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GENERAL ASSEMBLY
Thirty-fifth session
Items 26, 51, 53, 57, 92, 106 and 109 of the preliminary list*
THE SITUATION IN THE MIDDLE EAST
PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES
UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST
REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ISRAELI PRACTICES AFFECTING THE HUMAN RIGHTS OF THE POPULATION OF THE OCCUPIED TERRITORIES
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REPORT OF THE SPECIAL COMMITTEE ON ENHANCING THE EFFECTIVENESS OF THE PRINCIPLE OF NON-USE OF FORCE IN INTERNATIONAL RELATIONS
REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION

SECURITY COUNCIL
Thirty-fifth year

Letter dated 27 June 1980 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General

I have the honour to refer to my letters of 16 November 1978 and 20 December 1978 (A/33/376 and A/33/543), in which I registered my Government's strong objection to the release of a United Nations Secretariat publication entitled The Origins and Evolution of the Palestine Problem, Part I: 1917-1947; 1/ and Part II: 1947-1977 2/ (ST/SG/SER.F/1). In those letters I expressed regret

* A/35/50.

1/ United Nations publication, Sales No. E.78.I.19.

2/ United Nations publication, Sales No. E.78.I.20.

that the United Nations had been drawn into the pattern, so characteristic of certain régimes, of rewriting history according to the transient interests of a political body.

Since submitting those letters to you, three other "studies" have been released in the same series. They are entitled: The Right of Return of the Palestinian People (ST/SG/SER.F/2); 3/ The Right of Self-Determination of the Palestinian People (ST/SG/SER.F/3); 4/ and An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question (ST/SG/SER.F/4). 5/

As in the case of the first "study", all the others were prepared by or under the aegis of the "Special Unit on Palestinian Rights" within the Secretariat, "under the close guidance" of the "Special Committee on the Exercise of the Inalienable Rights of the Palestinian People". The first three "studies" were published anonymously; the fourth is said to express the views only of its authors, W. Thomas Mallison and Sally Mallison.

The three new pseudo-scientific publications are no less objectionable than the first one. Emblazoned with the emblem of the United Nations, and carrying the imprimatur of the Secretary-General, these later "studies" are designed not only to give further currency to a completely misleading version of the history of the Arab-Israel conflict, but also to propagate bogus theories with regard to a number of complex legal issues connected with the Arab-Israel conflict.

The partisan views expressed in all the "studies", like the recommendations of the Committee under whose "guidance" they have been prepared, accord fully with those held by the terrorist PLO, an organization which is committed to the destruction of Israel, a Member State of the United Nations.

By producing and disseminating these publications, the United Nations is serving the cause of international terror, not the cause of international peace. In the process, the United Nations has once again misused international funds, gravely compromised the integrity of the Secretariat and exposed the Organization to severe and more than justified criticism.

The Government of Israel does not intend to reply to the gross distortions, misrepresentations and other improprieties taken with history and law in these "studies".

That notwithstanding, it has requested learned counsel, in the person of Professor Julius Stone, Member of the Institute of International Law; Distinguished Professor of International Law and Jurisprudence, University of

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3/ United Nations publication, Sales No. E.78.I.21.

4/ United Nations publication, Sales No. E.78.I.22.

5/ United Nations publication, Sales No. E.79.I.19.

California Hastings College of the Law; Professor of Law, University of New South Wales; Emeritus Challis Professor of International Law and Jurisprudence, University of Sydney; author of numerous authoritative works in the field of international law, to peruse these "studies" from the legal point of view. I now enclose a memorandum of law which he has written and which deals with some of the main propositions which the "studies" seek to establish.

As will be seen, this memorandum of law shows that all the "studies" in the series rest on flawed foundations and that their conclusions are untenable.

The opinions expressed in the memorandum are those of learned counsel, and do not necessarily reflect those of the Government of Israel.

I have the honour to request that this letter and its enclosure be circulated as an official document of the General Assembly, under items 26, 51, 53, 57, 92, 106 and 109 of the preliminary list, and of the Security Council.

(Signed) Yehuda Z. BLUM
Ambassador
Permanent Representative of
Israel to the United Nations

ANNEX

Israel, the United Nations and International Law

Memorandum of Law

by

Julius Stone

S.J.D. (Harvard), LL.D. (Leeds, honoris causa), D.C.L. (Oxford), O.B.E.

Member, Institute of International Law;
Distinguished Professor of International Law and Jurisprudence, University of California Hastings College of the Law;
Professor of Law, University of New South Wales; Emeritus Challis Professor of International Law and Jurisprudence, University of Sydney; Barrister-at-Law, etc.

June, 1980

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INTRODUCTION

1. It is a commonplace among international lawyers that each organ of the United Nations is the interpreter of its own powers and procedures. This applies to the General Assembly, even when regrettably the majorities in that body are marshalled by means, such as the oil weapon, which do not reflect the legal or moral merits of the issues before it. General Assembly resolution 3376 (XXX) of 10 November 1975 established a "Committee on the Exercise of the Inalienable Rights of the Palestinian People". In its resolution 32/40 B of 2 December 1977, the General Assembly set up a "Special Unit on Palestinian Rights" in the Secretariat, which in 1978 and 1979 prepared and disseminated a series of tendentious studies "under the close guidance" of that Committee. A list of those "studies" and their brief titles as employed in this memorandum is as follows:

(a) The Origins and Evolution of the Palestine Problem (ST/SG/SER.F/1) (herein "Origins", published in two parts);

(b) The Right of Return of the Palestinian People (ST/SG/SER.F/2) (herein "Return");

(c) The Right of Self-Determination of the Palestinian People (ST/SG/SER.F/3) (herein "Self-Determination");

(d) An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question (ST/SG/SER.F/4) (herein "Resolutions").

2. Resolutions, the latest of the "studies", rehearsing and overlapping much that appears in its predecessors, differs from them in that it discloses the identity of its authors, namely, W. T. Mallison, Professor of Law and Director, International Comparative Law Program, George Washington University, and Sally V. Mallison, Research Associate. Although that "study", like the others, was prepared and published "at the request of the Committee on the Exercise of the Inalienable Rights of the Palestinian People", the Secretariat found it necessary to distance itself from it by stating that "the views expressed are those of the authors", a caveat which does not appear in the three earlier anonymous "studies". The present examination of this entire series of explicitly partisan "studies", strangely emblazoned with the official emblem of the United Nations, indicates that the sponsoring Committee's caution in dissociating itself from Resolutions was well-advised and might well have been extended to all the anonymous "studies".

3. The structure of argument which the authors pursue to their conclusions is as follows. First, they seek to establish that the United Nations, and particularly the General Assembly, is "an international lawmaker". Second, they elaborate various implications of the Partition resolution, before its destruction by Arab rejection and armed aggression in 1947-8, and argue that that resolution remains now as "law" created by the General Assembly, still binding more than three

decades later. Third, they seek to show that repeated recitals in General Assembly resolutions, from resolution 194 (III) to resolution 3236 (XXIX), establish in international law a "right of return" for the benefit of Palestinian Arab refugees. Fourth, the authors likewise seek to show that repeated references in General Assembly resolutions since 1970 constitute a legal determination of the right of self-determination of Palestinian Arabs and that the General Assembly is empowered to redraw the boundaries of Israel in order to satisfy that right.

4. The legal merit of this single-minded argument depends not only on its internal coherence but also on the soundness of the premises on which it is based. I shall examine it in both those aspects, beginning immediately with the fundamental premise from which all the conclusions flow: the status and force in international law of General Assembly resolutions.

5. While I originally set out to examine the consistency with international law of the assertions and assumptions of the "studies", I soon found it necessary to transcend this ad hoc design. I realized that the outcomes of the legal analysis were likely to have critical effects, not only on the Arab-Israel conflict, but on some basic doctrines of international law. Thus, this memorandum analyses legal aspects of many complex problems directly relating to the Middle East, and in so doing clarifies central issues of current international law. In addition to the legal status of General Assembly resolutions, this memorandum will discuss the effect of coercion of the Assembly membership by, for example, the oil weapon, the legal status of the supposed right of self-determination of peoples, the content and limits of that right and its relation to the limits on the use of force set by international law, the application of the fundamental international law principle ex injuria non oritur jus, and other international law issues of similar gravity.

I. LEGAL EFFECTS OF GENERAL ASSEMBLY RESOLUTIONS

6. The basic general rule on the legal effect of General Assembly resolutions was stated by Judge Sir Hersch Lauterpacht in his opinion in the South West Africa - Voting Procedure case. He observed that save where otherwise provided for in the United Nations Charter (as for example with regard to the budget under Art. 17, or the admission of new members under Art. 4, para. 2), "decisions of the General Assembly ... are not legally binding upon the Members of the United Nations". Apart from such Charter exceptions, "resolutions" of this body, even if framed as declarations or decisions, "refer to recommendations ... whose legal effect although not altogether absent ... appears to be no more than a moral obligation". The binding legal quality of such resolutions must be established by conformity with the recognized requirements for creation of customary law or treaty law. 1/

7. A generation later, in an equally considered pronouncement, another distinguished former judge of the International Court of Justice, Sir Gerald Fitzmaurice, was no less unequivocal in rejecting the "illusion" that a General Assembly resolution could have "legislative effect". He pointed out, inter alia, that a Philippines proposal to expressly permit such a legislative effect was overwhelmingly rejected at the San Francisco Conference; that the general structure of the Charter limits the General Assembly (as distinct from the Security Council) to merely recommendatory functions; that it was precisely this limitation which explains why United Nations Members are so often prepared to acquiesce in allowing so many resolutions to be adopted by abstaining or not casting a negative vote; and that such relevance as General Assembly resolutions might have to international law is, at most, that the content of a particular resolution may come to be considered for adoption by States in "a separate treaty or convention", binding by virtue of its adoption. 2/

8. These scholarly observations were confirmed the following year, at the 1492nd meeting of the General Assembly's Sixth (Legal) Committee, by a remarkable manifestation of concurrent views by Members of the United Nations. The Committee had before it a draft resolution on the role of the International Court of Justice. Its preamble referred to the possibility that in deciding disputes the Court might take into consideration declarations and resolutions of the General Assembly. A wide spectrum of States from all parts of the world rejected even this rather mild reference. The proposal was, some said, an attempt at "indirect amendment" of Article 38 of the Statute of the International Court, and a "subversion of the international structure of the United Nations". It was capable of meaning "that General Assembly resolutions could themselves develop international law". The proposal attributed to the General Assembly "powers which were not within its competence". It was an attempt to "issue directives regarding sources of law", departing from the view that resolutions and declarations of the General Assembly are "essentially recommendations and not legally binding". Declarations and resolutions of the General Assembly could not

be considered a source of international law, "particularly in view of their increasing political content which was often at variance with international law". 3/

9. Therefore, before their massive reliance on General Assembly resolutions as creating legal obligations, the authors of the "studies" owe their readers a full, careful and candid consideration of the requirements involved in justifying this reliance under Article 38 of the Statute of the International Court of Justice. The authors' inability to establish the propriety of grounding the legal basis of their theses in recent General Assembly resolutions is especially manifest in the whole structure of the Resolutions "study". It opens with a section devoted to "The Juridical Competence of the Political Organs of the United Nations", obviously intended to maximize the legal effect of those General Assembly resolutions favourable to their theses.

10. Despite the contentiousness of the issue and the vast literature on it, Resolutions purports to dispose of the matter by two carefully selected quotations. One is from Professor Rosalyn Higgins' general statement 4/ that votes and views of States in international organizations have "come to have legal significance", and that "collective acts of States repeated by and acquiesced in by sufficient numbers /of States/ with sufficient frequency, eventually attain the status of law" (emphasis supplied). The other is Judge Tanaka's dissenting opinion in the South West Africa cases. 5/ But Judge Tanaka there only pointed out that the traditional requirements for the creation of a new rule of customary law (practice, repetition, and opinio juris sive necessitatis) remain unchanged. However, they may mature at a quicker pace under modern techniques of communication and international organization.

11. From these carefully qualified generalities the "study" proceeds immediately (p. 5) to its own statement of its sponsors' desired law, namely, that "the State practice requirement for customary law-making /is to be found/ in the collective acts of States (as in voting in favour of a particular General Assembly resolution) as well as in their individual acts". For this summary to represent correctly the opinions of the learned authorities whom they quote, the authors should then have proceeded, with the same care as Professor Higgins and Judge Tanaka, to consider additional requirements. These include the acquiescence of States, the demonstration of opinio juris sive necessitatis, the sufficiency of the number of States involved (judged by the nature of their interest, self-serving or adverse, in the subject-matter), as well as the sufficiency of the number of instances when these requirements are met. Thus, the quotations relied on by the authors proceeded by analogy with these requirements of customary law. By neglecting the relevant specifications for customary law, the authors distort the analogy into a vague notion of "consensus".

12. The Mallisons' wish for a simplistic rule translating General Assembly resolutions into international law, and their failure to establish this proposition, are understandable. What is difficult to understand is why, as international lawyers, they show so little awareness of the range and depth of

the controversies among their colleagues, which forbid such simplification. Half a dozen hypotheses - each with its own consequential criteria and limits - are current in the literature and divide the authorities. They include the treatment of voting behaviour (1) as an extension of treaty-making; (2) as authoritative interpretation of existing treaties; (3) as expression of "general principles of law"; (4) as declaratory of the existence of rules of international law; (5) as a new source of international law supplementing the inadequacies of the sources laid down in Article 38 of the Statute of the International Court of Justice; and (6) as a means of creating informal expectations among States. According to the sixth hypothesis, expectations can mature into binding rules depending on whether the votes of States (a) represent the interests of all affected sides in controversial matters; (b) avoid extreme and intransigent positions; (c) are free of vague and indeterminate language; (d) are free of politically motivated double standards; (e) are not used to champion ex parte positions in political quarrels; and (f) proceed from an international organ which maintains on the particular matter impartial methods of deliberation and resolution.

13. Hypotheses (1)-(5), as well as that which proceeds on the analogy of customary law, all remain inchoate, with applicable criteria surrounded by doubt and dispute. As to hypothesis (6), it will be apparent, as this examination proceeds, that much recent General Assembly action on the Middle East, especially since the deploying of the oil weapon in 1973, is a veritable paradigm of that kind of United Nations action which will not mature into law. 6/

14. But the authors do not trouble to explore these vital questions. Instead, they fill the lacuna with a superficial summary of the subject matters on which the Security Council and General Assembly are authorized to adopt resolutions under Articles 12 to 14 and 33 to 38 of the Charter. It is surprising that in doing so, they make no reference to the point, relevant to their thesis, that only as to certain decisions of the Security Council can Article 25 of the Charter create legally binding obligations for Members. No legal force is attributed by the Charter to resolutions of the General Assembly.

15. Ignoring or side-stepping all of these issues, the authors invite the reader (p. 8) to accept the proposition that all assertions of law repeated in General Assembly resolutions become ipso facto international law by "consensus". Indeed, by a singular begging of the question, the only real guidance offered in Resolutions for selecting those General Assembly resolutions which qualify as customary law, is to say (pp. 3-4) that "this practice /i.e. of expressing consensus on legal issues through the General Assembly/ is particularly evident in General Assembly resolutions concerning Palestine, Israel and the Middle East". Thus, after setting out to establish, as a basis for their claim that certain resolutions on the Palestinian Arabs are law, the limits within which General Assembly resolutions may be offered to establish the existence of new international law by direct action of the participating States, the authors then simply tender those very resolutions as examples of how such new customary law is created in the General Assembly. This failure of the authors to lay a firm

legal foundation for their interpretation of General Assembly resolutions negates all the main submissions in the "study". Their submissions that a formidable series of legal obligations, arising outside traditional international law and the Charter, have been imposed on Israel by General Assembly resolutions, do not bear scrutiny and so must be rejected.

* * *

16. Professor Schreuer wisely observed in his survey of the state of international law in 1977:

> A recommendation's significance will not least depend on the moral authority of the adopting organ. Only the maintenance of high and impartial standards of decision-making in the international organ will endow its recommendations with persuasive force for all sectors of the international community. The application of politically motivated double standards or the use of general resolutions to champion positions in political quarrels are liable to undermine the credibility of the international organ even in areas of relative agreement. 7/

There are several reasons for suspecting that this rather self-evident prerequisite for attributing binding force to resolutions of the General Assembly has often not been fulfilled in recent years.

17. One obvious reason is that some pronouncements of that body, even when they purport to "declare" or "interpret" law, smack of short-term power politics rather than of a deliberative legislative process. In a General Assembly of over 150 Members, operating on the basis of one State - one vote, major Powers like the Soviet Union, or alliances controlling a major resource like oil, together with large blocs of third world States, are in a position to convert that body into one more instrument of their own political warfare. In a General Assembly with the limited powers envisioned by the Charter this parliamentary situation would afford a tolerable (perhaps even desirable) arena for international politics. It becomes unacceptable and dangerous when the majority of groupings made up of temporary and shifting alliances attempts to attribute legally binding force to the resolutions it forces through this body. Such usurped power is at present being targeted against much of the western world, and even more particularly against Israel.

18. A second reason for denying General Assembly resolutions law-making effect is to be found in the duress or political pressures regularly brought to bear on States voting in the General Assembly. For example, the coercive oil embargo power wielded by a few States, diminutive in population but formidable in the importance of the resource they control, constantly inhibits Members who might wish to vote no, or even to abstain, on a range of matters notably but not exclusively affecting the Middle East. Under adequate duress, enough Members can be "obliged" to support, or at least abstain from opposing, such resolutions,

so as to secure a majority for them. But to be "obliged" in this manner certainly does not satisfy the time-honoured requirement of opinio juris sive necessitatis in the international law-making process. In the jurisprudential commonplace, to be "obliged" to yield to an armed bandit is not to have a legal obligation to do so. No process of this kind, whether on issues affecting the Middle East or on other matters, can create international legal obligations.

19. General Assembly resolution 34/65 B of 29 November 1979, purporting to declare the Camp David Accords and other agreements, including the Peace Treaty between Israel and Egypt to "have no validity" poses, at a new height of visibility, the threat to international legal order from automatic attribution of legal (or even moral) force to resolutions of the General Assembly. That extraordinary pronunciamento on the legal validity of agreements freely negotiated and arrived at between sovereign States blatantly expresses the policy of the Arab "rejectionist" States, and the Soviet determination to secure its super-Power role in the Middle East. But these political statements cannot be transformed into "law" by means of a vote in the General Assembly. The 38 States which voted against that resolution and the 32 which abstained included the United States, the nine members of the European Economic Community, and nearly 60 other Members. When this voting pattern is analysed more closely, it emerges that many of the abstentions would have been negative votes but for fear of the use of the oil weapon against them. The majority includes more than a score of Members who are either oil producers or Arab or Moslem in affiliation, and no less than that number of Communist or Communist-aligned States.

20. That this is now a regular voting pattern in the General Assembly is clear from a comparison with the notorious resolution 3379 (XXX) of 1975, which solemnly pretended to "determine" that "Zionism" is a form of "racism". There too almost half the Members of the United Nations voted against or abstained, and the majority consisted of only 72 out of the 142 Members of the United Nations. The coercion by oil-producing States, in alliance with Communist States, was only too apparent in that vote. It is obviously not possible to prevent such resolutions from being adopted. But that is not the pertinent issue. That issue is whether, as the manipulators demand, there should be added to these extravagant expressions an attribution of binding force in international law.

21. It would indeed be extraordinary if a legal order which holds void treaties procured by the threat or use of force (see article 52 of the Vienna Convention on the Law of Treaties), would simultaneously attribute binding legal force to resolutions of the General Assembly for which States vote under extreme duress. No doubt the use of bargaining power, whether deriving from oil resources or from military force, cannot be prevented altogether from influencing the outcomes of negotiations between States. Yet, just as the Vienna Convention on the Law of Treaties sets limits to the lawful role of military power in inducing a party to accede to a demand, there must be corresponding limits to other means of coercion, including threats of economic strangulation by deprivation of essential oil supplies. 8/

22. There are a number of specific provisions of the Charter governing the employment of extreme economic duress. First, Article 53 expressly lays down that "no enforcement action shall be taken under regional arrangements, or by regional agencies without the authorization of the Security Council". Yet in fact this is what the 1973 Arab States' oil embargo against the United States, the Netherlands, Japan and other States amounted to. Such unilateral measures would not be in conformity with the Charter even if the political demands of the Arab States against Israel had conformed (which they did not) to the relevant Security Council resolutions. Second, the extreme coercion of the concerted oil measures probably constituted a threat or use of force, forbidden by Article 2, paragraph 4, of the United Nations Charter. There is a great difference between this degree of economic coercion based on monopoly power over oil supplies, and mere legal embargoes by one State against another when the fact of monopolistic control is absent. If this is so, the Vienna Convention on the Law of Treaties renders void any consensual obligation which States are thereby induced to accept. Third, many United Nations Members have taken the view in connexion with the Definition of Aggression that it includes "economic aggression", and that its victims may lawfully take appropriate measures of self-defence. Fourth, a conspiratorial design of this kind by a group of Members to cripple the economies of other Members for collateral political ends obviously flouts the "Purposes" and "Principles" of Articles 1 and 2 of the Charter, as well as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, adopted by the General Assembly in resolution 2625 (XXV). Fifth, as a number of States urged in the Special Committee on the Definition of Aggression, the "sovereignty" of States protected by Article 2 of the Charter, as well as by the Definition of Aggression, may embrace economic attributes in addition to "territorial integrity" and "political independence". Hence, the extreme coerciveness and dubious legality of the Arab oil boycott under Article 53 of the Charter would seem to constitute "a threat or use of force in violation of the principles of the Charter".

23. If the exercise of modes and degrees of duress against individual States or regional groups are thus unlawful, it would be strange to think that they could remain lawful when exercised against the collectivity of Member States of the United Nations in the General Assembly. And it would become correspondingly grotesque to argue, as do all these "studies", that once assertions in resolutions of that body are sufficiently repeated they are transformed into international law, regardless of any duress by way of oil or other pressures which induced many Members to vote or abstain so as to allow them to be adopted. The grotesqueness arises not merely from ignoring the unlawful pressure by which the mere appearance of consensus is produced, and which, in principle, should of itself taint the resolution qua resolution. The grotesqueness is raised to breath-taking proportions by the claim that such resolutions are transmuted into precepts of international law binding on all States.

24. A third reason for rejecting claims that General Assembly resolutions as such create binding law is the rather indiscriminate fashion current today in the General Assembly of endorsing assertions made in the name of "international law", merely because they seem "progressive" in the sense of constricting the legal rights of States not belonging to the so-called Non-Aligned Group. Such positions are sometimes taken by publicists of some sincerity; yet they often represent a naive view not only of international law, but also of both morality and international politics. These publicists can be found to take stern restrictive views of the range of lawful resort to force by States, while insisting, with no sense of the incongruity, that States are also free to initiate or support "wars of liberation" of their own choice, provided that they can control by any means sufficient protective votes in the General Assembly. Such doctrines are a veritable forcing-bed for the double standards which Dr. Schreuer, as seen, correctly stigmatizes as fatal to any attribution of law-making to the General Assembly.

25. This "softening" of the doctrine which has been a mainstay of statecraft since before the Peace of Westphalia (1648), is due in part to changing power-constellations, cultural styles and ideological commitments, and sometimes to post-colonial guilt feelings. But it is also due in part to the skill, imagination and persistence with which Soviet, Arab and other diplomats and publicists have co-ordinated, disguised and pressed the accumulation of their demands against the existing legal order. It is not the present thesis that in this new situation the give and take in the conflict of claims and the power that backs them may not yield new principles for a viable legal order. Yet to qualify as international law <u>any</u> assertion for which a majority can be marshalled in the General Assembly is to undermine both the United Nations and the international legal order as hitherto understood. The effect may be to block or vaporize that law, so as to foreclose any chance of adjusting it to changing conditions, as well as to invite political and military disasters.

26. Professor Gaetano Arangio-Ruiz's work, <u>The Normative Role of the General Assembly of the United Nations and the Declaration of Principles and Friendly Relations</u>, 9/ is perhaps the most comprehensive and up-to-date examination of this matter. That learned author and experienced diplomat has diligently assembled, scrupulously commented upon, patiently organized and critically analysed the practice and growing literature which seeks to establish, explain or support pretensions to law-making authority by the General Assembly. It is a work which commands attention from all who value juristic and intellectual integrity above fashion and ideology. Professor Arangio-Ruiz ranges over numerous theories which purport to attribute law-making authority to the General Assembly. These include the supposed legitimation by the Charter or other contractual rule; a supposedly authorizing rule of customary law, the supposed "will" of the "Organised International Community", and the supposed binding force of particular resolutions seen as the practice of States maturing into custom or as "treaty" obligations based on "consensus".

27. On every such ground he is led to conclude that the General Assembly lacks authority either to "enact" or "declare" or "determine" or "interpret" international law in a way legally binding on any State, whether or not a Member of the United Nations and regardless of how that State voted on the particular resolution. His demonstration is relevant both for attempts at abstract "declaration" of law made by the General Assembly and for usurpation of the power to "determine" matters on which States are at variance, despite the lack of authority from the Charter to so "determine". He calls upon international lawyers to resist and reject what he calls the "soft-law method" associated with loose attribution of independent law-making power to the General Assembly. In response to arguments like those made in these "studies", that sufficiently frequent repetition of a statement in the General Assembly can in itself transmogrify that statement into a rule of customary law, Professor Arangio-Ruiz offers a fitting answer:

> It would be too easy if the "shouting out" of rules through General Assembly resolutions were to be law-making simply as a matter of "times" shouted and size of the choir. By all means, we would urge that one let the General Assembly shout as often and as loud as it is able and willing to shout. However, for the shouted rule to be customary law there still remains to consider the conduct and the attitudes of States with regard to the actual behaviour, positive or negative, contemplated as due by the rule (p. 476).

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28. Among the more dramatic examples of the dangers to the international legal order from loose attempts to turn General Assembly resolutions into international law is that body's resolution 3236 (XXIX) of 22 November 1974 on the rights of the Palestinian people. Since that resolution is also a centre-piece of all four "studies" it is instructive to examine it in terms of the preceding general analysis.

29. The basic issues and principles for the settlement of the Middle East situation were set forth in Security Council resolution 242 (1967), reaffirmed in resolution 338 (1973), which required the parties to proceed forthwith to negotiations for a just and durable peace. During the period from 1967 to 1973, various cease-fires ordered by the Security Council and consented to by the parties were beyond any doubt in full legal force. Under those circumstances, the hostilities initiated by Egypt and Syria in 1969-1970 and 1973, and the Arab States' harbouring and support of terrorist operations against Israel under the auspices of the PLO and its military wings, should have incurred the censure of the United Nations. However, the geo-political drives of Soviet policy, the multiplication of United Nations Members aligned in voting blocs with Communist and Arab Members, the political use of the Soviet veto and the coercive use of the oil weapon, rendered the Security Council impotent through most of the Yom Kippur War of 1973.

30. Then, on 22 November 1974, the General Assembly adopted resolution 3236 (XXIX) which made explicit this travesty of the applicable principles of international and Charter law. No one can second-guess the voting fate of that resolution had not the damoclean sword of an oil boycott hung over the proceedings. Even under such coercion, one third of the Members of the General Assembly either voted against or abstained. Resolutions adopted in such circumstances are not likely to reflect or promote international law, much less justice or morality.

31. In resolution 3236 (XXIX), the General Assembly purported to reaffirm "the inalienable rights of the Palestinian people in Palestine". It also recognized the PLO as the appropriate claimant in respect of such rights. In so doing, the General Assembly endorsed by implication prior PLO actions, including terrorist activities deliberately aimed at men, women and children, as well as the citizens, airports and aircraft of numerous States not involved in the Middle East dispute. By the same token, and by a later express provision, it also offered dispensation for the continuance of such activities.

32. Second, the resolution violated various legal principles and rights guaranteed under international law and under other authoritative long-standing United Nations resolutions. By its endorsement of the PLO's aspirations, which (under art. 6 of the Palestinian National Covenant) call for the destruction of the State of Israel, the measure violated the sovereign equality of Israel, guaranteed by Article 2, paragraph 1, of the Charter. It also violated Israel's right to be free from the threat or use of force under Article 2, paragraph 4, and to be free from armed attack under Article 51.

33. Third, the resolution contradicted the assurance embodied in Security Council resolution 242 (1967) of Israel's right "to live in peace within secure and recognized boundaries free from threats or acts of force".

34. Fourth, by reaffirming what it called "the inalienable rights of the Palestinian people in Palestine", with no geographical limitation placed on those last two words, the resolution contradicted the General Assembly's 1947 Partition resolution. Although Arab aggression prevented that resolution from ever coming into legal operation, the General Assembly was certainly committed to recognizing the entitlement of the Jewish people, and later of Israel, to <u>some part</u> of Palestine. Historic and geographic "Palestine" includes not only Judea and Samaria and Gaza, but also the whole of pre-1967 Israel and the Kingdom of Jordan. This notwithstanding, the representative of Jordan in the debate on the 1974 resolution made clear his country's view that Israel <u>was</u> included in the "Palestine" claimed for the Palestinians, whereas Jordan was not!

35. Fifth, while the General Assembly in 1947 had requested the Security Council to treat the use of force by Arab States as "a threat to the peace, breach of the peace or act of aggression", the General Assembly in 1974 placed itself in the role of a virtual accomplice by encouraging the resumption of the very kind of aggression which it formerly singled out for peremptory condemnation. This

lamentable volte-face is underscored by the express approval in paragraph 5 of the resolution of the use by the PLO of "all means" to achieve its ends, and its appeal to all States and international organizations to assist with such means! 10/

36. The representative of the United States spoke for many Members when he referred to the dangers to the authority of the United Nations posed by such one-sided resolutions. He cited the handling of the global economic crisis and the Middle East conflict as examples of what he viewed as arbitrary disrespect for the Charter. He warned that if the United Nations continued to proceed on the basis of arithmetical majorities, a "sterile form of international activity" would result and the United Nations would no longer be regarded as a responsible forum of world opinion. 11/ Yet this resolution typifies the resolutions of the recent period on which these "studies" base their untenable conclusions.

II. GENERAL ASSEMBLY RESOLUTION 181 (II) of 29 NOVEMBER 1947

37. Two distinct and basic legal questions are wholly overlooked in the Mallisons' analysis of the Partition resolution. One: What would have been its effects on sovereign title in the territories concerned had the Arab States not rejected it? Two: What residual binding effect (if any) survived the destruction of the resolution by Arab aggression? Both these questions are certainly part of what the authors call (p. v) "the context of international law" in which they claim to be examining the United Nations resolutions concerned. Legal relations of States cannot be frozen at a point in time over a quarter of a century ago, even at the behest of these authors.

38. The first issue is the potential legal effect of the Partition resolution had it come into legal operation. On this issue the authors involve themselves a somewhat tortuous struggle. On the one hand, they do not dissociate themselves from Arab claims that the resolution was invalid ab initio, violating (in their view) the Mandate for Palestine, as interpreted by Arab protagonists (pp. 22-23). 12/ Acceptance of these claims would obviously tend to justify the Arab States' forcible rejection of the resolution. On the other hand, after failure of that Arab aggression to destroy Israel, the authors, writing over three decades later, wish for rather obvious reasons to attach great value to certain provisions of the 1947 resolution which would, on their interpretation, be legally embarrassing to Israel (pp. 24-25). In this schizophrenic posture, their analysis suggests that the General Assembly was in 1947 both a legitimate United Nations successor to the League of Nations Mandates System, and a usurping authority acting ultra vires. The tension of simultaneous validity and invalidity which they suggest for the 1947 resolution infects and cripples the whole of their account of the role of the General Assembly at that time.

39. If we address ourselves directly to the potential effects on sovereign title had the Partition resolution not been aborted by Arab aggression, the answer is not complicated. On 2 April 1947, the United Kingdom, as the Mandatory Power, gave formal notice to the United Nations and authorized the General Assembly to attempt a settlement on the question. 13/ Since the Charter refers to the Mandate System, the United Kingdom's request was properly a "question or ... matter within the scope" of the Charter, for purposes of General Assembly discussion under Article 10.

40. It is no less certain, however, that the powers of the General Assembly acting on a matter within Article 10 are limited to the non-binding mode of "recommendations" (paras. 6-36, supra). Moreover, the language of the 1947 resolution was scarcely such as to convey titles instanter. Nor was it clear that the General Assembly had any territorial title in Palestine to convey. Elihu Lauterpacht correctly concludes that the Partition resolution had no legislative character as is necessary to vest territorial rights in either Jews or Arabs. Any binding force would have had to arise from the principle pacta sunt servanda, that is, from the agreement of the parties concerned to the proposed plan. Such agreement was frustrated ab initio by the Arab rejection, 14/ a

rejection underscored by the armed invasion of Palestine by the forces of Egypt, Lebanon, Transjordan, Syria, Iraq and Saudi Arabia launched hard on the heels of the British withdrawal on 14 May 1948, and aimed at destroying Israel.

41. Israel thus does not derive its legal existence from the Partition plan. 15/ Rather, its independence rests (as does that of most other States in the world) on its own assertion of independence, on the vindication of that independence against assault by other States, and on the establishment of an orderly government within the territory under its control. At most, as Israel's Declaration of Independence expressed it, the General Assembly resolution was a "recognition" of the "natural and historic right" of the Jewish people in Palestine. The immediate recognition of Israel by the United States and other States, and its admission in 1949 into the United Nations, were in no way predicated on its creation by the Partition resolution.

42. Israel's Declaration of Independence of 14 May 1948, made under the immediate shadow of armed attack from the Arab States, predicated independence on the following grounds: (1) Eretz Israel (the Land of Israel, the Hebrew name for "Palestine") was the birthplace of the Jewish people where "their spiritual, religious and national identity was shaped", where they first attained statehood, created cultural values of national and universal significance, and gave the Bible to the world; (2) Jews in exile had never ceased to pray and hope for their return to political freedom in the Land of Israel; (3) efforts to return to Eretz Israel had continued throughout successive generations, and in recent decades had become a mass movement, bringing a revival of the Land of the Hebrew language, and progress for all inhabitants; (4) the historic connexions between the Jewish people and Eretz Israel and the right of the Jewish people to rebuild its National Home there were internationally recognized in the League of Nations Mandate; and (5) the contribution of the Jewish people to the victory of the freedom-loving nations over the nazi tyranny had gained for them the right to be reckoned among the peoples who founded the United Nations. These elements are summed up in a concluding affirmation that "it is the natural right of the Jewish people to be master of their own fate, like all other nations, in their own sovereign state".

43. All these elements of Israel's entitlement to sovereignty were independent of the United Nations. They refer to facts existing before the United Nations was established. However, the Declaration did also refer to the General Assembly's Partition resolution. It recited that on 29 November 1947 the General Assembly had adopted a resolution "calling for" the establishment of a Jewish state in "Eretz-Israel", and that "this recognition by the United Nations of the right of the Jewish people to establish their state is irrevocable" (emphasis supplied). 16/

44. I have emphasized certain of the words used in the official translation of the Declaration because the Mallisons' version in Resolutions (p. 26) alters them in ways tending to support the otherwise untenable assertion that "Israel has placed heavy reliance upon the Partition resolution as providing legal authority" and that it "is the pre-eminent juridical basis for the State of Israel". The authors interpret (without adducing any support) the expression "calling for" in the

Declaration of Independence as though it was authorizing. They also take liberties with the phrase that the United Nations' "recognition" is "irrevocable". In context, this means that the preceding five elements of Jewish peoplehood and entitlement to national independence, as elucidated earlier in the Declaration, justify "this recognition" by the United Nations. The authors substitute for the word "recognition" the word "resolution", thus rewriting Israel's Declaration of Independence as if it read, "This resolution by the United Nations ... is irrevocable". This distortion is obviously essential to their argument that Israel remained and still remains bound by the 1947 resolution despite its rejection by the Arab States and other authorities concerned. It is, however, pure fabrication.

45. Returning to the question: What would have been the legal binding effect of the Partition resolution had its coming into operation not been aborted by the Arab States? The answer is that the "Plan of Partition with Economic Union" set out in the annex to that resolution, would, if accepted, have been binding on Israel and on the Arab States, including the new Palestinian Arab State once it was established, on the basis of the rule pacta sunt servanda. The effect of the agreement would have been to allocate sovereign titles, inter alia, to Israel, the proposed new Arab State, and the proposed corpus separatum comprising Jerusalem and its environs. Israel stood ready to enter into this agreement. On the other hand, as even the authors have to admit (pp. 25-27), the Arab States rejected it, and used armed aggression to destroy the Plan. 17/ There was in fact no such agreement, no such effect in vesting and delimiting titles, and no such entities as the proposed Arab State and corpus separatum ever came into being, in fact or in law.

46. The chronology of events is essential in assessing whether the Partition resolution could affect sovereign titles in Mandated Palestine. The resolution recommended to the Mandatory Power the adoption and implementation of the revised majority plan of the United Nations Special Committee on Palestine (UNSCOP); it requested the Security Council to "take measures" to implement the Plan; it called upon the inhabitants of Palestine to take steps necessary to put the Plan into effect; and it appealed to all Governments and peoples to refrain from any action which might hamper or delay the Plan's coming into effect. The Plan envisaged the termination of the Mandate and the withdrawal of British forces no later than 1 August 1948. It provided that the Arab and Jewish States and the international régime in the City of Jerusalem should come into existence not later than 1 October 1948. The Plan also described their future boundaries and included chapters on the Holy Places, religious buildings and sites, religious and minority rights and citizenship, international conventions and financial obligations.

47. The Jewish Agency for Palestine reluctantly accepted this resolution, in the belief that it contained the elements upon which the parties could together construct a peaceful future. 18/ The Jewish Agency did so on the understanding that, despite the negative attitudes of the Arab States in the General Assembly, they would accept the appeal of that body not to oppose its implementation by violence. This understanding was implicit in the principle of reciprocity in

international relations founded on mutual consent. The Arab States, however, rejected the resolution as infringing Arab rights, and ultra vires of the General Assembly. They proceeded in May 1948 to attempt to seize the whole of Palestine by armed force. Consequently, all basis for bringing the plan into legal operation was finally destroyed by the Arab States in May, months before the termination of the Mandate. 19/

48. The authors of Resolutions pay virtually no regard to these dates and events, despite their crucial importance for vesting titles in international law. After their opening vacillation as to whether or not the resolution was "invalid" ab initio, they confuse matters further by vigorously asserting that the resolution is certainly of continuing validity today (pp. 25-27), over 30 years later.

49. The miracle to be wrought by the Arab States, and by the Mallisons in their wake, is almost as impressive as the revival of something dead. It is no less than the resuscitation of a resolution which they had guaranteed would be still-born and which they had buried by their own aggression over three decades ago. 20/ Since, as shown, none of the resolution's potential legal effects ever came into being in the first place, they cannot have any "continuing validity" today.

50. The opposite view pressed by the authors of Resolutions is grossly repugnant to elementary considerations of justice and equity and good faith common to most legal systems, including international law. There are additional grounds, rooted in basic notions of justice and equity, on which the Arab States and the Palestinian Arabs should not, in any case, be permitted after so lawless a resort to violence against the resolution, to claim legal entitlements under it. Several of "the general principles of law" mentioned in Article 38, paragraph 1, of the Statute of the International Court of Justice preclude it. These Arab claimants do not come with clean hands seeking equity; their case is mired by the illegal bid to destroy by aggression the very resolution from which they now seek equity. They may also be thought by their representations concerning these documents to have led others to act to their own detriment, and thus are now debarred by their conduct from espousing, in pursuit of present expendiencies, positions they formerly denounced. Their position also resembles that of a party to a transaction who has unlawfully repudiated the transaction, and then comes to court years later claiming that selected provisions of it should be meticulously enforced against the wronged party. Similarly, it resembles that of a party who has by unlawful violence wilfully destroyed the subject-matter which is "the fundamental basis" on which consent was to rest, and now clamours to have the original terms enforced against the other party.

51. The authors of Resolutions seek to salvage some continuing binding effect for the Partition resolution by suggesting (p. 27) that the gist of some later General Assembly resolutions, especially those concerning Palestinian peoplehood, somehow retroactively instilled new life into the still-born resolution of 1947. They argue that these later resolutions now "constitute a world-wide consensus of support". I have already submitted that these authors have not adequately examined

the limits within which votes in international bodies can be the equivalent of statements of rules of international law. This deficiency also undermines this final basis of their claim that the provisions of the abortive 1947 Partition resolution constitute binding norms of international law in 1979. General Assembly resolutions having no law-making authority on their own, certainly cannot revive a resolution which never had any legal effect to begin with.

III. THE RIGHT OF RETURN

52. An examination of the General Assembly resolutions on the right of return or compensation of Palestinian refugees shows that the heavy reliance on them displayed by the authors of Resolutions (pp. 31-37) is misplaced. The authors themselves observe (pp. 31-32) that paragraph 11 of General Assembly resolution 194 (III), which they properly recognize as the starting point and basis of their argument, did not even purport to be in mandatory terms. It was simply part of the terms of reference of the Palestine Conciliation Commission. A recital in resolution 273 (III), on the admission of Israel into the United Nations, "recalled" that resolution 194 (III) provided an option for refugees to return to their homes or to receive compensation, but it immediately "noted" the declarations and explanations made by Israel with respect to implementation of that resolution. Since Israel's declarations and explanations did not unqualifiedly accept the resolution, it can in no way be regarded as creating a legal obligation. As Elihu Lauterpacht observes the General Assembly "could not by its resolution give the Jews and Arabs in Palestine rights which they did not otherwise possess; nor, correspondingly, could it take away such rights as they did possess". 21/

53. It is clear that the next resolution, General Assembly resolution 513 (VI), was designed to facilitate the resettlement of the refugees in order to end their virtual confinement in concentration camps on Arab territory. Resettlement was the effective solution for the far larger and more complex refugee problems in Europe after the Second World War. With regard to the Arab refugees, it is a melancholy fact that this more humane and effective course has been followed to so small an extent, for so long, that some observers have concluded that, for the Arab States concerned, the refugee problem was more useful than its solution. Resolutions 2452 (XXIII), 2535 (XXIV), 2963 (XXVII), 3089 (XXVIII) and 3236 (XXIX), concerned with refugees fleeing in the aftermath of the Arab aggression of both 1947-1948 and 1967, aim at supporting the activities of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Although they contain various calls upon Israel and expressions of regret in the matter of repatriation and compensation, the peremptory assertions vital for the "studies" only finally mature in resolution 3236 (XXIX) of 22 November 1974. In the era of the oil weapon which then ensued, General Assembly resolutions indeed began regularly to insert the adjective "inalienable" before the words "right to return".

* * *

54. Even if those resolutions are taken as declaratory of international law, the question still arises why the authors of these "studies" have ignored the fact that Israel has absorbed and rehabilitated even larger numbers of Jewish refugees uprooted from Arab lands since 1948. In their doggedly meticulous analysis of General Assembly resolutions, the authors nowhere refer to Jewish refugees, nor do they even seek to explain why the general judicial principles on this matter

which they so eloquently invoke (pp. 28-30), running from Magna Carta (1215) to the International Covenant on Civil and Political Rights (1966), should apply only to Arab refugees and not to Jewish refugees.

55. The members of each of these groups suffered similar wrongs. The duty of providing homes for the 700,000 Jewish refugees involved was assumed by Israel in its fundamental Law of Return of 1950, as a first responsibility of the new State. This great burden of rehabilitation assumed by Israel should, both in law and justice, be brought into account in assessing contributions to be made by the Arab States and Israel to what Security Council resolution 242 (1967) called a "just" solution to the refugee problem. The point is even more pertinent because the misfortunes of both peoples arose from unsuccessful ventures in aggressive use of armed force in defiance of the United Nations Charter and resolutions by Arab States, and not by Israel.

* * *

56. In this connexion, the authors of Resolutions exhibit a curious astigmatism. Most remarkable is their failure to look carefully at relevant Security Council resolutions, especially resolutions 242 (1967) and 338 (1973). After all, the title of their "study" is Major United Nations Resolutions, not Major General Assembly Resolutions. In their tangled doctrine about "the right of return" of Palestinian refugees, they pay no regard whatsoever to the fact that the Security Council in 1967 did not feel that it could invoke any such hard-and-fast rule of international law as the authors assert. Nor do the authors deign to notice the fact that the formula of resolution 242 calling for "a just settlement of the refugee question", does not suffer from their own one-sidedness in ignoring Jewish refugees from Arab lands, while insisting on redress to Arab refugees from Palestine. They fail to notice that, as late as 1973, the Security Council reaffirmed in resolution 338 (1973) all the provisions of resolution 242 (1967), and called for urgent negotiation on their basis. This means that even in 1973 the resolutions of the Security Council, also a principal organ of the United Nations, did not conform to the reconstructed version of international law offered in Resolutions.

IV. SELF-DETERMINATION AND THE ARAB-ISRAEL CONFLICT

57. Is self-determination, whatever its specific content, the subject-matter of a precept of international law itself, or is it only a consideration of policy or of justice, to be weighed as one among other facts and values in the interpretation and application of legal rules? The authors of the Self-Determination "study" ask (p. 1) whether the doctrine is "a principle" or "a right". To this rather abstruse question, they give an even more abstruse answer. Conceding that the complexities of the issue are not within their ambit, they nevertheless announce that they will proceed "on the axiom" that "the right of self-determination exists as a crucial element in contemporary international life and is recognized as such by the political world community". Note that this supposed axiom studiously avoids any juridical reference, and might be better suited to a textbook on the sociology of the international community. A careful lawyer knows that a notion of "right" may or may not refer to a "legal right". I propose to analyse the evidence and process by which the authors of Self-Determination and of Resolutions seek to demonstrate the transmogrification of this sociological observation into a precept of international law currently in force.

58. The demonstration proceeds (pp. 2-13) by culling the views of publicists who have asserted that "self-determination has developed into an international legal right". Some of these are experts whose distinction is certainly not in the field of international law; 22/ but as a token of objectivity the "study" also mentions (though scarcely exhaustively) one or two publicists who hold the opposing view. The anonymous writers have perforce to admit (p. 12) that, even today, there is a "variety of opinions on the issue of the juridical position in international law of the right of self-determination". Yet this in no way inhibits them from assuming that the right of self-determination is "an established principle of international law", because this is "the consistent stand of the General Assembly". Moreover, this stand "reflects the will of the international community". This is nothing more than a reassertion of their opening axiom, of no legal significance unless the General Assembly "stand", as reflected in its resolutions, can be said to have a legislative character. But, as has been shown, although Resolutions opens with a laborious effort to demonstrate that the "stand" of the General Assembly on a matter becomes international law, its efforts were unsuccessful. Hence, proceeding from faith (or prejudice) rather than any juristic demonstration, the anonymous authors of Self-Determination perform the extraordinary feat of elevating the self-determination principle to the level of jus cogens. 23/

59. In both the "studies" on Self-Determination and Resolutions, therefore, the standing in law of the right of self-determination in general is asserted in conclusional terms, but nowhere is any demonstration proffered. Within this hazardous frame the authors produce a collage of documents critical of the League of Nations Mandate and of Zionism, the national liberation movement of the Jewish people. With similar selectivity, they rehearse (pp. 22-28) the history of the British administration in Palestine and the first phase of United Nations

involvement up to the abortion of the Partition resolution by what the authors delicately call the "sending" by "the Arab States" of "forces" into Palestine (p. 31). Nowhere in this presentation do they give any reason why self-determination, as the legal right they claim it to be, does not spread its blessings over the Jewish people as well as the Palestinian Arab people. Equally irrelevant for them is the unlawful occupation and annexation by Jordan of the West Bank and its failure, from 1948 to 1967, to accord the slightest degree of autonomy to the Palestinian Arabs living there.

* * *

60. Up to 1970, General Assembly resolutions dealt only with the claims of Arab refugees to return to their homes and "their repatriation, resettlement and economic and social rehabilitation and payment of adequate compensation for the property of those choosing not to return". 24/ It is only with General Assembly resolution 2672 C (XXV) of 8 December 1970 that "the General Assembly moved towards acknowledging the correlation between the right of self-determination and other inalienable rights" (Resolutions, p. 44). From this resolution and from a phrase in resolution 2649 (XXV) of 30 November 1979, the authors of Resolutions make so bold as to argue that all earlier resolutions on the self-determination of peoples in general, have later and retroactively become "specifically applicable to the Palestinian people" (id.). They are thus accepting as an historical fact that, so far as the General Assembly is concerned, no rights of the Palestinian Arabs under the Charter were recognized until 1970.

61. Even resolution 2672 C (XXV) of 8 December 1970, claimed as an epoch-making recognition of Palestinian self-determination, was hesitant at that late stage. No less than 72 States out of a total of the 139 Members of the United Nations at the time either opposed it or abstained in the vote, and only 47 States voted for it. This scarcely signals a whole-hearted flash of recognition, even a belated one, by the international community of an age-old self-evident truth!

62. Moreover, unprecedented coercion was exercised in the General Assembly by the Arab States' oil boycott in support of the Syrian-Egyptian attack on Israel in 1973 in order to induce a majority to vote for resolutions asserting the existence of the fact of a separate Palestinian Arab national identity. Even under such threats and duress, in 1973, the pertinent resolution 3089 D (XXVIII) marshalled only 87 affirmative votes (with 39 States voting against or abstaining). It is noteworthy that when, a year later, resolution 3236 (XXIX) attempted to strengthen the self-determination claim by "reaffirmation", there were increases in both the number of Members who opposed, and the number who abstained. 25/

63. The "study" on Self-Determination concludes (pp. 33-37) with a section entitled "The Affirmation by the United Nations of the Right of Self-Dtermination of the Palestinian People". While the Resolutions "study" blurs the precise time of full recognition by the General Assembly of the claim of the Palestinian Arabs, Self-Determination is crystal clear and accurate on the point. The anonymous authors of Self-Determination point out that the General Assembly's repeated

assertions of Palestinian qualification as a nation do not begin until resolution 2672 (XXV) of 8 December 1970. They even stress (p. 33), with perspicacity, but without mentioning the oil weapon, that it was with the Arab war of aggression of October 1973 that the cause of self-determination for the Palestinian people "began a rapid advance". They also stress the close relation between the affirmations by Arab Heads of State at the Rabat Summit in 1974 of the right of self-determination for the Palestinian Arabs and the status of the PLO, and the General Assembly's adoption of the PLO resolution 3236 (XXIX) of 22 November 1974. All this leads inexorably to the admission that the General Assembly's action was taken under pressure of the Arab States, including those now flexing their muscles through OAPEC.

64. The authors of Self-Determination admirably summarize (p. 37) the main point as to national claims of the Palestinian Arabs in this striking way:

> Thus it will be seen that the right of self-determination of the Palestinian people, denied for three decades during the Mandate, ignored for two decades in the United Nations, have over almost the last decade received consistent recognition and strong assertion by a preponderant majority of Member States of the United Nations ...

It is ironic that this eloquence, applied to the Palestinian Arabs, admits, indeed insists, that the proper date for the application of the self-determination principle is placed about 1970, and certainly not half a century before, in 1917. The implications of this admission are examined below (paras. 66-82).

65. It is also curious that in a 10-page section on "The National Rights of the People of Palestine" (Resolutions, pp. 39-48), the authors continue avoiding reference to the most important and influential of recent resolutions on the Middle East, Security Council resolutions 242 (1967) and 338 (1973). As international lawyers, the authors must be aware of the importance of resolution 242 as the only authoritative and unanimously accepted formulation by the Security Council of the issues between Israel and the Arab States. They ignore its implications for the self-determination issue in that Security Council resolution 242 (1967) significantly excludes all reference to any national claims of Palestinian Arabs against Israel. This was simply not an issue in the Middle East conflict in 1967, nor was it in 1973 when resolution 338 (1973) reaffirmed resolution 242 (1967).

* * *

66. A basic assumption underlying this whole series of "studies" is that the peoples whose competing claims to self-determination are to be reconciled are the Jewish people on the one hand, and the Palestinian Arab people on the other. A corollary to this assumption is that the relevant date for applying the self-determination principle in the Middle East is 1947, the date of the Partition resolution. Alternatively, it may be 1974, when the General Assembly first

pronounced, in resolution 3236 (XXIX), that "the Palestinian people is entitled to self-determination in accordance with the Charter of the United Nations".

67. Such assumptions fly in the face of the history of the struggle over Palestine by ignoring the critical importance of the decades before 1947. The main conclusion of Self-Determination (p. 37) is that no such right of Palestinian Arabs as a separate people was recognized "during three decades" of the League Mandate, or "the first two decades" of the United Nations. This admission confirms what is in any case clear from the post-First World War settlement: the rival claimants to the former Ottoman territories concerned were limited to the Jewish and Arab national movements, and given the historical context, properly so.

68. For centuries preceding 1917, the name "Palestine" never referred to a defined political, demographic, cultural or territorial entity. In the immediately preceding centuries, the area formed part of the Ottoman Empire, and for much of that time its provincial capital was in Damascus. In 1917, its larger part, north of a line from Jaffa to the River Jordan, was part of the Vilayet of Beirut and the whole of it was considered part of Sham (a broad area comprising what is today Syria and beyond). The Arabs living there were not regarded by themselves or by others as "Palestinians", nor did they in any major respect differ from their brethren in Syria and Lebanon. This "Syrian" rather than "Palestinian" identification of Arabs living in Palestine underlay the request of the Syrian General Congress on 2 July 1919, "that there should be no separation of the southern part of Syria known as Palestine, nor of the littoral Western Zone which includes Lebanon, from the Syrian country". 26/

69. Indeed, the main argument made by Arabs in the post-First World War negotiations was not that "Palestinians" would resent the loss of Palestinian identity by the establishment of the Jewish National Home, but that the inhabitants would resent the severance of their connexion with their fellow Syrians. In the light of these facts, the notion that the Arabs living in Palestine regarded themselves in 1917 as a Palestinian people in the sense required by President Wilson's self-determination principle (for brevity "the liberation principle") is thus a figment of an unhistorical imagination. To respect these historical facts is not to impugn the liberation principle; it is merely to point out that the principle must be applied at the appropriate time to group life as they truly exist.

70. Even some PLO leaders have disavowed a distinct Palestinian identity. On 31 March 1977, for example, the head of the PLO Military Operations Department, Zuhair Muhsin, told the Netherlands newspaper Trouw that:

> There are no differences between Jordanians, Palestinians, Syrians and Lebanese ... We are one people. Only for political reasons do we carefully underline our Palestinian identity. For it is of national interest for the Arabs to encourage the existence of the Palestinians against Zionism. Yes, the existence of a separate Palestinian identity is there only for tactical reasons. The establishment of a Palestinian state is a new expedient to continue the fight against Zionism and for Arab unity.

71. Thus, the facts relevant to a correct application of the self-determination doctrine in the present case go back to 1917. For whether this doctrine is already part of international law stricto sensu, or (as many international lawyers think) a precept of politics or policy or justice, to be considered where appropriate, it is clear that its applications must be predicated on facts. One such fact is when in time the claimant group lacking a territorial home first constituted a people or nation, with the requisite common endowment of distinctive language, ethnic origin, history, tradition and the like.

72. The point in time at which it can be confidently said that a distinctively Palestinian Arab claim for self-determination emerged on the Middle East scene was around the adoption of the Palestinian National Charter in 1964 (revised as a "Covenant" in 1968). 27/ The Covenant itself testifies with striking clarity that the belatedness of this self-recognition as Palestinian Arabs undermined the demands for territorial sovereignty. It was, after all, nearly half a century after the non-Turkish territories of the Ottoman Empire had already been allocated between the Jewish and Arab liberation claimants (the latter including the Palestinian Arabs, but not as a distinctive part). The Covenant sought to side-step these historical facts by two devices. It claimed that the Palestinian Arabs were part of "the Arab nation" to which the post-First World War allocation was made, and which by 1964 had come to control a dozen new independent States in the Middle East (arts. 14-15). But it also insisted that Palestinians were a separate people entitled to the whole of Palestine as an indivisible territorial unit for its homeland (arts. 1-5).

73. This design still left the problem of how, conceding the emergence of a distinctive Palestinian people only in the 1960s, such subsequent events could affect the prior correct application of the "self-determination" or "liberation" principle in 1919. To meet that problem the Covenant adopted the ingenious fiction of declaring Palestinian nationhood retrospectively to have existed in 1917. To this end it provided that only Jews who had "normally resided" in Palestine before the "Zionist invasion" (presumably around 1917) could qualify for membership in the Palestinian state, and, by clear implication, that all others would be expelled (arts. 6, 20-23).

74. In order to examine the assumptions on which the "studies" on Self-Determination and Resolutions proceed, the year 1917 must be utilized for testing the application of the self-determination principle to the Jewish and Arab peoples. At that time none of the present Arab States in the former provinces of the Ottoman Empire in the Middle East had come into existence, so "the Arab Nation", on whose behalf wide-ranging claims were made, was certainly an eligible claimant under that principle. By the same token, however, the Jewish people was also a proper claimant under it. Indeed, historically the Jewish claims began earlier than did the Arab claims. The Emir Feisal, in his well-known letter of March 1919 to Felix Frankfurter, recognized the concurrence of the Jewish and Arab liberation movements. He thanked Chaim Weizmann and other Zionist leaders for being "a great helper of our /the Arab/ cause", and expressed the hope that "the Arabs may soon be in a position to make the Jews some return for their kindness". And as a

signal reminder that, among Arabs too in 1919, there was no distinguisable Palestinian Arab nationhood, he added: "There is room in Syria for us both" (emphasis added). 28/

75. This historical context was clearly set out in the Agreement of Understanding and Co-operation of 3 January 1919 signed by the Emir Feisal, representing Arab national aspirations at the Paris Peace Conference, and Dr. Weizmann, representing the Zionist movement. Its preamble envisaged the closest possible collaboration in the development of "the Arab State and Palestine" as the surest means of "the consummation of their national aspirations". It is obvious from article 1 of that Agreement, providing for the exchange of "Arab and Jewish accredited agents" between "the Arab State" and "Palestine" that what was envisaged was the allocation of "Palestine" for self-determination of the Jewish nation, and of the rest of the region for that of "the Arab nation". 29/ The Ottoman Empire was so vast that a dozen independent Arab States came later to be established on it alone. In fact, the Arab claim for territory in which to exercise their right of self-determination extends beyond these dozen Middle East States. Several other States in Asia and North Africa also realize the Arab nation's claim to self-determination. Together these make up the Arab League, which comprises over 20 members today.

76. Thus, no liberty is being taken with history when it is recalled that representatives of the Jewish and Arab national movements presented themselves simultaneously after the First World War as claimants for liberation. Each people, Jewish and Arab, shared within itself cultural and religious traditions and experiences deeply rooted in the Middle East region. The Jewish people claimed one part, Palestine, with which it had nearly four millenia of unbroken connexion, as its historic home. The Arabs claimed virtually the whole of the territories detached after the First World War from the Ottoman Empire. These were the two claimant peoples, the Jews and the Arabs, between whom the Principal Allied and Associated Powers made the territorial allocations which began the modern history of Palestine.

77. The myth propagated in the Palestinian National Covenant that the "Palestinian people" was unjustly displaced by "Jewish invasion" of Palestine is widely disseminated, and is unquestioningly and dogmatically espoused in the United Nations "studies" under consideration. It is therefore necessary to recall not only the Kingdom of David and the succession of Jewish politics in Palestine down to the Roman conquest and Dispersion, but also the continuous Jewish presence in Palestine even after that conquest. In 1914 the Jews in Palestine were a closely-knit population of almost 100,000.

78. The connexion of the Jews with Palestine is eloquently stressed by the Report of the Royal Commission (headed by the late Lord Peel) in 1937. The zeal with which the "studies" cite passages from that Report fails to include the following:

> While the Jews had thus been dispersed over the world, they had never forgotten Palestine. If Christians have become familiar through the Bible with the physiognomy of the country and its place-names and events that

> happened more than two thousand years ago, the link which binds the Jews to Palestine and its past history is to them far closer and more intimate. Judaism and its ritual are rooted in those memories. Among countless illustrations it is enough to cite the fact that Jews, wherever they may be, still pray for rain at the season it is needed in Palestine. And the same devotion to the Land of Israel, Eretz Israel, the same sense of exile from it, permeates Jewish secular thought. Some of the finest Hebrew poetry written in the Diaspora has been inspired, like the Psalms of the Captivity, by the longing to return to Zion. Nor has the link been merely spiritual or intellectual. Always or almost always since the fall of the Jewish State, some Jews have been living in Palestine. Under Arab rule there were substantial Jewish communities in the chief towns. 30/

79. In terms of modern ideas concerning the liberation of peoples, it is critical to identify the two peoples whose competing claims were adjusted when the future of the former Ottoman territories in the Middle East was being negotiated. For it is fatal to any judgement of justice to misidentify the claimants among whom a territorial distribution is to be made. The facile assertion that Israel came into existence on the basis of an injustice to a Palestinian nation proceeds on a gross error of this very kind. In historical fact the Arab claimants after the First World War embraced Arabs of the whole Middle East area, including Arabs in Palestine, who were then in no sense a distinctive national group. The consequence is that now in 1980, to recognize a "Palestinian nation", and to endow it retroactively with an 80-year history as a rival claimant for Palestine, is to play impermissible games with both history and justice.

80. Arab national aspirations were certainly realized in the territorial distribution between Arabs and Jews after the First World War. Arab claims to sovereignty also received extensive fulfilment in the settlements following the Second World War, not only in the Middle East but in other parts of Asia and in Africa as well. Altogether this historical process included the following features:

(a) Despite all the extraneous Great Power manoeuvrings, Jewish and Arab claims in the vast area of the former Ottoman Empire came to the forum of liberation together, and not (as is usually implied) by way of Jewish encroachment on an already vested and exclusive Arab domain.

(b) The territorial allocation made to the Arabs after the First World War was more than 60 times greater in area, and hudreds of times richer in resources, than the "Palestine" designated in 1917 for the Jewish National Home. Indeed, the area of the territories ultimately made available to satisfy the claims of the Arab nation to self-determination is 500 times greater than the area of Israel.

(c) By successive steps after 1917, further encroachments were made upon this already tiny allocation to Jewish claims. As early as 1922, a major part of it (namely 35,468 out of 46,339 square miles, over three quarters) was cut away to establish what was to become the independent Hashemite Kingdom of Transjordan.

81. The liberation principle was thus applied to the rival claims of the Jewish people and the "Arab Nation" in the period following the First World War. Moreover, the principle was applied correctly to the facts of peoplehood then existing, by allocating the overwhelming share of territory and resources of the whole of the Middle East to the Arab nation (including the Palestinian Arabs). This share was ample enough to form in later decades the territorial basis for a dozen independent Arab States. The principle was also applied by allocating to the Jewish people, as part of the same settlement, a minute fraction of the area, embracing both Cisjordan and Transjordan. That tiny fraction was then reduced by four fifths in 1922, leaving the share allotted to the Jewish people under the liberation principle as 10,871 square miles, poor in resources, about one two hundredth of the entire territory distributed. This distribution in no way impaired any right of self-determination of any other nation. As has been seen, neither at the time of distribution, nor until decades later, did any distinct grouping of Palestinian Arabs come to be recognized as a separate nation either by themselves, or by other Arabs.

82. This presentation of the historical context belies the attempt in the Palestinian National Covenant, now emulated by the named and anonymous authors of the "studies", to present the Palestinian issue as a struggle which began in 1917 between the Jews of the world on the one hand, and "Palestinian Arab Nation" on the other, in which the Jews seized the major share. The underlying error here is the failure to recognize that the liberation principle has to be applied at particular points in time to the facts as they exist at the particular time. The self-determination claim on behalf of Palestinian Arabs was first pressed in United Nations resolutions at the end of the 1960s. If indeed they were wronged by not having been given an appropriate share of the vast territorial allocation made in 1919 to the "Arab Nation", of which they were then and now remain a part, such wrongs must be laid at the door of the dozen sovereign Arab States which arose from the lion's share of the distribution of the territory of the former Ottoman Empire.

* * *

83. The detaching in 1922 of four fifths of the territory within which the Jewish National Home was to be established in order to create first the Emirate of Transjordan and subsequently the present Kingdom of Jordan is of double significance in the context of applying the principle of self-determination. On the one hand, as already indicated, it drastically reduced the already tiny allocation for the exercise of the Jewish people's right to self-determination. But, conversely, in addition to satisfying the claims of Hashemite leadership, it provided a reserve of land for Arabs across the River Jordan in Palestine. Both Cisjordan and Transjordan made up historic Palestine. Hence the erroneous premise of these "studies" as to the identity of the claimants to self-determination in 1917 immediately gives rise to another dramatic error. That is their assumption that the Palestinian Arabs as a people do not already have a homeland and a base for statehood, and that these prerogatives must be wrested from the State of Israel. The fact is that after the First World War Transjordan arose as an encroachment on the small area properly allocated to the Jewish Nation, and subsequently the

Jewish National Home provisions of the Mandate were made non-applicable there. 31/ Yet these "studies" do not, as far as can be observed, refer to any duty on the part of the Kingdom of Jordan to accommodate the claims of the Palestinian Arabs.

84. The relevant consideration for the application of the self-determination principle in 1980, however, is that the origins and present position of the Arab Kingdom of Jordan in Palestine give the lie to the very claim that the Palestinian people lacks a homeland. Not only did the Kingdom of Jordan arise in Palestine over Jewish protests at the expense of territory allocated for the Jewish nation; it also inexorably became, by the same course of history, a Palestinian Arab State.

85. Therefore, in terms of any meaningful application of the self-determination principle, Jordan was certainly a Palestinian Arab State before 1948. Whether the King and his Palestinian subjects chose to conduct their affairs as a unitary or a federated State, the Palestinian Arabs already had a homeland in the State of Jordan. This reality may be concealed from time to time by the difficult relations between the King and his Palestinian subjects. Yet for much of the period 1948 to 1967, and perhaps until the bloody hostilities with the PLO in 1970, the Palestinian Arabs in the Kingdom of Jordan regarded Jordan as their State. Indeed it seems that in 1970 most Palestinian Arabs sided with the King and his Government against the PLO. That underlying reality continues to this day.

86. The assumption of these "studies" that the existence of Israel deprives the Palestinian Arabs of a national home is thus erroneous. It is understandable that the rejectionist Arab States and the PLO should refuse to entertain any mention of these errors. Only by propagating them can they twist the liberation claims of Palestinian Arabs into a demand against Israel, and move towards their avowed goal of destroying that State. 32/ But it is strange that the authors of these "studies" ostensibly engaged in the exposition of international law, should indulge these unjustified positions so unquestioningly.

V. APPEASEMENT OF SELF-DETERMINATION CLAIMS BY REDRAWING THE BOUNDARIES OF SOVEREIGN STATES

87. With apparent pain, the authors of the Resolutions study conclude (p. 27) that the Partition resolution was not necessarily void ab initio merely because it recognized the "national rights" of the Jewish people as well as those of the Arabs of Palestine:

> The self-determination issue may have been resolved in an unusual manner, but it is not possible to conclude as a matter of law that the particular method of self-determination in two States was invalid per se.

Given these writers' premises this does indeed have the air of a major concession. They head the title of their relevant section (p. 39) "The National Rights of the People of Palestine", which implies that there is only one "people of Palestine" entitled to self-determination. It is clear from all they have written, and from all the output of the "Committee on the Exercise of the Inalienable Rights of the Palestinian People" that if there is only one people of Palestine, the Arabs are the one. This logical inference conforms openly to the claims of article 6 of the Palestinian National Covenant (1968) that all Jews who had not normally resided in Palestine before 1917 should be barred from citizenship in the projected Palestinian Arab state and presumably expelled. There is consequently an air of magnanimity in the admission that the Jewish people, as well as the Arabs in Palestine, might be entitled to self-determination. Yet as these authors expatiate on this apparent concession it becomes clear that there is little substance to it.

88. Proceeding throughout as if any resolution of the General Assembly is law (despite their failure, as noted, to provide any foundation for this), the authors review the assertions of Palestinian national identity in General Assembly resolutions since 1970. They then attempt (pp. 46, ff.) to delineate the precise geographical area, presumably within Palestine, "to which Palestinian self-determination applies". Next they struggle to show how two States in Palestine may be warranted by the self-determination principle, despite the fact that the self-determination these authors are vindicating is only that of "the people of Palestine".

89. Their solution is regrettably of little comfort either to international law as hitherto understood, or to the State of Israel. What they seriously assert is that the General Assembly now has a new power deriving its legal authority from resolution 2625 (XXV), commonly known as the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations" (herein "Declaration on Principles"). Whenever any group hitherto connected with a State asserts a right to self-determination against it, the General Assembly is now purportedly empowered to redraw the frontiers of that State in accordance with that same body's view of the extent to which the Government of the target State "represents" the whole of the people in its territory.

90. In a remarkable tour de force, the authors infer this extraordinary power of the General Assembly from the following proviso in the Declaration on Principles:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
>
> Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country (emphasis supplied).

I do not propose to canvass the question of whether that passage supports any proposition that the General Assembly can by resolution usurp the drastic power of cutting up and even dismantling Member States of the United Nations. Any such assumption transcends the bounds of credulity of both international lawyers and national political leaders.

91. The threat posed to the territorial integrity and political unity and independence of all States by a General Assembly with such omnipotence scarcely needs elaboration. The self-determination principle is now increasingly invoked not merely against Western ex-colonial Powers, but also within and between the populations of new States which have attained independence since the Second World War. Consequently, those States too would become subject to these asserted powers of the General Assembly to make and unmake States by redefining their boundaries.

92. The authors do display some awareness of the dangers to which all States would be exposed by their extraordinary proposal. They try to minimize these dangers by arguing that the case of Israel is sui generis. The boundaries of Israel, they contend (p. 47), are merely de facto because they exist "at a particular time as a result of military conquest and of illegal annexation". But this egregiously false assertion of both fact and law, lifted almost literally from the first report of the "Committee on the Exercise of the Inalienable Rights of the Palestinian People", 33/ ignores the considered opinions to the contrary of many reputable international lawyers, as well as the necessary contrary implications of repeated actions by the General Assembly and the Security Council.

93. If the case of Israel cannot be so cavalierly singled out, then no less a threat is posed to all other States in the international community. Any State with neighbours entertaining predatory designs against it, which are able to find, promote or manipulate any specious "self-determination" claims, will be vulnerable to similar machinations. The sinister game in which the Committee sponsoring these pseudo-scientific "researches" into international law is engaged, is a deep and wide-ranging threat to the whole international legal order and to the United Nations itself.

94. In a pamphlet issued late in 1979, following the Resolutions study, the "Committee on the Exercise of the Inalienable Rights of the Palestinian People" made this threat even more explicit. It asks, somewhat disingenuously: "If a series of General Assembly resolutions on the right of self-determination in general has the effect of creating a principle of international law, then do not a series of resolutions on the specific right of self-determination of a particular people create obligations on the part of the international community?" 34/ The Committee here frankly reveals its intent to invest General Assembly majorities with binding power to disrupt, dismember, and even destroy the life of sovereign independent States, Members of the United Nations, under the pretext of satisfying self-determination claims of one dissident group or another.

95. The fact that the States which are the intended victims of this draconian power would be picked off one by one in no way alleviates the threat to them all.

96. The Resolutions "study" finally and grudgingly admits (p. 47) that Israel's pre-1967 boundaries "may have received some international assent". This is the undeniable implication of Security Council resolution 242 (1967) which clearly contemplates withdrawal of Israel's armed forces only from "territories occupied in the recent conflict", and also affirms the principle of "the sovereignty, territorial integrity and political independence of every State in the area". These provisions of resolution 242 (1967) are set out as bases for the negotiations to be promoted between the States concerned, and they are in full accord with principles of international law. Any other approach, especially one suggesting that the General Assembly has any power under international law to determine the boundaries of Israel, is not merely naive, but is demonstrably unfounded and dangerous.

VI. THE USE OF FORCE AND ALLEGED LIBERATION STRUGGLES

97. Among the more outrageous assertions in these "studies" is the proposal that any asserted legal right of self-determination gives rise under international law to the legal licence for any people claiming self-determination, and for third States supporting it, to use armed force against a sovereign State in its vindication.

98. At the same time when this supposed legal liberty to use force in liberation struggles was being asserted in the General Assembly against the State of Israel in 1974, the Special Committee on the Question of Defining Aggression was concluding its seven years of labour. No question was more hotly debated than the question whether the use of force in liberation struggles was lawful, notwithstanding the prohibitions of the Charter. That Special Committee was composed of 35 Member States, and it was never suggested that they were not a fair representation of the entire membership of the United Nations. For scholars genuinely concerned about the extent to which the voting behaviour of States in the General Assembly manifests either the opinio juris sive necessitatis necessary for the formation of a rule of customary law, or the kind of assent which can be treated as equivalent to consent to be bound by a treaty, these debates are an indispensable and decisive body of research material. The significance of these materials is enhanced by the fact that the General Assembly accepted and endorsed the outcome of the Committee's work.

99. Yet among the material which they invoke against Israel, there is no sign that the authors of the "studies" have evinced the slightest interest in these proceedings which touch so closely their ostensible intellectual concerns. Had they studied the records of the Special Committee and those of the Sixth Committee, or even only resolution 3314 (XXIX), they would certainly have been more guarded before leaping to their simplistic conclusions. They would have found that the practice of States is in stark contrast to the thesis pressed by these researchers, namely, that the "consensus" of States as manifested in repeated General Assembly resolutions makes the contents of those resolutions binding international law. State practice demolishes a point crucial to these "studies", which is that international law today permits the use of armed force in liberation struggles and by third States supporting them.

100. In the seven years during which the General Assembly and the Special Committee debated the question of the use of armed force by peoples struggling for independence and by third States supporting them, various arguments advanced to legitimize the use of force in liberation struggles were considered and rejected. Those arguments asserted, inter alia, that Article 51 of the Charter accords "a right of self-defence of peoples and nations against colonial domination", and that the use of force is authorized by an accumulation of recent General Assembly pronouncements, including resolution 1514 (XV) on the Granting of Independence to Colonial Countries, resolution 2131 (XX) on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their

Independence, resolution 2625 (XXV) (the "Declaration on Principles" already mentioned), resolution 2734 (XXV) on the Strengthening of International Security and, finally, resolution 3314 (XXIX) itself on the Definition of Aggression.

101. The crucial provisions of the Definition of Aggression for our purposes are article 3 (g) and article 7. Article 3 (g) of the Definition stigmatizes as an act of aggression:

> The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above /i.e. acts constituting "aggression"/, or its substantial involvement therein.

In apparent contradiction is article 7:

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

102. The full antithesis between the drafts of the self-determination saving clause finally embodied in article 7 and the indirect aggression armed bands provision (art. 3 (g)) emerged late in the course of the deliberations. There were three main earlier drafts of that saving clause. The Soviet draft did not only propose to save the "struggle" for self-determination; it unambiguously went on to make licit "the use of armed force in accordance with the Charter", including its use in order to exercise the inherent right of self-determination. 35/ The 13-Power (non-aligned) draft, on the other hand, protected the provisions of the Charter as to "the right of peoples to self-determination, sovereignty and territorial integrity", but was not express in stating whether armed force could be used in seeking this right. 36/ The six-Power (Western) draft, on the other hand, carefully provided that a non-recognized "political entity" could be considered a victim of aggression only if (a) it was delimited by international boundaries or internationally agreed lines of demarcation, and (b) the "political entity" concerned is not "subject to the authority" of the State alleged to be committing aggression against it. 37/ This, of course, includes the most characteristic class of self-determination struggles. Some Members resisted even that limited concession towards non-State political entities, and thought that victims of aggression should be limited by definition to States.

103. It was in the context of the failure of the 13-Power draft to free the use of armed bands and other modes of indirect aggression from the stigma of aggression that the provision which ultimately became article 7 of the Definition first appeared. In its original form (as art. 5) the bid to legitimize the use of force by non-State groups and by States assisting them was (as in the above Soviet draft) quite explicit. There was nothing in the proposed definition to prevent peoples "*from using force and seeking or receiving support and assistance*" in exercise of "their inherent right to self-determination in accordance with the principles of the Charter". 38/ If those words had survived to the final text of article 7, they would have compensated the proponents of "wars of liberation" for the failure of their bid to free the sending, etc. of armed bands from the stigma of aggression. But the quoted words did not survive.

104. In the version of article 7 ultimately adopted, the range of conduct saved from inculpation was narrowed in several significant respects. The reference to "peoples under military occupation" disappeared (a matter especially relevant to the problem of the Middle East). Not "foreign domination" as such, but only "forcible deprivation" of the Charter right of self-determination could justify the right to "struggle". Above all, article 7 was stripped of any express reference to a right to use force in the "struggle", and of any right of third States to use force to assist. What remains is the radically reduced formula of "the right of these peoples to struggle to that end". 39/ In other words, the States which rejected the view that international law permitted the use of armed bands by non-State political entities, or of force by States assisting them under the banner of "self-determination" or "liberation", won the day, while those States which tried to claim that international law had legalized such uses of force were simply outnumbered and failed.

105. The Definition of Aggression, therefore, was established against the background of those very General Assembly resolutions which the researchers of the "Committee on the Exercise of the Inalienable Rights of the Palestinian People" assert have established rules of international law legalizing the use of force in self-determination struggles. The attitudes of the States participating in the Special Committee, whose work was subsequently endorsed by the General Assembly, clearly show that this claim is wrong. In three critical respects, the text finally adopted absolutely denies any such claim. First, the Definition deliberately omits mention of any right to use force in self-determination struggles. Second, no right to receive assistance by way of force from third States is expressed or implied. Third, all reference to "peoples under military occupation" was removed. On all these counts spurious claims such as those asserted in the "studies" were decisively rejected by a preponderance of States clearly not limited to Western States.

VII. ISRAEL'S RIGHTS UNDER INTERNATIONAL LAW ARISING FROM LAWFUL SELF-DEFENCE AGAINST ARAB AGGRESSION

106. Any legal import of any of the United Nations resolutions discussed so far cannot operate in a vacuum. Its effects must be determined by reference to the context of the rights and duties of the States concerned under general international law, including the provisions of the Charter and any pertinent binding determinations of the Security Council.

107. Although some may wish it otherwise, it is an axiom of international law, even under the Charter, that States live within an international legal order in which force is not the monopoly of the organized community, but rather is under the control of individual nations. In the absence of predominant community force there has been a constant accumulation of force (notably military potential) in the control of individual States. The most that can be done in support of legal order and community is to marshal, on occasion, some private forces against others for public ends. Unfortunately, the fact is that such forces are from time to time marshalled against the international legal order. It is for these reasons that international law has always given legal effect ex post facto to the outcomes of its collision with the overwhelming power of individual States. By allowing the military victor through an imposed treaty of peace to incorporate his terms into the body of international law, international law at least preserved the rest of its rules and ensured its own continued existence.

108. In international law until recently, these legal positions held for the relations between States, whether the victor was himself an aggressor or whether the victor was an innocent victim of aggression, responding by way of legitimate self-defence. The recent modification of this position, especially under the Covenant of the League of Nations and Charter of the United Nations, arises from the application of the principle ex injuria non oritur jus. Whether applied to treaties procured through duress, or the acquisition of territory, this modification seeks to strip of legal effect, not the use of force as such, but the unlawful use of force.

109. From its inception, Israel has maintained an unusually strong record of compliance with international law despite ceaseless provocations by its neighbours. It was armed aggression by Arab States (denounced as such in the Security Council) which aborted the Partition Plan accepted by the Jewish people in 1947. From that point onward, to President Sadat's journey to Jerusalem in 1977 in response to Prime Minister Begin's invitation, Egypt as well as other Arab States persisted in maintaining a state of belligerency against Israel. For three decades they flouted their basic obligations as Members of the United Nations to refrain from the threat or use of force and armed attack against Israel's independence and territorial integrity. They did so not merely by wars and threats of wars; they also gave shelter to and promoted attacks by armed bands against Israel from Syria, Egyptian-controlled Gaza, Jordan and Lebanon. Those terrorist attacks massacred and maimed hundreds of innocent men, women and

children. From Jordan first and subsequently from Lebanon, the PLO and its associated terror organizations have operated for years since 1967 aided and abetted by their Arab hosts and other Arab States. This situation was re-endorsed by the Members of the Arab League at their Tunis Conference as recently as 22 November 1979.

110. Israel's repeated requests, directly or to the United Nations, that these unlawful attacks be stopped have been left unanswered. Its own military actions in southern Lebanon were accordingly designed to abate them. Its actions conform to international law, as set out, for example, in such an authoritative work as Oppenheim's International Law edited by Sir Hersch Lauterpacht. That work states that on failure of the host State to prevent or, on notice, to abate these attacks, "a case of necessity arises and the threatened State is justified in invading the neighbouring country and disarming the intending raiders". 40/ This rule of international law makes clear that this is a case of necessity, of self-defence, authorizing a State to enter another and destroy or remove the weaponry and bases being used against it. Majorities in the United Nations organs which, from time to time, have purported to condemn such responses by Israel, have no competence to alter such fundamental precepts of international law. This is especially so when the actual conduct of States observed in the international community bears no relation to the norms of conduct proscribed in those resolutions. No State has yet abandoned its inherent right of self-defence, preserved in Article 51 of the Charter.

111. After cease-fires were accepted by the Arab States concerned in the 1967 and 1973 wars, the illegality of continued hostilities by them became (if possible) even more heinous. Their continued hostilities flouted not only the Charter, but the very cease-fire agreements for which they had supplicated and which they had solemnly accepted. Here again, the fact that Soviet and other pro-Arab interests in the United Nations were able to marshal majorities to shield those illegalities from censure in no way sanctioned them or impugned the legality of Israel's responses.

112. All the States concerned (including Israel) are Members of the United Nations, bound by the Charter. Refusal by a Member to acknowledge the statehood and Membership of a State duly admitted is incompatible with the Charter, and in particular with Article 2, paragraph 1, enshrining the principle of the sovereign equality of all Members. This is surely a fortiori so when the refusal, as in the case of several Arab States denying Israel's right to exist, carries with it the claim to be at liberty to destroy that State by force, despite Article 2, paragraph 4, of the Charter. However one interprets that difficult text, the openly articulated claims of Arab States since 1948 to destroy Israel or, as their jargon has it today, "to liquidate the Zionist entity", violate Charter prohibitions against the threat or use of force, and the positive duties implied in Article 2, paragraph 1, and elsewhere concerning the assurance to Israel of the benefits of membership, and the peaceful settlement of disputes. 41/

* * *

113. The basic precept of international law concerning the rights of a State which has been the victim of aggression, and which is lawfully administering territory of the attacking State, is also clear. The precept ex injuria non oritur jus holds that a lawful occupant such as Israel is entitled to remain in control of the territory involved pending conclusion of a treaty of peace. Security Council resolutions 242 (1967) and 338 (1973), adopted after the respective wars of those years, expressed this requirement for settlement by negotiations between the parties, the latter resolution using those very words. Through the decade 1967-1977, the Arab States and the Arab League compounded the illegality of their continued hostilities by proclaiming at their Khartoum Summit in September 1967, the notorious three "No's": no recognition of, no peace and no negotiation with Israel. 42/ This effectively blocked the regular processes for post-war pacification and settlement.

114. In the meanwhile, oil pressure upon countries throughout the globe, and the propaganda machines of the Arab-Soviet blocs, set out to blur and if possible expunge all record of these gross illegalities. Though the general law (as well as resolutions 242 and 338) required the Arab States to negotiate with Israel among other things the extent of Israel's withdrawal from territories, those States demanded withdrawal from all the territories before negotiation. There is no historical instance in which aggressor States have been granted that kind of prerogative after the defeat of their aggression.

115. Israel's territorial rights after 1967 are best seen by contrasting them with Jordan's lack of rights in Jerusalem and Judea and Samaria (the West Bank) after the Arab invasion of Palestine in 1948. The presence of Jordan in Jerusalem and elsewhere in Cisjordan from 1948 to 1967 was only by virtue of its illegal entry and occupation in 1948. Under the international law principle ex injuria non oritur jus Jordan acquired no legal title. Egypt itself denied Jordanian sovereignty and never tried to claim Gaza as Egyptian territory.

116. By contrast, Israel's presence in all those areas pending the conclusion of negotiations for the establishment of secure and recognized boundaries is entirely lawful, since Israel entered those areas legally in exercise of its inherent right of self-defence. International law forbids acquisition of territory by unlawful force, but not where, as in this case, the entry into the territory was lawful. In particular, it does not forbid it when force is used to stop an aggressor, for the effect of such prohibition would be to guarantee to all potential aggressors that, even if their aggression failed, all territory lost in the attempt would be automatically returned to them. Such a rule would, of course, be utterly absurd.

117. International law, therefore, supports on three counts Israel's claim that it is under no obligation to hand the territories back automatically to Jordan or any other State. First, those lands never legally belonged to Jordan. Second, even if they had, Israel's present control is lawful, and it is entitled to negotiate the extent and the terms of its withdrawal. Third, international law would not in such circumstances require the automatic handing back of territory

even to an aggressor who was the former lawful sovereign, which Jordan certainly was not. It requires the extent and conditions of the handing back to be negotiated between the parties.

* * *

118. As many have shown, all attempts to amend the draft of Security Council resolution 242 of 1967 so as explicitly to call for Israel to withdraw to the 1967 frontiers, failed. 43/ That resolution did not call for withdrawal from all territories occupied in the 1967 War, but only withdrawal to lines to be negotiated, which were then to become "secure and recognised boundaries". Indeed, any other provision would have been at odds with the plain fact that, immediately after the War, at the 1,360th meeting of the Security Council on 14 June 1967, the Soviet resolution seeking to brand Israel as the aggressor was rejected by 11 votes to four. Also, the General Assembly at its 1,548th meeting of 4 July 1967, long before the entry of the oil weapon into that voting arena, also repeatedly refused to endorse such a proposition. 44/

119. Because the operative parts of resolution 242 are so explicit, Arab arguments began to focus on the preamble which refers to "the inadmissibility of the acquisition of territory by war", in the hope of weakening through that delphic phrase the clear international legal basis of Israel's territorial standing in the territories. They have had to argue that this phrase must be taken literally in its widest sense. Having stretched it in this way, they extract from it a meaning which other States have not been willing to accept. That meaning indeed yields such absurd results that while they press it against Israel, they implicitly deny its application to themselves.

120. The international lawyer, faced with this recital in the preamble to resolution 242 juxtaposed with its operative provisions, will recognize no less than three logically possible interpretations. He must ask which of them makes sense in its immediate context, bearing in mind the existing principles of international law, and what many call the "world order" policies underlying those principles.

121. The Arab States' interpretation is one logical possibility, and it does yield their desired result, that Israel must automatically and fully withdraw from all the territories, however perfectly lawful its presence there. A second interpretation is that the recital merely recalls, with the eloquent flourish common in preambles, the established ex injuria principle of international law as this applies to unlawful war. In this reading, "acquisition ... by war" would refer to the initiation of war for the purpose of acquiring territory; such initiation, being unlawful, would bring the ex injuria principle into play. Israel's action being in self-defence, this principle would in no way affect its rights under international law as set out above. Third, no less plausibly, the recital could be a restatement of the rather commonplace technical principle of international law that mere occupation of territory does not itself vest in the occupant sovereign title over it. Transfer of title requires some further act,

such as formal annexation or cession by a treaty of peace or other accepted instrument. That third meaning would fit particularly well the operative provisions calling for negotiations on such matters as "secure and recognised boundaries", the fixing of "demilitarised zones", and the like, and again would not affect Israel's rights as set out herein.

122. As indicated, the first interpretation, favoured by the Arab States, would be at odds with the operative provisions of resolution 242. Moreover, it would conflict with existing international law. It could scarcely be regarded as an amendment of the law, offered by the Security Council de lege ferenda for the future. For, in that eventuality, the recital would mean that an occupant must withdraw even before peace terms are agreed, even if he entered lawfully in self-defence against an aggressor. A rule presented de lege ferenda must by definition be a rule the consequences of which would be regarded as desirable for all members of the community generally. But it is apparent that this proposed rule would be disastrous and undesirable. It would assure every prospective aggressor that, if he fails, he will be entitled to the restoration of every inch of any territory he may have lost. This proposed rule would yield this result even if the defeated aggressor still openly reserves the liberty to renew his aggressive design, and even if the territories concerned had been seized unlawfully by the claimants, who have consistently used them since as a base for aggressive activity against the present occupant. In short, that interpretation would unconditionally underwrite the risks of loss from any contemplated aggression. Such a rule would turn ex injuria principle on its head: rather than discourage aggressors, it would positively encourage them. To put forward such a rule de lege ferenda is to sanction a new and cynical legal maxim which might run: "If you cannot stop the aggressor, help him!" The interpretation yielding such a result cannot, therefore, be accepted when two others, each more consonant with both international law and common sense are, as shown above, readily available.

123. In this connexion, it must be added regarding both Egypt in Gaza and Jordan in Judea and Samaria, that even if their entry had not been unlawful or in defiance of the Security Council's cease-fire and truce resolutions of April and May 1948, the proposed rule would bar any right of theirs to remain in those territories. For in those circumstances their continued presence would fall within the meaning they seek to give to "the inadmissibility of the acquistion of territory by war". The consequence is that even were the rule now newly adopted with retrospective effect, it could not improve their present legal position vis-à-vis Israel except by an entirely unprincipled discriminatory application of the new rule in favour of - or rather against - one side only. 45/

124. Finally, it should be noted that this kind of Arab activity, designed to "amend" international law for ad hoc use against Israel, has become persistent since 1967 in all organs and contexts of international activity. The work of the 1967 Special Committee on the Question of Defining Aggression has already been discussed at length in another context (paras. 97-105). But of relevance here is the fact that its work was also characterized by efforts on the part of

the Arab States to include a provision that territorial acquisition even by lawful force would be invalid. Those efforts failed abjectly. 46/

125. The only operative provision concerning acquisition of territory by force (art. 5, para. 3) strictly limits any invalidity by imposing no less than three requirements: (1) It is not acquisition by mere threat or use of force, but only acquisition by "aggression", which is invalid, so entry in the course of self-defence as in the case of Israel in 1967 would not be proscribed. (2) The acts of force there enumerated (in arts. 2 and 3) are stated to be aggression only if first committed by the occupant, thus doubly excluding acts in self-defence from the taint. (3) Even such acts, to be tainted, must be "in contravention of the Charter", thus triply excluding acts of self-defence.

126. Through all the meetings of the Special Committee and of the Sixth Committee of the General Assembly between 1967 and 1974, a version of the rule concerning acquisition of territory by force based on the principle ex injuria non oritur jus maintained itself against all Arab efforts to mutate it into a tool for condemning Israel. The attempt to twist this principle of international law for ad hoc use against one particular State thus wholly failed. This must be attributed not simply to the legal skills and learning of most State representatives but also to a keen awareness by many of them of the dangers to their own security likely to ensue from a change in international law of which the operative implications are, as shown, quite absurd. 47/

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10 June 1980

Notes

1. I. C. J. Reports, 1955, 155 ff. His further explanation that repeated flouting of such recommendations may overstep the "line between impropriety and illegality" (p. 120), has reference to the special case of exercise of supervisory competence over the trusteeship system under the Charter. It is not of general application.

2. Institute of International Law, Livre du Centenaire (1973) 268 ff. For the discussion of the San Francisco Conference, see 9 UNCIO Documents 70.

3. Official Records of the General Assembly, Twenty-ninth Session, Sixth Committee, at 166 ff.

4. The Development of International Law Through the Political Organs of the United Nations (1963) 2.

5. Second Phase, I. C. J. Reports, 1966, 6 at 248.

6. See generally for a recent and most valuable survey of the literature manifesting these doubts and disputes, Christoph Schreuer, "Recommendations and the Traditional Sources of International Law" (1977) 20 German Yearbook of International Law 103-118.

7. Ibid., at 117.

8. See on the history and scope of article 52, Stone, Of Law and Nations (1974), 231-251.

9. 137 Académie de Droit International, Recueil des Cours (1972), 419.

10. Resolution 3236 (XXIX), para. 6. The succeeding words - "in accordance with the Purposes and Principles of the Charter" - are ambivalent as to whether any limits are to be read into that extraordinary appeal.

11. Press Release US-UN 191 (74), 6 December 1974.

12. See, e.g. H. Cattan, Palestine and International Law (London, 2nd ed., 1964), on which the authors rely heavily.

13. See Official Records of the General Assembly, First Special Session, Plenary Meeting (A/286), 183.

14. E. Lauterpacht, Jerusalem and the Holy Places (London, 1968), 39.

15. Certainly, in so far as all the parties concerned allowed it to become operative, it would become binding on them and on all concerned. It was on that assumption that Moshe Shertok, speaking for the Jewish Agency, distinguished at the time between the Partition resolution and other resolutions of the General

Assembly, and stated on 27 April 1948 that the Partition resolution would (that is, if it became operative) have a (emphasis supplied) binding force. Official Records of the General Assembly, Second Special Session, vol. II, at 108. Mr. Shertok was dealing with the particular problem which arose in 1948, namely, whether the General Assembly could revoke the 1947 resolution and impose a United Nations trusteeship on Palestine. The Mallisons quote a part of that section of his statement (Resolutions, pp. 25-26), without due reference to the context in which it was made, and to the assumption underlying it, namely that the 1947 resolution was to become operative.

16. Official translation in 1 Laws of the State of Israel (5708-1948) 4. Reproduced in J. N. Moore (editor), The Arab-Israel Conflict, III, Documents, (Princeton, 1974) 349.

17. In fact, the Arab States were on this account subject, under the resolution, to Security Council action against them as aggressors. The Mallisons, as already observed, blow hot and cold as to whether, at its moment of proposed implementation, the resolution was or was not "valid", let alone binding on the States concerned (Resolutions, pp. 23-25).

18. Cf. Israel and the United Nations in the Carnegie Endowment Series of National Studies on International Organization (New York, 1956), 67.

19. As early as 20 February 1948, the Security Council received a report from the Palestine Commission that "powerful Arab interests, both inside and outside Palestine, are defying the resolution of the General Assembly /181 (II) of 29 November 1947/ and are engaged in a deliberate effort to alter by force the settlement envisaged therein" (S/676, 16 February 1948). Official Records of the Security Council, Third Year, Special Supplement No. 2 at 11.

20. For the quite explicit objectives of the attack see the official statements of Arab Governments and their representatives, assembled in the letter dated 12 December 1978 of the Permanent Representative of Israel to the United Nations (A/33/488-S/12966).

21. E. Lauterpacht, supra, note 14, at 27 ff.

22. For instance, here and elsewhere the references in the "studies" to W. E. Hocking, The Spirit of World Politics (1932), 354, 372-74.

23. At 12-13. Their main authority on jus cogens is a somewhat complicated ipse dixit of M. Gros Espiel in his study prepared for the Subcommittee on the Prevention of Discrimination and the Protection of Minorities, entitled Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination (E/CN.4/Sub.2/405), especially at 33-35. Contra, see study for the same Subcommittee by A. Critescu entitled The Historical and Current Development of the Right to Self-Determination on the Basis of the Charter of the United Nations and Other Instruments Adopted

by United Nations Organs, with Particular Reference to the Promotion and Protection of Human Rights and Fundamental Freedoms (E/CN.4/Sub.2/404), para. 154, who squarely states: "No United Nations instrument confers such a peremptory character on the right of peoples to self-determination." The anonymous authors also cite a dictum of Professor Georg Schwarzenberger to the effect that since international law has always been a system of nation-States, it has always in that sense been based on the self-determination of these nations. See G. Schwarzenberger, International Law and Order (1971), 27-28. How much Professor Schwarzenberger's position is here misunderstood is indicated by the fact that in his important Frontiers of International Law (London, 1962) neither the notion of jus cogens nor the self-determination principle receive any discussion even under the head of "fundamental rights and freedoms". Loc. cit., 308 ff. And see his essay "International Jus Cogens", 43 Texas Law Review 455 (1965). It is to be recalled that no treaty and no serious scholar has yet given jus cogens any function other than the negative one of making void an inconsistent treaty.

24. Count Folke Bernadotte, Progress Report of 16 September 1948, 3 UN Official Records of the General Assembly, Supplement No. 11, 1-19, at 18, United Nations Document A/648.

25. See the voting figures in Resolutions, pp. 57 ff. In this connexion, it is recalled that the United Nations Conference on the Law of Treaties adopted its well-known Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, solemnly condemning the threat or use of pressure "in any form", by any State in order to coerce another State "to perform any act", in violation of the "principles of the sovereign equality of States and freedom of consent" (emphasis supplied). United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, at 285 (A/CONF.39/26).

26. Cf. Foreign Relations of the United States, Paris Peace Conference, 1919, vol. 12, 781 (Report of the King-Crane Commission). This historical fact continues to reverberate today in Arab circles. President Assad of Syria in 1974 stated that "Palestine is a basic part of Southern Syria" (New York Times, 9 March 1974). On 17 November 1978, Yasser Arafat commented that Palestine is southern Syria and Syria is northern Palestine (Voice of Palestine, 18 November 1978).

27. For English translation, see Moore, op. cit. note 16, at 698, 705.

28. Ib., 43.

29. Ib., 40. The significance of this document receives little attention in the "studies". Cf. Origins, Part I, p. 82, n. 7.

30. Report of the Palestine Royal Commission, Great Britain, Parliamentary Papers, Cmd. 5479 (1937), 8-9. Contrast Origins, Part I, pp. 55-57.

31. It is to be noted that Origins, although containing several maps, significantly omits one crucial map, namely the map of Palestine to which the Mandate for Palestine applied; and this, until 1946, included the area now called Jordan, covering almost four fifths of the territory of Mandated Palestine.

32. Thus it was stated in the political programme approved by the Fourth Congress of Al-Fatah (the largest single component within the PLO, headed by Yasser Arafat) held in Damascus at the end of May 1980, that its purpose is "to liberate Palestine completely and to liquidate the Zionist entity politically, economically, militarily, culturally and ideologically" (published by "al-Liwa" of Beirut on 2 June 1980).

33. A/31/35, para. 33.

34. The International Status of the Palestinian People (1979) 27.

35. A/AC.134/L.12, reproduced in the 1971 Report of the Special Committee on the Question of Defining Aggression, Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 19 (A/8419), 23.

36. A/AC.134/L.16, ib., 24.

37. A/AC.134/L.17, ib., 26. The texts of this and the other earlier drafts are reprinted in Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 19 (A/9019), 7-12, from Annex 1 to the 1967 Committee's 1970 Report, Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 19 (A/5019), 55-60.

38. See the Committee's 1973 Report, Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 19 (A/9019), 16, 17.

39. Grammatically, it is not clear what "to that end" refers to - presumably "the right of self-determination, etc."

40. Oppenheim-Lauterpacht, International Law, vol. 1, para. 130.

41. Cf. Q. Wright, "Legal Impacts of the Middle East Situation" (1968) 33 Law and Contemporary Problems 5, 17.

42. Moore, op. cit. in note 16, at 788.

43. Stone, No Peace-No War in the Middle East (1969), 34-35. Also A. Lall, The United Nations and the Middle East Crisis (1967), passim.

44. See Official Records of the Security Council, Twenty-second Year, 1360th meeting at 18. In the General Assembly the majorities rejecting (including abstentions in each case) were of the order of 88 against 32, 98 against 22, 81 against 36, and 80 against 36. Official Records of the General Assembly,

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Fifth Emergency Special Session, 1548th plenary meeting, 14-16. And see Stone, The Middle East under Cease-Fire (1967), Sections II-IX, at 2-40.

45. Cf. A. Lall, op. cit., in note 43, citing Abba Eban in the Security Council, Official Records of the Security Council, Twenty-second Year, 1375th meeting (13 November 1967), para. 49.

46. See the analysis of the drafting in Stone, Conflict Through Consensus (1977) 55-56. The Thirteen-Power draft ("Third World" draft) (A/AC.134/L.16 and Add.1 and 2), para. 8, had proposed a text harmonious with the Arab position. It was not followed.

47. After the above failure of their main efforts, the Arab States then sought the inclusion in paragraph 20 of the Special Committee's Report of an enigmatic Note 4: "With reference to the third paragraph of article 5 ... this paragraph should not be construed so as to prejudice the established principle of international law relating to the inadmissibility of territorial acquisition resulting from the threat or use of force." Official Records of the General Assembly, Twenty-Ninth Session, Supplement No. 19 (A/9619 and Corr.1). Since, as indicated, international law is precisely what article 5 affirmed, the purport of the note seems to be to keep alive the precise words of the relevant recital of resolution 242, in the hope presumably that its superficial ambiguity could continue to be exploited by the Arab side in the Middle East conflict. See Stone, op. cit., note 46, at 63-64.

APPENDIX

Political bias in legal argument: the Mallison study

1. The foregoing memorandum establishes the international law context, including the prevailing rules as to the territorial entitlements of States, in situations emerging from the lawful and unlawful use of force. In the same context it examines the assumptions of the Mallisons in their Resolutions "study" concerning the legal effects of General Assembly resolutions. A conscientious inquiry in the context of international law is also what those authors claim to pursue in their "study". It is thus dismaying to find that major questions and principles which have been shown to be part of the essential international legal context of the matters they discuss receive virtually no consideration or even mention from these authors. Moreover, where, as with the question of the legal value to be attributed to General Assembly resolutions, they do consider this context, their consideration is slim, if not perfunctory, and ignores most of the authorities. In the end they patently beg the question. In this, the Mallison "study" is no different than the three anonymous "studies" which preceded it. The following exposition highlights some of their more egregious errors in fact and law. It is meant to be illustrative, and is by no means exhaustive.

2. The authors presumably are not aware of some of their inadequacies. But other inadequacies are highlighted by them in their introduction. One of these is their declaration (p. v) that "consistent with the consulting arrangements with the United Nations, no direct use has been made of the formal negotiation history of the resolutions or of the informal unrecorded consultation which led to the adoption of particular wording". 1/ Consultation of the travaux préparatoires is an essential part of international techniques of interpretation. The reader is entitled to wonder why either any United Nations officials of the "Committee on the Exercise of the Inalienable Rights of the Palestinian People", or these authors, should wish to renounce it. This is especially so since such preparatory materials are sometimes critical to the issues on which the authors engage. As Lord Caradon himself testified, for example, the legislative history is essential background for understanding the effect of the references to withdrawal of Israel's armed forces in Security Council resolution 242. 2/ They are equally essential to ascertaining the meaning of references to acquisition of territory by force in contravention of the Charter in the General Assembly's Definition of Aggression.

3. The Mallisons' renunciation of the travaux was not necessarily inspired by a sense that foreshortened inquiries would yield better results for their particular theses. However, no such neutral explanation is plausible for another statement in their introduction, namely:

> The terms "Jew" and "Jewish" are used to refer to adherents of a particular monotheistic religion of universal moral values. The terms "Zionism" and "Zionist" refer to a particular national movement, with its political programme of first "a national home" and then a national state located in Palestine.

The authors innocently declare that this is a "basic distinction" which it is necessary to make "because this is a juridical study" (p. v). But it is no more "basic" from a juridical point of view than an analagous distinction between "Irishmen as adherents to a particular form of Christian Catholicism", and some other term for those "who are adherents to a political programme of securing (formerly) the independence of Ireland, or now of Northern Ireland". The authors are certainly aware that the designations "Zionism" and "Zionist" have been falsely and arbitrarily translated into "racist" by one of the most lamentable resolutions of the General Assembly (3379 (XXX)). It is just such resolutions which they are attempting to extricate from the morass of international politics to the more sheltered level of international law. No reputable international lawyer has accepted that meretricious pronouncement as other than an adventure in expedient pejoration. The authors should, as international lawyers, have avoided demeaning their brief in this way, especially since it is difficult to find any important legal argument of theirs which would not be equally strong (or equally weak) without this so-called "basic distinction". 3/

4. On the other hand, there is another distinction which would indeed have been "basic", not only for the Mallisons' juridical "study" but also for their exposition of what they claim (pp. 9-17) to be "the background of the Partition Resolution". That is the distinction in time, demonstrated earlier, between what they in 1979 identify as "the Palestinian Nation", on the one hand, and the "Arab Nation" of 1917, on the other. That distinction is no invention of the present writer, for as seen the "Palestinian National Covenant" insists precisely on it. The Mallisons may or may not agree with my conclusion that the burden of redress due to the Palestinian Arabs, like the redress due to Jews displaced by this distribution, should be shared equitably between the Arab States of the Middle East and Israel. But it is difficult to see how they could fail to address themselves at all to a distinction so relevant and central, and at the same time so damaging by its omission to both the structure of their argument and its main conclusions.

5. A further observation is called for particularly in the light of the Mallisons' dogged efforts (sometimes even to the point of misquoting important documents) to show that the General Assembly's Partition Resolution is "the pre-eminent juridical basis for the State of Israel", and that Israel is bound by that resolution even though the Arab States rejected it and, by blatant acts of armed aggression, wholly aborted its operation. The Mallisons have, as shown, an exalted if somewhat undiscriminating view of the legal effects of General Assembly resolutions. They are particularly enthusiastic about the Partition Resolution. But there is one central provision of that resolution, reference to which they asiduously avoid. That is the General Assembly's request that: "The Security Council determine as a threat to the peace, breach of the peace or act of aggression, in accordance with Article 39 of the Charter, any attempt to alter by force the settlement envisaged by this resolution." By this omission, they are able to ignore the consequences of the Arab side's rejection of the resolution, and their armed aggression against it and against Israel, which prevented it ever coming into legal operation. Such consideration, had it been given, would, as demonstrated in the memorandum have proved fatal for the main legal conclusions to which the Mallisons seek to lead their readers.

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6. Perhaps these unfortunate lapses in purportedly objective "studies" are explained in part by the need of the "Committee on the Exercise of the Inalienable Rights of the Palestinian People" to find lawyers whose known opinions on the issues would produce the conclusions desired by the Committee. One dramatic instance of reliance on very questionable sources appears in Origins, Part I, pp. 35 ff., in relation to the "validity" of the Palestine Mandate. The Committee there can apparently only marshall two writers to support the desired conclusion. One is Mr. Henry Cattan, a former member of the Arab Higher Committee in Palestine. The other is our familiar Professor W. T. Mallison, who has written introductions to works by H. Cattan. The reader can assess for himself the scholarly and dispassionate objectivity of such manoeuvring.

Appendix notes

1. A curiosity within a curiosity. That remark presumably refers to travaux préparatoires available other than in official United Nations records. Sed quaere? It is positively startling later to find the authors deliberately invoking the negotiating history of the Palestine Mandate to make a point which they believe favourable to Arab claims (p. 26).

2. See Stone, No Peace-No War in the Middle East (1969), pp. 33-35.

3. The only real use the authors seek to make of this supposedly "basic juridical distinction" is for ventilating some criticisms of the early Jewish liberation movement, or of Israel by isolated Jewish individuals and a few extreme Jewish religious sects. See Resolutions, pp. 9-14, passim. Whatever else is to be said about this, it is in no sense "juridically basic" to the Mallisons' terms of reference.
