VOLUME 33, NUMBER 1, WINTER 1992

The Israeli-Occupied Territories, International Law, and the Boundaries of Scholarly Discourse: A Reply to Michael Curtis*

Richard A. Falk**
Burns H. Weston***

There is a troubling problem in scholarly debate: it is not always easy to distinguish between a genuine engagement of contending views and a cynical polemical exercise intended to appear detached and respectable. In responding to our essay on "The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada,"[1] Professor Michael Curtis presents this problem in an acute form.[2] He writes, in our judgment, as an Israeli apologist who will go to virtually any length to discredit opposing views, no matter what the evidence. Part of his extremism involves a clever, but irresponsible, stratagem of role reversal, casting us as the polemicist and purporting himself to be the dispassionate scholar.

We find it distressing—and not merely irksome—to be confronted by this diversionary tactic. We were moved to write our article because we believe, partly as a result of personal witness, that the Palestinian people living under Israeli occupation in the West Bank and Gaza (and representing more than a third of all Palestinians) have been and continue to be severely victimized by systematic and gross violations of their fundamental rights under international humanitarian law. It is our professional ethical responsibility, we believe, to work against injustice wherever and by whomever inflicted. Regrettably, rather than meet us on a plane of principled if differently construed concern, Professor Curtis chose to distort and ridicule.

** Albert G. Milbank Professor of International Law and Practice, Princeton University.
*** Bessie Dutton Murray Professor of Law and Chair, Graduate Program in International and Comparative Law, The University of Iowa.
1. 32 HARV. INT'L L.J. 129 (1991) [hereinafter "Falk & Weston"].
2. *See* Curtis, *International Law and the Territories*, 32 HARV. INT'L L.J. 457 (1991) [hereinafter "Curtis"].

In the end, our position rests on an appeal to the evidence fully and fairly considered. This evidence, when measured against the legal standards that are relevant, clearly indicts the policies and practices that have guided Israel's approach to the occupied territories. By exposing and clarifying Israel's pattern of legal abuse, we believed we could help put the legal status of the Palestinian *intifada* resistance in appropriate perspective and thereby encourage a just accommodation of interests. We of course do not claim to be dispassionate about the underlying circumstance of Palestinian oppression against which our legal arguments are directed. Nor do we contend that there are no reasonable counter-arguments or counter-interpretations. We do assert, however, that Professor Curtis evinces little interest in putting such arguments and interpretations forward, much less in meeting our arguments and interpretations in the professional manner and spirit in which they were advanced. Our recourse to international law was based on a conviction that the legal guidelines as well as the overall facts are clear in all essential respects. Our goal was to develop factually and theoretically well-grounded legal arguments that could help to alleviate suffering and move toward an overall equitable solution. But rather than respond directly to those arguments and to the substantial evidence on which they are based, Professor Curtis eschewed serious dialogue and relied on the most partisan pro-Israeli sources he could find to discredit us and develop his own line of legal reasoning—a line of reasoning, we submit, that is unlikely to persuade anyone who is sensitive to the actual circumstances and devoted to justice and the search for enduring peace.

The standoff here is significant beyond the substance of our "debate." As we write, Palestinian suffering in the occupied territories persists, and real peace continues to elude the Israeli people. For these reasons, among others, most people—which includes most Palestinians but not yet most Israelis—now believe that, after almost a quarter century of Israeli military occupation, some form of Palestinian state in the West Bank and Gaza is essential to Israel's legitimacy in Arab eyes and consequently to long-term Middle East peace and stability. Michael Curtis, however, is not among them. He argues, instead, that Arab acceptance of Israel's legitimacy is a prerequisite to any grant of Palestinian autonomy; and, indeed, that the failure to achieve an Arab-Israeli peace treaty so far, coupled with the "continued rejection of Israel" by the Palestine Liberation Organization (P.L.O.) and the Arab states, validates, at a minimum, continued Israeli military occupation. The tone of his argumentation strongly suggests that he would be comfortable with virtually any level of Israeli sovereignty over these territories. He fails, at any rate, to indicate any limit on Israeli rights anywhere in his lengthy disquisition.

It is conceivable that under some set of circumstances Professor Curtis could win respect for his viewpoint. But not in this instance. His one-sided and selective use of history and authority to denigrate our evidence of Palestinian deprivation, his resort to diversionary arguments irrelevant to our thesis, and his ad hominem attacks upon our professionalism do not add up to a serious attempt at dialogue. Indeed, they do not accomplish even the more modest goal of partisan refutation. Each of these and related stratagems, pursuant to which Curtis repeatedly twists our meaning and otherwise adopts sophomoric debating tactics that he falsely accuses us of using (even attributing to us words we never wrote), undermine the credibility of his position and cast grave doubt on whether he can be regarded as a serious scholar engaged in serious scholarly debate. Worse, they lend unseemly respectability to some outrageous conclusions, shared only by the Likud Party and its sympathizers—for example, that Israel is essentially without blame in its treatment of the Palestinian people; and for another, reviving the shopworn contention of the Jewish Agency on behalf of the Zionist Movement, that Palestinian Arabs do not constitute a distinct ethnic group separate from other Arabs and therefore have no clear right to self-determination in Palestine.[3] As with Israel's ruling elite, the best that Professor Curtis has to offer the Palestinians is a kind of Arab bantustan within the frame of Israeli state power that would lack real sovereignty rights and therefore likely prove unstable and unsatisfactory for both sides if ever it were to be established.

Professor Curtis accuses us of "buttressing" our legal argument for a legitimate Palestinian right of resistance and a Palestinian state "with [a] skewed version of historical and contemporary experience [that] lacks any consideration of the true nature of the Arab-Israeli conflict and regard for the realities of Middle East politic."[4] It is true that we did not devote much attention to the long history of Israel's vulner-

3. The issue of Palestinian distinctiveness may not in fact be relevant to claims to Palestine. Writes JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 74 (1990): "The basis for a claim to territory is longtime [lawful] occupation. For this purpose it does not matter whether the Palestine Arabs are distinct from neighboring peoples. The fact that they may have constituted part of a larger nation cannot be used to defeat their right to their territory." In any event, we agree with Yoram Dinstein, who writes:

> There is no prospect of reconciliation in the Middle East unless and until both sides realize that neither lives in a vacuum and that both are entitled to self-determination. There is a Jewish people (or a part of a Jewish people) in Palestine, and there is an Arab people (or part of an Arab people) in Palestine. Each must be free to determine its political fate. Neither can dictate to the other its decision. Since both have claims over the same country, the only solution is partition of Palestine between them.

Yoram Dinstein, *Self-Determination and the Middle East Conflict*, in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 243 (Y. Alexander & R. Friedlander eds. 1980).

4. Curtis, *supra* note 2, at 459.

ability in relation to its Arab neighbors, which is at the heart of Professor Curtis' complaint. Our observations that Israel has "substantial security concerns,"[5] that "[e]ver since its birth . . . it has been beset by hostile, typically violent, acts at the hands of Palestinians and other Arabs throughout the Middle East,"[6] and that these acts have been aimed "against not only its people and territory (however defined) but, as well, its very claim to lawful existence,"[7] represented, we thought, conscientious acknowledgement of Israel's historical plight, a condition we took seriously throughout our analysis. Perhaps we should not have bypassed so quickly, as we did on the stated grounds of familiarity, "[t]he controversial history of [the hostile Arab] challenge, stemming from the persisting debate about the controversial attack by the Arab armies in 1948 and the related expulsion of Palestinians from pre-1967 Israel."[8] The result of this history was a Jewish state that occupied almost all the territory that had been allocated to the Jewish inhabitants of the U.N. Partition Plan, plus a large part of the area that had been allocated to the Arab inhabitants. Perhaps, too, we should have explored in detail the complexities of Israel's more contemporary experience, including former Defense Minister Moshe Dayan's observation, made after the 1967 Six Day War to justify "a state of permanent [anti-Arab] war," that the Arabs "[do not] hate Jews for personal, religious, or racial reasons," but "consider us—and justly, from their point of view—as Westerners, foreigners, invaders who seized an Arab country to turn it into a Jewish state."[9] We could have done all this, of course, but it is familiar ground and did not fit within the compass of an article-length treatment of our subject.

Moreover, the focus of our essay was not on the Arab-Israeli conflict as a whole (as Professor Curtis' *legerdemain* would have it), but on the more limited Israeli-Palestinian conflict which, for over twenty-four years, has exacerbated the Arab perception of rank injustice associated with Israel's creation in 1948.[10] Furthermore, even if we were to take

5. Falk & Weston, *supra* note 1, at 146.

6. *Id.*

7. *Id.*

8. *Id.* at 146. Professor Curtis castigates us for contending that the history of Israel's birth is controversial and that debate about it persists. The fact is, however, that it is controversial and that the debate does persist. *See, e.g.*, QUIGLEY, *supra* note 3, ch. 9 ("Arab vs. Zionist: War of Independence or War of Aggression?"), published by Duke University Press in 1990. *See also* IAN LUSTICK, FOR THE LAND AND THE LORD: JEWISH FUNDAMENTALISM IN ISRAEL (1988); WILLIAM MALLISON & SALLY MALLISON, THE PALESTINE PROBLEM: INTERNATIONAL LAW AND WORLD ORDER (1986); EDWARD W. SAID, THE QUESTION OF PALESTINE (1979).

9. LE MONDE, July 3, 1969, at 4.

10. Professor Curtis' insistence upon treating the Arab-Israeli conflict as a whole rather than the Israeli-Palestinian problem in particular appears to derive, at least in part, from his perception of the latter as an unwarranted imposition that has been deliberately and unfairly foisted on

the entire Arab-Israeli conflict into account, there is nothing in the international law of war and peace generally, or in the more particular law of belligerent occupation specifically, that excuses the major and continuing contempt that Israel has shown for the human and sovereignty rights of the Palestinian residents of the West Bank and Gaza during its long occupation, especially as aggravated by the "Iron Fist" policy initiated in 1985. Professor Curtis may wish to deflect attention from the "harsh character of [Israel's] administration in the West Bank and Gaza" (our words,[11] which Curtis labels "intemperate") by alleging that we are disinterested in "clarifying the legal landscape"[12] (a peculiar claim considering that we devote nineteen out of twenty-eight pages precisely to that end). But it is Professor Curtis, we believe, who has failed to clarify—even fully to understand—the legal landscape. He correctly observes that "territorial change . . . cannot properly take place as a result of the unlawful use of force" when discussing Jordan's annexation of the West Bank in 1950,[13] but he fails to see the applicability of this elemental legal norm when it comes to Israel's annexation of East Jerusalem and the Golan Heights (to say nothing of Israel's yet larger stated ambitions). He waffles repeatedly on the universally accepted (save for Israel) applicability of the 1949 Geneva Convention (No. IV) relative to the Protection of Civilian Persons in Time of War ("Geneva IV")[14] to the circumstance of the West Bank and Gaza. And he reveals not a scintilla of recognition that the ultimate and primary purpose of the law of belligerent occupation as it is embodied in Geneva IV and customary international law is, as we stated, "to sustain the pre-occupation character of all facets of civilian life, respecting the dignity and well-being of the occupied people as much as possible"[15] and "to facilitate the prospects for an eventual peace agreement."[16] Curtis seeks an unconditional vindication of Israel's behavior, relying upon official and quasi-official Israeli government writings dating back to 1971 and, in any event, pre-dating the "Iron Fist" policy of 1985,[17] which is not even mentioned in his lengthy retort.

Israel. "The Palestine question," he writes, "on which so much international attention has been focused by successful, relentless pressure, is derivative from that central [Arab-Israeli] problem." Curtis, *supra* note 2, at 460. The "Palestine question," Curtis fails to appreciate, is the central problem.

11. Falk & Weston, *supra* note 1, at 144.
12. Curtis, *supra* note 2, at 457.
13. Curtis, *supra* note 2, at 465.
14. 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* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 170 (B. Weston, R. Falk & A. D'Amato eds., 2d ed. 1990) [hereinafter "BASIC DOCUMENTS"].
15. Falk & Weston, *supra* note 1, at 142.
16. *Id.*
17. *See* Curtis, *supra* note 2, at 476–77, 488. A writing principally relied upon by Professor

Yet it is not just the law that Professor Curtis fails to clarify and understand. It is the facts as well. The evidence of repeated Israeli disdain for Palestinian rights over the course of many years, prohibited by the laws of war and international human rights law, is overwhelming. It has been attested to in numerous reports prepared by dozens of expert witnesses, including such respected Israeli observers as The West Bank Data Base Project (directed by former Vice-Mayor of Jerusalem Meron Benvenisti) and B'Tselem/The Israeli Information Center for Human Rights in the Occupied Territories.[18] Yet Professor Curtis can say only that (a) "certain acts of the Israeli administration or of particular Israeli citizens *may* merit criticism,"[19] (b) that—incredibly—"it is difficult to depict the administration of the occupied territories as suppressive of civil and human rights,"[20] and (c) that—yet more incredibly—"it is inappropriate to characterize the situation as intolerable or one of unbearable suffering."[21] Resting these assertions on little more than his own personal opinion and generally failing to respond to the authoritative evidence that is contrary to his argument, Curtis casts himself either as a propagandist disguised as a scholar or as a scholar suffering from the severest kind of psychological denial.[22] Evasively, he resists identifying and appraising the "certain acts . . . [that] . . . may merit criticism." Audaciously, he hails Israeli "religious tolerance," "socio-economic advances," and "general freedom" extended in the occupied territories[23] while failing to address the evidence of large-scale Israeli wrongdoing: the suppression of Palestinian cultural traditions, the shutdown of Palestinian schools and universities, land confiscations, the repeated establishment and expansion of Jewish settlements on disputed land, the destruction of crops, and the diversion of scarce water resources, as well as other flagrant abuses that reveal a consistent pattern of gross violations of internationally recognized human rights (e.g., summary deportations; systematic arbitrary and coercive arrests, detentions, interrogations, and other denials of procedural rights; collective punishments; torture; murder). How, in the face of all these documented grave breaches, Professor Curtis can accuse us of "selective and intemperate language" when we

Curtis is Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262 (1971). The author, Meir Shamgar, was at the time Attorney General of Israel; and in this essay, part of a 1971 symposium at Tel Aviv University, he first expressed Israel's disavowal of the applicability of Geneva IV to the occupied territories.

18. *See* Falk & Weston, *supra* note 1, at 133–37, 145, 147.
19. Curtis, *supra* note 2, at 475 (emphasis added).
20. *Id.* at 477.
21. *Id.*
22. Professor Curtis would do well to read GEOFFREY ARONSON, ISRAEL, PALESTINIANS, AND THE INTIFADA: CREATING FACTS ON THE WEST BANK (1990).
23. Curtis, *supra* note 2, at 475–78.

speak of, *inter alia*, the "prolonged and oppressive" character of Israel's occupation, Israel's violations "of principles of criminal accountability laid down at Nuremberg in 1945," and Israel's otherwise "failed responsibility towards the Palestinian people,"[24] we are at a loss to comprehend.[25] Mindful of those who would deny the Holocaust or otherwise trivialize Jewish suffering to discount Israel's claims to self-determination, we were at pains to express our conviction that Judaism's "notorious history of persecution" should "never be forgotten."[26] We wish that Professor Curtis could have been as evenhanded and not tried to deny or otherwise trivialize Palestinian suffering.

But this may be too much to expect from a critic who cannot be objective about the sources upon which we rely to substantiate our viewpoint. Professor Curtis writes: "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."[27] We regard this contention as cheap polemics. After all, our main assertions have been confirmed by Amnesty International, the International Commission of Jurists, and the International Committee for the Red Cross, to name a few of the "international bodies" on which we relied.[28] To call such sources biased is to depart from the boundaries of serious discussion.[29] To be sure, Professor Curtis' chief complaint is with the United Nations, and we agree with him that the recently repealed anti-Zionist resolution passed by the U.N. General Assembly in 1975[30] was inappropriate and inflammatory and should have been renounced. Also, we share some of his criticism of the work of the U.N. Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Populations of the Occupied Territories for its double standard.

24. *See id.* at 458.

25. "In relation to the inhabitants of the occupied territories," writes Tom Farer, former Chairman of the Inter-American Commission on Human Rights, "Israel's [human rights] record is not plainly better than that of former President Augusto Pinochet's regime in Chile." Tom Farer, *Israel's Unlawful Occupation*, 82 FOR. POL'Y 37, 57 (Spring 1991).

26. Falk & Weston, *supra* note 1, at 149.

27. Curtis, *supra* note 2, at 461.

28. We relied also on Al Haq/Law in the Service of Man (the West Bank affiliate of the International Commission of Jurists), B'Tselem/the Israeli Information Center for Human Rights, the National Lawyers Guild, the Lawyers Committee for Human Rights, the Physicians for Human Rights, the Swiss League for Human Rights, the U.S. Department of State, and the West Bank Data Base Project, among other sources. We ask Professor Curtis further: are these sources suspect too?

29. What makes the Curtis position so flimsy is that there are now many convergent, respected sources that confirm the depth and severity of Israeli abuse in the occupied territories. One would hope that this element of the reality is now so firmly established as to be beyond controversy.

30. G.A. Res 3379 (XXX), 30 U.N. GAOR, Supp. (No. 34) at 83, U.N. Doc. A/10320 (Nov. 10, 1975).

We made this point in our article[31] (although Professor Curtis conveniently overlooked this fact in framing his reply). At the same time, we reject the Curtis view that every United Nations criticism of Israel is thus tainted. We regard, for example, the resolutions condemning the October 1990 Al Aksa Mosque/Temple Mount incident as justifiable criticism formulated in a responsible fashion. We certainly do not share the convenient Israeli (and apparently Curtis) view that the United Nations is totally dominated by hostile forces. As former Israeli Foreign Minister Abba Eban wrote recently in *The New York Times*, "[c]ontrary to the standard view, the United Nations is not a traditional adversary of Israel. No nation has derived similar advantage from it."[32] Indeed, is not Israel's existence derived from the United Nations? Does not Israel's own legitimacy rest upon its U.N. birthright? While Professor Curtis is correct that some countries with terrible human rights records have managed to escape U.N. censure, there is now scarcely a country whose human rights practices are not subject to United Nations scrutiny. It is, moreover, beside the point to argue that the United Nations focuses its attention "disproportionately on Israel, while generally ignoring other countries' blatant human rights violations."[33] Israel is responsible for its own transgressions regardless of the treatment of other transgressors. The argument we support is analogous to the refusal to suspend judgment about Iraq's aggression against Kuwait because past instances of aggression have sometimes been ignored by the United Nations and others.

Yet Professor Curtis' overreaching does not stop here. Historical distortions, specious arguments, and false attributions abound in his response.

For example, in recent years the P.L.O. and the Palestinian National Council (P.N.C.) have made clear their acceptance of Israel's right to exist on the basis of U.N. Security Council Resolution 242. They also have declared their rejection of terror "in all its forms"[34] and generally have abstained from violence directed against civilian targets despite Israeli provocations. Disregarding these developments, however, Professor Curtis refuses to concede any sign of Palestinian accommodation or goodwill. He simply dismisses these historic decisions as ambiguous

31. *See* Falk & Weston, *supra* note 1, at 133 n.10.

32. Abba Eban, "Israel and the Peace Process: Does the U.N. Belong at the Table?; The Benefit to Israeli Interests Would Be Huge," N.Y. TIMES, June 13, 1991, at A29, col. 1.

33. The double standard argument can be said to have been exaggerated even when it was relevant some 20 years ago. As Tom Farer insightfully observes, "the claim of a double standard [during the earlier period] fails to take account of the fact that the concern of most U.N. members for human rights was inhibited by sensitivity to claims of sovereignty," an inhibition "that . . . did not function where the victims of atrocity enjoyed a right to self-determination" (such as the Palestinians in the occupied territories). Farer, *supra* note 25, at 57.

34. *See* Falk & Weston, *supra* note 1, at note 4 and accompanying text.

and Machiavellian and insists upon the P.L.O.'s "continued rejection of Israel,"[35] managing this distortion of P.L.O.-P.N.C. views by referring to the outdated language of the P.L.O. Charter[36] and attributing to the P.L.O.'s mainstream the extremist viewpoints of its peripheral elements.[37] Worse, he augments the distortion by refusing to take any note whatsoever of extremism and rigidity on Israel's part. Talk about double standards! Nowhere does he question Israel's defiant claim to the occupied territories by sacred right despite a U.N. consensus to the contrary or its equally defiant refusal to commit to eventual withdrawal as required by international law in circumstances of "belligerent occupation." Nowhere does he concede Israel's intractability in its opposition to negotiating within a normative framework deemed reasonable by an overwhelming majority of governments in the international community. Nowhere does he admit to Israeli intransigence when it comes to accepting the P.L.O as the viable representative of the Palestinian people, capable of representing the Palestinian people as fully as the present Israeli government represents Israel and the Jewish people.[38] Curtis consistently skews the historical

35. *See* Curtis, *supra* note 2, at 466.

36. The language to which Professor Curtis refers is contained in controversial articles 9, 15, 19, and 23 of the Palestinian National Charter of 1968, *reprinted in* 3 THE ARAB-ISRAELI CONFLICT 706 (J.N. Moore ed. 1974) and BASIC DOCUMENTS at 89. These provisions, drafted to reflect a commitment to Palestine as "the homeland of the Arab Palestine people" (Article 1), speak of "[a]rmed struggle" as "the only way to liberate Palestine" (Article 9), the "liberation of Palestine" as involving "the elimination of Zionism in Palestine" (Article 15), the establishment of the state of Israel as "entirely illegal" (Article 19), and the necessity "to consider Zionism an illegitimate movement" and "to outlaw its existence" (Article 23). Speaking on French television on the occasion of a visit with French President François Mitterand at the Elysée Palace in May 1989, approximately six months after the P.N.C., upon proclaiming an independent state of Palestine, implicitly accepted the existence of Israel and a two State solution to the Israeli-Palestinian problem, P.L.O. Chairman Yasir Arafat declared these provisions "caduc," a seldom-used French word meaning decayed, lapsed, or null and void. *As quoted and explained in* Anthony Lewis, *Foreign Affairs: A Slippery Slope to Peace?*, N.Y. TIMES, May 7, 1989, at § 4, p. 27, col. 1. For the text of the P.N.C. resolution relating to the acceptance of Israel's existence, see N.Y. TIMES, Nov. 17, 1988, at 5, cols. 3–4 ("an unofficial United States Government translation"). For subsequent clarifications by P.L.O. Chairman Yasir Arafat, see Steve Lohr, *Arafat Says PLO Accepted Israel*, N.Y. TIMES, Dec. 8, 1988, at A1, col. 1; *Statement by Arafat on Peace in Mideast*, *id.*

37. Curtis misrepresents: "The P.L.O.'s definition of self-determination would appear to require the end of Israeli statehood." Curtis, *supra* note 2, at 466.

38. Professor Curtis would object to this comparison on the grounds that the present Israeli government was elected whereas the P.L.O. leadership was not. *See* Curtis, *supra* note 2, at 466, where he insists, despite the evidence of overwhelming support among the Palestinian people, that the P.L.O. only *claims* to be [the Palestinian Arab population's] sole legitimate representative although never formally chosen or elected" (emphasis added). If the comparison fails for lack of elections, however, a comparison with the one-time Jewish Agency on the same grounds would not. In any event, a formal election process, while no doubt desirable, is unnecessary to establish popular representativeness, and it is clear that the vast majority of the Palestinian people regard the P.L.O. as its legitimate representative. A 1986 poll indicated that 95% of the Palestinian people in the occupied territories regarded the P.L.O. as their sole legitimate representative. *See, e.g.*, DAVID MCDOWALL, PALESTINE AND ISRAEL: THE UPRISING AND BEYOND 120 (1989).

record by his insistence that Israel from its beginnings, and especially since 1967, has been an altogether innocent victim of Arab recalcitrance and revenge.

Indeed, not content to twist Middle East history and to engage in misleading attributions vis-à-vis the P.L.O., Professor Curtis resorts, as well, to specious arguments to challenge our main line of argument. He contends, for example, that it is mistaken for us to conclude, as we do,[39] that the termination of Israel's occupation "comports" (our word) with the future peace and stability of the Middle East and world.[40] It is mistaken, he says, because such a conclusion "ignores the more significant threats to that peace and stability" that are posed by Iraq, Syria, Libya, rising Islamic fundamentalism, internal discord in Lebanon, and so forth.[41] How? Why? Professor Curtis never explains. Nor does he illuminate how Jordan's illegal behavior in the West Bank from 1948 to 1967, about which he exhibits considerable concern,[42] excuses Israel's illegal behavior since then; or, indeed, how Israel's breaches since 1967 are in any way mitigated, as he implies, by the human rights violations of other countries such as Cambodia, China, Cuba, India, and Iran;[43] or by the new presence of the Islamic Jihad in Gaza and the Islamic Hamas in the West Bank, or by Yasir Arafat's support of Saddam Hussein during the 1990-91 Persian Gulf conflict.[44] We are, in fact, at a loss to understand how these events are at all responsive to our central thesis, which is: that Israel is obligated under international law to safeguard the sovereignty rights and human rights of the Palestinian inhabitants of the West Bank and Gaza; that it has failed to do so in extremely severe ways; that its prolonged occupation has become unlawful; and that the Palestinians consequently possess a legitimate right to resistance. Admittedly, the rise of Islamic fundamentalism and the P.L.O.'s stance during the Persian Gulf conflict have an adverse *political* impact on prospects for a proximate and equitable resolution of the Israeli-Palestinian conflict; but these developments in no way diminish the objective *legal* assessment that can be made about a conflict that began decades ago and

In any event, Curtis' point is disingenuous considering that Israel has not allowed municipal elections in the occupied territories since 1976, that it has criminalized any showing of support for the P.L.O., and that it forbids all Palestinians from the West Bank and Gaza from attending meetings of the Palestine National Council (P.N.C.), the Palestinian parliament in exile which *is* an elected body. For details on the P.L.O. and P.N.C., see ABDALLAH FRANGI, THE PALESTINE LIBERATION ORGANIZATION 146–50 (1982).

39. *See* Falk & Weston, *supra* note 1, at 157.

40. *See* Curtis, *supra* note 2, at 460.

41. *Id.* at 460–61.

42. *See id.* at 465, 475.

43. *See id.* at 459.

44. *See id.* at 467–70.

that is rooted in the respective rights and duties of the two peoples and their political representatives.[45] Professor Curtis' arguments simply are not responsive to our thesis. A bruising offense is not a convincing scholarly substitute for a sound legal defense. No lightning follows from such thunder!

But as if all this were not enough, Professor Curtis misrepresents our intent, ascribing to us beliefs and language that are useful to his designs but that we never penned. To cite one example, Curtis says that we "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 . . . ."[46] "Stop short," indeed! What we argued, to distance ourselves from the widespread Arab belief that Iraq and Israel could be seen to have violated similar legal duties, was the importance of avoiding *"the polemical insistence* that Israel's invasion and occupation of the West Bank and Gaza is equivalent to Iraq's invasion and occupation of Kuwait . . . ."[47] For another example, Curtis imputes to us viewpoints we do not and never have maintained—among others: that it is appropriate "to excuse the serious and flagrant violations of international law by Arab states as attempts to redeem Arab honor . . . or as the result of the politics of despair"[48] and that the *intifada* "is justified because Israel took the territories by force in 1967 . . . ."[49] Our clear position is that serious and flagrant violations of international law are unacceptable under all circumstances and that the *intifada* is justified because of Israel's gross violations of the law of belligerent occupation and international human rights law, as well as by its frequent iterations of an intention to remain indefinitely in control of these territories. Similarly, but—significantly—without the benefit of a footnote citation, Professor Curtis claims that

45. In this connection, Professor Curtis is correct in saying that the P.L.O. "disgraced itself" by supporting Saddam Hussein and failing to uphold the principle of self-determination for an Arab people. He overreaches, however, when he contends that it has "lost [its] credibility as an interlocutor in the peace process." *Id.* at 468. Could it plausibly be said that the Government of Israel has lost its credibility as an interlocutor in the peace process because of its failure to uphold the principle of self-determination for an Arab people? Like much of the rest of the world, Professor Curtis fails to assess the P.L.O.'s pro-Iraqi stance in its appropriate context, to wit (as we stated in our essay), "as an expression of profound Palestinian frustration, betrayal, and despair" at the hands of the Israeli Government, the United States, and even the Arab world. Falk & Weston, *supra* note 1, at 130–31. He fails to appreciate, too, that in the absence of a rhetorical expression of P.L.O. solidarity with Saddam Hussein the P.L.O. might well have been taken over by the fundamentalist Hamas. Israel's failure to respond to the moderation of P.L.O. demands and to the adjustment of P.L.O. doctrines and tactics during the *intifada*, many believe, has been a strong stimulus to the radicalization of Palestinian attitudes and to the growth of the fundamentalist strain.

46. Curtis, *supra* note 2, at 457.

47. Falk & Weston, *supra* note 1, at 131 (emphasis added).

48. Curtis, *supra* note 2, at 461.

49. *Id.* at 494.

we characterize Israel as "'the most flagrant country in the world' in its defiance of international agreements . . . ."[50] While we would agree with such a characterization when it comes to Geneva IV, we never expressed such a sentiment in our article, much less the broader assertion that Curtis attributes to us. Presumably these misrepresentations of our views are intended to convince an innocent reader that our arguments should be ignored.

Which leads to a final cluster of concerns. Professor Curtis charges: "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."[51] This reproach, we submit, is a classic example of the tendency to accuse an adversary of what you are doing, often to disguise what you are doing. Worse, it reflects a complete inability to maintain that minimum objectivity of observational standpoint upon which true dialogue depends. Professor Curtis' unconditional commitment to Israel is everywhere evident, most vividly, perhaps, when he is dealing with Israel's history and human rights record. In our view, Curtis' approach reflects a failure to comprehend that even engaged scholarship must be guided by a decent respect for evident and otherwise observable patterns of behavior and their plausible interpretation. We have definite views as to the nature of an equitable solution for the Israeli-Palestinian conflict as it relates to Palestinian claims and the status of the occupied territories; but we have attempted to sustain this judgment by addressing the range of issues and concerns in a scholarly, professional way—that is, with respect for sources, for facts contrary to our preferences, and for prevailing lines of legal interpretation. Of course, this claimed disparity between our approach and that of Professor Curtis cannot be definitively established by us. We leave that validation to the scholarly community and to the wider marketplace of further informed assessment.

We would point out, however, that there is a special sensitivity in scholarly and other circles within the United States whenever an analysis of Middle East affairs results in conclusions that are critical of official Israeli policy and practice. In this regard, for example, we note that this Harvard journal conditioned its acceptance of our article on its intention to solicit a "balancing" article, which itself implies that our assessments were somehow excessive, in need of balance. Such a format might be appropriate in relation to this kind of issue generally. But in this instance our article was written on its own, without anticipating debate, and in the belief that we were not treating our subject in a partisan manner—unless, of course, being favorable to

50. *Id.* at 459.

51. *Id.* at 457.

human rights and to evenhanded historical analysis constitutes partisanship. Given the prolonged and abundantly documented abusiveness of Israel's military occupation, we thought that our fact-law assessments, though profoundly disquieting, would not be controversial, except possibly for our overall conclusion that the *intifada* as a whole is a species of legitimate resistance. We cannot help wondering whether a manuscript from Professor Curtis on these issues would have produced an editorial insistence on deliberately soliciting a second article that would take a contrary viewpoint. If "pro-Palestinian" assessments are regarded as needing balancing while "pro-Israeli" assessments are not, then the context of assessment itself reflects a pro-Israeli bias.[52]

In the same issue of this journal in which our article appeared, there also was published an article on "Critical Legal Studies and International Law" that criticizes policy-oriented jurisprudential applications as unavoidably subjective.[53] It is impossible to discuss adequately the full import of such a jurisprudential position at this time, but it seems relevant nevertheless to express our view that there are degrees of objectivity attainable by way of legal analysis and that C.L.S. exaggerates the play of subjective forces necessarily at work even while usefully calling to account various maneuvers to disguise subjectivity and preference. Indeed, it is this possibility and understanding that underlies our assurance that we adhered to canons of scholarly inquiry in presenting the legal status of Israel's military occupation and the *intifada* whereas Professor Curtis did not. We adhere to the jurisprudential position that favors maximum attainable transparency, clarifying the connections between observational standpoint, fact, law, values, and recommends legal outcomes. At the same time, we acknowledge fully that there exists a discretionary zone—a subjective element—in any legal analysis of a complex problem. Complete objectivity of outcome is as illusory a goal as polemicism is inappropriate a tactic. In the end, as we suggested above, the legal authoritativeness of our assessment will depend upon the responses of impartial legal scholars and policymakers to the arguments we make, a process that is itself necessarily tentative and never completed.

52. In this connection, we note that the leading scholarly arguments supporting Israel's prolonged military occupation and possibly Israel's ultimate permanent control of the West Bank and Gaza (arguments, parenthetically, that we not only acknowledged but debated in our article) have been published without insistence upon a "balancing" response, including one published by this Harvard journal. *See* Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968); Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1 (1973); Nicholas Rostow, *"Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. IN WORLD PUB. ORDER 147 (1979).

53. *See* Nigel Purvis, *Critical Legal Studies in International Law*, 32 HARV. INT'L L.J. 81 (1991).

What we admit, then, is that no assured guidelines to the resolution of legal controversy exist. True, in instances where the factual evidence seems overwhelming and the legal guidelines are generally simple, questions of interpretation arguably need not be raised. A high degree of legal conclusiveness is possible in such instances.[54] Still, legal analysis that is based on disciplined canons of inquiry is salutary, as is the willingness to be forthcoming about policy preferences. Such an orientation does not pretend to escape from the tangles of legal complexity, but it does offer the best way to honor the postulates of political democracy about a free community of plural discourse in settings of controversy.

54. For example, if 10 witnesses observe a robbery it of course remains theoretically possible that they are sharing a delusion or are that they are not aware that what seems to be a robbery is really a bit of theater. In more than 99% of instances, however, the appearances are real enough to be legally conclusive.