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# International Law and Conflict Resolution: Palestinian Claims and the Arab States

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# INTERNATIONAL LAW AND CONFLICT RESOLUTION: PALESTINIAN CLAIMS AND THE ARAB STATES

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## I. INTRODUCTION

Over the last few years there has been a revival of interest in international law as a mechanism for conflict resolution. These same years have seen a demonstration of the undeveloped state of international law, particularly concerning intrastate conflicts. The wide disagreement about questions of fact, legal consequence, and world order implications of internal war is a telling commentary on the current problems of applying legal standards to such conflicts. A major part of the disagreement can be explained in terms of the specific problems relating to fact determination and authoritative interpretation engendered by the nature of the environment in which the international legal order must function. The ambiguous and emotionally charged atmosphere that is characteristic of all international actions when force or the threat of force is involved also contributes to the disagreement.

Conflicts such as the Arab-Israeli dispute clearly raise the question whether the traditional approaches and concepts of international law are adequate to characterize the range and variety of contemporary internal disorders and the types of involvement by third states. In addition, many international legal norms are not specific enough in content to allow "illegal" behavior to be identified with confidence. This is true especially of norms purporting to limit the use of coercion. Under the general heading of "minor coercion," the many different forms of coercive influence have remained largely undifferentiated in law. The major problem is not the perennial one of making appropriate judgments about state behavior, but the more complex problem of constructing categories that will accurately reflect the changed and changing milieu in which the law must function.

This is a challenging and perhaps insuperable task. The most fundamental obstacle to clarification remains the decentralized nature

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of the international legal order, which permits national decision-makers to reach authoritative determinations of fact and legal consequence by their own "adversary" representations.[1] Even when there is a consensus in support of desired behavior, there is neither uniformity of legal technique, nor an established framework with substantial agreement on usage, to encourage a convergence of views. Often a single label is used to refer to several different phenomena, but a similarity in labels does not imply necessarily a similarity in factual points or legal reference.[2]

Yet, there remains a need for third party inquiry into both the relevance of international law to conflicts such as the Arab-Israeli confrontation and, in particular, the status of Palestinian claims to use violence to change the present status quo. With due regard for the limitations of legal techniques and third party observations,[3] it bears emphasizing that law can provide both a technical language for rational discussion of emotion-filled issues[4] and a framework of

1. For a discussion of the difference between adversary arguments and transcendental legal judgments see R. FALK, LEGAL ORDER IN A VIOLENT WORLD 334-35 (1968); for a different view see McDougal, *Some Basic Theoretical Concepts about International Law: A Policy Oriented Framework of Inquiry*, 4 J. CONFLICT RESOLUTION 337 (1960).

2. For example, does the term "intervention" denote delictual conduct, or is it a neutral term; does it denote a fact or a supposed legal judgment? Perhaps a prior question is what are the legally permissible forms of involvement by states in the internal affairs of other states? Some observers think of intervention in terms of standards to which behavior ought to conform; others see it as a certain set of consequences stemming from behavior; still others see it as certain forms of behavior; and many equate it with certain intentions underlying behavior. Consequently, we have discussions of military, diplomatic, ideological and economic intervention. The concept has been defined in such a general way that even inaction whenever certain consequences follow can be regarded as intervention. Logically this can produce such absurd conclusions as the inference that both the inaction of the United States in Indochina in 1954 and our heavy involvement there a decade later constitute intervention. *See generally* Rosenau, *Intervention as a Scientific Concept*, 13 J. CONFLICT RESOLUTION 153 (1969).

3. For example, see the debate between Rostow and Wright. Rostow, *Legal Aspects of the Search for Peace in the Middle East*, and Wright, *The Middle Eastern Crisis*, in *Proceedings*, 64 AM. J. INT'L L. 64-70, 71-77 (1970).

4. For a discussion of law as a language and tool of moderation see Coplin, *International Law and Assumptions about the State System*, 17 WORLD POLITICS 615 (1965). It should be noted that "communication" does not imply either understanding or acceptance of claims. The use of a common framework is no guarantee against misperception, and the nature of the communication may

analysis that may lead to an understanding of what is a reasonable solution in the context of the conflict.[5]

### A. *Analytical Perspectives*

In order to be effective, the law requires some minimal consensus among those whose behavior is to be regulated on acceptable means and ends, which may be expressed either in a positive sense as community or in a negative sense as deterrence. If mutuality of interests, positive or negative, is absent, law becomes little more than a rhetorical device or ideological tool to be manipulated at will, rather than a relevant consideration in the policy-making process. This often seems the case when statesmen invoke universal or general principles in support of their politics. These principles may express community interests, but they are cast at a level of abstraction that renders the principle irrelevant as a guide in specific situations. Any consensus on principle must be at a level that is meaningful to a particular conflict.

Nevertheless, both in analysis and in rhetoric, it is customary to refer to *the* international system and *the* international legal order as if there were only one system and one legal order. The use of the system concept is understandable. As a simplifying assumption and organizational construct, the idea of an international system is attractive. To a certain extent it does correspond with reality, and in thought and

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predetermine the response. The communication may convey a threat to basic values. In addition, there must be some correspondence between reality and language. If reality and language are totally divergent, *i.e.* if the legal principles invoked are inappropriate to the facts as known, then law is destroyed as a language that parties hold in common. For example, note the Soviet position on Czechoslovakia. 23 U.N. SCOR, 1441st meeting 8-9, 26 (1968), U.N. Doc. S/PV. 1441.

5. Myres McDougal argues that there are opposing normative sets applicable to every situation. In context, however, not all normative sets are equally convincing. So far as disputes are concerned, it is a commonplace observation that international law is used as a means of bolstering political claims. In this view law is merely one more weapon in the armory of national rhetoric. Appeal to legal considerations is one way of mobilizing international support. The Israelis, for example, have attempted to rationalize normally illegal actions, such as their activities in East Jerusalem, in legal terms. This is a very cynical and narrow view of the function of law. Because policy makers do feel compelled to give some attention to legal justification, law must be perceived to be more than a simple exercise in rhetoric, more than a systematic ex post facto rationalization. McDougal, *supra* note 1, at 347. *See also* L. HENKIN, HOW NATIONS BEHAVE 3-30 (1968); Taulbee, *Reprisals and State Responsibility for the Acts of Guerrillas and Other Irregular Forces,* AM. SOC'Y INT'L L. (1971) (mimeo).

discourse it is much easier to deal with one system than with multiple systems.

The major problem in dealing with international law and politics from a comprehensive systemic viewpoint is remoteness from specific political realities. From a systemic perspective, the constituents of system order are often defined in terms of major actor interests. Thus the basic threats to international order are commonly characterized as nuclear war and imperial expansion. International order is identified with policies that purport to limit expansion and minimize the risk of nuclear war. Description becomes confused with prescription. These policies become norms for all actors in the system. In situations in which nonmajor actors are involved, this assumption about the requisites for order can lead to significant distortions in perspective.

Given the complexity and diversity of the contemporary international milieu, the possibility of more than one system and more than one legal order would seem a permissible assumption. The numerous ideological struggles, the bi-polarity of military power, and the various and conflicting forms of tacit and formal recognition suggest that assumptions of singularity might be misplaced.[6] Also, with some exceptions such as functional organizations, decisions about the rightful exercise of authority in the international system are made in regional and local subsystems.[7]

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6. McDougal and his associates have suggested the possibility of multiple legal orders operating concurrently within the contemporary international system. In application McDougal assumes that there are two legal orders—a Western one based upon human dignity and a totalitarian one based upon the denial of human dignity. In essence, McDougal retains a somewhat disguised system focus. Norms (policies) that promote "human dignity" are given universal significance. Even though McDougal emphasizes the importance of political context in evaluating specific claims, he still defines the requisites for stability and order in terms of systemic (and status quo) considerations. McDougal & Lasswell, The *Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959). *See generally* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). Adda Bozeman has also questioned the existence of a unitary international system. The major defect in Bozeman's approach is the assumption that the functions of municipal and international law are determined directly by the same factors. *See* A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD (1971).

7. Frey-Wouters, *The Prospects for Regionalism in World Affairs*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 463 (C. Black & R. Falk eds. 1969); Miller, *The Prospects for Order Through Regional Security*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 556 (C. Black & R. Falk eds. 1969).

This is not to reject the possibility that some universal norms do exist, but rather to point out that the interface between system and specific subsystems has received little attention. Ultimately, we are concerned with "fit"; that is, the degree of congruence between norms for behavior and patterns of behavior. This inquiry is a tentative attempt to assess the validity of certain universal norms for action in the Middle Eastern subsystem and to isolate the factors that may indicate the evolution of a normative set distinctive to this region.

### B. *The Political-Legal Distinction*

One further series of comments is in order by way of introduction. Many scholars insist upon distinguishing political from legal considerations, and argue that "politics" rather than law will determine the future of Middle Eastern conflicts. The authors of this article contend that this is not a viable distinction: there are no inherently "political" disputes. The task of legal analysis is to conjoin law and politics without collapsing one into the other.[8]

The insistence on this distinction rests on a misunderstanding of the relationship between law and conflict. In general, there is no antipathy between law and conflict over public policy; that is, normally one should not speak of a breakdown of law when conflict occurs. In a decentralized legal system there may be some question about how conflict should be interpreted—whether it should be considered as deviant or creative, as precedent shattering or precedent creating—but this does not indicate the irrelevance of law. Rather, it indicates that conflict often produces new legal norms by making explicit the issues involved in a particular context.

Furthermore, the view that separates law from politics concentrates too much on the restraint function of law. While law does function as a restraint system in pursuit of order, it also functions to promote and protect other public policy goals subsumed under the general heading of "equity." In this sense law constitutes the formal aspect of a particular conflict relationship and expresses the more lasting interests of the parties involved. This is only to indicate that in most conflict situations the parties have shared, as well as disputed, interests. Law may be characterized as a mediating structure—a mechanism that provides a common framework, a common point of

8. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in THE RELEVANCE OF INTERNATIONAL LAW 133, 141 (K. Deutsch & S. Hoffmann eds. 1968).

reference for the control of cognitive divergence.[9] It is with these functions of law in mind that we make a tentative overview of the Arab-Israeli conflict.

## II. Legal Status of the Palestinians

The central issue in the Arab-Israeli conflict is the status of the Palestinians. The question has at least two dimensions: territorial control and personal identity. The former may be amenable to rational settlement, the latter may not. Most fundamentally, the Arab-Israeli conflict reflects a mutual denial of national and personal identity.[10] An increasingly prominent factor in the situation since 1967 has been the use of violence by various Palestinian organizations. Through various activities the fedayeen[11] have attempted to coerce not only Israel but also certain Arab states. Consequently, it is clear that regional stability depends on an equitable settlement of Palestinian claims. A regional, minimal consensus on a "just" resolution of outstanding claims is required, and it is toward an evaluation of such demands that international law becomes centrally relevant.

Nothing is to be gained from reciting the history of the struggle for Palestine.[12] Both Zionists and Arabs have numerous grievances, and all have been subject to considerable extra-regional manipulation. The initial problem in evaluating these grievances is characterization of the situation. For the purposes of this inquiry, there is reason to characterize the core Israeli-Palestinian struggle as a civil war for control of smaller Palestine.[13]

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9. Glenn, Johnson, Kimmel & Wedge, *A Cognitive Interaction Model to Analyze Culture Conflict in International Relations,* 14 J. Conflict Resolution 35, 37 (1970).

10. Glenn, Johnson, Kimmel & Wedge, *supra* note 9, at 40; Peretz, *Arab Palestine: Phoenix or Phantom?,* 48 For. Affairs 322 (1970); Harkabi, *The Position of the Palestinians in the Israeli-Arab Conflict and Their National Covenant,* 3 N.Y.U.J. Int'l L. & Pol. 209 (1970).

11. Fedayeen is used as a synonym for "guerrilla." Of the approximately 3,000,000 individuals who identify themselves as Palestinians, perhaps 50,000 are active in various armed organizations and would be classified as fedayeen in the most precise sense. Fedayeen is preferred to more subjective alternatives available such as terrorists, freedom fighters, resistance fighters, etc.

12. *See, e.g.,* J. Hurewitz, The Struggle for Palestine (1950); F. Khouri, The Arab-Israeli Dilemma (1969); W. Laqueur, The Arab-Israeli Reader (1968); N. Safran, From War to War (1969).

13. The following points should be made about this language: (a) Smaller Palestine refers to western Palestine, or that part of Greater Palestine remaining

Arab claims regarding the nonlegislative nature of the partisan United Nations resolution,[14] which purported to divide Palestine between Zionists and Arabs, have merit. [15] Considerable evidence exists to support the Arab contention that the terms of the original Mandate, the Balfour Declaration, and Article 80 of the Charter guaranteed Palestinian rights in the territory. [16] Additionally, the Arabs can point to continued and effective local control for over a thousand years. [17] Therefore, if the Assembly resolution is not legally binding, and if the United Kingdom were unable, as it claimed, to protect the rights of the indigenous population in the territory, then the conflict may be regarded most accurately as a civil war within the territory of Palestine.

The traditional law prohibiting third party involvement in civil wars has been violated extensively in the 20th century. [18] Thus arguments regarding the legitimacy of the Arab states' support of Palestinian claims in 1948 cannot be authoritatively resolved. While such legal considerations may have been relevant in the past, the results of the 1948 war for Palestine must be given some legitimacy by

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after the United Kingdom granted independence to Trans-Jordan in 1946; (b) in referring to Palestinians as Arabs, the authors are aware that a number of Jews are also indigenous to Palestine, but these have now become Israelis. The word Palestinian is now a useful way to refer to Arabs who live in the area, even though there remains some necessary overlap between Palestinians and Arab Israelis.

14. G. A. Res. 147 (1947).

15. R. FALK, THE STATUS OF THE INTERNATIONAL LEGAL ORDER 174 (1970); O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 11 (1966); Lande, *The Effect of Resolutions of the United Nations General Assembly,* 19 WORLD POLITICS 83 (1966); Onuf, *Professor Falk on the Quasi-Legislative Competence of the General Assembly,* 64 AM. J. INT'L L. 349 (1970).

16. *See* Elaraby, *Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements,* 33 LAW & CONTEMP. PROB. 97, 103-104 (1968); Wright, *The Middle East Problem,* 64 AM. J. INT'L L. 271 (1970); Bousky, *The Claims of the Arabs and Jews to Palestine,* 45 PAPERS OF THE MICHIGAN ACADEMY OF ARTS AND SCIENCES 265 (1960).

17. Wright, *Legal Aspects of the Middle East Situation,* in THE MIDDLE EAST: PROSPECTS FOR PEACE 11 (I. Shapiro ed. 1969), and in 33 LAW & CONTEMP. PROB. 97 (1968); AMERICAN FRIENDS SERVICE COMMITTEE, SEARCH FOR PEACE IN THE MIDDLE EAST 5 (1970).

18. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 322 (1963); Farer, *Intervention in Civil Wars: A Modest Proposal,* in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 509, 515 (R. Falk ed. 1968).

any legal system seeking to maintain order. Israel, now the incumbent regime in a protracted civil war, has acquired legitimacy in the following ways: Arab acceptance of the post-1948 partition resolution; the admission of the state of Israel to the United Nations; general acceptance of Israel by many states in bilateral recognition; and effective exercise of state functions. The Palestinians, once the potential incumbent regime, are now most accurately regarded as the challenging faction in the continuing struggle.

What, then, is the legal relationship of the Arab states to the state of Israel? The Arab states have interpreted the four Armistice Agreements of 1949 as a temporary military cease-fire pending settlement of the state of belligerency in a formal peace treaty. Accordingly, the state of belligerency is said still to exist. The status of an armistice seems to be a question not fully resolved in international law. The traditional interpretation favors the Arab view while more recent developments tend to undermine it. In 1951 the Security Council held that, under Article 40, no claim of belligerency was permitted during an armistice that envisaged progress to peace, and expressly prohibited a return to hostilities. [19] United Nations practice apparently has established the position that if U.N. machinery is in operation, an armistice under its auspices establishes a legal situation in which the provisions of the Charter will be applied, thereby prohibiting a claim to belligerency. [20] The rights and duties of

19. Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1 (1970). In the 1949 Agreements all parties affirmed the principle that no aggressive action by either's armed forces would be undertaken, planned or threatened against the people or armed forces of the other. It was agreed that no military or paramilitary force of either party would commit any hostile act against the forces of the other or otherwise violate the international frontier or the sea or air space of the other party. The agreement also delineated the Armistice Demarcation Line, but stated that it was not to be considered in any sense as a political or territorial boundary. Nonmilitary claims were specifically left open for later agreement: "It is emphasized that it is not the purpose of the Agreement to establish, to recognize, to strengthen, or to weaken or nullify in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either party in the area of Palestine or any part or locality thereof covered by this Agreement, whether such asserted rights, claims, or interests derive from the Security Council resolutions . . . or from any other sources. The provisions of this Agreement are dictated exclusively by military considerations and are valid only for the period of the Armistice." 4 U.N. SCOR, Spec. Supp. 3, at 3, U.N. Doc. S/1264/Rev. 1 (1949). There are similar provisions in all the other armistice agreements.

20. R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 214 (1967).

third-party states to a civil war, as noted above, are too controversial to permit a judgment supported by consensus. [21] Therefore, we turn to other criteria in order to evaluate the Arab states' relations with the Palestinians.

Two basic problems are of central importance: first, the validity of Palestinian claims vis-à-vis Israel, and permissible actions concerning enforcement of these claims; and secondly, the legal relationship of the Arab states to the Palestinians. Considerable polemical literature exists concerning "wars of national liberation" and the justness of the "anti-imperial struggle," but there are few nonpolemical works on the status of these movements. We turn now to this additional area of complexity.

## III. PALESTINIAN CLAIMS

There can be no challenge to the historical fact that Arabs constituted an overwhelming majority of persons and property owners in pre-1947 Palestine. [22] While there is some challenge and controversy over responsibility for the exodus of Palestinian Arabs from their homes during 1947-1948, objective third-party inquiry cannot overlook either the examples of concerted Zionist efforts to harass Arabs or the lack of empirical evidence to support Zionist arguments that Arab leaders encouraged flight. [23]

From these facts stem two types of Palestinian claims—a collective claim to national self-determination, which was endorsed recently by the General Assembly, and an individual claim to a choice between repatriation or resettlement with compensation, which has been acknowledged yearly by the Assembly since 1948. These two types of claims, in one form, can be said to constitute one general claim. If repatriation of some 1.5 million Palestinians were to occur at once, the probability is that Israel as a Zionist state would cease to exist shortly thereafter, either through violence or through such peaceful means as a higher Arab birth rate. [24] Thus, when the possibility of

21. For an overview of problems raised by civil war situations, see Forsythe, *UN Peacekeeping and Domestic Instability,* 15 ORBIS 1064 (1972).

22. *See, e.g.,* N. SAFRAN, *supra* note 12, at 23-26; *cf.* Peretz, *Problems of Arab Refugee Compensation,* 8 MIDDLE EAST J. 403 (1954).

23. For an objective presentation of Zionist harassment see Stevens, *Arab Refugees: 1948-1952,* 6 MIDDLE EAST J. 281 (1952). *See generally* J. DAVIS, THE EVASIVE PEACE, 53-60 (1968); N. SAFRAN, *supra* note 12, at 35.

24. Controversy over the original number of refugees does not affect this point, whether that number be 700,000 or 750,000 or some other number. *See* Forsythe, *UNRWA, The Palestine Refugees, and World Politics 1949-1969,* INTERNATIONAL ORGANIZATION 26-45 (1971).

large scale repatriation is left unqualified, the two claims can be viewed as complementary.

The claim to national self-determination presents rather obvious difficulties when asserted as a legal principle, despite repeated endorsements of the concept in the Assembly during the last decade. Historically, the status of this concept in international law has been murky. [25] Moreover, it is obvious that the states asserting the principle as law restrict its application decidedly. [26] Of course, black peoples are said to have the right to self-determination vis-à-vis white regimes; but what about Kurdish people in Iraq, Armenians in Lebanon, Georgians in the U.S.S.R., and Navajos in the United States? In short, there is no general application of the principle. Despite this rather major restriction on the development of national self-determination as a part of customary law, it seems relevant to note that non-Western and socialist states assert quite strongly a claim that struggles for national liberation are "just" under the "higher" law of anti-imperialism.

The claim to choice between repatriation or resettlement for individuals is at once more complex and more simple. Freedom of choice in matters of repatriation has little standing in international law, except that there is agreement in opposition to forced repatriation—whether to the U.S.S.R. in the 1940's or to North Korea in the 1950's. Moreover, the Palestinians have never claimed to be "stateless persons" in the legal sense of that term. It is clear, however, that repatriation or resettlement is a community-desired choice for the Palestinians, as evidenced by yearly endorsements of paragraph eleven of A/Res/194 (III) in each Assembly plus numerous efforts to implement the principle over the past two decades via United Nations and United States efforts. The state of Israel is virtually a minority of one in opposition to recognition of the validity of the principle.

Part of the difficulty lies in the ambiguity surrounding Arab pronouncements concerning a "just solution to the refugee question." If the state of Israel be regarded as legitimate, as argued here and as supported by general state practice, then unqualified repatriation as a weapon against Israeli security cannot be permitted. Moreover, there is little reason to believe that unqualified repatriation could lead to a democratic, secular, binational state of Palestine; rather, there is every

25. *See generally* W. TUNG, INTERNATIONAL LAW IN AN ORGANIZING WORLD (1968). The inclusion of the right to self-determination in two covenants accepted by the General Assembly in the late 1960's is counterbalanced by lack of definitions, sanctions and ratifications.

26. For a discussion of problems in applying the higher law of self-determination see Emerson, *The New Higher Law of Anti-Colonialism,* in THE RELEVANCE OF INTERNATIONAL LAW, *supra* note 8, at 153.

reason to anticipate both violent opposition and violent struggle during such a transformation. [27]

On the other hand, lack of equity and resettlement may lead to violence as well. As recent events have demonstrated, lack of equity for Palestinians forced from their homes by the state of Israel is obviously a condition conducive to extremist politics. In addition, resettlement into Lebanon would upset the Christian-Moslem balance crucial to Lebanese stability and resettlement into Jordan similarly would exacerbate the Palestinian-Jordanian split that once already has brought civil war to that nation.

These considerations and the logic of the situation suggest that a feasible legal framework for satisfaction of Palestinian claims should center on the ideas of the Johnson Mission of the early 1960's. [28] This Mission suggested a listing of preferences for the Palestinians, qualified by the right of the receiving state to veto admissions for security reasons. Nothing in this approach would preclude the process of resettlement from leading to the creation of an Arab state of Palestine in the West Bank area. Indeed, both Israel and Jordan might endorse such a proposal as a solution to certain problems. For both regimes a state of Palestine in the West Bank area might reduce the charge of ignoring the self-determination rights of the Palestinians, thereby reducing pressures for more violent actions. [29]

While this line of reasoning is not endorsed by either Israel, which rejects repatriation and choice per se, or the Palestinians, who demand unqualified choice and the demise of the Zionist state, the argument does possess merit. It is close to the policy position of both the United States and the U.S.S.R., who endorse both A/Res/194, paragraph eleven, and the legitimacy of Israel. [30] This concurrence affords hope

27. For a presentation of an argument for a democratic, secular, binational state of Palestine see Peretz, *supra* note 10, at 331. *See also* M. REISMAN, THE ART OF THE POSSIBLE: DIPLOMATIC ALTERNATIVES IN THE MIDDLE EAST (1970). The problems with this approach are two: there is nothing in it for the Zionist elite and they would oppose it—with force if necessary; should they not oppose it, the subsequent state would be dominated by more socially aggressive Jews accustomed to democratic procedures, which will lead to antagonisms and eventually violence within that projected state.

28. *See* J. JOHNSON, *Arab v. Israeli: A Persistent Challenge to Americans,* 18 MIDDLE EAST J. 1, 2-13 (1964); *cf.* D. FORSYTHE, UNITED NATIONS PEACEMAKING (1972).

29. Any number of subsidiary questions are involved, such as the projected state's right to armament, its relation to Gaza, etc.

30. The United States has reportedly explored the possibility of an Arab Palestine in the West Bank with Palestinian leaders. The Soviet Union has

for a convergence of law and power. Furthermore, recent statements by such influential states as the U.A.R. and Jordan seem compatible with equity for the Palestinians and security for Israel.[31] Therefore, there could be support for this form of equity from important elements in the Arab world.

## IV. Arab States and Palestinian Violence

Given the above determination of the status and claims of the Palestinians, what is the responsibility of the Arab states toward the Palestinians? This question, like the question of status and claims, is not easy to subsume under legal judgment. The focus of the controversy is the extent of Arab state responsibility for Palestinian violence against Israel.

The factual relationship between fedayeen groups and the Arab states, while complex, lends itself to some systemization. There is a fundamental distinction among the Arab states: some organize and control guerrilla groups as governmental policy; some offer support to the guerrillas in various forms; but neither have initiated the groups nor control them. While virtually all Arab states offer either money, arms, logistical support, territorial bases, or verbal endorsement to the fedayeen, only a few Arab states have sought direct governmental control over particular groups. The United Arab Republic was the sponsor and patron of the original Palestine Liberation Organization (PLO) in the mid-1960's; Syria created Al Siquah as an adjunct of the Ba'ath party in the late 1960's; and Iraq has sought to control the guerrilla movement by forcibly opposing groups that do not adhere to governmental policy.[32] The major post-1967 guerrilla organization, PLO-Al Fatah, is largely independent of direct governmental control as are several active smaller groups, some within and some outside the larger framework, such as the Popular Front for the Liberation of Palestine (PFLP). Relative independence has been achieved through the popularity of "the cause" in the Arab world, through independent

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reportedly informed those same leaders that the Palestinian movement should unify behind realistic goals. On the latter point see The Christian Science Monitor, March 9, 1971, at 2, col. 3.

31. Both the U.A.R. and Jordan have accepted an indirect recognition of Israel's legitimacy, and have publicly stated their willingness to recognize that legitimacy through treaty.

32. *See* John Cooley's reporting in The Christian Science Monitor, July 13, 1970, at 5, col. 4; Hudson, *The Palestinian Arab Resistance Movement*, 23 MIDDLE EAST J. 291 (1969); Sharabi, *Palestine Guerrillas*, SUPPLEMENTARY PAPERS (Georgetown Center for Strategic and International Studies) (1970); Harkabi, *Fedayeen Action and Arab Strategy*, ADELPHI PAPERS No. 53 (1968).

financial wealth coming in from Palestinians particularly in Kuwait and Saudi Arabia, and through small arms from China (via Iraq) and Russia (via the U.A.R. and Syria).

A second factual distinction is also important. Some Arab states support Palestinian guerrillas from a relatively voluntary commitment to the Palestinian movement as anti-Zionist and/or anti-imperialist. Given the regional ideology of Arab unity, no Arab state wishes to place itself on public record as opposing the Palestinian movement, but at least two Arab states show an unmistakable historical record of reservations toward support of the Palestinians—Lebanon and Jordan. The Hussein Government finally undertook direct military action against the guerrillas in September, 1970 and thereafter. The several Lebanese Governments, lacking both the military capability and a mandate from the electorate to move decidedly against the fedayeen, nevertheless have a record of some noninvolvement in anti-Zionist affairs of the Arab world. Internally, Lebanese Governments have challenged Palestinian activities from time to time; and while the governments are as fragmented as the larger Lebanese society, the general outcome of governmental policy has been distinctly different from Iraqi, Syrian, and U.A.R. policy on the question of Palestinian support.

Hence, the factual situation is characterized by general, but uneven, Arab state support of Palestinian violence against Israel. Neither PLO-Al Fatah activities nor those of other groups are controlled by these states. The factual situation demonstrates a dichotomy between Palestinian interests and a given state's interests (most notably evident in the Jordanian civil war).

State claims concerning responsibility in this factual context vary considerably. A particular problem for the process of claim evaluation in the Arab-Israeli conflict is distinguishing public pronouncements intended for certain domestic or foreign communities from legal claims intended to coincide with actual public policy. [33] Since there is no sure legal standard for this task, one must take careful note of state practice over time.

33. While this problem exists in evaluations of most governmental claims, it is accentuated in the Arab-Israeli conflict. Observers have long noted the Arab tendency to make extreme and provocative public statements frequently at variance with actual policy; although Israel, too, has misrepresented claims, as when it argued in the Security Council that the U.A.R. carried out an armed attack in 1967 before Israel's air strike on the U.A.R. air force. *See, e.g.*, T. LIE, IN THE CAUSE OF PEACE 97 (1954). *See generally* Deutsch, *The Probability of International Law,* in THE RELEVANCE OF INTERNATIONAL LAW, *supra* note 8, at 57.

Unfortunately, the norms of the United Nations Charter prohibiting threat or use of force, while being law of the first order, do not necessarily apply to guerrilla groups. Consequently, the Charter framework does not provide a sure guide for assessment of claims, at least in prima facie form. In such situations, "it appears useful to maintain second-order levels of legal inquiry. . . ." [34] That is to say, one must look to a second order of legal norms—the customary laws of state responsibility. These become relevant when Charter norms are too general or are bypassed for other reasons. The traditional norms of this second order, however, are not self-sufficient in their historical form since "the legal rules and standards embodied in international law do not come to grips with the underlying policy setting provided by the Arab-Israeli conflict." [35] Particularly for guerrilla violence,

34. Falk, *The Beirut Raid and the International Law of Retaliation,* 63 AM. J. INT'L L. 415, 430-31 (1969). One can distinguish several different "orders" of legal considerations. Recognition of differing levels or orders of law merely reflects the complexity of the international system. Geographical and ideological diversity, the various processes of rule formation and application, the heterogeneity of situations to be regulated all suggest the utility of such a distinction. *See* McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order,* 53 AM. J. INT'L L. 1 (1959). Claims based upon the Charter would be claims of the first order. These general principles, however, are at such a level of abstraction that normative guidance from them in concrete situations is impossible. Such guidance must come from the network of consensual rules that arise out of the everyday interaction of states—second order considerations. Often, these too are vague, and so there is the possibility of even a third order of considerations.

However persuasive this argument is in analytic terms, there is a problem with it in practical terms. Its relatively unconventional nature means that it is either unknown or irrelevant to policy-makers. It is arguable that the functions of law operate whether policy-makers are aware of them or not, but the fact remains that officials will still regard clear statements of general principles as substantive rules of law whenever it suits them. Even if the above argument is a good one and explains a good deal, its credibility with practitioners is a limited one. As a result, the present confusion over the law of civil war and other uses of coercion short of general war is perpetuated. For an elaboration of this argument with respect to reprisals see Onuf, *The Current Status of Reprisals,* AM. SOC'Y INT'L L. (1970) (mimeo).

35. Falk, *supra* note 34, at 437. Both the Arab states and Israel justify their actions by a claim of action in self-defense. Since under the Charter this is the only allowable exercise of force, it is to be expected that all parties to a conflict will invoke such a claim. Given the paralysis of the U.N. peacekeeping machinery, in addition to the controversy over the scope of the right under article 51 and article 2.4, the Charter provides little guidance for the evaluation of claims. *See* J. STONE, AGGRESSION AND WORLD ORDER 92-103 (1958); J. BRIERLY,

there must be a contextual analysis of politico-factual situations and subsequent modification of traditional norms in the interest of relevancy and concomitant probability of obedience. [36]

The traditional Arab public posture had been to claim that aggression originated when the Zionists seized control of Palestine in 1947-1948; in the words of Foreign Minister Bourguiba of Tunisia, "it is the very existence of Israel which constitutes permanent aggression." [37] The Arab argument then continues with the claim that war and lesser violence is permitted as a sanction against the continuing aggression. This is the essential position of states such as Syria, and it is the position of spokesmen such as Baroody of Saudia Arabia, whatever the official policy of his government. [38] It is also the stand taken by the Palestinian fedayeen when their revolutionary ideology is translated into legal terms.

While this position may have had legitimacy in the late 1940's, it cannot be accepted in the 1970's. Israel has gained legitimacy. [39] Furthermore, a claim to an unlimited right to threaten a state's

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THE LAW OF NATIONS 416-20 (C. Waldock ed. 1963); D. BOWETT, SELF DEFENSE IN INTERNATIONAL LAW (1958); I. BROWNLIE, *supra* note 18, at 268; R. HIGGINS, *supra* note 20, at 167.

In the absence of authoritative guidance from the Charter, a case can be made that customary law is still effective. This is of little help, however, since the scope of customary rights is equally vague and uncertain. In the absence of authoritative third-party review, customary rights are affirmed to cover not only threats to a state's territorial integrity but also its vital interests or "existence" in a broader sense. Similarly, there are no clear guidelines to evaluate the proportionality of force used in self-defense. There is considerable disagreement on whether proportionality applies to objectives pursued or to the size and character of the aggression, *i.e.* whether a state may act to remove the cause of aggression, or simply to repel the aggression. The response and consequent justification of the United States in the Cuban missile crisis in 1962 demonstrates the difficulty of the problem. *See* Gerberding, *International Law and the Cuban Missile Crisis,* in INTERNATIONAL LAW AND POLITICAL CRISIS 175-210 (L. Scheinman & D. Wilkinson eds. 1968).

36. For an elaboration of this idea and a critique of Falk see Taulbee, *Retaliation and Guerrilla Warfare in Contemporary International Law,* 8 INT'L LAWYER ( January 1973).

37. A. LALL, THE U.N. AND THE MIDDLE EAST CRISIS, 1967 at 181 (1968).

38. For a very illustrative summary of the debate in the Security Council after the Israeli raid in the spring of 1969 see 6 U.N. MONTHLY CHRONICLE, No. 4 at 14-36 (1969). The focus on this raid caused most governments to clarify their positions on the legal point at issue for the first time since 1967.

39. *See* Sharabi, *supra* note 32, at apps.

existence, when not supported by state practice or community expectations, tends to undermine all restraining norms. Law is largely irrelevant in such a revolutionary political setting.[40] There must be agreement on avoiding threats to existence if mutually advantageous laws are to become operative.[41] Palestinians realistically cannot expect implementation of the emerging law on refugee choice or of the general law on proportionality in reprisal on which such unlimited claims are made. In addition, state practice increasingly rejects the assertion that Israel is a colonial state and thus a legitimate target of violence under the higher law of anticolonialism. Not only do the Western and Latin American states reject that assertion, but Jordan and the U.A.R. have recognized, *inter alia*, the basic legitimacy of Israel.[42] Moreover, the Soviet spokesman in the Security Council is on record as stating that "nobody denie[s] the right of Israel to exist. . . ."[43] Claims to exercise violence against the very existence of Israel cannot be accepted now by any legal order seeking minimum public order, whether the perspective of the claimant be traditional interpretation of specific law, philosophical interpretation of specific law, philosophical interpretation of "natural rights," state practice, or community expectations.[44]

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40. *See* Hoffmann, *International Systems and International Law,* in THE INTERNATIONAL SYSTEM (K. Knorr & S. Verba eds. 1961).

41. *See generally* Deutsch, *supra* note 33.

42. This is evidenced by the following: acceptance of Resolution 242, which recognizes the right of all states in the Middle East to security; public statements offering an end to the state of belligerency; and the U.A.R. offer to sign a treaty with Israel.

43. 6 U.N. MONTHLY CHRONICLE, No. 4, at 28-29 (1969). Soviet policies and legal claims on this series of issues have been something less than fully consistent. In general, the Soviets endorse the "sacred right of all peoples that are determinedly fighting for the liquidation of racist and colonial regimes and are fighting against imperialist aggression." Bowett, *Reprisals,* AM. SOC'Y INT'L L. (1970) (mimeo). Yet the Soviets have also argued that "[i]ll-considered and rash actions which do no substantial harm to Israel's military potential cannot solve the problem of eliminating the consequences of the Israeli aggression, and . . . may even help the Israeli extremists. . . ." Dmitriev, *The Arab World and Israel's Aggression,* INT'L AFFAIRS (Moscow) 23 (1970). These pronouncements, coupled with Soviet arguments in the Security Council, seem to support resistance to illegal occupation but not violence against Israel per se.

44. For a relevant argument that pursuit of minimum order is more likely to lead to justice than the pursuit of absolute justice at the expense of order see C. DE VISSCHER, THEORY AND REALITY IN INTERNATIONAL LAW (3d ed. P. Corbett transl. 1967).

The traditional Arab claim, and with it the right to give total support to the fedayeen, has been significantly altered by some states since 1967. Jordan, the U.A.R., the U.S.S.R. and others now focus on the territory occupied since 1967 by Israel, claiming a right to support Palestinian violence or direct governmental violence against Israel's presence in these areas.[45] While the Palestinians themselves recognize no such difference in Israeli controlled territory, these other states lay claim to the permissibility of violence for two reasons: (1) because this territory is said to be clearly colonialist in nature, the higher law of violent struggle against colonialism is controlling; (2) occupation during time of war is legal, but when an end to the state of war is offered there is a right to resist if the occupier will not withdraw.

The competing Israeli claim is that, with the collapse of the 1949 Armistice Agreements in both 1956 and 1967, states have become bound by the specific prohibition against coercion contained in the Security Council's cease-fire resolution of 1967.[46] Behind this legal stance is the Israeli concern that reference to post-1967 occupied land is but a prelude to characterizing all of Israel as illegally occupied, which is of course the position of the Palestinians and of some supporting states such as Syria.

The starting point for evaluation is that if states such as Jordan and the U.A.R. make an argument supporting limited violence, they must exercise their responsibility in curtailing guerrilla activity from their territory directed against the existence of Israel per se. Both law and logic are clear on this point.[47] There is no doubt that the Egyptian Government has the capability to exercise this responsibility. Events during the fall of 1970 indicate that Jordan also has the capability to police its own territory, although the cost in September of 1970 was high in terms of over-all stability; the territory is well under the Government's control. Lebanon, unique as usual, is not altogether free of the same responsibility.[48] Syria, the fourth staging

45. *See* 6 U.N. MONTHLY CHRONICLE, No. 4, at 28-29 (1969).

46. See the Israeli statement of November 18, 1966, in Bowett, *supra* n. 43.

47. I. BROWNLIE, *supra* note 18, at 323.

48. Lebanon is one Arab state that historically has maintained a de facto posture of neutrality. Its forces were involved in neither the 1956 nor the 1967 actions. To the extent that the Government has control over the situation, neutrality has been maintained since 1967. It appears that the Arab world generally recognizes the imperatives of the Lebanese situation; consequently, with the exception of Syria, there is no demand from other Arab states that Lebanon overtly support the guerrillas. This understanding is a prudent calculation based on Lebanese domestic politics. The Moslem-Christian split is such that any overt action either in support of or in opposition to the Palestinian guerrillas will

area for Palestinian raids, has increased its control over the fedayeen since the military ousted the more adventuresome politicians in the early fall of 1970. While Syria has not yet either accepted S/242 or renounced a policy of total fedayeen support, it too falls logically under these same constraints.

It would seem, therefore, there is no state obligation to prohibit the operations of groups that direct their attacks to military targets in the areas occupied since 1967. This may be interpreted as a legitimate challenge to Israeli occupation, since it is clear that no title accrues through occupation.[49] The responsibility for the origin of the 1967 war is not significant as a point of law, especially if it is held, as is reasonable considering the facts, that both Israel and the U.A.R. were aggressive.[50] Violence in resistance to occupation, however, must clearly demonstrate a difference from attacks against Israel per se. The most obvious differentiation is the limitation of targets to the occupied territories and to military targets. It would reduce unnecessary destruction if this norm were matched by the avoidance of population centers, whether refugee or national, by the fedayeen in the anticipation of Israeli reprisal. Rather than being naive and legalistic restraints, these points largely have been agreed on in the past between the fedayeen and Arab governments in a compromise between guerrilla interests in raids and government interests in avoiding reprisal. In the period 1968-1970 such agreements were negotiated by both Lebanon and Jordan. In the Lebanese case, there remains a loosely defined free-fire zone in southern Lebanon where

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jeopardize the stability of the Government. While it is true that the guerrillas use Lebanese territory as a base for their operations, the Lebanese Government can do little to control them. Given the position of Lebanon in the history of the conflict, the Israeli raid against the Beirut airport seems unreasonable. *See* Falk, *supra* note 34, at 442-43.

49. *See* R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 52 (1963); M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 17-18 (1960).

50. It is perhaps generally assumed in the West that only the U.A.R. was aggressive in ordering the withdrawal of U.N.E.F., mobilizing troops and deploying them in Sinai, ordering a blockade on the Gulf of Aqaba, and making bellicose statements. Israel, however, had exercised certain threats against Syria and, most importantly, was the first to initiate armed attack at a time when the U.A.R. was beginning to negotiate with the United States on how to avoid war. Thus Israel initiated violence when the threat of imminent attack probably was declining. *See* The Christian Science Monitor, October 3, 1970, at 1; M. COPELAND, THE GAME OF NATIONS 276-77 (1969). For a larger perspective see W. LAQUEUR, THE ROAD TO WAR (1969).

the guerrillas operate with the understanding that they stay out of the cities. If the legal order cannot establish an effective law *for* behavior, then it can lend its support to the best available law *of* behavior. [51]

It may seem somewhat artificial to urge that violence be contained within territory occupied since 1967 in order to demonstrate that the activity is directed toward impermissible occupation rather than Israel's security per se. But it is not. While it is true that bomb damage in Tel Aviv is as destructive as in Ramalah, the former does not achieve the stated objective of resisting occupation. It has the reverse effect of increasing Israeli determination to stay in the occupied territories for security reasons. Military effectiveness has long been an underlying support for the laws regulating coercion; [52] accordingly, it is in the military as well as in the legal interest of those legitimately resisting illegal occupation to contain violence within the occupied territories.

Some question, however, arises concerning rights acquired by conquest in the occupied territories because of certain Israeli actions in East Jerusalem and the West Bank that clearly are in violation of its obligations and rights as *occupant* power. Since there is no clear rule of law [53] regarding the acquisition of territory by *conquest*, the discussion might more usefully focus on the economic and political factors that must be considered in any eventual legal judgment.

The occupied territories can be divided into two categories—those to which the Palestinians have some claim, and those that formed part of the de facto or de jure territory of the adjacent Arab states. East Jerusalem, Gaza and the West Bank area fall into both categories. Thus there is a potential divergence in interest between the Arab states and the Palestinians concerning the eventual disposition of certain of the occupied territories. In addition, it might be fruitful to distinguish between those territories in which Israeli interest is primarily strategic and those in which its interest is potentially economic or ideological.

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51. *See generally* Deutsch, *supra* note 33.

52. M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 520 (1961).

53. This point has engendered considerable debate. In the traditional pre-United Nations view, acquisition of territory by conquest and subsequent annexation was recognized, although at times with great reluctance, as the logical consequence of the legal status of war. For a good survey of the literature see M. MCMAHON, CONQUEST AND MODERN INTERNATIONAL LAW (1940). Under the Charter, nations are not to reap the benefits of a resort to force, and so it would seem that territory gained by conquest cannot be legitimately kept. The Council, Assembly, major states and numerous states have recently endorsed that concept.

The prima facie case for return of East Jerusalem to Jordan is a weak one.[54] The original partition plan provided for the establishment of Jerusalem as separate from the proposed Jewish and Arab states, but integrated into a projected economic union. While the Arabs resisted the plan, the Israelis accepted it as the price of partition. Several plans for internationalization of the city were drawn up but never implemented.[55] Despite a number of General Assembly resolutions for internationalization, both Israel and Jordan formally incorporated the areas controlled at the Armistice in 1948. Hence, neither side had strict legal title to the portion it controlled before the war in June of 1967. To the extent that military decisions are subject to change by subsequent military actions, the Israeli action in incorporating the whole city is not barred by the Armistice. Israel has done no more than Jordan did in 1949. Israel, of course, is obligated to protect the rights of the Arab population and others who hold the city sacred.

This does not argue that the case for internationalization is irrelevant. Internationalization under a plan more or less similar to the original proposal would clearly accomplish Israel's stated goals of unifying the city and ending an artificial division.[56] Nonetheless, it is probable that this solution will not be acceptable to either side. The Armistice line, however, does not have to be regarded as the presumptive starting point for negotiations on the status of Jerusalem.

In Sinai the problem is different. The territory involved is Egyptian and no other state or faction has a claim to it. The same is true of the Golan Heights of Syria. From the standpoint of a *status iniuriae* to an Israeli security interest, the occupation of these territories is legal until a treaty of peace is signed.[57] Nevertheless, the legality of occupation is affected by the over-all context of occupation.[58] It would seem that a satisfactory guarantee of Israeli security, such as the permanent demilitarization of Golan and the Sharm el Sheik, is not only the prerequisite for any settlement, but would also remove any justification for continued occupation. Given the contemporary tendency for armistices to serve the function of peace

54. Schwebel, *What Weight to Conquest?* 64 AM. J. INT'L L. 354-57 (1970). *See generally* R. JENNINGS, *supra* note 49.

55. *See also* E. WILSON, JERUSALEM: KEY TO PEACE (1969); R. PFAFF, JERUSALEM: KEYSTONE OF AN ARAB-ISRAELI SETTLEMENT (1969).

56. The N. Y. Times, Oct. 31, 1967, at 23.

57. *See* M. GREENSPAN, *supra* note 49, at 213.

58. *See* R. JENNINGS, *supra* note 49, at 52.

treaties,[59] and given the recent proposals of the U.A.R. to the Jarring Mission,[60] continued Israeli occupation seems increasingly unreasonable.

Gaza and the West Bank may be grouped together since both were to be part of the originally projected Arab-Palestinian state. When the projected state did not emerge, the Egyptians took Gaza and the Jordanians annexed the West Bank. Again, if the Armistice lines are purely military and not political, these territories are not part of the respective states. As with Jerusalem, although Israel does not have a greater right to these territories, it does not have a lesser right either. The principal distinction to be made here, and one that strongly endorses the Jordanian claim (but not the Egyptian), is the importance of the West Bank to the Jordanian economy. There is some question about Jordan's ability to survive as a viable state without the West Bank.[61] This is not the case with Gaza, which is in no way vital to the Egyptian economy and is separated from the central part of Egypt by the Sinai desert. This point has relevance for the whole problem: when the claims on both sides are equally unclear and when both sides demonstrate little concern for law, the solutions necessarily must be on the basis of other than narrow legal considerations.

## V. CONCLUSIONS

We have been focusing on the type of law that seeks to regulate coercion rather than on other types of law such as those that establish a framework of jurisdiction or that lay a foundation for community building.[62] We have found that within this law of regulation there may be several orders or levels of legal inquiry. The first, that of the United Nations Charter, has proved generally uninstructive in efforts to evaluate claims on the basis of order and equity in the complex factual situation of the Arab-Israeli conflict in the 1970's.[63] The second order of restraining norms, that of the customary law of war, of measures short of war, and of neutrality, has also proved somewhat deficient in clearly illuminating controlling legal principles. This is the

59. *See* M. GREENSPAN, *supra* note 49, at 589.

60. The U.A.R. has offered both plans for a DMZ at Sharm el Sheik and a peace treaty with Israel. Apparently, the U.S. and U.S.S.R. have discussed guarantees for Israeli security.

61. Several points in this overview could be satisfied, however, if an Arab state of Palestine, linked economically to Jordan, were created in the East Bank.

62. *See* Hoffman, *supra* note 40; W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW (1966).

63. Major problems are the definition of force, aggression and self-defense.

case regarding Palestinian claims to refugee choice and Israeli claims to reprisals against targets in Jordan. Thus we have ultimately resorted to a third level of legal inquiry, that of the relevance of these customary norms when modified by a contextual analysis of the contemporary features of the Arab-Israeli conflict—such as the validity of claims to the "higher law" of national liberation and anti-imperialism, and claims to reprisal based on an assertion of state responsibility for guerrilla activity. It is our view that the normal scope for creativity in legal reasoning, found in all legal systems,[64] must be expanded under the international legal order. Revolutionary changes in state perspectives, modes of coercive interaction and community value judgments make this imperative.[65]

The function of this law, while maximally to restrain behavior in keeping with community expectations, is multifaceted. The persistent weakness of centrally organized and managed sanctions obviously undermines the effectiveness of law as a restraint system. But law as a tool of communication and framework for analysis, which is perhaps the major role for law regarding coercive processes in a fragmented political system, is not so weakened. States can at times bypass third-party legal inquiry when the power configuration permits. It is increasingly clear, however, that they do so at some sacrifice and cost to their real long-term interests.[66] Reasonable interpretations of international law have been trying to communicate to Arab actors for some time the interests derived from acceptance of the legitimacy of Israel. These same interpretations are now trying to communicate to Israel the futility of its quest for regional stability when law and equity are ignored—whether concerning territory or legitimate claims of the Palestinians. If actors fail to pursue their real national interests, it is in part because they fail to observe what law is trying to convey. The question of sanctions remains "separable from the question of whether the core law itself is present."[67]

The Arab-Israeli conflict has generated certain normative sets that we hold relevant for a broader range of situations: The impermissibility of imperialism, but the need to restrict that term to

64. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921).

65. We speak here of the addition of non-Western and noncapitalist states, the proclivity to guerrilla activity, and the growing importance of collective review of state assertions. *See generally* Falk, *Gaps and Biases in Contemporary Theories of International Law,* in R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 7-40 (1970).

66. *See* L. HENKIN, *supra* note 5, at 270-71.

67. M. BARKUN, LAW WITHOUT SANCTIONS 155 (1968).

situations clearly so defined by state practice and community judgments; the impermissibility of title by conquest, but the need to direct resistance to illegal occupation rather than legitimate state security per se; the impermissibility of state surrender of authority in relation to guerrillas, but the need to recognize situations in which a government does not have the capability to control guerrilla activity. As with other types and orders of international law, the implementation of these sets and their derivative specifics depend upon a system of mutual reciprocity that, in turn, reflects the shared interests of the actors in a conflict situation.