV GENEVA CONVENTION 36 (1958).
109. 1961 Y.B. Eur. Ct. Hum. Rts. 430–32.
110. PICTET, *supra* note 108, at 334.

According to that article, the penal laws of the occupied territory remain in force during occupation. Administrative detention was an element of both the Jordanian penal code and its predecessor, the penal law of the British Mandate. Under this system, persons suspected of involvement in terrorist activity or violence, or of incitement of terrorist activity or violence, may be detained for up to six months. This sentence may be extended without specific charges or trial.[111]

Generally, Israel has acted in accordance with the spirit of Geneva IV and has not attempted to impose its own values on the territories. The administrative detentions, curfews, and school and university closures imposed by the Israeli administration, if sometimes unwise, have been motivated by a desire to maintain law and order. Such actions are justifiable or perhaps even mandated by the international law of belligerent occupation. As noted earlier, the international law of belligerent occupation is still applicable to the territories until the parties negotiate a peace treaty.[112]

B. *The Israeli Predicament*

The foregoing discussion was not intended to indicate that Israel has free reign to impose any administrative or law enforcement scheme in the occupied territories. Falk and Weston are correct in asserting that the 1907 Hague Regulations and the Geneva IV of August 12, 1949, regulate the belligerent occupation of territory. Article 2 of the Geneva IV requires High Contracting Parties to apply the Convention to any belligerent occupation of territory of another High Contracting Party.[113] Despite the many examples of actual occupations by signatories of the Convention, such as that by the USSR in Afghanistan, Israel is the only contracting party which has applied in practice the Convention's provisions relating to occupied territories.[114]

111. Dov Shefti, *The Reports of the U.N. Special Committees on Israeli Practices in the Territories*, in 1 SHAMGAR, *supra* note 95, at 295.

112. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 434 (H. Lauterpacht 7th ed. 1952) ("The belligerent does not acquire sovereignty over the territory by the mere fact of military occupation, but he acquires the right to exercise military authority over it"). The basis for a settlement of the Arab-Israeli conflict is contained in U.N. Security Council Resolutions 242 and 338. The gist of Resolution 242 is that Israel should withdraw from occupied territories, all claims or states of belligerency should be terminated, and all states should recognize the "sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats of acts of force." Resolution 338 prescribes the framework for reaching the objectives set out in Resolution 242, and calls for an immediate cease-fire, implementation of Resolution 242, and the commencement of negotiations "aimed at establishing a just and durable peace in the Middle East." U.N. Security Council Resolution 242 (Concerning Principles for a Just and Lasting Peace in the Middle East), U.N. Doc. S/Inf/22/rev. 2, at 8 (1967).

113. STONE, *supra* note 42, at 209.

114. *See* Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families*, 18 ISR. Y.B. HUM. RTS. 177 (1988).

Further complicating Falk and Weston's argument is their claim that the 1977 Protocol I to the 1949 Geneva Convention[115] applies to the Israeli occupation. First, Israel has not signed the Protocol. Second, the Protocol cannot be considered customary international law because many major powers, including Britain, France, Japan, and the United States, have not acceded to it. Moreover, the drafters of certain provisions of the relevant conventions appear to have selectively manipulated the language to focus on the Israeli predicament; indeed, some of the Protocol's provisions appear designed to prevent Israel from putting captured P.L.O. terrorists in jail as criminals.[116] By conferring on the terrorists the status of "prisoners of war," Protocol I could imply that Israel is dealing with citizens of a "state." The Protocol invalidated the general rule that "prisoner of war" status applied only to belligerents who wore uniforms, carried their arms openly, and had an insignia. Gerson argues that the Protocols were designed to prevent Israel from putting P.L.O. guerrillas in jail as ordinary criminals, and any reference to P.L.O. prisoners as "prisoners of war" legitimizes the P.L.O.'s armed struggle against Israel.[117] The political aims of Protocol I are, in fact, made quite clear in its attempt to change the concept of international war to apply to armed conflicts conducted in the name of self-determination.[118] In other words, the Convention sustains the presumptuous and inaccurate assumption of Palestinian statehood which pervades much of the discussion of conditions in the occupied territories.

It is indeed ironic that despite all of Israel's efforts to meet international standards of protection for human rights, to use minimal force, and to conduct itself with restraint, Israel is consistently and uniquely condemned for violating international norms. As mentioned above, Israel is the only contracting party to the Geneva Convention that has in practice actually applied the Convention in occupied territories.[119] For instance, Israel's manual for military advocates is based

115. *See* Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977) ("Geneva Protocol I"). For a convenient text, see ROBERTS & GUELFF, *supra* note 106, at 389.

116. Allan Gerson, *Closing Remarks*, 21 N.Y.U. J. INT'L L. & POL. 569 (1989).

117. *Id.* at 569–70.

118. L.C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 215 (1985); Protocol I (1977) to the Geneva Conventions of August 12, 1949, article I(4) states in part that international war "include[s] armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . ." It might be helpful to keep in mind the general remark of Roberts, *supra* note 1, at 82, that the U.N. resolutions "have lost sight of laws of war principles as a possible restraint not just on occupying powers, but also on liberation movements." The Protocol, by not sufficiently distinguishing between combatant and civilian populations, and thus protecting terrorists, creates a danger to the civilian population as a whole.

119. Dinstein, *supra* note 114, at 177.

on the norms of international law and on the laws of war.[120] Since 1971, Israel has agreed to adhere *de facto*, if not *de jure*, to the humanitarian provisions of the Convention.[121] In general, the government has observed the customary norms of international law, whether codified or not, unless that law contradicts an express provision of the laws of Israel.[122]

Beyond applying international legal norms in dealing with security problems in the territories, Israel has since 1967 permitted over 75,000 Palestinians to reunite with their families by acquiring permanent residence in the territories. Israel undertook this program despite the fact that international law did not call for such reunifications and no explicit reference is made in the Hague or Geneva conventions to reunification.[123]

Although Israel did not ratify the Protocols Additional to the 1949 Geneva Convention,[124] Israel has had a close working relationship with the International Committee of the Red Cross (ICRC) at all levels of military and administrative authority,[125] and it has given the ICRC free access to all the territories. The ICRC may privately visit detainees under interrogation and can raise any issue of concern. And yet, the Red Cross arbitrarily discriminates against Israel by refusing recognition of the Magen David Adom (the Red Shield of David) as a protective emblem, and by deliberately excluding the Magen David Adom Society (the national Geneva Convention relief society) from full participation in the International Red Cross. The nature of this discrimination is highlighted by article 41 of the Geneva Convention of August 12, 1949, which allows the use of symbols of Islamic countries.[126]

---

120. SHAMGAR, *supra* note 95, at 27.

121. Shamgar, *Observance of International Law in the Occupied Territories*, 1971 ISR. Y.B. ON HUM. RTS. 266; ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES, 1967 - 1982, at 43 (1985). The Court accepts jurisdiction of petitions against military commanders and allows judicial review of military actions that infringe on the rights of civilians. Some 85 soldiers have been court-martialed for their acts during the intifada.

122. SHAMGAR, *supra* note 95, at 15; Abu Itta v. Commander of the Judea and Samaria Region, 37(2) P.D. 197 (Israeli Supr. Ct. 1983).

123. *Id.* at 177.

124. *See* Geneva Protocol I, *supra* note 115, and the Protocol Additional (II) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 ("Geneva Protocol II"), *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 447.

125. Alan Baker, *Explanation of Vote*, G.A. 45th Session, Sixth Committee: 44th Meeting, Nov. 19, 1990, at 2.

126. "[I]n the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, these emblems are also recognized by the terms of the present Convention." Geneva IV art. 41, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 286.

HeinOnline -- 32 Harv. Int'l. L. J. 481 1991

C. The Israeli Supreme Court and International Law

Significantly, the Israeli Supreme Court has played an essential role in protecting human rights and enforcing the Geneva Convention in the region. It has taken the humanitarian provisions of the Geneva Convention into consideration and at times has called for their direct implementation.[127] The Court has used the Hague Regulations as an expression of customary international law and has referred to such law in its decisions.[128] In addition, the Court has responsibility for overseeing the acts and legislation of the military government in light of the Fourth Convention, despite the fact that the Convention has not been formally incorporated into Israel's legal system. Finally, the Court has questioned the extent to which security considerations justify Israeli law enforcement actions.

Perhaps most important for purposes of protecting human rights in the region, non-Israeli residents of the territories have standing in Israeli courts to bring claims against the government and its military and civilian agencies.[129] The Israeli Supreme Court, sitting as the High Court of Justice, has heard petitions from Palestinians to provide remedies for arbitrary or illegal acts. In this context, military commanders and their subordinates in the territories, as agents of the executive branch, are subject to the jurisdiction of the Supreme Court. And in exercising this jurisdiction, the Court has relied not only on principles of Israeli administrative law, but also on customary international law, provided there is no conflict with local laws.[130] The Court has granted petitioners the possibility of effective remedy and it has applied the Hague Regulations as part of customary international law at least since *Ayub v. Minister of Defence*.[131] The weight of the Court has therefore been placed on the scales to constrain violations of humanitarian rights.[132] Indeed, the Israeli occupation is unique both in the control the civilian court system exercises and in the fact that the military branches avail themselves of preliminary legal advice before taking action.[133]

---

127. *See, e.g.*, H.C.13 + 58/86 Shaine v. Commander of I.D.F. Forces in the Judea and Samaria Region, 41(1) P.D.197 (1986).

128. Dinstein, *supra note* 105, at 176. H.C. 390/79 Dweitat v. Government of Israel, 34(1) P.D. 1 (1980).

129. COHEN, *supra* note 121, at 80.

130. Dinstein, *supra* note 105, at 174; Justice Haim H. Cohen, *Foreword*, THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL, at viii–ix (1981).

131. 33(2)P.D. (1978).

132. Moshe Negbi, *On Occupation, Intifada, and Constitutional Crisis in Israel*, JERUSALEM Q. 30–31 (Fall 1989).

133. Moshe Negbi, *The Israel Supreme Court and the Occupied Territories*, JERUSALEM Q. 41 (Spring 1983).

HeinOnline -- 32 Harv. Int'l. L. J. 482 1991

The structure of the legal regime in the territories provides an avenue for effective non-violent response to alleged violations of human rights, undermining Falk and Weston's apparent justification for Palestinian violence. Those who claim their rights have been violated can appeal to the military court system and then to the Supreme Court. This is the first time in the history of belligerent occupation that individuals in an occupied territory have been granted the right of appeal to the highest court of the occupant. The courts martial, operating on procedure and laws of evidence similar to those in Israeli courts, have sentenced or penalized soldiers for illegal acts against Arabs. And the Supreme Court has dealt with a variety of cases, including deportations, demolitions, reunification of families, and settlements, thus allowing it to question the discretion of the military authorities. Most recently, an Israeli was convicted for ordering the use of excessive force in violation of law. Still, the task of interpreting military action from the perspective of international law has not been easy. As has been the case throughout legal history, although lawyers may dispute certain Court decisions, this does not in itself refute the system's sincerity in trying to maintain international standards.

One example of the difficulty and complexity of applying and interpreting international law in the territories is the *Jamayat Iscaan* case of 1982, concerning the expropriation of land for the construction of highways that were to connect the territories with Israel.[134] Article 43 of the Hague Regulations requires the occupant to "restore, and ensure as far as possible public order and safety, while respecting, unless absolutely prevented, the laws enforced in the country."[135] In the *Jamayat Iscaan*, the Court held that article 43 accommodated concerns for economic development and the needs of a long-term military government. In addition, "longterm basic investments . . . are permissible if they are required for the benefit of the local population, provided they do not affect substantial change in the fundamental institutions of the zone."[136] Ultimately, the Court held that Israeli action was not beyond the authority of the military government.

Cases of this kind give rise to difficult problems in international law. Occupation does not by itself affect the legal status of a territory, nor is annexation of the territory by unilateral action of the occupant permitted. Occasionally, however, the principle of *ex factis jus oritur* has been sanctioned. Israel does not regard itself as the sovereign power in the territories, except in the annexed areas. It accepts the

134. Jamayat Iscaan v. Commander of I.D.F. Forces in the Judea and Samaria Region, 37 (4) H.C. 393 (1982) [hereinafter Jamayat Iscaan].

135. 1907 Hague Regulations, art. 43, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 55.

136. Iscaan, *supra* note 134, at 801.

HeinOnline -- 32 Harv. Int'l. L. J. 483 1991

requirement to preserve the existing laws and institutions, except where they are regarded as unfair, such as the Jordanian disenfranchisement of Palestinian women and non-propertied males.

Both the Hague and Geneva Conventions, as well as the 1945 British Regulations,[137] allow for the limitation of rights where the relationship between occupier and occupied so requires. Article 5 of Geneva IV permits the forfeiture of rights of communication by those suspected of hostile activity. Article 43 of the Hague resolutions allows limits on freedom of movement and association, and the imposition of curfews and censorship to prevent acts of sabotage, possession of arms, or hostile organization. Article 64 allows for the creation of penal laws to fulfill obligations of the occupant.[138] Yoram Dinstein has pointed out that since military occupation is not democratic, and its prime objective is not the welfare of the population, political activity can be limited if it is viewed as harmful[139] or likely to foment disorder.[140]

Minimum international standards of due process of law exist to ensure the life, liberty, and property of civilians in the territories, although no absolute protection of these rights exists.[141] Individuals in the territories may be detained as a preventive administrative measure, provided that procedures established by article 78 of Geneva IV are followed. Moreover, the Israeli Supreme Court in the 1972 *El-Tin* case held that limitations on freedom of movement were permitted under international law.[142]

Furthermore, some 2000 deportations have occurred. The General Assembly has criticized Israel for these individual deportations in a series of resolutions, the first of which was Resolution 2546 (XXIV) of December 1969. However, these deportations are not the mass deportations designed to displace an entire population, which are the

137. British Defense (Emergency) Regulations of 1945, *reprinted in* Palestine Gazette No. 1442 (Supp. No. 2, 1945) at 1058–98. The Israeli Supreme Court ruled that the Regulations remained in force in Abu Awad v. Regional Commander of Judea and Samaria, H.C. 97/79, 33(iii), P.D. 309 (1979).

138. Article 64 reads:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

Geneva IV art. 64, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 293.

139. Arnon v. Attorney General, 27(1) PD, 233, 237, H.C. 507/72 (1972).

140. Dinstein, *Legislative Power in Occupied Territories*, 2 TEL AVIV U. L. REV. 505–12 (1972).

141. Dinstein, *The International Law of Belligerent Occupation*, 1978 ISR. Y.B. HUM. RTS. 116.

142. The Supreme Court held in El-Tin v. Minister of Defense et al., 27(1) P.D. 481, 485, H.C. 500/72 (1972), that an occupant can limit freedom of movement in the territories.

HeinOnline -- 32 Harv. Int'l. L. J. 484 1991

principle concern of the relevant clauses of Geneva IV, especially in light of the Nazi transfer of peoples during the Holocaust.[143] Rather, these are deportations of specific individuals who are regarded, rightly or wrongly, as imperiling security.[144] Moreover, the deportees are often sent to Jordan, an Arab country which, until 1967, claimed sovereignty over them, as its population is sixty percent Palestinian, and thus has been regarded by some observers as a Palestinian nation.

D. *The Relevance of General Assembly Resolutions*

The status of General Assembly resolutions as international law is debatable. Respected international lawyers disagree on the power of the General Assembly to create authentic and binding interpretations. In 1966, Professor Falk made the case for the "law-creating" power of the Assembly. Yet Falk acknowledged that "if the Charter intent is decisive and strictly construed, it becomes impossible to attribute binding force to resolutions of the General Assembly or to consider that the Assembly is in any sense an active, potential or partial legislative organ."[145] In 1955, Hersch Lauterpacht of the I.C.J. stated that while "decisions of the General Assembly are endowed with full legal effect in some spheres of [U.N.] activity . . . [generally] they are not legally binding upon the Members of the United Nations . . . and are in the nature of recommendations."[146] Each member state remains free to act on the Assembly's non-binding recommendations. Furthermore, in the 1962 *Certain Expenses of the UN* case, the I.C.J. held that only the Security Council has power to impose explicit obligations of compliance.[147] In its *Namibia* opinion in 1971, the I.C.J. held that the resolution being discussed had legal effect only upon its receiving the endorsement of the Security Council.[148] Even

143. Article 49 states:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake the total or partial evacuation of a given area, if the security of the population or imperative military reasons so demand. Such evacuation may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

Geneva IV art. 49, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 288.

144. *See* Awaad v. Commander of the Judea and Samaria Region, 33(3) P.D. 309 (1979).

145. Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 783 (1966).

146. South West Africa Voting Procedure Advisory Opinion, 1955 I.C.J. at 115 (H. Lauterpacht, J., concurring).

147. Certain Expenses of the United Nations, 1962 I.C.J. 151.

148. Namibia Advisory Opinion, 1971 I.C.J. 16. The official decision favored the view that General Assembly resolutions have binding effect only upon endorsement by the Security Council.

HeinOnline -- 32 Harv. Int'l. L. J. 485 1991

in the contentious matter of Resolution 181, the majority of the states believed the Resolution could be legally binding only after a Security Council decision implemented it.

In the words of Thomas Franck, members of the Non-Aligned Movement "regularly distort their numerical preponderance to heighten tensions and hinder dialogue."[149] International law does not exist in a political vacuum, and care should be taken that laws have not resulted from either pro-Israeli or anti-Israeli political machination in the Security Council or in the Assembly.[150]

Any realistic appraisal of the relationship of U.N. activity to international law cannot discount the constant animus against Israel or the host of charges later proven groundless. Perhaps the most serious of these groundless charges was the suggestion that Israel poisoned the water supply for school children in the territories in 1983.[151] The unceasing criticism by the General Assembly of almost all Israeli actions against resistance fails "to note that the dilemmas Israel faces are difficult and its rights under the law on occupations real."[152]

V. ISRAEL AND INTERNATIONAL CONVENTIONS

Much of the case made by Falk and Weston and the international organizations critical of Israel rests on the view that Israel has acted in violation of the Geneva IV, which it signed on August 12, 1949 and ratified on July 6, 1951. It is ironic that this charge should be made in reference to a convention the purpose of which was to prevent the recurrence of a Nazi-like occupation with its brutality, disregard of human rights, physical and mental coercion, taking of hostages, and imposition of foreign law.[153] The most relevant is article 49 of Geneva IV, which forbids "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to

149. FRANCK, *supra* note 21, at 117.

150. Such political bias in the Security Council was noted by Trygve Lie, who was dismayed when the Security Council on May 15, 1948 failed to condemn Arab aggression against Israel. He observed that "there seemed to be a conspiracy of silence reminiscent of the most disheartening head-in-the-sand moments of the Chamberlain appeasement era." LIE, *supra* note 13, at 175.

151. Letter to the President of the Security Council, U.N. Doc. S/15674 (1983). Arab representatives, in letters to the President of the Security Council, charged that Israel had engaged in "collective poisoning of over 1000 Palestinian schoolgirls," and that it was "exercising genocide against the Arabs" using "some kind of poison." Despite numerous official reports refuting these allegations, the Security Council never stated that the Arab allegations were false. BLUM, *supra* note 14, at 21–23; Letter from Blum to President of Security Council, 29 Mar. 1983, U.N. SCOR, U.N.Doc. S/15659 (1983); Letter from Blum to the President of the Security Council, Apr. 3, 1983, U.N. SCOR, U.N.Doc. S/15674 (1983).

152. Roberts, *supra* note 1, at 82.

153. Ruth Lapidot, *The Expulsion of Civilians from Areas which Came under Israeli Control in 1967: Some Legal Issues*, forthcoming in EUR. J. INT'L L. (1991); L.C. GREEN, *supra* note 118, at 95.

HeinOnline -- 32 Harv. Int'l. L. J. 486 1991

the territory of the Occupying Power or to that of any other country."[154] Moreover, it states that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."[155] Article 49 has been interpreted as "intended to cover cases of the occupant bringing in its nationals for the purposes of displacing the population of the occupied territory."[156] In addition, article 147 of the Geneva Conventions forbids "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[157]

Israel has held that the Geneva IV is not applicable to the territories since article 2 refers to "cases of . . . occupation of the territory of *a High Contracting Party* by another such Party."[158] The territories do not legally belong to any party that is a signatory state. Jordan was not a legitimate sovereign in the West Bank, and Egypt did not acquire sovereignty during its military occupation of Gaza. The West Bank and Gaza are still unallocated areas, and technically the Geneva Convention is not applicable.[159] Israel's acceptance of the *de jure* applicability of Geneva IV might imply its recognition of Jordanian sovereignty over the West Bank, a recognition that was refused by the general international community, including all of the Arab states.[160]

The Geneva Convention is intended for short-term military occupation, not for what might be described as the *sui generis* situation in the territories. Jordan, the state ousted from the West Bank in 1967, was never the legitimate sovereign, and therefore the rules of belligerent occupancy pertinent to a former sovereign power are not relevant.[161]

Despite the technical inapplicability of Geneva IV, Israel has nevertheless agreed to act in accordance with the basic norms of customary international law and the principles of natural justice, and to apply *de facto* all the humanitarian provisions of the Convention. For example, the Geneva Convention requires warring nations to preserve the existing laws and institutions of the occupied state. Israel assumed the administrative functions and responsibilities formerly undertaken by Jordan, from 1949 to 1967, on the basis of Hague article 43 by which

154. Geneva IV art. 49, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 288.
155. *Id.*
156. OPPENHEIM, *supra* note 112, at 452.
157. Geneva IV art. 147, *reprinted in* ROBERTS & GUELFF, *supra* note 106.
158. Geneva IV art. 2, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 272.
159. William V. O'Brien, *Israel, the West Bank and International Law*, Wash. Star, Nov. 26, 1978.
160. Blum, *supra* note 45, at 279–301.
161. Remarks of Chaim Herzog, UNGA Oct. 26, 1977, 47th Plenary Meeting, A/321 P.V. 47, 869.

HeinOnline -- 32 Harv. Int'l. L. J. 487 1991

powers pass *de facto* to the military occupant.[162] Moreover, Israel has maintained Jordanian law where possible, and local courts and officials continue to function.[163]

At the same time, Israel has introduced important reforms in local affairs, including the right of women to vote, and the freedoms of religious worship, press, and criticism. In addition, the status of public officials has not been altered. No political organization was outlawed, and no media organizations were closed, except for those that were believed to have incited terrorism.[164]

In a number of ways, Israel has gone beyond the requirements of the Convention. Israel has not applied capital punishment in the territories, although the Convention allows it. As mentioned above, all residents have free access to the Supreme Court, which accepts jurisdiction of petitions against military commanders and their subordinates in the territories and allows judicial review of military actions concerning the rights of civilians. Israel has also permitted thousands of people to move in and out of the territories, has facilitated trade, and has enabled the population to hold elections. Yet, the object of most criticism is ultimately the dispute over title to the territories, rather than the waywardness of military rule. The emphasis on adherence *de jure* to the Convention appears more an attempt to prejudge the status of the territories than an argument for abiding by international law.

A formidable panoply of international organizations, ignoring Israel's efforts to comply with and even go beyond the Convention, has endorsed criticism of Israeli rule with enthusiastic rhetoric. A typical example is the U.N. Commission on Human Rights, which held that the occupation is "a fundamental violation of the human rights of the civilian population of the occupied Arab territories . . . ."[165] By contrast, the murders of some 400 Palestinians by their fellow Arabs, sometimes categorized as "executions," have been treated with indifference and conspicuous silence by the international community. Meanwhile, on December 6, 1990, advocates of the Palestinian cause called for a meeting of the 164 signatories to Geneva IV in order to discuss possible measures to protect the Palestinians in the territories.[166] It is worth noting that this is the first time that such a meeting

162. *See* Christian Society for the Holy Places v. Minister of Defense, H.C. 337/71, 26(1), P.D. 574 (1972).
163. Shamgar, *supra* note 121, at 262–77.
164. *Id.*
165. U.N. Commission on Human Rights, Res. 1987/2, U.N. ESCOR Supp. No. 5 at 43, U.N. Doc. E/1987/18 (1987).
166. G.A. Res. 44/42, 49 U.N. GAOR Supp. 45–46, U.N. Doc. A/44/49 (Dec. 6, 1990). In April 1991, U.N. Secretary-General Perez de Cuellar asked the 164 signatories for their opinions on holding a conference to discuss Israel's treatment of the Palestinians in the territories, and on whether this treatment conforms to the Geneva Convention.

HeinOnline -- 32 Harv. Int'l. L. J. 488 1991

has been suggested for any country, and that many of the signatories have themselves engaged in brutal or inhumane acts against people in their own countries.

The very volume and extreme nature of the U.N. criticisms of Israeli policy, and the wholly disproportionate energy allotted to the subject, make the resolutions wholly unsuitable to any effort at finding a genuine resolution of the Arab-Israeli conflict.[167] A dispassionate observer could quickly detect the bias of the U.N. Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories.[168] Since October 1970, the Committee has issued a series of 22 strong reports wholly critical of Israeli policies.[169] It is striking to note, however, that two of the three states initially on the Committee did not have diplomatic relations with Israel and one of them, Somalia, considered itself at war with Israel.

Not only have the international organizations shown prejudice toward Israel, but they have also endorsed the use of violence. The U.N. Human Rights Commission determined that the force employed in the intifada was lawful, and it upheld "the right of the Palestinian people to regain their rights by all means in accordance with the purposes and principles of the Charter of the U.N. and with relevant U.N. resolutions";[170] it held that the intifada "is a form of legitimate resistance, an expression of their rejection of occupation."[171] At the same time, the Special Political Committee of the U.N. on November 28, 1990, referred to Israel's breaches of Geneva IV as "war crimes and an affront to humanity."[172]

In judging the pronouncements of these U.N. organizations, one must take into account the political reality of the U.N. structure. The General Assembly is primarily comprised of Third World countries, and as a result of Third World alliances has been automatically critical of Israel. In addition, the practice of selecting Security Council mem-

167. Roberts, *supra* note 1, at 82.
168. U.N.G.A. Res. 2443 (XXIII) (Dec. 19, 1968).
169. FRANCK, *supra* note 21, at 213. The very creation of the Committee meant that the Assembly had concluded that human rights were being violated. William Buckley, then a member of the U.S. delegation, immediately recognized that the Committee was "staffed conspicuously, in some ways flagrantly, by anti-Israel people." William F. Buckley, 1974 U.N.J. 175. In its resolution 44/48A of December 8, 1989, the General Assembly changed the name to "Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs in the Occupied Territories." In its most recent effort of October 19, 1990 (A/45/576), the Committee, while harshly criticizing Israel, made no mention of the killing of Palestinians by fellow Palestinians or the killing of Jews by Palestinians.
170. U.N. Comm. on Human Rights, Res. 1988/3, U.N. ESCOR Supp. No. 2 at 26, UN Doc. E/CN4 (1988).
171. *Id.*
172. U.N. Press Release, U.N. GAOR SPC2001, 27th Meeting (Nov. 28, 1990).

HeinOnline -- 32 Harv. Int'l. L. J. 489 1991

bers from five regional blocs has meant that the Arab League and its allies are always represented. Fifteen Arab states (including Syria, Iraq, Lebanon and Yemen), as well as members of the Organization of the Islamic Conference and members of the Non-Aligned Movement, which do not recognize or have diplomatic relations with Israel, have served on the Security Council.[173] By contrast, Israel has never served on the Council. Not surprisingly, there has never been a Council resolution critical of Arab attacks on Israel, the murder of Jews, or of P.L.O. atrocities.

There is room for legitimate differences on the extent of Israel's violations of humanitarian principles. Debate can range around the empirical definitions of "military necessity," "public order and safety," and "absolute necessity." There may also be legitimate disagreement on what measures may be taken "to maintain the orderly government of the territory and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and . . . of the establishments and lines of communication used by them" under article 64 of Geneva IV.[174]

The Israeli Supreme Court held that Geneva IV is a constitutive treaty and is therefore not an automatic part of the law of Israel as is customary international law and declaratory treaties.[175] As a result, the Geneva IV needs Israeli legislative action before it becomes part of Israeli law. So far, the Court has divided on whether it has the right to implement the humanitarian provisions of Geneva IV.[176]

Despite the uncertainty over whether the humanitarian principles of Geneva IV apply, the Court has examined the actions of the military government in the light of the Convention. On a number of issues, however, the Court has held that regulations issued on the basis of the British Defense (Emergency) Regulations of 1945[177] are still valid and in force. The regulations provide for administrative detention and deportation of those who might pose a danger to security, allow for the temporary restriction of travel and for the demolition of property when it is used to base terrorist attack. The regulations thus constitute part of the local law in the territories, and the Israeli Military Government consequently has recourse to implement them by virtue of

173. HARRIS O. SCHOENBERG, A PATTERN OF PREJUDICE: THE UNITED NATIONS DEALS WITH ISRAEL 3 (1990).
174. Geneva IV art. 64, *reprinted in* ROBERTS & GUELFF, *supra* note 106, at 293.
175. Lapidot, *supra* note 153; Kawassmeh et al. v. Minister of Defense et al., 35 (1) P.D. 617 (1981).
176. The Israeli Supreme Court has held that article 49 of the Convention does not ban individual deportations, believing that the Article refers to large scale transfers of population such as those perpetrated by the Third Reich. Abu v. Commander of the IDF Forces in the West Bank, H.C. 97/79, 33 (iii), P.D. 309 (1979).
177. British Defense (Emergency) Regulations of 1945, *supra* note 137, at 1058–98.

HeinOnline -- 32 Harv. Int'l. L. J. 490 1991

article 64, according to which the penal law of the occupied territory shall remain in force.[178] The Supreme Court ruled in the *Awad* case that the 1945 Regulations remained in force as a part of Jordanian law.[179]

Article 49 of Geneva IV provides that "the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand."[180] By the Convention, Israel is obliged to preserve public order in the territories, and has the "right to employ the necessary means to ensure its own security."[181]

According to the Red Cross Commentary on the Geneva Convention, the Occupying Power shall judge the importance of such military requirements, although the Commentary also warns of possible bad faith in application, and holds that "the occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done."[182] The Israeli High Court has tried to examine the actions of the authorities in the light of the Commentary's statement that "the Occupying Power must try to interpret the case in a reasonable manner."[183] The Court is limited when examining the actions of the military, however, because the Court is restricted to examining the procedural aspects of cases brought to it. The military, on the other hand, has been imbued with the power to evaluate security needs and is presumed to act in good faith.[184]

Violations and excesses have undoubtedly occurred, even if the numbers have been exaggerated by the Palestinian cause. Still, even the violations that have occurred must be viewed in the proper perspective. Soldiers and police, accused of using unwarranted force in the territories, have been tried in the courts. Israel has closed schools and universities in the territories, but only after it was convinced that these schools had instigated violence in the intifada. Property which has served as a base for terrorist acts has been demolished or closed, but this demolition cannot be equated with the "collective penalties"

178. Dov Shefti, *The Report of the UN Special Committee on Israeli Practices in the Territories, A Survey and Evaluation*, in SHAMGAR, *supra* note 95, at 297–98.
179. Awad v. The Area Commander for Judea and Samaria, PD 33(3) 309 (1979).
180. Geneva IV art. 49, *supra* note 143, at 288.
181. Opinion of Sussman P., Abu Awad v. Commander of Judea and Samaria, H.C. 97/79, 33 (iii), at 316.
182. OSCAR M. UHLER, ET AL., THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 6 (1958).
183. PICTET, *supra* note 108.
184. "From the High Court's judgements it is clear that the Military Commander does not enjoy unlimited discretion in exercising his authority . . . he is free to act only if he has in his possession material [of] 'sufficient probative value' regarding existence of the said conditions in the Regulations." Ha-aretz, Apr. 11, 1988.

HeinOnline -- 32 Harv. Int'l. L. J. 491 1991

forbidden by article 33 of Geneva IV, however, because it is necessary for reasons of security. In the case of the Latrun villages, homes were destroyed to create access to the Latrun route to Jerusalem. This route was necessary to provide access to Israeli military positions around Jerusalem. Public land has also been used, but only for security or military reasons and not for economic exploitation. Deportations have been conducted, but only when required for security purposes, and never for political or ethnic reasons, forced labor, or extermination.

VI. LEGITIMATE TITLE TO THE OCCUPIED TERRITORIES

Under international law, Israel can occupy the territories until a peace agreement is reached since there is no sovereign authority with title. The most salient document remains the Security Council Resolution 242, which does not require withdrawal by Israel until the establishment of a just and lasting peace through negotiations. Furthermore, it does not attribute sovereignty to any designated party. Falk and Weston assume that the locus of sovereignty lies with the Palestinian people, but alternative claims are relevant. The Mandate for Palestine entrusted to Britain on July 24, 1922 provides a basis for the Israeli claim to sovereignty. The Mandate provides for "the establishment in Palestine of a national home for the Jewish people" without prejudice to "the *civil and religious* rights of existing non-Jewish communities in Palestine."[185] Eugene Rostow argues that the Mandate, in fact, still applies to the West Bank and Gaza because these areas have not been allocated either to Israel or Jordan, nor have they become an independent state.[186]

Symptomatic of the conflicting sovereign claims is the fact that the actual legal regime now functioning in the territories is an amalgam of Mandatory law, Jordanian law, Israeli law, military administrative law, and recently enacted local ordinances. As the occupying power, Israel has applied the humanitarian provisions of Geneva IV, and has largely left Jordanian law in effect. Over the twenty-three-year period of occupation, however, military commanders have made a number of changes required by economic and social needs, and by administrative necessity. In addition, regional and local councils have added their own rules.

Although Israel does not recognize Jordanian sovereignty on the West Bank, it has not officially proposed annexation of the West

185. *See* 2 REPORT TO THE GENERAL ASSEMBLY OF THE UNITED NATIONS SPECIAL COMMITTEE ON PALESTINE—ANNEXES, APPENDIX AND MAPS 18–22, U.N. Doc. A/364 Add. 1 (Sept. 9, 1947).
186. Eugene Rostow, *Letter to Editor*, 84 AM. J. INT'L L. 717, 718 (1990).

HeinOnline -- 32 Harv. Int'l. L. J. 492 1991

Bank, with the exception of East Jerusalem.[187] Israeli law relating to offenses, income tax, VAT, and land appreciation, is pertinent only to the Jewish residents of the territories. Some services, such as postal and telephone, are provided by the government to the settlers. Similar services for the Palestinians are provided by specialists who are part of the military government although professionally connected to the substantive ministries in Israel.

On the controversial question of Jewish settlements, international law gives no clear answer. In Rostow's view, because the West Bank is an unallocated part of the British Mandate, settlements can continue until a new state is created or an annexation takes place.[188] The Hague Regulations do not deal with the question of civilian settlements in the territories. Article 49 of Geneva IV forbids "individual or mass forcible transfers" and the "transfer of parts of (the occupant's) civilian population."[189] Objections on these grounds have been made to the settlements that are sponsored and financed by the government. There is, however, no automatic legal ban on the establishment of voluntary settlements on an individual basis, nor on their location, if the underlying purpose is security, public order, or safety, and as long as they do not involve the taking of private property. The blanket condemnation of settlements by the General Assembly since December 1976 not only ignores this fundamental distinction between voluntary and government-sponsored settlements, but also disregards historical and legal rights of Jews in the Etzion bloc and in Hebron, and in the incorporation into the Jerusalem area of Neve Ya'acov and Atarot, which were Jewish villages before 1948.

The Israeli Supreme Court has rendered different decisions on the settlement question, approving settlements on security grounds, as in the Beth-El case, March 13, 1979, and denying them where they did not contribute to security, as in the case of Elon Moreh.[190] Despite strong differences over the legality, as well as the political desirability, of Jewish settlements, Allan Gerson has pointed out that "in the perspective of contemporary international law, Israel's land acquisition and settlement policy was not unlawful, as it neither aimed for, nor

187. On July 31, 1980, the Knesset adopted a Basic Law declaring Jerusalem the capital of Israel, in response to Security Council Resolution 465 of March 1, 1980, which called for the dismantling of settlements "in the Arab territories occupied since 1967, including Jerusalem." *See* Slonin, *Why Israel Had to Say No*, Jerusalem Post, Nov. 6, 1990; Slonin, *The United States and the Status of Jerusalem, 1947–1984*, 19 Isr. L. Rev. 179, 243–44.

188. Rostow, *supra* note 40, at 21–22.

189. Geneva IV art. 49, *supra* note 143.

190. Ayub v. Minister of Defense, H.C. 606/78 (1979), P.D. (2) 113; Dweikat v. Government of Israel, H.C. 390/79 34(i), P.D. 1 (1980). *See* Yoram Dinstein, *Elon Moreh: The Question of Legality*, Ha-aretz, June 12, 1979, at 2.

HeinOnline -- 32 Harv. Int'l. L. J. 493 1991

reared, a state involving displacement of the existing population as a prelude to future annexation."[191]

VII. A RIGHT OF RESISTANCE?

In their article, Falk and Weston argue for an internationally sanctioned right of resistance. While some support for this view appears in the 1970 Declaration of Friendly Relations and in the 1974 U.N. Definition of Aggression, international law calls for extensive restrictions on the methods, weapons, and targets of liberation movements.[192] The issue of a Palestinian right of resistance is prejudged, because its objective is the capture of territories that were never under Palestinian control. The General Assembly has generally approved the struggle for independence by peoples under foreign domination as legitimate, even if the struggle involves violence. In the case of the Palestinians, however, it has taken an extreme position, labeling Israeli occupation as a denial of the right of Palestinian self-determination and "a serious and increasing threat to international peace and security."[193]

Although article 2(4) of the U.N. Charter addressed to the U.N. Member States prohibits "the threat or use of force against the territorial integrity or political independence of any state,"[194] the U.N. Commission on Human Rights has considered the force used by Palestinians in the territories as lawful and as "a form of legitimate resistance, an expression of their rejection of occupation."[195] Yet, as mentioned earlier, any argument that Palestinian action is justified because Israel took the territories by force in 1967 is fallacious. Attempts organized by the Soviet Union to label Israel's actions in June 1967 as "aggression" failed in both the Security Council and the General Assembly. Nasser's belligerent statement of May 27, 1967—"Our basic objective will be the destruction of Israel"[196]—leaves little doubt as to the identity of the aggressor.

Exercise of the right of self-defense is justified in the light of the requirements formulated by Webster in the 1837 *Carolina* case, discussed earlier: necessity, proportionality, and immediacy.[197] Professor

191. Gerson, *supra* note 36, at 173–74.

192. Annex to *Declaration on Principles of International Law Concerning Friendly Relations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 122, U.N. Doc. A/8028 (1970); Annex to *Definition of Aggression*, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

193. G.A. Res. 24/44, U.N. Doc. A/34/46 (1980).

194. Done at San Francisco, June 26, 1945, 1976 Y.B.U.N. 1043.

195. G.A. Res. 1988/3, U.N. Doc. E/Cn/4 (1988).

196. *Myths and Facts*, 1978 Near East Rep. 25. For a similar statement by Nasser on May 26, 1967 see Theodor Draper, Israel and World Politics 222 (1968).

197. Dinstein, *supra* note 34, at 227.

HeinOnline -- 32 Harv. Int'l. L. J. 494 1991

Falk has himself upheld this view: "Israel was entitled to strike first in June of 1967, so menacing and imminent was the threat of aggression being mounted against her."[198] By contrast, King Hussein refused to abide by the message sent from Israel on June 5, 1967 (by a U.N. intermediary) urging him to stay out of the war; instead, he ordered his forces to open fire, and as a result, lost the West Bank. Consequently, Israel has a legitimate right to administer the area until an eventual settlement by peace treaty with its Arab neighbors has been achieved, and the argument that resistance is justified because Israel's occupation is illegal is without merit.

The proper role for international law at this historic juncture ought to be one of assisting and fostering peace between Israel and its Arab neighbors. Two alternative approaches to legal issues are possible: they may be used either as a means of negotiation or as a tool of condemnation. Today, the latter has been international law's principal use, as demonstrated by the bias against Israel in international organizations and by the international legal argument of Falk and Weston. Bias of this kind can only encourage extremism and does not serve the cause of peace. The Arab-Israeli conflict can only be resolved by the exercise of judgment, by a judicial, or at least judicious, approach.

---

198. Falk, *Reply to Professor Julius Stone*, 64 AM. J. INT'L L. 162, 163 (1970).

HeinOnline -- 32 Harv. Int'l. L. J. 495 1991