ISRAEL AND PALESTINE

Assault on the Law of Nations

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List of Abbreviations

American Journal of International Law
British Year Book of International Law

Emergency Session
General Assembly Official Records

George Washington University Law Review
H. A. Hassouna, *The League of Arab States and Regional Disputes: A Study of Middle East Conflicts* (1975)

House of Commons Debates
International Court of Justice

See Introduction, at n.4.


Permanent Mandates Commission
See Introduction, at n.4.
C. Schreuer, *Recommendations and the Traditional Sources of International Law* (1977) 20 German Yearbook of International Law, 103-18
Security Law Council Official Records
See Introduction, at n.4.
United Nations Document
United Nations General Assembly Official Records

Introduction

Almost a half-century ago the present writer published his first works on important aspects of the world's first international security organization, the League of Nations.¹ He remains still, more than four decades and a score of books later, fascinated both by the persistence of the central core of international doctrine, and by the kaleidoscopic hues and shapes that its surface texture presents to the first glance of successive generations.

No age has seen more dramatic contrasts between the deep core of international law—in the arcana of state sovereignty for which peoples have for centuries sought in vain a less perilous substitute—and its surface texture, than since World War II. This generation has a security organization whose charter promises riddance from the scourge of war, but in which continuance of that scourge is perforce assured by the Great Power veto, and various "escapes and evasions"² expressed or implicit in the same instrument, not to speak of the innate logic of national control of nuclear weaponry. It has a Security Council that is ostensibly endowed with ample power to keep or restore world peace, but that, except in rare circumstances, cannot use these powers effectively for any but peripheral or parochial conflicts. The General Assembly, at the behest of the Western powers, in 1950 assumed a nonmagisterial peace-keeping role within the framework of the so-called "Uniting for Peace Resolutions"; but operations within this frame can usually be described as "dividing for war" rather than "uniting for peace." The merely hortatory nonmagisterial role of the General Assembly for the support of principles of international law and cooperation under the charter has been steadily transformed into an arena of political warfare in which the principles of international law are travestied, or rather beaten into the shape of weapons, weapons of conflict rather than norms for judgment.

These paradoxes, and many by-products from them, are the combined result of the bipolar power system, underpinned by ideological rift and nuclear armaments, and, within this frame, the decolonization process. This process has almost tripled since the 1950s the number of United
Nations members who each enjoy one vote in the General Assembly, many of them minuscule and of dubious viability. This increase in numbers now produces an almost automatic majority against the Western-type political democracies on any matter in which the “Group of 77” (now mounting to 110) identify a common concern or a common demand against these states. This, of course, turns inside out the position of the 1940s and 1950s, in which, in a restricted membership, American economic and military aid, and hemispheric loyalties of the Latin American states could usually marshal majorities against the Soviet bloc. This formidable shift in the balance of power within that body, however, does not advance the aspiration to make it into a forum of international law and cooperation. The reality of its activities is still embedded in the aura of sovereignty; plus ça change, plus c'est la même chose.

In 1958, when U.N. membership had moved to eighty-two, this writer observed that the thirty-five members of the Afro-Asian and Soviet blocs were already in a position to stop any General Assembly decision favoring a Western state, and that on some matters—for instance economic—on which Latin American states might align with those blocs, they could actually marshal fifty-five votes—enough to carry any resolution by a two-thirds majority. He pointed out that the one-state-one-vote principle regardless of population size, contribution, responsibility, or form of government laid no basis for any claim that such a General Assembly was an expression either of democracy on the international plane or of “the conscience of mankind.” The continuing story of the General Assembly project for a “New World Economic Order” fits well into this foreshadowing.

Insofar as any redistribution of the world’s resources may be regarded as properly on the international agenda, the fact that it was thus opened to discussion is salutary. At the point, however, when the majorities that placed it there began to seek by the same majorities to usurp for the General Assembly magisterial powers over members that the charter very deliberately withheld, we entered a more open and dangerous phase of still persistent Realpolitik, only slightly masked by pseudolegality.

Membership of the United Nations has almost doubled since 1958, to the present 150, the increase consisting of states for the most part similarly aligned with the Afro-Asian and Soviet blocs. And the consequences have been aggravated to an extent few recognize in the chancelleries, by the dual impact of the use of oil boycotts and oil pricing as a political weapon by the Organization of Arab Petroleum Exporting Countries (OAPEC). On the one hand, this has produced a new vulnerability of Western industrialized states to illegal demands of all kinds, weakening the resistance of these states to the pressures from overwhelming majorities in the General Assembly. On the other hand, it has pushed the Third World states, whose community of interests with the Arab oil-producing states is in itself a rather limited one, into an abject dependence on the OAPEC states, which virtually commands the voting behavior of the former on most important issues.

This hitherto skillful use of oil as a political weapon, indeed, may be thought to challenge the present writer’s view in Aggression and World Order (1958 at 164-65). The view there ventured was:

Clearly the Western Powers would not, in the long run, continue to assist in strengthening the authority of a General Assembly which might become a protective shield for predatory and imperialist designs against them, and an execution chamber for any State that tried to defend itself against these designs. And it is in part these dangers which have led the present Writer repeatedly to stress the importance of remembering that the General Assembly has no legal power of binding Members by resolutions to which state is an aggressor, nor, indeed, as to what should be done by any Member in a crisis. But even the power of the General Assembly based on its claim to represent the conscience of mankind, and its promotion of voluntary action by Members, could also become such a protective shield, through a regular stacking of votes regardless of the merits it committed a détournement of the moral authority of that body.

This change in the political importance of the General Assembly is being pressed at present toward an even more arresting paradox. This is that after the undoubted legal magisterial powers of the Security Council have faded before the practice of bipolarity, the veto, and the nuclear arms race, there is an accelerating drive in certain quarters to promote such powers on the General Assembly. That events were tending in this direction was one of the conclusions of this writer’s examination of the definition of aggression adopted by the General Assembly in 1974. Observing there that “the General Assembly is rapidly becoming a committee to execute the will of the Soviet and Arab oil-producing nations, manipulating the numerically overwhelming votes of African and Asian States,” we commented:

How long will the target States permit themselves to be led, one by one, issue by issue, step by step, like sheep to the slaughter? No doubt, the submissiveness of Western States since 1973 has been mostly due to the brooding threat of renewal of the economic coercion of the oil boycott—a kind and degree of coercion which is certainly a candidate for the title of economic aggression.” In part, however, it was also due to the notion that even such extreme economic coercion is free of legal restraints applicable to strictly military coercion, and is somehow also immune from legitimate defensive action of the victims. The dangers threatened by this chaotic state of affairs may now have arrived. Intransigent and irresponsible majorities in the General Assembly can now, by placing spurious self-serving interpretations on the ambiguities and silences of the Consensus Definition, use it as a political weapon against whichever are the target States for the time being. This would increase enormously “the clout” of that body’s de facto usurpation of magisterial power. The dangers to the Organisation itself are almost as great as those to target States. The Great Power veto in the Security Council was based on
weapon as a part of the 1973 aggression, and that international law, no less than Israel, is its victim. And the present work will, indeed, have to examine a whole series of attempts to rewrite those parts of international law that endow Israel with her undoubted legal rights, and to apply this ad hoc revision retrospectively to the main matters at issue between that state and the rejectionist Arab states. The main materials and process for this operation are accumulations of resolutions in the General Assembly, claims that they are lawmaking, and the diversion of the resources of the United Nations, through committees of that body, to the tasks of eroding the rights of the selected target.

The extraordinary campaign against the State of Israel in the General Assembly since the oil weapon was drawn from its scabbard in 1973 thus involves subversion both of basic international law principles, and of rights and obligations vested in states under them. It has also entailed rather grotesque reversals of the United Nations’ own positions of the preceding quarter-century, as part of a wide and illicit rewriting of history. Considered in the context above sketched, this campaign is a kind of piloting operation in a remarkable venture in the détournement de pouvoir—an assault with covert as well as overt elements, on the international legal order. It would follow that what is at stake are not only the range of state interests that lie within the lawful concern of the organs of the United Nations, but all interests of states that the General Assembly can by the ipse dictum of automatic majorities reach out to control, truncate, or destroy.

The General Assembly’s Committee on the Exercise of the Inalienable Rights of the Palestinian People, appointed by Resolution 32/408 of December 2, 1977, has now sponsored and issued a series of “studies” that clearly display this design. The studies prepared by the special unit on Palestinian Rights for and under the guidance of the committee include the following: The Origins and Evolution of the Palestine Problem (1978), 2 parts (ST/SG/Ser F/1), is “prepared for” or “under the guidance of” the committee, by “the Special Unit on Palestinian Rights”; The Right of Return of the Palestinian People (ST/SG/Ser F/2, 1979) is “prepared for” the committee “in keeping with its guidance”; The Right to Self-Determination of the Palestinian People (ST/SG/Ser F/3, 1979) is “prepared for and under the guidance” of the committee. These were followed, also in 1979, by An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question (ST/SG/Ser F/4) by W. Thomas Mallison and Sally B. Mallison.

The last-mentioned of these “studies” rehearses much that is in its predecessors and overlaps them, and is apparently a kind of coping stone of the series for the time being. The committee has here disclosed the names of the authors, and has also felt it necessary to caution that “the views expressed are those of the authors.” The reason for such a caveat in this case, as distinct from the anonymous papers, is not clear. Yet it is very
clear that such a caveat cannot disengage the responsibility of the United Nations from any work commissioned and published under its auspices. It is, of course, a proper function of the organization to circulate the partisan positions of member states on contentious matters. It seems, however, highly improper for it to commission, publish, and disseminate, as views of the organization itself, partisan theorizing in support of one side in the contentions among its members.

The appearance at this stage from the General Assembly’s Committee on the Inalienable Rights of the Palestinian People, of the above series of studies, catalyzed an interaction between two major interests of the present author, and this book is in a sense a result of this interaction. In one perspective it can be seen as a particular case study in the sociology of contemporary international law. In another it can be seen as a case study of the threatened impact of changes in the constitution and power balance within international organs on the legal rights of a particular state. For both perspectives the above U.N. publications afford examples of what is being done to international law in the theater of the General Assembly. For this reason, rather than because of any basic juridical value in themselves, these publications will often be referred to in the following chapters.

The present writer’s concern with the sociology of international law—to the relation of its socioeconomic, political, and psychological substrate to its surface manifestations—is of long standing. It goes back to his Master of Laws thesis about “The Doctrine of Sovereignty and the League of Nations” at the University of Leeds in 1930, and has continued through books on Legal Controls of International Conflict (1954, repr. 1958); on Problems Confronting Sociological Inquiries Concerning International Law (1956), Hague Recueil, vol. 89, pp. 61-180; on Aggression and World Order (1958); on The International Court and World Crisis (1962), International Conciliation, no. 536: Towards a Feasible International Criminal Court (1970) especially pp. 315-41; Conflict through Consensus (1977), and other writings. He has also contributed much in the last decade to the literature on particular legal aspects of the Arab-Israel conflict.

A mere sampling of some of the issues canvassed in this book will suffice as illustrations for this introduction. What is the standing of General Assembly resolutions as sources of international law concerning matters other than those limited cases in which the charter makes them binding? When, if ever, can they be said to express international law binding on states? When, indeed, is weight to be given even to their assertions of fact? What is the bearing, even on any nonlegal persuasive effect of these resolutions, of the fact that they are adopted by reason of the use by a few members of extreme coercion on others (for example, the duress of the oil weapon)? Is the General Assembly to be given the competence to pass sentence of truncation or even of extinction on states, including members of the United Nations? Is the “sovereign equality” of members under Article 2 to be made subject to even lesser whims and predations of automatic majorities in the General Assembly? Is the legal establishment of a state on the basis of the self-determination principle, and its admission as a peace-loving, law-abiding state to membership in the United Nations to be subject forever after to such whims and predations of majorities from time to time? Has the adoption of the charter, as most international lawyers believe, reinforced the cardinal principle ex iniuria non oritur ius in its application to aggressor states, or has it (as the Arab states now claim) dispensed aggressor states from this principle by enabling them to be restored automatically to the status quo ante bellum whenever their aggression is defeated? Is the “self-determination principle” a principle of present international law, or is it still but an important policy or guideline? What, in any case, are the precise content and limits of this principle? What is its intertemporal effect when one application of it is challenged half-a-century later, by another people that has only at that later time recognized itself as a rival claimant? What are the wider implications of any rule adopted as to this matter of intertemporality, that is, the operation of legal principles in the stream of time? Does international law authorize the use of force by some members against others, on the mere allegation that they are violating that later claimant’s self-determination?

These are only some of the general issues of contemporary international law involved in the positions now taken by a manipulated General Assembly on the Arab-Israel conflict. They are additional, of course, to the specific legal problems involved in the conflict concerning Palestine. These arise from legal events now spread according to one’s preferred perspective over the 70 years since the Balfour Declaration, or the 1100 years since the Arab conquest of Palestine, or the 2900 years since the Kingdom of David. Of necessity, this work will have to range mainly over the last 70 years. It will be seen that some events from the early part of that period, like the terms of the mandate for Palestine, remain of great importance even for the problems of today.

In this more particular aspect of the subject, the present work will of course examine the arguments and conclusions of the recent U.N. Secretariat “studies” mentioned above. It will in particular examine their central theses: (1) that the problematic Resolution of November 29, 1947 (Resol. 181[III] on the future government of Palestine (often termed “the Partition Resolution”)) is still legally binding on Israel, requiring her to accept or even facilitate the establishment of an additional Arab state (in addition to Israel and Jordan) within the borders of Mandated Palestine west of the Jordan (Cisjordan); and that (2) this same Partition Resolution also imposes legal obligations on all member states of the United Nations to ensure that such a third state, additional to Israel and Jordan, is established; (3) that repeated recitals in General Assembly resolutions, from Resolution 194(III) to Resolution 3236(XXIX) of Nov. 12, 1974, and others, establish an inter-
national law "right of return" of Palestinian refugees; (4) that repeated references in General Assembly resolutions after 1970 constitute a legal determination of the right of self-determination of Palestinian Arabs and that the General Assembly is empowered to remodel the boundaries of Israel accordingly. The legal merits of these arguments depend not only on internal coherence but also on the legal soundness of the premises from which the authors have chosen to begin. This work will examine them in both these aspects, beginning immediately with two main premises from which they proceed: first, the conflict of claims to self-determination between the Jewish and Arab peoples; second, the standing and force in international law of General Assembly resolutions.

The setting of these interesting (perhaps too interesting) legal problems of the current Middle East conflict into the more general problems of contemporary international law on which they finally rest, has made the enterprise here undertaken worthwhile for the author. He ventures to hope that it will likewise seem so to the reader.

1

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Self-Determination Rights: The Time-Frame

PARALLEL LIBERATIONS: "ARAB ASIA" AND JEWISH PALESTINE

The Historical Context. A basic assumption underlying a whole series of United Nations "studies" issuing from the Unit on Palestinian Rights is that the peoples whose competing self-determinations are to be reconciled consist of the Jewish people on the one hand, and the Palestinian Arabs on the other. This assumption is in turn linked with an assumption that the relevant date for applying the self-determination principle in the Middle East is 1947, the date of the Partition Resolution; unless, indeed, it be 1974, when the series of General Assembly recitals about the rights of the Palestinians was transformed in Resolution 3236 of November 22, 1974, into a recital that "the Palestinian people is entitled to self-determination in accordance with the Charter of the United Nations."\(^1\)

Such assumptions fly in the face of the history of the struggle concerning Palestine. The critical importance of the decades before 1947 is testified to not only by the history of the periods before and during the League of Nations mandate over Palestine, the documents of several United Kingdom commissions of enquiry, and reports of the Permanent Mandates Commission of the League of Nations. Even the anonymous authors of Origins, the first title in this very series, found it necessary to devote its entire first part (pp. 1-108) to the diplomatic, political, and military history of the struggle of Jews and Arabs over Palestine for three decades before 1947. The Palestine mandate contained safeguards for civil and religious rights of the Arab inhabitants, but studiously avoided referring to their political rights or political standing. This omission seems to confirm what in any
case is clear from the post-World War I historical context, that the rival claimants in the distribution of ex-Turkish lands were, at that time, only Jewish nationalism on the one hand and Arab nationalism (with, of course, further dynastic distributions within the Arab allotment) on the other. And the main conclusion of the pamphlet Self-Determination in this series is that no such right of Palestinians as a separate people came into recognition "during three decades" of the League mandate, or "the first two decades" of the United Nations.3

The importance of this point is that the facts relevant to a correct application of the self-determination doctrine go back to 1917. For whether this doctrine is already a doctrine of international law stricto sensu, or (as many international lawyers would still say) a precept of politics or policy, or of justice, to be considered where appropriate, it is clear that its application is predicated on certain findings of fact. One of these is the finding that at the relevant time the claimant group constitutes a people or nation with a common endowment of distinctive language or ethnic origin or history and tradition, and the like, distinctive from others among whom it lives, associated with a particular territory, and lacking an independent territorial home in which it may live according to its lights.

The name Palestine had not for centuries (perhaps millennia) before 1917 referred to a defined political, demographic, cultural, or territorial entity. In the immediately preceding centuries it was a part of the Ottoman Empire designated as "Southern Syria" and governed from Damascus. In 1917, its northern part, from Safed almost to Jerusalem, was part of the Vilayet of Beirut and the whole of it was claimed to be part of Syria. The Arabs living there were not regarded by themselves or others as "Palestinians" or in any major respect as different from their brethren in Syria and Lebanon. This "Syrian" rather than "Palestinian" identification of Arabs living in Palestine underlay the request of the General Syrian Congress on July 2, 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." A main argument thus made by Arabs in post-World War I negotiations was not that "Palestinians" would resent the loss of Palestinian identity by the establishment of the Jewish national home in Palestine, but rather that they would resent severance of their connection with their fellow Syrians.

That this is correct, so that "Palestine" had no special geographical or political role, and "Palestinians" no specific sociopolitical or cultural identity within the area, during twelve hundred years following the Arab conquest in the seventh century, is clear also from recent historical scholarship. The Princeton historian Professor B. Lewis, in his article "Palestine: On the History and Geography of a Name" in the International History Review (vol. 2, no. 1, pp. 1-12, Jan., 1980), made a comprehensive review of the whole matter, from which the following points emerge. First, the term used for the area after its settlement by Jews following the exodus from Egypt was "Eretz Israel," and the two kingdoms that emerged within it after the death of Solomon were called "Israel" and "Judah" (p. 1). Second, the Emperor Hadrian and the Roman invaders attempted to substitute "Palestine" for these names, and "Aelia Capitolina" for Jerusalem, in a calculated design to "stamp out... Jewish nationhood and statehood" and to "obliterate... historic Jewish identity" (p. 2). Third, after the Arab conquest of the area in the seventh century, Palestine (Filastin) was treated merely as a part of "Syria" (the land of Sham), this being one of a number of major "social, cultural and to some extent even economic and political entities with a continuing identity." Such identities were attributed, along with Syria, to Egypt, Jazira (Mesopotamia), Iraq, Arabia, and Yemen, but not to any area designated as Palestine (pp. 4-5). Fourth, for the Crusaders the area was "the Holy land," or "the Kingdom of Jerusalem," not "Palestine." Fifth, after the Islamic reconquest from the Crusaders, the term "Palestine" ("Filastin") disappeared even as a mere subdistrict of Syria (Sham), (p. 5). Subdistricts under Damascus were identified by reference rather to capital towns such as Gaza, Lydda, Qaqun, Jerusalem, Hebron, and Nablus (p. 5).

This is an ironic commentary on recent claims about the centrality for Islam of Palestine and Jerusalem. Sixth, Ottoman rule, after the Ottoman conquest of 1516-17, underscored still further this absence of any distinct sociocultural or political identity of Palestine in Arab and Islamic thought. Not only were the subdistricts ("Sanjaks") still identified merely by towns, but the north of the country was separated off from the rest of it as part of the Vilayet of Damascus, though both sectors remained merely a part of Syria.

By this time, Professor Lewis aptly notes, the very name "Palestine," which for Moslems "had never meant more than an administrative subdistrict... had been forgotten even in that limited sense" (p. 6).

Indeed, eventually, Palestine Liberation Organization (P.L.O.) leaders have frankly disavowed distinct Palestinian identity. On March 3, 1977, for example, the head of the P.L.O. Military Operations Department, Zuhair Muhsim, told the Netherlands paper 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.

In the light of these facts, the notion that the Arabs living in Palestine regarded themselves in 1917, at the time when Woodrow Wilson's seminal self-determination principle emerged, as a Palestinian Arab people in the
sense required by the self-determination principle (or, as I may sometimes here call it, "the liberation of peoples principle" or "the liberation principle") is thus a figment of unhistorical imagination. To respect the historical facts is, therefore, not to impugn the liberation principle; it merely points out that the principle must be applied at the appropriate time to the facts of group life as they truly exist. These historical facts continue to reverberate today in Arab state circles. President Assad of Syria in 1974 stated that "Palestine is a basic part of Southern Syria" (New York Times, March 9, 1974). On this, on November 17, 1978, Yassir Arafat commented that Palestine is southern Syria and Syria is northern Palestine (Voice of Palestine, November 18, 1978).

The point in time at which it can be confidently argued that a distinctively Palestinian national self-recognition emerged on the scene—if at all—would be around the adoption of the Palestinian National Charter (or Covenant), in 1966 (revised in 1968). And that covenant itself testified with striking clarity that the belatedness of this self-recognition as Palestinians raised grave obstacles to "national" ambitions at so late a stage. For this was nearly half a century after the former Turkish empire had been allocated between the Jewish and Arab liberation claimants, of the latter of which the Palestinians were a part, but not a distinctive part at that time.

The Palestine National Covenant sought to overcome these obstacles by two devices. It claimed that Palestinians were a part of "the Arab nation" to which that allocation was made, and which by 1966 had come to control a dozen new independent states in the Middle East (articles 14-15). But it also insisted in 1966 that Palestinians were a separate people entitled to the whole of Palestine as an indivisible territorial unit for its homeland (articles 1-5). This still left the problem, how, assuming the emergence of a distinctive Palestinian people in the 1960s, the covenant could control the application of the "self-determination" or "liberation" principle in 1917. To meet this problem an ingenious fiction was adopted by the Palestinian National Covenant through declaring Palestinian nationhood to have existed in 1917. To this end the Covenant (articles 6, 20, 22-23) provided that only Jews who had "normally resided" in Palestine before the Balfour Declaration and the mandate for Palestine (the Covenant declared both of these illegal) could qualify for membership in the Palestinian state, and, by clear implication, that all others would be expelled.

It is perhaps understandable that the covenant did not seek to go much further back, for instance to Arab entry into Palestine as conquerors in A.D. 663 or to the Kingdom of David one thousand years before the present era. For these leaps in time would, on any principles basing the claims now made for "the Palestinian people," base a no less irrefragable claim to Palestine for the Jewish people, and fix any Arab pretensions of title with the taint of an unlawful breach by past armed invasion of Jewish rights of self-determination. There is on principle no reason why a hundred century of time is any more explicable than a millennium or so. Some would even argue that qui prior est tempore prior est iure. The facts to which principles are applied may change as completely in a half-century as in a millennium. If a time past is to be reopened, it is still to be explained why one moment in that past rather than other possible moments imposes itself.

For the purpose of examining the assumptions on which the pamphlets on Self-Determination and Resolutions proceed, however, 1917 may be here accepted for testing the application of the self-determination or liberation principle to the Jewish and Arab nations. At that time the twelve present Arab states of the Middle East had not come into existence, so that "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 the liberation principle. Historically, indeed, the Jewish claims began earlier than the Arab. In his famous exchange of March 3-5, 1919, with Felix Frankfurter, the Arab leader Emir Feisal recognized the concurrence of the Jewish and Arab nationalist (we would now say "liberation") movements—"having suffered similar oppressions"—and thanked Chaim Weizmann and other Zionist leaders for being "a greater 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 distinguishable Palestinian nationhood, Emir Feisal added: "Our two movements complete one another... There is room in Syria for us both" (emphasis supplied). Even prior to this, the otherwise much controverted Hussein-McMahon exchange of letters referred constantly to the Arab Nation as the single undifferentiated claimant on the Arab side in these basic negotiations. It is interesting to juxtapose with this correct record of history the account by the main author of Resolutions, who in no way mentions the Arab people generally, or Emir Feisal, in the 1919 negotiation, but names "the Arabs of Palestine" as a "participant."

The correct historical context was clearly set out in the Agreement of Understanding and Cooperation which had been signed on January 3, 1919, by Emir Feisal, representing Arab national aspirations at the Peace Conference of Versailles, and Dr. Chaim Weizmann, representing the Zionist movement at that time. The agreement's preamble envisaged the closest possible collaboration in the development of "the Arab State and Palestine" as the surest means of "the consummation of their [the Arabs'] national aspirations." And it is obvious also from Article 1, providing for the exchange of "Arab and Jewish accredited agents" between "the Arab State" and "Palestine" 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." This is no less clear from articles 2...
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by President Wilson in order to draft a map of the world based on the Fourteen Points, affirmed the right of the Jewish people “that Palestine should become a Jewish State” clearly on this ground. Palestine, the commission said, was “the cradle and home of their vital race,” the basis of the Jewish spiritual contribution, and the Jews were the only people whose only home was in Palestine. It would be difficult to provide a more succinct statement of the essence of the self-determination principle. The Permanent Mandates Commission, in 1937, provided perhaps the supplementary point when it observed that the sufferings of Arabs and Jews are not comparable “since vast spaces in the Near East... are open to the former whereas the world is increasingly being closed to settlement by the latter.”

This connection is eloquently stressed by the report in 1937 of what was perhaps the most balanced Commission on Palestine, the Royal Commission, headed by Lord Peel. The zeal with which the U.N. Secretariat’s Palestine unit cites passages from this report that favor its own arguments, fails to reach 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, Erets 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.

On the other hand, when the Peel Report refers to “national aspiration” of Arabs in Palestine it is clear in the relevant context of Chapter 20, paragraph 5, that the reference is not to any such “aspiration” of Palestinian Arabs as a separate people, but the general “hope of reviving in a free and united Arab world the traditions of the Arab golden age.” But this aspiration was, of course, provided for by the vast territorial allocation to the Arab people (including the Palestinians). It accords with this, and with the present view, that in Chapter 23, paragraph 5, of its report the Peel Commission observed wryly: “There was a time when Arab statesmen were willing to concede little Palestine to the Jews provided the rest of Arab Asia were free. That condition... is on the eve of fulfilment now.” That was in 1937; the reality of the territorial endowments achieved by the Arab nation, constituting now a dozen Arab States in the Middle East alone, has exceeded all former Arab aspirations.
In other words, in terms of modern ideas of self-determination or liberation of peoples, it is critical to identify the two peoples who were thus claimants at the relevant time when the future of the former Ottoman territories in that Middle East was laid out. For it is fatal to any judgment of justice to misidentify the claimants among whom the distribution is to be made. Fallacy arises from ignoring the historical reality that the establishment of a Jewish national home in Palestine was itself an application of the self-determination principle—parallel both in time and principle to the allocation of the great bulk of Middle East territory, "Arab Asia," as the Peel Commission called it, to the Arab people, including the Arabs in Palestine. This fallacy is aggravated by ignoring also the historical fact that the Arab claimants after World War I embraced Arabs of the whole Middle East area, including Arabs in Palestine, who were then in no sense a distinctive national group. The facile assertion that Israel came into existence on the basis of injustice to a Palestinian nation proceeds on gross errors of these kinds. To present, in 1980, a "Palestinian nation" as having been displaced by Israel in Palestine, when no such distinctive entity recognized itself or existed at the time of the allocation between the Jewish and Arab peoples after World War I, is an impermissible game with both history and justice.  

The distribution between Arabs and Jews after World War I was certainly implemented in succeeding decades as far as Arab entitlements were concerned. Arab claims to sovereignty received extensive fulfillment in the creation of more than twenty sovereign states following World War II, not only in the Middle East but also in Africa as well. Altogether this historical process included the following features.

First, despite all the extraneous Great Power maneuverings, 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.

Second, the territorial allocation made to the Arabs (as now seen in about a dozen Arab sovereignies in the Middle East (not to speak of many Arab sovereignities elsewhere)) was more than a hundred times greater in area, and hundreds of times richer in resources than the "Palestine" designated in 1917 for the Jewish national home.

Third, by successive steps thereafter, this already tiny allocation to Jewish claims was further encroached upon. Thus, already in 1922, a major part of it (namely, 35,468 out of 46,399 square miles, including the more sparsely populated regions) was cut away to establish the kingdom of Transjordan (now known as the Hashemite kingdom of Jordan).

With so preponderant an Arab allocation capable, as events since 1973 now show, of threatening the economic existence of most of the rest of the world, it seemed reasonable to expect Arab acquiescence in the minute allotment to the people of Israel as their only national home.

The meaning of these historical facts is that the relevant time context for testing the conformity of Israel and Arab (including the present Palestinian Arab) claims in respect of Palestine to the self-determination or liberation principle, is that of the distribution of the former Turkish domains of the Middle East after World War I. And once this is acknowledged, the basic premise on which all these "studies" proceed, namely, that the issue is one of Israel's encroachment on the right of self-determination of the Palestinian Arab nation, is exposed as simply incorrect.

The liberation principle was thus, if I may summarize, applied to rival claims of the Jewish people, and the "Arab Nation" (as the Palestine National Covenant still calls all Arabs) in the period following 1917. It was then applied correctly, moreover, according to the facts of peoplehood as they then existed. It was applied by allocating the overwhelming share of territory and resources of the whole Middle East to the Arab Nation (including Palestinians) as that nation then presented itself. This share was ample enough in later decades to form the territorial basis of a dozen independent Arab states. It was also applied by allocating to the Jewish people, as part of the same settlement, a minute fraction of the area, namely the 46,399 square miles embracing both Cisjordan and Transjordan. And that tiny fraction was then reduced by four-fifths in 1922, to create in Palestine what is now called the State of Jordan, leaving the share of the Jewish people under the liberation principle as 10,871 square miles—or 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 recognition as a separate nation either by themselves, or by other Arabs. There were Arabs who lived in Palestine for centuries, as there were Arabs who had lived in Syria and Iraq and the Hedjaz and Yemen and elsewhere: all of these were then seen as part of the Arab nation to which the vastly preponderant Arab share was allocated. So, similarly, there were Jews who had lived in all these and other parts of the region for centuries. And many of these, Jews and Arabs alike, were to pay a price for the inheritances gained by their respective nations.

This presentation of historical context contrasts violently with the attempt in the Palestine National Covenant in 1964, now repeated by the authors named and anonymous of these "studies" from the U.N. Secretariat, to present the Palestinian issue as a struggle that began in 1917 between the Jews of the world on the one hand, and the Palestinian Arab Nation on the other, in which the Jews seized the major share. It may be appropriate at this point to reaffirm the correct historical content, as here presented, in the light of more recent doctrine of the International Court of Justice. The essential point is not whether self-determination was a legal right in 1919,
but rather that, whatever it was, it was duly applied in parallel to the claims of the Jewish people and the Arab people in the Middle East.

**Self-Determination and the International Court.** The International Court of Justice in the Namibia Advisory Opinion made clear that the self-determination principle, as this was to be understood in 1971, is continuous from its early expression in Woodrow Wilson’s Fourteen Points, the mandates system, and Article 22 of the League Covenant, into its embodiment in the United Nations Charter, preamble and Chapters II and 12 on the regime of non-self-governing territories and the trusteeship system. This course of history, said the court, left “little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned” (p. 31). The change brought by later developments was not in the principle of self-determination itself, but in extending its benefits to peoples not formerly under the mandate system, extending the sacred trust concept by Article 73 to embrace other “territories whose peoples have not yet attained a full measure of self-government” (p. 31).

The court’s stress on the continuity of the self-determination principle since its application in the World War I settlement, confirms the basic submission of the present section, and indeed of this entire opening chapter. The self-determination principle was applied in that settlement for the benefit of the Jewish people and the Arab people (within which Arabs in Palestine were included). As already seen, this resulted in the territorial allocation of the small area known as Palestine for a Jewish national home, and the overwhelming balance of the territories concerned for the Arab people, which later became a dozen Arab states. That allocation under the self-determination principle was accepted at that time, both informally among the states and peoples concerned, and also through the solemn procedures of the international community and the League of Nations. It was confirmed by the admission of the State of Israel, after it was established, to the United Nations. So the principle of self-determination now being used as a weapon for attacking or even dismantling the State of Israel, is the very principle of which that state is among the earliest historic expressions.

To assert that the self-determination principle must now be applied, as if for the first time, for the benefit of a separate Palestinian Arab Nation that emerged in the 1960s, as if the allocations under that same principle more than half a century before had never occurred, is thus extravagant on its face and contravenes the International Court’s stress on the unbroken continuity of the self-determination principle from the World War I Settlement, into the period of the United Nations. It would perhaps be somewhat more plausible to argue that the earlier allocations under the self-determination principle should be somehow revised or even canceled to take account of the later appearance of a new claimant under the principle, the Palestinian Arabs, a people “post-natus,” as it were, to the original disposition. Such an argument, however, would finally have to rest on some vastly expanded notion of rebus sic stantibus. The expansion would indeed have to be so vast as to threaten the stable existence of virtually all states and of the whole international order.

A degree of instability is, of course, unavoidable in the dynamically changeable conditions of the present world. Among the sources of it are the extraordinary tempo of technological development in the field of communications and of weaponry, changes in demand for and availability of various basic resources, the conflict of ideologies and Weltanschauungen among more than 150 independent states, unprecedented changes in individual ways of life among their peoples, and (without seeking here to be exhaustive) the substantial implementation of the self-determination principle. This last process, in the course of decolonization, has already tripled the membership of the United Nations in less than a quarter of a century. Most of these factors have operated beyond the control of any authority, national or international. The creation of so many new states under the self-determination principle, on the other hand, is a factor that arises from policies espoused by states individually and through the United Nations, recognizing that the importance of the principle justifies the resulting instabilities and uncertainties in international relations. One assumption of this recognition is that the instabilities and uncertainties of state life would be transitional, and that once the transition was made, the outcome would be a stabler and more peaceful community of states, resting on a closer correspondence of statehoods and peoples.

To accept the above arguments as justifying the use of the self-determination principle in 1980 to attack the existence of a state that was itself a product of this principle sixty-odd years before, would surely be fatal to the assumption that a modicum of international stability is eventually achievable. A state founded or delineated conformably to the self-determination principle at a given time would be exposed forever thereafter to revision of boundaries or even destruction, at the behest of some later-born competing entity. This would be so, indeed (as in the very case of the Palestinian Arabs) even if the new claimant entities did not come to self-consciousness, or to recognition by others, until generations later.

These grave effects would follow, moreover, even if the entities always made their claims in perfect good faith. They would follow even if third states were not prone to promote or exploit or manipulate such entities for purposes of political power, often quite extraneous to, and sometimes quite subversive of, the principle of self-determination. In the actual world, however, this proneness is a notorious and chronic fact of international life. The consequences for the international community would be correspondingly dire and persistent, like those attributed to the intertwined nineteenth-century phenomenon of irredentism, interventionism, and Bal-
kanization. The P.L.O. makes such threats to orderly international life quite explicit. Its leader, Yassir Arafat, again reaffirmed as recently as February 11, 1980: "The destruction of Israel is the goal of our struggle, and the guidelines of that struggle have remained firm since the establishment of Fatah in 1965." And the Soviet Union and other states seeking to manipulate this situation to their adventitious purposes, but to the frustration of peace, expose to open view the threat of subversion to the rights of integrity and sovereignty of all existing states.

This attempted unsettlement of established, lawful title and boundaries would proceed not only ex post facto by reference to later events, but also by reference to past historical circumstances belonging to periods only speculatively related, if at all, to the modern principle of self-determination. It is not necessary to follow in detail the learned explorations of this kind that had to be made by the International Court in the Western Sahara Advisory Opinion (International Court of Justice Reports, 1975, pp. 12 ff., 29 ff.) to appreciate the indeterminate and indecisive outcomes of that opinion with regard to the clarification of the status of the peoples and territories concerned. The court itself in the Western Sahara case (p. 33) was constrained to observe upon the obscurities affecting particular applications of the self-determination principle. In the court's words:

The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was unnecessary in view of special circumstances.22

And the court was also at pains to emphasize that despite the measure of discretion in the General Assembly's efforts to "realize" the right of self-determination, its opinion would at least "assist" that body in its "future decisions" so that it could continue its discussions "in the light of the Court's advisory opinion" (pp. 36-37).

The questions presented for determination in the Western Sahara were whether that area was "at the time of colonization by Spain a territory belonging to no one (res nullius); and (if it were not res nullius) "what were the legal ties between this territory and the Kingdom of Morocco and the Mauretanian entity" (p. 14). The request referred to an area to which the principle of self-determination had not yet been applied, and in which, indeed, serious competitive interests of states or peoples had only recently arisen. It was made as a preliminary to the conduct by Spain as administering power of a referendum in the Western Sahara.

In the existing uncertainty concerning the future of the territory, the uncertainties of outcome in that case of the self-determination principle were not, perhaps, of particular concern. Should we, however, expose well-established states, themselves founded originally on solemn and open applications of the self-determination principle in the circumstances of the time, to the hazards of repeated reaplications of that principle by votes of states whose attitudes are necessarily affected by the changes and even vagaries of their national interests? To do so would surely be disastrous. It would convert the arena within which states live and have their being into a veritable minefield, in which the location and timing of each explosion remained ever and profoundly uncertain, and in which the only certainty would be a succession of disasters for an endless series of target states.

It is, indeed, precisely to the avoidance of this danger that the final paragraphs of the section on self-determination of the General Assembly's Resolution on the Principles of International Law Concerning Cooperation and Friendly Relations among States, being Resolution 2625(XXV) (hereafter termed the "Resolution on Friendly Relations"), are directed. That section—after referring to the rights of all peoples to determine without external interference their political status and pursue their development, the general duties of states to promote "realization" of the self-determination principle and to refrain from forcible action depriving peoples of the right thereto, and the right of peoples to seek and receive support in accordance with the purposes and principles of the Charter—was careful to spell out in its last two paragraphs the limitations in any case implicit in the words here above italicized:

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). (General Assembly Resolution 2625[XXV].)

Professor Schwobel has drawn attention in a related context23 to the fact that the "battle of words" surrounding "wars of liberation" in U.N. organs has been inconclusive. "Resultant resolutions," he observes, "when they have gained universal support, are so general that they lend themselves to conflicting interpretations on the critical issues." On the other hand, "resolutions which are clearer" lack sufficient support to be thought to express international law.

The matter is much less complicated on the issue here under review. The issue is whether the unity and territorial integrity of established states, based on the application of the self-determination principle to the facts of international life as they existed at the time of establishment are to be
respected. Or whether such established states shall continue thereafter to be subject to endless and repeated attacks on their existence, on the pretext that fact situations of a later time—in the case of Palestine, a half-century later—are thought by some to require a different application of the self-determination principle. It is sufficient for the present purpose to observe that the above-quoted paragraphs forbid either partial or total dismemberment or impairment of states conforming to the self-determination principle, and prohibit states from engaging in “any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.” Even if this last prohibition were not as unqualified as it appears to be, these paragraphs clearly bar repeated attempts to use the self-determination principle to threaten “the national unity and territorial integrity of States” themselves founded in their due time on that very principle. That is precisely the case of the state of Israel.

Professor Schwebel concluded, after analyzing relevant General Assembly resolutions and votes thereon, that “the Friendly Relations resolution may not reasonably be interpreted as endorsing support by way of provision of arms—still less by way of armed support itself—to national liberation movements.” In this respect the resolution would be consistent with basic principles both of general international law and of the Charter, and of the above analysis of the concluding paragraphs of the self-determination section of that resolution. We shall later show, in chapter 6, that this view is decisively supported by the clear evidence of contemporary State attitudes in the course of the labors of the 1967 Committee on Defining Aggression, and in the outcomes of its work.

THE KINGDOM OF TRANSJORDAN (JORDAN) AS A PALESTINIAN ARAB STATE

The cutting away in 1922 of four-fifths of the territory within which the Jewish national home was to be established, in order to create the emirate of Transjordan, which later became the present state of Jordan, is in this context of double significance. On the one hand, as already indicated, it drastically reduced the already tiny allocation to the Jewish people’s right of self-determination. But it is no less important to note that a reason for this separation, alongside the claims of Hashemite leadership, was to provide a reserve of land for Arabs across the Jordan. Both Cisjordan and Transjordan made up historic Palestine.

Thus, the erroneous premise, indulged by these pamphlets from the U.N. Secretariat, as to who were the claimants to self-determination or liberation in 1917 spawns immediately another dramatic error in their points de départ. This is their assumption that the Palestinians do not already as a people have a homeland and a base for statehood, so that these must be wrested from the state of Israel. The fact is that after World War I Transjordan arose as a last-minute encroachment on the already small allocation to the Jewish nation in the self-determination distribution, thereafter excluded from the promise of a Jewish national home. Yet these U.N. Secretariat “studies” do not, as far as can be observed, refer to any duty of Jordan as an Arab state in Palestine to accommodate the Palestinians; just as the studies are inadvertent to the moral default of other Arab states in not resettling within their vast domains the hundreds of thousands of Palestinian refugees displaced by the wars initiated by these states. These defaults are the more surprising when it is recalled that the tiny state of Israel did offer and provide such a home for at least as many Jewish refugees from Arab states during the same troubled period, as well as for scores of thousands of Arab refugees. The defaults become astonishing when one also recalls that in the same epoch Western states admitted, resettled, and absorbed as citizens more than nine million destitute persons displaced in the course and aftermath of World War II. Even greater displacements and exchanges of population have been managed in Asia; for example, between India and Pakistan.

The major point for the application of the self-determination principle in 1990, however, is that the origins and present position of the Arab state of Jordan in Palestine rebut the very claim that the Palestinian people lack a homeland. Not only did the state of Jordan arise in Palestine over Jewish protest at the expense of the home allocated for the Jewish nation; it also inexorably became, by the same course of history, a Palestine Arab state. As already seen, the original extraction of Transjordan in 1922 from the area designated by the mandate for a Jewish national home had as a major purpose the assurance of a territorial unit for movement of Palestinian Arabs. Jordanian expansion by unlawful military adventure on to the West Bank in 1948 could only reconfirm this character as a Palestinian Arab state in a triple sense. With or without the West Bank, Jordan is unambiguously Palestinian territory; and the vast majority—something over 60 percent—of its inhabitants consists of Palestinian Arabs. Moreover, the number of Palestinians within this extended Jordan constituted a majority of all Palestinians.

In terms, therefore, of any intelligible account of the self-determination principle, Jordan was certainly a Palestinian state after 1948. Whether King Hussein and his Palestinian subjects chose to conduct their affairs as a unitary state on democratic majority principles, or whether they chose to establish a separate Palestinian state within the extended territory, the Palestinian Arabs already had a homeland within the state of Jordan. This reality may be concealed from time to time by the difficult relations between King Hussein’s regime and his Palestinian subjects. Yet for much of the period 1948 to 1967, and perhaps indeed until the bloody hostilities
with the P.L.O. of 1970, the Palestinians in the kingdom of Jordan (forming as mentioned a majority of its population and also a majority of all Palestinians) may well have come to regard Jordan as the Palestinian Arab state. Indeed, it seems that in 1970 the Palestinians sided with their own state of Jordan against the P.L.O. The underlying reality continues today. Recent estimates place the percentage of Palestinians in Jordan at 60 percent (London Observer, March 2, 1976), 55 percent (Economist, Annual Supp. on Jordan and Syria), 66 percent (P.L.O. figures). King Hussein in, himself, in an interview with the France-Soir of February 3, 1977, asserted that Palestinians were the majority of the Jordanian population. In 1979 the population included 1,200,000 Palestinians and 900,000 Bedouin.

This Palestinian Arab affinity with Jordan moreover is deeply embedded in history, and in the consciousness of Jordanian authorities, and even of the P.L.O. Lord Balfour’s Memorandum of August 11, 1919, noted that “Palestine” includes all the area east of the Jordan. King Hussein himself in his autobiography, Uneasy Lies the Head, asserts the unity of Transjordan and Palestine. He told the paper Al-Mustakbal on June 16, 1979, that “the unity of both Banks under one Arab. Moslem rule, will ensure equal rights for the Palestinians.” Crown Prince Hassan told the National Assembly on February 2, 1970, that “Palestine is Jordan and Jordan is Palestine.” Premier Zayd al-Rifa’i of Jordan, himself a Palestinian, told Al-Diyar (Lebanon) on December 13, 1974, that “there is one Jordanian Palestinian People.” As for the Palestinians themselves, the Conference of West Bank Notables in 1948 called for union of both banks under King Abdullah. Many P.L.O. statements, including statements of the Palestinian National Council, have steadily claimed that Jordan is a part of the future Palestinian state. For example, the 5th Council Meeting of March 1971 declared that “the future State in liberated Palestine will be the Democratic Palestinian Republic . . . in full unity,” stressing the unity of the people on both banks of the Jordan, a sentiment repeated at the 9th and the 12th Council meetings, the lattermost in July 1974. And the chief of the Political Department of the P.L.O. was reported (Newsweek, March 14, 1977) to have declared that Palestinians and Jordanians are one people. And it is clear that before the realignments of the Rabat Conference the principal Arab states in fact treated Jordan as representing its Palestinian as well as Bedouin population.

Despite the Rabat decisions, a Conference of Syria, Egypt, and Jordan and the P.L.O., on January 4, 1975, asked Jordan to halt the “Jordanization” policy by which it reacted to those decisions. A P.L.O. delegation in Amman announced in Al-Nahar (Beirut) on December 18, 1978, the continued responsibility of Jordan for Jordan’s Palestinian population. And the central role in Jordan still played by this population was surveyed by Al-Ahram (Cairo) on March 5, 1976. Palestinians at that time were reported to control 70 percent of the Jordanian economy; others estimate that Palest-
proportion to benefits they respectively received in the overall allocation of 1917.

This principle, moreover, also seems applicable to Jews fleeing from Arab lands, as well as to Arabs fleeing from Palestine, all in the course of the same Arab-Israel conflict. The members of each of these groups suffered similar wrongs incidental to the overall distribution. The duty of providing homes for the 700,000 Jewish refugees was assumed by Israel in its fundamental Law of Return, as a first responsibility of the new state. The great burden of rehabilitation was assumed by the state of Israel and 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 called a "just" solution to the refugee problem. Surprisingly again, the authors of the studies entitled Resolutions and Right of Return show no advertence to the principles involved.20

2

General Assembly Resolutions and International Law

RESOLUTIONS AS LAWMaking?

Pronouncements on Palestinian Self-Determination. It has been shown, thus far, that the chronology and circumstances of the primary application of the self-determination or liberation principle in the Middle East took account of the rights of both the Jewish and the Arab nations as they then existed. This removed any basis on which a claimant to separate Palestinian peoplehood, emergent forty-odd years later, could claim to dismantle statehoods properly established in their due time on the liberation principle. The erroneous assumptions of the Mallisons on these critical matters undermine much of their analysis of the major U. N. resolutions.

The Mallisons are, for example, at pains (and necessarily so since it is crucial to their themes) to explain away the absence of General Assembly resolutions before 1970,1 affirming the right of self-determination of Palestinian Arabs as an issue between Israel and the Palestinians. Up to then (the Partition Resolution apart—to be considered hereafter) General Assembly resolutions concerned themselves 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."

2 It is only with Resolution 2672C, as late as December 8, 1970, as the Resolutions "study" has to admit2 that "the General Assembly moved towards acknowledging the correlation between the right of self-determination and other inalienable rights." From this and from a phrase in Resolution 2649 of November 30, 1970, its authors make bold to argue that prior resolutions of self-determination of peoples, which the General Assembly had not at the time applied to the Palestinian people, "are now specifically
applicable to the Palestinian people." They are thus accepting as a historical fact that, even so far as the General Assembly is concerned, the peoplehood of the Palestinians begins in 1970. And the elaborate structures that they try to build on this then proceed on the gross error, exposed in preceding sections, that the basic application of the self-determination principle to the claims of the Jewish and Arab nations had not already been made half a century before. And it is to be noted that even Resolution 2672C in 1970, which is thus claimed as an epoch-making recognition of Palestinian self-determination was hesitant even at that late stage. No less than 72 states out of a total of 139 then Members of the United Nations either opposed, or abstained from, this vote, and only 47 States voted for it. This scarcely signals a wholehearted flash of recognition, even a belated one, by the international community of an age-old self-evident truth.

It is also curious that in a ten-page section on "The National Rights of the People of Palestine," these authors avoid reference to what many regard as the most important of resolutions on the Middle East, namely, Security Council Resolution 242 of November 22, 1967, and Resolution 338 of October 22, 1973, which emphatically reaffirms Resolution 242 as the basis on which a Middle East settlement is to be negotiated. As international lawyers, the authors must be aware of the importance of Resolution 242, accepted by Egypt, Jordan, Syria, and Israel, as the only authoritative formulation of a unanimous Security Council on the issues between Israel and the Arabs requiring resolution by negotiation. Indeed, the authors enthusiastically cite it in the preceding section of their pamphlet as supporting the "right of return" of Palestinian refugees, since it calls for "a just settlement of the refugee problem." But they do not deign to notice that on the self-determination issue Security Council Resolution 242 significantly excludes any reference to any national claims of Palestinian Arabs against Israel. This was not an issue in the Middle East conflict in 1967; nor was it even in 1973 when Resolution 338 reaffirmed Resolution 242. (N. R. May add, on "the right to return" aspect, do these authors care to notice that the "just settlement of the refugee problem" called for embraces on its face all refugees, Jewish and Arab.)

In the General Assembly itself it required the unprecedented coercion of the Arab states' oil boycott in support of the Syrian-Egyptian attack on Israel in 1973, and its aftermath of pressures in subsequent years, in alignment with the Soviet bloc, to move a majority of the membership to vote for a resolution asserting the existence of separate Palestinian Arab national identity. And under such threats and duress the pertinent Resolution 3089D of December 7, 1973, marshaled only eighty-seven affirmative votes (with thirty-nine states voting against or abstaining). When, a year later, Resolution 3236 of November 22, 1974, 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. The authors of Resolutions are willing, at any rate, automatically to translate such resolutions into rules of international law. This, however, raises another set of international law questions about the legal effects of General Assembly resolutions, to which I now turn.

STANDING OF RESOLUTIONS: SIMPLISTIC ASSUMPTIONS

The basic general rule as to the legal effect of General Assembly resolutions is that stated by Sir Hersch Lauterpacht, concurring in the South West Africa Voting Procedure Advisory Opinion of 1955. He there observed that, save where otherwise provided, as (for example) with regard to budget under charter, Article 17, or admission of members under Article 4(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 decisions, "refer to recommendations ... whose legal effect although not altogether absent, ... appears to be no more than a moral obligation." Beyond this, legal bindingness of such resolutions has to be established by criteria of some recognized process for creating international law, as by conformity to the requirements for creation, for example, of customary law or treaty law. Before, therefore, their massive reliance on General Assembly resolutions as creating legal obligations for members, the Mallisons owed their readers a full and careful consideration of these requirements.

A generation after the above opinion of Judge Lauterpacht, in an equally considered pronouncement, still 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 can have "legislative effect." First, he pointed out, a Philippine proposal for such a legislative effect was rejected in Commission II at the San Francisco drafting of the charter by an overwhelming vote of 26-1 (United Nations Conference on International Organization Documents [1945]316). Second, the general structure of the charter limits the General Assembly (as distinct from the Security Council) to merely recommendatory functions. Third, it was precisely this limitation that explained why U.N. members are so often prepared to allow Assembly resolutions to be adopted, for example, by abstaining rather than opposing them. Fourth, Sir Gerald pointed out, General Assembly resolutions do not and cannot become a formal source of international law additional to those already well recognized. He adopted the conclusions as to this in H.W.A. Thirlway, International Customary Law and Codification (1972), Chapter 5, and the authorities there cited. Fifth, such reliance as General Assembly resolutions might have to international law was, at most, that the content of a particular resolution might come to
be considered for adoption by states in "a separate treaty or convention." (This, of course, would become binding by virtue of such treaty adoption, whatever its literary or material source, and not because of any legal force of the resolution.) Finally, the "complete imbalance" arising from the entry of scores of new states into the United Nations promotes resolutions in the General Assembly reflecting political, economic, or sociological aspirations rather than a responsible assessment of the relevant legal issues and considerations. It would greatly enhance the dangers inherent in this imbalance in the United Nations, if the above illusion were thoughtlessly indulged.

In the following year, at the 1492d meeting of the General Assembly's Sixth Committee, on November 5, 1974, there was a remarkable manifestation of similar views by United Nations members. The Committee had before it a draft resolution on the role of the International Court of Justice, the preamble of which referred vaguely in its eighth paragraph to the possibility that the court might take into consideration declarations and resolutions of the General Assembly. A wide spectrum of states, including Third World, Soviet bloc, and Western states, rejected even this indecisive reference. It was, some said, an attempt at "indirect amendment" of Article 38 of the Statute of the International Court—a "subversion of the international structure of the United Nations" (Mr. Sette Camara [Brazil] United Nations General Assembly [U.N.G.A.] A/C6/SR.1492, p. 166, with whom U.S. representative Rosenstock agreed on this point). It contradicted the U.N. Charter and the court statute, so that on a separate vote the Soviet Union would not have supported it (Mr. Fedorov, Union of Soviet Socialist Republics, ibid., p. 167). It was capable of meaning that "General Assembly resolutions could themselves develop international law" (Mr. Steel, for United Kingdom, ibid., p. 167). It was "inappropriate in the light of Article 38" of the Court's Statute (Mr. Guney, Turkey, ibid., p. 168). It was subject to "serious doubts" (Mrs. Ulyanova, Ukraine, ibid., p. 168). It was an attempt to "issue directives regarding the sources of law," departing from his delegation's view that resolutions and declarations of the General Assembly are "essentially recommendations and not legally binding" (Mr. Yokota, Japan, ibid., p. 168). Mr. Rasoloko, Byelorussia, declared roundly (ibid., p. 169) that "declarations and resolutions of the General Assembly could not be sources of international law"; and Mr. Prieto, Chile (ibid., p. 169) added that they could not be so considered "particularly in view of their increasing political content which was often at variance with international law." The eighth paragraph, it was also objected, attributed to the General Assembly "powers which were not within its competence" (Mr. Foldesak, Hungary, ibid., p. 169). Also, the preambular paragraph in question had already been amended at the instance of Mexico in a sense explained as in no way altering or introducing any new source of international law to those enumerated in Article 38 of the Statute of the International Court of Justice (A/C6/L.989).

The authors' lack of assurance as to the legal basis afforded for their thesis by recent General Assembly resolutions, moreover, is manifest in the whole structure of Resolutions. They open with a section devoted to "The Juridical Competence of the Political Organs of the United Nations," obviously designed to maximize the legal effect of those General Assembly resolutions favorable to their thesis.

Whole volumes have been devoted, and more no doubt will be, to the contentious issue whether, and if so within what limits, the conduct of states in the course of debating and voting on resolutions in the General Assembly, can establish new rules of international law. The authors of Resolutions, however, purport to dispose of the matter by two carefully selected quotations. One is from Professor Rosalyn Higgins's opening general statement³ 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.⁴ That learned judge there pointed out that the requirements of practice, repetition, and opinio iuris sive necessitatis in the relevant conduct of states, traditionally required for the creation of a new rule of customary law are still required, but may mature at a quicker pace under modern techniques of communication and international organization.

From these carefully qualified generalities the authors of Resolutions proceed immediately to their own statement of the 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 favor of a particular General Assembly resolution) as well as in their individual acts."¹⁰ For this summary to represent correctly the learned authorities whom they quote, the authors should then have proceeded to add, with the same care as Professor Higgins and Judge Tanaka, the requirements as to acquiescence of states, and the exact meaning of acquiescence by reference to the essential requirement of opinio iuris sive necessitatis; as to the sufficiency of the number of states involved, including 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. The authors, however, do not trouble to explore these vital questions, and I shall have to return to them below under "Standing of Resolutions: Actual Legal Complexities" and "Taints in General Assembly Process as Lawmaking."

Instead of exploring those questions, they fill the lacuna rather with a superficial summary of the subject matters on which the Security Council
and General Assembly are authorized to pass resolutions under articles 33-38, and articles 12-14. It is surprising that in doing so, they make no reference to the point, rather important for their thesis, that it is only as to decisions of the Security Council that Article 25 of the charter creates legally binding obligations for members. No such legal force is attributed by the charter to resolutions of the General Assembly except on certain specific and narrowly delimited matters, such as apportionment of expenses among members (Art. 17[2]).

The most serious matter remains the use (or abuse) of quotations from Professor Higgins's and Judge Tanaka's careful specifications, followed by a summary, which is then attributed to these authorities, but which ignores those specifications. On this basis the authors invite the reader to accept that all assertions of fact or law repeatedly found in General Assembly resolutions become ipso facto international law by consensus. Indeed, by a singular petitio principii, the only real guidance offered by Resolutions as to the requirements for General Assembly resolutions to qualify as customary law, is to say 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 Palestinians 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 beg that preliminary question by tendering those very resolutions as examples of how such new customary law is created in the General Assembly.

This vice in the legal foundations that the authors attempt to lay for their interpretation of General Assembly resolutions affects all their main submissions in the rest of the pamphlet. These submissions are that a formidable series of legal obligations arising outside traditional international law and the charter have been imposed on Israel by General Assembly resolutions.

STANDING OF RESOLUTIONS: ACTUAL LEGAL COMPLEXITIES

The desire of the authors of Resolutions for a simplistic rule translating General Assembly resolutions into international law, and their failure to establish such a proposition, are understandable. What is difficult to understand is that as international lawyers they show so little awareness of the range and depth of controversies among their colleagues that forbid such simplification.

The two quotations resorted to by the authors proceeded by analogy with customary law, an analogy that the authors then distort into a vague notion of consensus. But half a dozen other hypotheses—each with its own consequential criteria and limits—are current in the literature and divide the authorities. These hypotheses include the treatment of voting behavior—(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 statements about 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(1) of the Statute of the International Court of Justice; (6) as a means of creating informal expectations among states. On this sixth hypothesis, expectations have been thought only to mature into binding rules according to 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; (f) proceed from an international organ that maintains on the particular matter impartial methods of deliberation and resolution between parties in conflict.

Hypotheses 1-5, as well as that which proceeds on the analogy of customary law, all remain rather 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 action in United Nations organs that will not mature into law. And I shall in the concluding sections of Chapter 6 show, by a study of the work of the General Assembly's Fourth Special Committee on Defining Aggression, that the conclusion of that committee and the very many states represented on it (and indeed the General Assembly when it adopted the Definition of Aggression proposed by that committee) contradicts the simplistic thesis of the Resolutions study about the law-making effects of General Assembly resolutions.

TAINTS IN GENERAL ASSEMBLY PROCESS AS LAWMAKING

Double Standards and Credibility of Resolutions. Professor Schreuer wisely observed in his survey of the state of international law authorities in 1977 on this matter:

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

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 legislative process. Law, of course, may sometimes issue rather directly from power politics, as in the nineteenth-century Concert of Europe, when the ambitions of major powers checked balanced each other over the long run. In a General Assembly of over 150 Members, on a one-State-one-vote basis, major powers like the Soviet Union, or powers controlling a major resource like oil, alloying themselves to large blocs of Third World states, are in a position to use that body as a mere instrument of their own political warfare. In the General Assembly with limited powers sanctioned by the charter this would be a tolerable (perhaps even a desirable) arena of international politics. It becomes unacceptable and dangerous when the majority groupings for the time being attempt to attribute to the resolutions of this body, passed by these same groupings, legally binding power over members. Such usurped power is at present being targeted against much of the Western World, and against the state of Israel in its historic relations with this world. Neither the United Nations nor the traditional international legal order could sustain fuller development of these usurping tendencies.

**Resolutions Carried under Duress.** A second reason for suspecting the moral authority of the General Assembly is that the coercive powers wielded by a few states that may be diminutive in population but formidable in importance of the resources they control may frequently inhibit members who might wish to vote no, or even to abstain, on a range of matters notably but not exclusively affecting the Middle East.

In the light of the experience of recent years, it is not difficult to imagine most outrageous manipulations of voting in the General Assembly. It is no great distance from the General Assembly’s equivalent of “Zionism” with “racism,” to categorizing the United States or the United Kingdom or Australia as “racist” states.

The United Kingdom, for example, could be declared in violation of the principle of self-determination; Welsh and Scottish and Irish “liberation organizations” could be recognized, and made into international legal “entities” represented at the United Nations; so with the Basques and Catalonians against Spain; the Bretons and Corsicans against France; the Croats against Yugoslavia; the Walloons against Belgium; and numerous others. It is unnecessary to list the more well-known contexts of liberation claims in Asia and Black Africa, or of Chinese in Malaysia, Malays in Singapore, or the proliferating claims of tribal groupings within many new Black African states.

Committees on the inalienable rights of this or that “people” could be established in the Secretariat, publishing to the world under the U.N. emblem “studies” prepared by propagandists. Australia’s immigration policies could be pronounced in violation of the charter, so that levels of immigration there from overpopulated countries elsewhere could be prescribed by the General Assembly, after reciting references in the Charter preamble to promotion of “social progress and better standards of life in larger freedom,” and in Article 1 to the goal of solving “problems of an economic, social, cultural or humanitarian character and encouraging respect for human rights.”

Faced with sufficient duress, sufficient members can be “obliged” to support, or at least abstain from opposing, so as to secure a majority for such resolutions, and, indeed, for a resolution that the earth is flat.

States would be obliged to vote in this way; but to be “obliged” in this manner certainly does not satisfy the time-honored requirement of *opinio iuris sive necessitatis* in the international lawmakers process. In the jurisprudential commonplace, to be “obliged” to yield to an armed bandit is not to have a legal obligation to do so. Nor can any process of this kind, whether on Middle East or other issues, create international legal obligations.

The General Assembly resolution 34/65B of November 29, 1979, purporting to declare that the Camp David Accords and other agreements such as the Treaty of Peace between Israel and Egypt, have no validity, poses, at a new height of visibility, the threat to international law from automatic attribution of legal (or even moral) force to resolutions of the General Assembly. This extraordinary pronunciamento on “legal validity” blatantly expresses the policy of the Arab “rejectionist” states, including the Organization of Arab Petroleum Exporting Countries (OAPEC), and the Soviet determination to maintain its power role in the Middle East. That is as it may be. But the present point is that these policies cannot be made into “law” by such a vote in the General Assembly. In a United Nations of more than 150 members, 100 members can pass any resolution they wish, however irresponsible, and it cannot be overlooked that the so-called Group of 77 Third World states in the United Nations is now alone well over 100.

That this is now a regular pattern in General Assembly voting is clear from a comparison with the notorious Resolution 3379(XXX) of November 10, 1975, which solemnly pretended to “determine” that “Zionism” is a form of “racism.” On that resolution, too, almost half the members of the United Nations voted against or abstained, the majority...
consisting of only eighty-two of the members of the United Nations. From the roll-call of this vote the inference of coercion by oil-producing states, in alliance with Communist states, is very difficult to avoid.

It is obviously not possible to prevent such resolutions being passed. But that is not the pertinent issue. This issue is whether to these extravagant expressions there should be added, as the manipulators demand, an attribution of binding force in international law that would be grossly inconsistent with the provisions of the charter.

Transitional Confusions in Doctrine. It would indeed be extraordinary if at a time when treaties induced by the application of unlawful coercion to a state party thereto have been declared to be void, the international community should for the first time attribute legal binding force to the resolutions of the General Assembly for which states vote under extreme duress such as threats of deprivation of essential oil supplies. No doubt the use of bargaining power, of which the possession of oil resources no less than the possession of great military power is an example, cannot be prevented altogether from influencing the outcomes of negotiations between states. Yet just as Article 52 of 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, for instance, by economic strangulation.15

The “Declaration on the Prohibition of Military, Political and Economic Coercion in the Conclusion of Treaties,” adopted by and annexed to the Final Act of the United Nations Conference on the Law of Treaties, of May 23, 1969, clearly asserted such limits. It solemnly condemns the threat or use of pressure in any form, whether military, political or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.” What was thus declared to limit even the axiomatic principle that every treaty in force binds the parties to performance in good faith, must a multo fortiori also limit any force as law of General Assembly resolutions, problematical in any case as such force is on other grounds.

At least three such limits are suggested by the oil measures launched in 1973 in support of the armed attack initiated by Egypt and Syria against Israel.

One limit pertains to the degree of severity of the duress of any kind, including economic duress, that states in the relations of peace may use against each other as a means of inducing acceptance of otherwise lawful demands. This, of course, is the problem of economic aggression, stricte sensu, which has been frequently discussed since 1956 in the course of attempts to define aggression. The best known Soviet proposal, to the 1956 General Assembly Special Committee on that matter, included under “aggression” measures of economic pressure “violating the sovereignty and economic independence” or “threatening the bases of the economic life” of another state.16 Serious discussion of this continued into the work of the General Assembly’s 1967 Special Committee on the same matter from 1967 to 1974. For various reasons, centrally the importance of focusing in the first stage of definition on armed force as “the most dangerous form of the illegal use of force,” the definition of aggression then arrived at and adopted by consensus of the General Assembly on December 14, 1974, did not expressly refer to economic aggression. It is clear however from the travaux that many participating States asserted nevertheless that extreme economic pressure, such as that of withholding oil supply, constituted a grave international delinquency, if not a form of aggression. At the very least, as Special Committee Chairman Professor Bengt Broms declared, the use of economic coercion by a state could be a legal justification for a response of the victim state by the use of armed force against such economic coercion.18 And it is of the utmost significance, as indicating importance of this matter for all states, rather than merely Western states, that the main pressures in 1974 for thus establishing the unlawfulness of economic duress came from other than Western states and the main defense of such duress came from OAPEC states.19

The second limit proceeds a fortiori from the first above discussed, which applies in all cases even when the demands pressed by economic coercion are demands against the victim state. A fortiori extreme economic coercion must be unlawful when it is used against third states in order to compel their foreign policy or other alignment as between the coercing state and its opponent.20 The most notorious instance is, of course, the oil boycott of 1973, which went far beyond any plausible use merely to advance the foreign policies of the oil-producing states concerned, favoring return of some Arab lands and the cause of the Palestinians. The boycott was an attempt to force terms of settlement on Israel, not by means of oil pressure against Israel, but by coercing third states, for instance Japan, to change their own foreign policies, and even to compel them to take coercive measures against Israel. It openly inflicted severe coercion as punishment against states classified as “supporting Israel.” It aimed explicitly to force third states to sever diplomatic and trade relations with Israel, as well as to extend military and economic aid to Arab states. In all these respects it was an invasion of the sovereign prerogatives of the third states by the use of coercion no less extreme than most conventional military aggressions.

The third legal limit, which already seems clear, on the use of economic duress by States is that it must not be used to support activities that are themselves independently unlawful. The seizure of the United States
Embassy and personnel in Teheran in 1979 was unlawful. It must surely follow that proposed action by other oil-producing states such as Libya by way of oil boycott, in support of the extraordinary conduct of the Iranian authorities, must surely be tainted on this ground also.

If the exercise of modes and degrees of duress against individual states violating such limits is thus unlawful, it would be strange to think that it 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 the pamphlets from "The Committee on . . . Rights of the Palestinian People," 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 pressures, which induced many members to act so as to permit them to pass. The grotesqueness arises not merely from ignoring the unlawful pressure by which the appearance of consensus is produced, which, in principle, should taint the resolution qua resolution. The grotesqueness is raised to breath-taking proportions by the claim that such resolutions not only remain unexceptionable as resolutions despite this taint, but are transmuted into precepts of international law binding on all states. What is wrong here, of course, is not merely the ad hoc biased nature of much of this research. It also rests on the researchers' failure, as I have pinpointed above, to understand or even attend to the precise criteria that must be satisfied for voting behavior in international bodies to qualify as lawmaking.

We have up to now considered the effects of extreme duress on the legal validity of outcomes on general principle. Though it is not possible here to discuss them, it should also be mentioned that there are a number of specific provisions of the charter that are violated by measures of extreme economic duress such as oil pressure. First, Article 53 of the U.N. Charter expressly commands that "no enforcement action shall be taken under regional arrangements, or by regional agencies without the authorization of the Security Council." This is exactly what the 1973 Arab state oil measures against the U.S., Netherlands, Japan, and other states amounted to, even if their demands had conformed (which they did not) to the Security Council resolutions involved. Second, the extreme coercion of the concerted oil measures, arising from the near monopoly power involved, probably constituted a threat or use of force, forbidden by Article 2(4) of the charter. There is a great difference between this degree of economic coercion, and mere embargoes by one state against another when a monopolistic position of a group of conspiring states in the particular commodity is not involved. Third, as already seen, many U.N. members have taken the view in connection with the definition of "aggression" (for instance, under Article 39 of the charter) that this international crime includes "economic aggression," and that the victims of such aggression may lawfully take appropriate measures of self-defense. Fourth, this kind of conspiratorial design 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 Cooperation among States adopted by the United Nations General Assembly in 1970. Fifth, as a number of states urged in the 1967 Special Committee debates, the "sovereignty" of states protected by Article 2 of the charter, as well as by the Consensus Definition of Aggression, embraces attributes other than mere "territorial integrity" and "political independence." In addition, the extreme coerciveness and dubious legality of the Arab oil boycott would also seem to constitute "a threat or use of force in violation of the principles of the Charter," the presence of which under Article 52 of the Vienna Convention on Treaties of 1969 renders void any consensual obligation that states are induced to accept by this means.

Among the main objections to claims that General Assembly resolutions as such create binding law is the rather indiscriminate fashion in the General Assembly, in the aftermath of decolonization, of endorsing or even promoting assertions made in the name of "international law," merely because they seem "progressive" in the sense of constraining the legal rights of states that do not belong to the so-called nonaligned group. Such positions are often taken by publicists of some sincerity, but they often represent a naive view, not only of international law, but also of both morality and international politics, occasionally to the point of self-contradiction. They 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 that Dr. Schreuer correctly stigmatizes as fatal to lawmaking by General Assembly resolutions. (See above under "Double Standards and Credibility of Resolutions").

This "softening" of some Western publicist doctrine, doctrine which had been a mainstay of statecraft since before the Peace of Westphalia, is of course due in part to changing power-constellations, and cultural styles, to ideological commitments, and sometimes to postcolonial guilt feelings. But it is also in part due to the skill, political imagination, and energetic persistence with which Soviet, Arab, and other Third World diplomats and publicists have coordinated, disguised, and pressed the accumulation of their demands against the existing legal order. It is not the present thesis that in this new situation give and take in the conflict
of claims and the power that backs them may not yield new principles in a viable legal order, as perhaps they have already done to some extent for the law of the sea. Yet to sanctify as international law any assertion for which a majority can be marshaled in the General Assembly (claiming, for instance, that since the United States had not accorded full self-determination to American Indians, force may be used against it by third states in support of the American Indians) would quickly undermine both the United Nations and the international legal order as hitherto understood. The too facile attribution by some Western publicists of legal force to such resolutions of that body may also sometimes represent in Freudian terms a yearning for authoritative shelter from the storms of legal and political change. Yet such fantasies, however helpful to the publicist’s psyche, are at odds with basic assumptions of the charter, and of international law. And their effect may be so to block or vaporize that law as to foreclose any chance of adjusting it to changing conditions, as well as to invite political and military disasters.

Professor Gaetano Arangio-Ruiz’s work, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, is perhaps the most comprehensive and up-to-date treatise on this matter (though the authors of none of these U.N. Secretariat “studies” have apparently seen it). That learned and experienced diplomat has diligently assembled, scrupulously explicated, patiently organized, and critically analyzed, not only the practice but the growing literature that seeks to establish, explain, or support pretensions to lawmaker authority of the General Assembly, beyond the rare situations where the charter empowers that body to make law. It is a work that commands attention from all who value juristic and intellectual integrity above mere fashion and ideology.

Professor Arangio-Ruiz (like Professor Schreuer after him) ranges over numerous theorems offered for attributing lawmaker authority to the General Assembly. These include the supposed legitimating by the charter or other contractual rule; a supposedly authorizing rule of customary law; the supposed “will” of the “Organized International Community”; the supposed binding force of particular resolutions seen as the practice of states maturing into custom, or seen as “treaty” obligations based on “consensus,” or as declaring “principles of international law,” or as “determining” or “interpreting” international law. As to every such ground, he is led to conclude that the General Assembly lacks legal authority either to enact or to “declare” or “determine” or “interpret” international law so as legally to bind states by such acts, whether these states be members of the United Nations or not, and whether these states voted for or against or abstained from the relevant vote or did not take part in it.

He observes upon the “futility of grandiloquent theories” (among which he would certainly rank those here under discussion), and upon the dangers *de lege lata* as well as *de lege ferenda*, which may accompany this futility. His demonstration is cogent both for such projects of abstract “declaration” of law by the General Assembly, and for usurpation of the power to “determine” matters on which states are at variance, and which the charter does not empower that body to “determine.”

Professor Arangio-Ruiz summons international lawyers to resist and reject under whatever guise what he calls the “soft-law method” associated with loose attribution of independent lawmaker power to the General Assembly. The summons should be heeded, because such paths may be no guide either to law or to the objective facts. They rather lead to a legal chaos that is a sinister medium for subjugating particular members and indeed the organization itself to adventitiously voting blocs whose predominance may rest on elements as meretricious as economic duress and strangulation. In response to arguments like those made in the pamphlets from the U.N. Secretariat that a sufficiently frequent repetition of an alleged rule in the General Assembly can itself convert that statement into a rule of customary law, Professor Arangio-Ruiz offers a fitting peroration:

> 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.

**LEGAL PERVERSIONS IN GENERAL ASSEMBLY RESOLUTION 3236**

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 November 22, 1974. Since this resolution is also a centerpiece of all the pamphlets under scrutiny, especially that of the Mallisons, it may here be characterized in terms of the preceding general analysis.

As is well known, the basic issues and principles for settlement of the Middle East dispute were set forth in Security Council Resolution 242 of November 22, 1967, reprinted in an appendix hereto. And Resolution 338 of 1973 reaffirmed these and even more explicitly provided that the states involved in the 1967 and 1973 wars should proceed forthwith to negotiations for a just and durable peace. During the 1967-73 period, cease-fires ordered by the Security Council and consented to by the parties were beyond any doubt in full legal force.

Under these circumstances, the hostilities initiated by Egypt and Syria in 1969-70 and 1973, and the Arab states’ harboring and support of terrorist operations against Israel under the auspices of the Palestine
Liberation Organization (P.L.O.) and its military wings, should therefore have incurred the censure of the United Nations. However, the geopolitical drives of Soviet policy, the multiplication of U.N. members aligned in voting blocs with Communist and Arab members, the legal use of the Soviet veto, and the political use of the oil weapon rendered the Security Council impotent through most of the 1973 October War to give effect to international law or charter principles.

Then, on November 22, 1974, the General Assembly passed Resolution 3236 which made explicit this travesty of the applicable principles of international law and the charter law. No one can predict what the voting fate of these resolutions would have been had not the Damocles sword of an oil boycott hung over the proceeding. Even under such coercion, a third of the members either voted against or abstained from voting on it. Resolutions adopted in such circumstances are not likely to reflect or promote international law, much less justice or morality.

In this resolution on the Palestinians of November 22, 1974, the General Assembly purported (by a vote of eighty-nine to eight, with thirty-seven abstentions and four states absent) to "reafirm the inalienable rights of the Palestinian people in Palestine" and to recognize the P.L.O. as the appropriate claimant in respect thereof. In so doing, the General Assembly, first, impliedly endorsed prior P.L.O. terrorist activities deliberately aimed not only at the State of Israel but also at civilian 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 to be mentioned below, it also offered dispensation for the continuance of such activities.

Second, this resolution violated various legal principles and rights guaranteed under international law and other long-standing U.N. resolutions. By its implied endorsement of the P.L.O.'s aspirations, which (under Art. 6 of the Palestinian Covenant) included and still include the destruction of the state of Israel, the measure violated Israel's right of sovereign equality guaranteed under Article 2(1) of the U.N. Charter, not to speak of its right to be free from the threat or use of force and armed attack under Article 2(4) and Article 51. Article 2, paragraph 1, of the charter provides that "The Organization is based on the principle of the sovereign equality of all its members." Article 2, paragraph 4, provides that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Article 51 further provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Third, the resolution contradicted the assurance embodied in Security Council Resolution 242 of Israel's right to "live in peace within secure and recognized boundaries free from threats or acts of force." 27

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, Resolution 3236(XXI) of Nov. 22, 1974, contradicted Resolution 181(II). 28 Even though that resolution was prevented by Arab rejection and aggression from ever coming into legal operation, it certainly committed the General Assembly to the entitlement of the state of Israel to some part of Palestine. Historic and geographic "Palestine" includes not only Judea and Samaria (the West Bank) and Gaza, but also the whole of Israel and Jordan. 29 Yet the Jordanian representative in the debate on the Palestinian resolution made clear his country's view that Israel was indeed included in the "Palestine" claimed for the Palestinians but that Jordan was not! The fact is that the state of Jordan accounts (east of the river) for 35,469 of the 46,339 square miles of "Palestine," or almost four-fifths of the latter. 30 As already seen, most of Jordan's citizens are Palestinians and constitute, together with those on the West Bank, the great majority of all Palestinians. 31 Thus, Jordan was already, as above observed, a state of the Palestinian Arabs.

Fifth, the Palestinian Resolution impliedly reflected on the General Assembly's deliberate and well-considered endorsement of the establishment of the state of Israel. (But of course the establishment and the legal existence of the State of Israel, like that of most U.N. members, did not and does not depend on such endorsement.)

Sixth, the General Assembly in its Resolution 181(II) of November 29, 1947, had requested the Security Council to treat the use of force by Arab states to "alter by force the settlement" there proposed, as "a threat to the peace, breach of the peace or act of aggression." By contrast, the General Assembly in 1974 placed itself virtually in the role of accomplice in encouraging renewal of that very kind of aggression that it formerly singled out for peremptory condemnation.

Seventh, this lamentable role is underscored by the resolution's express approval of the use by the P.L.O. of "all means" to achieve its ends, 32 and its appeal to all states and international organizations to assist with such means. 33

The U.S. representative spoke for many members whose votes in no way reflected their view of the standing of these extraordinary assertions in international law, whether de lege lata or de lege ferenda. Referring to the dangers posed by one-sided resolutions to the authority of the United Nations, 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 U.N. 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.14 Yet this resolution is a veritable paradigm of the resolutions of the recent period on which in the final analysis the authors of these Secretariat productions, including that authored by the international lawyers selected by the Committee on... Rights of the Palestinian People, have to base their final positions.

3

Territorial Rights in Palestine
Under International Law

ISRAEL'S RIGHTS FROM LAWFUL SELF-DEFENSE

We shall return in due course to the legal standing of the specific contents of various resolutions of the General Assembly that the U.N.-sponsored authors of the study here briefly termed "Resolutions" try to qualify as international law. And we shall also consider the distinct question of the legal standing to be attributed to the Palestine Partition Resolution 181(11) if it had ever come into force, as well as the effect of its abortion through its rejection by the Arab states and their armed aggression against it, and against the state of Israel.

Any legal import, however, of United Nations resolutions would not in any case operate in a legal vacuum. It would operate within the frame of the rights and duties of the states concerned under international law, including the provisions of the charter and any pertinent determinations of the Security Council under the charter. It is essential, therefore, in this and the succeeding sections to set out this framework.

The axiomatic base of international law, even under the charter, is that states live under an international legal order in which force is not the monopoly of the organized community, but in the hands of individual nations. Nor can the organized international community change the legal order as it affects particular nations, without the consent of these same nations. Internationally what we have is the absence of predominant community force, and the constant accumulation of force (including military power) in the private control of states. Consequently, the most that can be done in support of legal order and community is to marshal some private forces against others for public ends. And these
forces are also, in fact, marshaled from time to time against the international legal order.

It is for these reasons that international law has always, right into the present century, given legal effect ex post facto to the outcomes of its collision with overwhelming power of individual states. By allowing the military victor through the imposed treaty of peace to incorporate his terms for peace into the body of international law, international law preserved at least the rest of its rules and its own continued existence.

In traditional international law these legal positions held for the relations between states, whether the victor himself initiated the use of force, as with the Soviet invasion of the Baltic States during World War II, or whether the force was initiated by the defeated state to which the victor responded by way of legitimate self-defense, as with Israel’s response in 1967 to the closing of the Straits of Tiran, the marshalling of Arab state forces at its borders, and the expulsion of the United Nations buffer forces.

The recent modification of this classical legal position, especially under the Covenant of the League of Nations and the Charter of the United Nations, arises from the application of the principle ex inturiae non oriitur ius. Whether as applied to treaties procured by duress, as in Article 52 of the Vienna Convention on Treaties, or to the acquisition of territory, this modification seeks to strip of legal effect, not use of force as such, but unlawful use of force.

From its beginnings the state of Israel has had an unusual record of law observance despite endless aggressions against her by her neighbors. Her statehood rests on her people’s Declaration of Independence and her successful repulsion of multiple aggressions from surrounding Arab states. Her immediate admission to the United Nations added world acclamation and endorsement to that existing legal reality. It was armed aggression by Arab states (denounced as such in the Security Council) that aborted the Partition Plan accepted by Israel in 1947. It is no less clear, as will be elaborated in Chapter 7, under “Bases of Sovereignty under International Law,” that the hostilities of 1967 were a case of lawful self-defense by Israel, even if we did not know that the General Assembly by an overwhelming vote defeated, on July 4, 1967, the Albanian draft resolution seeking to declare Israel the aggressor.1

From that point onward, right up to President Sadat’s journey to Jerusalem in 1977 and recognition of the state of Israel, Egypt as well as other Arab states persisted in 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 territory.

They did so, after 1948, not merely by threats of wars and wars of 1967 and 1973, of which the facts are notorious, violating their obligations under Article 2 of the U.N. Charter. They also less openly hosted and promoted attacks by armed bands against Israel from Syria, Egyptian-controlled Gaza, Jordan, and Lebanon, which massacred and maimed hundreds of civilian men, women, and children. From Lebanon, the P.L.O. and its associated terror organizations have operated for years with the aid of other Arab states and the tolerance of the authorities of Lebanon, a situation reendorsed by the members of the Arab League at their Tunis Conference as recently as November 22, 1979. Israel’s repeated requests, directly or in the United Nations, that these unlawful attacks be stopped have been fruitless. Her own military actions in southern Lebanon were accordingly designed to abate them, and conform to international law, as set out, for example, in such authoritative textbooks as Oppenheim-Lauterpacht’s International Law. This work states that on failure of the host state to prevent or on notice abate these attacks, “a case of necessity arises and the threatened State is justified in invading the neighbouring country and disarming the intending raiders.”2

The Israel government is thus legally correct in not speaking of “reprisals” or “retaliation” here, and it is unnecessary, and even misleading, to do so. The rule of international law makes clear that this is “a case of necessity,” of self-defense authorizing her to enter and destroy or remove the weaponry and bases used against her. In the language of the Soviet Union, in an analogous situation, such action is by way of necessary “countermeasures” and “legitimate defence.” The leading statement on this matter is, indeed, Secretary of State Webster’s statement of the conditions of self-defensive action by the aggrieved state.3 Majorities in the United Nations and its committees, which, from time to time, have by silence appeared to condone such attacks by armed bands, and even purported to condemn measures taken by Israel to abate them, have no standing to alter such fundamental precepts of international law. The somewhat speculative rider on the traditional law suggested by Professor Garcia-Mora is examined under “Aggression by Attacks by Armed Bands” below.

After the cease-fires accepted by the Arab states concerned in the 1967 and 1973 wars, the illegality of continued hostilities by them became even more heinous. They flouted not only the charter, but the very cease-fires that they had requested and that they had solemnly accepted. Here again the fact that Soviet and other pro-Arab interests in the United Nations marshaled majorities to shield these illegalityes from U.N. censure in no way legalized them, or impugned the legality of Israel’s responses.5 Nor is this conclusion as to the Arab states’ violations of international law a mere inference from their behavior. It has also been quite explicit in their own repeated declarations of position.6 As recently as February
in a long series of proposals and international instruments, including the Draft Declaration on Rights and Duties of States (Article 4), and the Draft Code of Offences against the Peace and Security of Mankind (Article 2, 4), (5), and (6). Article 2(4), as revised in 1954, stigmatized as such an offense:

The organisation, or the encouragement of the organisation, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(3) The emergence of criminal responsibility of the host state is evidenced by Article 2(4) of the Draft Code of Offences against the Peace and Security of Mankind quoted above and the related Article 2(12). "... [A] more effective legal order can only be attained if States and individuals are constantly made aware that the values of the international community will scrupulously be enforced by the establishment of a criminal law reaching individuals."

(4) This development is harmonious with pronouncements of the founding writers of international law, for instance de Vattel, who thought the injured sovereign "may justly lay the blame upon the whole [host] nation." De Vattel went even further: "Nay more, all Nations may unite to repress such a Nation as the common enemy of the human race."[12]

(5) The imputation of criminal responsibility under international law, as well as the municipal law of injured states, to members of such armed bands (as well as to the culprit state) is now rendered the more imperative by the increased use by states of armed bands as a way of "preparation of a larger scale military invasion into foreign territory, the undermining of the morale ... of the selected target and the establishment of bases ... for ... eventual annexation."[13] This peril lies behind the cumulative pattern of inclusion in lists of "acts of aggression" of support by a state of incursions by armed bands from its territory against neighboring states.[14]

Even authorities who are not as stern as Professor García-Mora in imputing responsibility for armed bands to the host state, for instance the late J. L. Kunz, still emphatically insist, like L. Oppenheim and H. Lauterpacht, and the present writer, that the victim state is entitled on this default to enter the host state's territory to abate the illegal hostilities.[15] Professor García-Mora, however, speculates rather paradoxically that while those hostilities are grave enough to constitute "aggression," and certainly give the victim state a right of forceful abatement under customary international law, as evidenced by the U.S.-U.K. correspondence in the Caroline Affair,[16] this legal right of the victim to
take measures of abatement may now be prohibited by the U.N. Charter provisions concerning the use of force.17

De lege lata his argument rests on one possible interpretation that I have elsewhere called "the idealist-restrictivist view," as opposed to "the realist traditional view," of the final meaning of complex charter provisions. The issue is not whether the license to use force is limited by the charter, but what precisely, bearing in mind all its provisions, including its voting rules, and the clauses of escape and evasion, these limits are. Others, including the present writer, have taken an opposed view.18 The learned writer bases his argument on Article 2(3) requiring members to settle their disputes "in such a manner that international peace and security, and justice, are not endangered," as well as on the better-known prohibition in Article 2(4) of "the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations."19

This view, as he perforce admits, confronts puzzles of how these and other charter provisions are to be read together. It does not, either, explain why the Article 51 liberty of self-defense "if an armed attack occurs against a Member" should not apply to a type of armed attack that he himself so emphatically stigmatizes as aggression and regards as an escalating threat to all nations. Nor does it attend sufficiently to the limits on the prohibition of Article 2(4) that arise if the word "against" in the phrase "against the territorial integrity or political independence of any State" is given its quite ordinary meaning of "directed against." Action by an attacked state to abate the hostile action of armed bands across a frontier is correctly described as action directed against those armed bands, and not against the territorial integrity of the host state, much less against its political independence.

Professor García-Mora's main position, therefore, well illustrated by his thoughtful critique on the Caroline Affair,20 reinforces the generally accepted view that a state's failure to prevent incursions by armed bands against a neighboring state, involve that state's responsibility, and may involve its criminal responsibility for aggression, and that customary international law permits the victim in such cases, if necessary by entry into the host state's territory, to abate the hostilities. He is inclined to think, however, that this latter remedial license of forcible abatement or self-defense is now excluded by the U.N. Charter provisions as to use of force. This offered caveat is, however, both sanguine and dubious. It rests no doubt on a utopian vision of "orderly world community processes" to replace abatement and self-defense. This is a desire that many (including this writer) share. But it is going too far to hope that this transformation has begun (or indeed could begin) at the extreme point of international conflict that he himself insists on characterizing as aggression by or by means of armed bands.21 Such a hope flies in the face of the facts of contemporary international life and law. When international law fails short of the model of "world community processes," we are neither wise nor correct to pretend otherwise. The harsh realities of the lex lata are still the base from which we must struggle towards the lex ferenda. It will be shown beyond doubt, at the end of Chapter 6, below, under "The 1974 Definition: . . .," that the present attitudes of states reject so hazardous a caveat on the undoubted license granted by customary international law.

EX INIURIA NON ORITUR IUS AND TERRITORY

The basic precept of international law concerning the rights of a state victim of aggression, which has lawfully occupied the attacking state's territory in the course of self-defense, is also clear. And it is still international law after the charter, which gave to the U.N. General Assembly no power to amend this law.

This precept is that a lawful occupant such as Israel is entitled to remain in control of the territory involved pending negotiation of a treaty of peace. Both Resolution 242 (1967) and Resolution 338 (1973), adopted by the Security Council after the respective wars of those years, expressed this requirement for settlement by "negotiations between the parties," the latter in those very words. Conversely both the Security Council and the General Assembly in 1967 resisted heavy Soviet and Arab pressures demanding automatic Israeli withdrawal to the pre-1967 frontiers. Through the decade 1967-77, Egypt and her Arab allies compounded the illegality of their continued hostilities by proclaiming the slogan "No recognition! No peace! No negotiation!" thus blocking the regular processes of international law for postwar pacification and settlement.22

In the meantime, blackmail pressure by the Organization of Arab Petroleum Exporting Countries (OAPEC) upon Third World states, as well as Western states and Japan, and the propaganda machines of the Arab-Soviet blocs, set out to conceal these gross illegitimately. Though the general law (as well as Resolution 242 and 338) required the Arab states to negotiate with Israel (inter alia) the extent of Israel's withdrawal from the territories, these 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.

Israel's territorial rights after 1967 are best seen by contrasting them with Jordan's lack of such rights in Jerusalem and 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 her illegal entry in 1948. Under the international law principle

\textit{ex iniuria non oritur ius} she acquired no legal title there. Egypt itself
denied Jordanian sovereignty; and Egypt never tried to claim Gaza
as Egyptian territory.\footnote{\textsuperscript{23}}

By contrast, Israel's presence in all these areas pending negotiations
of new borders is entirely lawful, since Israel entered them lawfully in
self-defense. International law forbids acquisition by unlawful force, but
not where, as in the case of Israel's self-defense in 1967, the entry on the
territory was lawful. It does not so forbid it, in particular, when the 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 be absurd to the point of lunacy. There is no
such rule.

Nor, even if some degree of legal effect were given to the relevant
provisions of the 1970 General Assembly Declaration on Principles of
International Law Concerning Friendly Relations and Cooperation
Among States, can any legal basis be laid for so absurd a rule. Those
provisions preserve the above distinction between lawful force and
unlawful force, and they seek to forbid "military occupation" as well as
"acquisition" of territory. The whole paragraph in which these are
forbidden is qualified by the description "resulting from the use of force
in contravention of the provisions of the Charter." Moreover, the para-
graph concludes, apparently \textit{ex majore cautela}, that "nothing in the
foregoing shall be construed as affecting (a) Provisions of the Charter
\ldots; or (b) the powers of the Security Council under the Charter." The
exercise of self-defense against armed attack is thus doubly removed
from any impact of these provisions and remains governed by the well-
recognized principles of international law discussed in this section.

It will be shown, at a later point, that the 1974 Definition of Aggression
is, if anything, even more emphatic in its maintenance of the principle
\textit{ex iniuria non oritur ius}, and of the crucial resulting distinction between
lawful and unlawful force.

International law, therefore, gives a triple underpinning to Israel's
claim that she is under no obligation to hand "back" automatically the
West Bank and Gaza to Jordan or anyone else. In the first place, these
lands never legally belonged to Jordan. Second, even if they had, Israel's
own present control is lawful, and she is entitled to negotiate the extent
and the terms of her withdrawal. Third, international law would not in
such circumstances require the automatic handing back of territory
even to an aggressor who was the former sovereign. It requires the
extent and conditions of the handing back to be negotiated between the
parties. Precisely for such reasons many international lawyers of standing
concluded that international law presented no obstacles even to formal
annexation by Israel if she were so minded. It testifies the more power-
fully to the state of Israel's steady concern for peace rather than terri-
torial gains, that its governments have for so many years maintained
their readiness to negotiate a comprehensive treaty of peace with each
of her neighbors. She has fully manifested this dedication in the peace
treaty recently negotiated with Egypt, and the agreed territorial regime
between them in Sinai.

Arab states and their protagonists have been concerned, of course, to
conceal not only their own illegal courses, but also this strong and clear
legal basis of Israel's territorial standing in Jerusalem, Gaza, and the
West Bank. They have made strenuous efforts to cover over or even
rewrite the precepts of international law, especially through resolutions
of the General Assembly promoted and pressed under threats of oil
derivations. The foresight, ingenuity, and persistence displayed in that
regard does not protect the outcomes from being, as here submitted, a
veritable travesty of international law. The next section will examine
another example of this travesty of established law that the Arab states
have sought to design and build on the preambulatory recital in Reso-
lation 242 of "the inadmissibility of the acquisition of territory by war."

ARAB STATES' RESISTANCE TO \textit{EX INIURIA NON ORITUR IUS}

As many (including this writer) have shown, attempts to amend the
draft of Security Council Resolution 242 of 1967 so as to call for Israel to
withdraw to the 1967 frontiers, failed.\footnote{\textsuperscript{24}} That resolution did not call for
withdrawal from \textit{all} the territories captured in the 1967 War, but only
withdrawal to lines to be negotiated, which were then to become "secure
and recognized boundaries." Indeed, any other provision would have
been at odds with the plain fact that, immediately after the Six Day War,
the Soviet resolution seeking to brand Israel as the aggressor failed of
adoption by 11 votes to 4. And the General Assembly at that time, long
before the entry of the oil weapon into that voting arena, also repeatedly
refused to endorse such a proposition.\footnote{\textsuperscript{25}}

Because of these votes, and of the terms of the operative parts of
Resolution 242, Arab arguments moved off to focus on the preambula-
ory recital in that resolution of "the inadmissibility of the acquisition of
territory by war." They have sought to bury under that Delphic phrase
the clear international legal basis of Israel's territorial standing in Gaza,
the West Bank, and other administered territories. They have had to
argue that this phrase must be taken literally in its widest ambit. When it
is thus stretched, they draw from it a meaning that 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 that it applies
against themselves. It is a rule offered as it were, to kill a particular
goose, not even other geese, and certainly not a gander.
The international lawyer, faced with this recital in Resolution 242, juxtaposed with its well-known operative provisions, will recognize no less than three logically possible interpretations of it. He has then to ask which of these three makes sense in its immediate context, in relation to the existing principles of international law, and in relation to what many call the "world order" policies that underlie these principles.

The above Arab states' version is certainly one logical possibility, and that version would yield their desired result, that the occupying state — here Israel — must automatically and fully withdraw, however perfectly lawful its presence. A second possibility 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.) Third, also 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 or other accepted instrument. And, of course, this third meaning would also fit well with the operative provisions calling for negotiations on such matters as "secure and recognized boundaries," the fixing of "de-militarized zones," and the like.

The Arab-favored first meaning would, as already observed, be at odds with the operative provisions of Resolution 242. It would, moreover, contradict existing international law. Even then, could it be said to be an amendment of this law, offered by the Security Council de lege ferenda for the international future?

So offered de lege ferenda the recital would mean that an occupant must withdraw even before peace terms are agreed, even if he entered lawfully in self-defense 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 members of the community generally. But it is apparent that this proposed rule would be disastrously undesirable. It would assure every prospective aggressor that if he fails he will be entitled to restoration of every inch of any territory he may have lost. It would do this even if the defeated aggressor still openly reserves the liberty to renew his aggressive design, and even if (as with Egypt in Gaza and Jordan on the West Bank), the territories in question were formerly seized unlawfully by the claimants, who have consistently used them since then as a base for aggressive activity against the present occupant.

In short, the Arab state-favored meaning would underwrite unconditionally the risks of loss from any contemplated aggression. By such a rule an international law that sets out by the ex injuria principle to discourage aggressors would end with a rule encouraging aggressors by insuring them in advance against the main risks involved in case of defeat. To offer such a rule de lege ferenda would sanctify a new and cynical legal maxim that might run: "If you cannot stop the aggressor, help him!" A meaning of the preamble yielding such a result cannot, therefore, be preferred when the two others above-mentioned are available. It may perhaps be added that Soviet and Arab voting patterns in the West Irian and Goan affairs showed no particular support for a norm in that context barring simpliciter acquisition of territory by force. 26

Finally, as to this point, it must be added as to Egypt in Gaza and as to Jordan on the West Bank, that even if their entry there had not been unlawful, nor in defiance of the Security Council resolutions of April and May 1948, the proposed rule would bar any right of theirs to be in those territories either. For their entry (even if not unlawful as it was) would fall within the meaning they seek to give to "the inadmissibility of the acquisition of territory by war." So that even if the rule were now newly legislated with retrospective effect it could not improve their present legal position vis-a-vis Israel except by an entirely unprincipled discriminatory application of the new rule to one side and not the other. 27

This kind of Arab state activity, designed to "amend" international law for ad hoc use against Israel, has become persistent since 1967 in all fora and contexts of international activity. The Fourth Special Committee on the Question of Defining Aggression, appointed by the Twenty-Second General Assembly in 1967, reported a draft definition, which was finally adopted by consensus of the twenty-ninth session on December 14, 1974. It had had an interesting history of Arab state efforts to include in it a provision that territorial acquisitions obtained even by lawful force would be invalid; those efforts failed abjectly. 28 The only operative provision concerning acquisition of territory by force (Article 5, para. 3) strictly limits any invalidity by reference to no less than three requirements. First, it is not acquisition by mere threat or use of force, but only acquisition by "aggression" that is so tainted. Entry in the course of self-defense, as in the case of Israel in 1967, is not within this. Second, the acts of force there enumerated in articles 2 and 3 are stated to be aggression only if "first committed by the acquirer," thus doubly excluding acts in self-defense from the taint. Third, even such acts, to be tainted, must be "in contravention of the Charter," thus triply excluding acts of self-defense. (This limitation of any taint to acquisition of territory to acts "in contravention of the Charter" is also explicitly made in the reference to the matter in paragraph 7 of the preamble.)

Through more than one hundred meetings of the thirty-five state Fourth Special Committee, not to speak of the Sixth Committee of the Twenty-Ninth 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 ius maintained itself against all Arab state
efforts to change it into a form targetable against Israel. The attempted
floating of this principle of international law for ad hoc use against a
particular target state thus wholly failed. This must be attributed not
merely to the legal skills and learning of most state representatives, but
also to awareness by many of them of the dangers to the security of all
states that would ensue from a change in international law of which the
policy implications are (as seen above under “Ex Inïœria non Oritur Ius
and Territory”) quite absurd.\textsuperscript{29}

OBSERVATIONS ON CERTAIN METHODS OF ARGUMENT

The preceding pages have reviewed the international law context,
and the prevailing rules, as to the territorial entitlements of states in situa-
tions emerging from the use of force, lawful and unlawful. They have also
examined, in that context, the assumptions as to the legal effects of the
General Assembly resolutions on matters as to which the charter itself
endows them with no binding legal effect. This conscientious inquiry in the
context of international law is also what the authors of the legal theses of
Resolutions claim to pursue. It is thus dismaying to find that major questions
and principles that have been shown to be part of the essential interna-
tional law context of the matters they discuss, receive virtually no considera-
tion or even mention from these authors. And where, as with the question of
the legal value to be attributed to General Assembly resolutions, they do
consider this context, the consideration is slight, if not perfunctory, ignoring
most of the authorities, and is in the end patently question-begging.\textsuperscript{30}

Those authors are presumably not aware of the inadequacies cited
above. Other inadequacies are, however, highlighted by the authors them-
selves in their introduction. This makes their own inadequacies even more
puzzling. One passage highlighting inadequacies is the authors’ declaration
that “consistent with the consulting arrangements with the United Nations,
no direct use has been made of the formal negotiating history of the resolu-
tions or of the informal unrecorded\textsuperscript{31} consultations which led to the adoption
of particular wordings.”\textsuperscript{32} Consultation of the travaux préparatoires is, of
course, an essential part of international techniques of interpretation. The
reader is entitled to wonder why either any U.N. officials concerned or the
Sponsoring Committee or these authors should wish to renounce it. And
this is especially so since such preparatory materials are sometimes
quite critical for Middle East issues on which the authors engage. As Lord
Caradon himself testified, for example, the travaux are essential back-
ground for understanding the effect of the references to “withdrawal of
Israel armed forces” in Security Council Resolution 242,\textsuperscript{33} just as they are
to ascertaining the meaning of references to acquisition of territory by
force in contravention of the charter in the 1974 Definition of Aggression
adopted by Resolution 3314 of the General Assembly’s twenty-ninth session.

The renunciation of the travaux was not necessarily inspired by a sense
that foreshortened inquiries would yield better outcomes for their own
particular theses. No such neutral explanation is plausible for another
stipulation of 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.”\textsuperscript{34} The authors innocently declare that
this is a “basic distinction” that it is necessary to make “because this is a
juridical study.” But it is no more “basic” from a juridical point of view than
an analogous distinction between “Irishmen as adherents to a particular
form of Christian Catholicism,” and “Tykes” (or some corresponding expletive)
who are adherents to a political programme of securing (formerly)
the independence of Ireland, or now of Northern Ireland. For the authors
are certainly aware that the symbols “Zionism” and “Zionist” have been
falsely and arbitrarily translated into “racist” by one of the lamentable
recent resolutions (3379[XXX] of Nov. 10, 1975) of the General Assembly,
which they are thus attempting to rescue from the morass of international
power 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 arguments in this
way, especially since it is difficult to find any important legal argument that
they make that would not be equally strong (or equally weak) without this
so-called “basic distinction.”\textsuperscript{35}

There is, on the other hand, another distinction that would indeed have
been “basic,” not only for the juridical study that these authors set out to
write, but also for their exposition of what they claim to be “the background
of the Partition Resolution.”\textsuperscript{36} This is the distinction in time that was
demonstrated in Chapter 1 under “Parallel Liberations: ‘Arab Asia’ and
Jewish Palestine” between what the authors in 1979 identify as “the Palest-
inian Nation,” on the one hand, and the “Arab Nation” of 1917, on the
other. This distinction is no invention of the present writer. The Palestine
national movement in its constituent document insisted precisely on this
distinction. It was to the “Arab Nation” (understood in 1917 as including
Arabs living in Palestine, who were not yet identified as a separate people)
to whom virtually the whole of the Middle East domains of Turkey were
allocated, in the distribution after World War I between the Arab liberation
movement, on the one hand, and the Jewish liberation movement (to
which a tiny sliver of this vast area was allocated), on the other.

It was shown, in Chapter 1, under “Parallel Liberations: ‘Arab Asia’ and
Jewish Palestine,” that there is neither juridical nor moral basis for undoing
that initial application of President Wilson’s self-determination principle
after World War I in its own time context, merely because, half a century
later, the Arabs of Palestine came belatedly to distinguish themselves as a
separate people from the "Arab Nation" whose self-determination was already so amply endowed. The authors of Resolutions might or might not agree with that analysis and the conclusion that the burden of redress due to Palestinians, like the redress due to Jews displaced by this distribution, should be shared equitably between the Arab states of the Middle East and Israel, perhaps in proportion to their respective endowments. But it is difficult to see how they could fail to address themselves at all to a distinction so relevant and central, but also so damaging by its omission, to both the structure of their argument and its main conclusions.

Still another observation must be made at this point, particularly as I approach in the succeeding section these authors' efforts (sometimes even to the point of misquoting important documents) to show that the General Assembly's Partition Resolution is "the preeminent juridical basis for the State of Israel," and that Israel is bound by this resolution even though the Arab states rejected it and, by blatant acts of armed aggression, wholly aborted its operation. These authors have, as here shown, an exalted but somewhat undiscriminating view of the legal effects of General Assembly resolutions. They are, as just observed, particularly enthusiastic about Resolution 181(II). But there is one central provision of that Resolution, reference to which they assiduously avoid. This 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 can also avoid considering the consequences of the Arab side's rejection of the Partition Resolution, and their armed aggression against it and against Israel, which prevented its ever coming into legal operation. Such consideration, as will immediately be submitted, is fatal for the main legal conclusions to which they seek to lead their readers.

These aspects of purportedly objective studies are perhaps in part explained by the need of the Committee on . . . Rights of the Palestinian People to find international lawyers whose opinion on points at issue would produce the outcomes that the committee desired. There is a dramatic instance of this in Origins, part I, in relation to the "validity" of the Palestine mandate. Mr. Henry Cattan is the main authority whom the Committee can apparently marshal to support the desired conclusion. Mr. Cattan is a lawyer of ability and distinction, but he is also a former member of the Palestine Higher Arab Committee led by the notorious Haj Amin al-Husseini, Mufti of Jerusalem. He also later presented the Arab case at the United Nations in 1947. The other international law "authority" offered is Professor W. T. Mallison, an associate of Mr. Cattan, who wrote an introduction to Henry Cattan's book Palestine and International Law (1973). And it conformed to this pattern, of course, that the committee also chose Professor Mallison as the consultant to enunciate versions of international law worthy of its sponsorship, in the final study on Resolutions.

4

Abortive Partition Proposals

LEGAL STANDING AND EFFECT OF RESOLUTION 181(II)

Three distinct and basic questions are wholly overlooked by the analysis, in the United Nations study here for brevity called Resolutions, of the partition proposals in Resolution 181(II) of November 29, 1947. What would have been the resolution's effects on sovereign title in the territories concerned if the Arab states had not rejected it, and, in the words of the General Assembly Soviet delegate, at the time, had not committed aggression against it and against Israel—aggression that completely aborted the resolution?

What residue (if any) of this potential binding effect of the resolution survived this destruction by the Arab aggression?

Assuming—argue— that some final residue of legal effect did survive that rejection and abortion in 1948, what would be the effect of that final residue in the context of the international obligations, and delinquencies arising from subsequent events from 1948 to date?

All these questions, assuredly, are part of what the authors call "the context of international law" in which they claim to be examining the U.N. resolutions concerned. The legal relations of states cannot be frozen at a point of time a quarter of a century and more ago, even at the behest of these authors. In the lives of states, no less than individuals, legal rights and obligations move with acts and events in time. And for that reason we shall have to refer again under the third head to the analysis of the prevailing international law principles examined in Chapter 3 above.

The present section deals with the first of those questions, and with the other two thereafter. First, then, what would have been the binding effects on sovereign title of the Partition Resolution (181(II)) if its operation had
not been aborted by Arab state rejection and related aggression against Israel!

On this matter the authors display a rather tortured struggle. They do not, on the one hand, dissociate themselves from Arab claims, which they cite at length, that the Partition Resolution was invalid _ab initio_, as violative (in their view) of the mandate for Palestine, as interpreted by protagonists of the Arab cause. This would obviously assist the authors’ thesis as justifying the Arab states’ rejection of the Partition Resolution, and ease the discomfort with which, in their so-called “background to the Partition Resolution,” they do not refer at all to the resort by the Arab states to armed aggression against Israel, which aborted it. On the other hand, however, writing now in 1979, after failure of that aggression to destroy the state of Israel, the authors wish (for rather obvious reasons) to attach great value to certain provisions of the Partition Resolution that would, on their interpretation, be legally embarrassing to the state of Israel. In this schizophrenic posture, their analysis succeeds in suggesting that the General Assembly’s role in 1947 was both as a legitimate U.N. successor to the League mandates system, and as a usurping authority acting _ultra vires_. The schizophrenic of simultaneous validity and invalidity that they suggest for the Partition Resolution thus infects their account of the role of the General Assembly.

If we distinguish as we should, however, the three diverse aspects above identified of the rolled-up question concerning the legally binding effect of the Partition Resolution, and address ourselves to the first aspect—its potential legal effects on sovereign title if it had not been aborted by Arab aggression—the answer is not complicated. The validity side of the authors’ schizophrenia then falls neatly into this slot.

It is clear that Great Britain as the mandatory power on April 2, 1947, gave formal notice to the United Nations and authorized the General Assembly to attempt a settlement for which that body summoned a special session in April 1947. Since the charter itself refers to the mandates system, the United Kingdom request was certainly a “question or . . . matter within the scope” of the charter, for purposes of General Assembly discussion under Article 10.

No less clearly, however, the powers of the General Assembly acting on a matter within Article 10, seem limited to the nonbinding mode of “recommendations.” Indeed, apart from a few specific matters, such as budget under Article 17, this is true of all General Assembly action. The language of the partition resolution, moreover, is scarcely such as to convey titles instantaneously; nor is it easy to see that the General Assembly had any territorial title in Palestine to cede. Eliehu Lauterpacht concludes, correctly, that the 1947 partition resolution had no such legislative character as to vest territorial rights in either Jews or Arabs. Any binding force of it 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, however, was frustrated _ab initio_ by the Arab rejection, a rejection underlined by armed invasion of Palestine by the forces of Egypt, Iraq, Lebanon, Syria, and Saudi Arabia, timed for the British withdrawal on May 14, 1948, and aimed at destroying Israel and at ending even the merely hortatory value of the plan.

The state of Israel is thus not legally derived from the partition plan, but rests (as do most other states in the world) on assertion of independence by its people and government, on the vindication of that independence by arms against assault by other states, and on the establishment of orderly government within territory under its stable 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 was in no way predicated on its creation by the partition resolution, nor was its admission in 1949 to membership in the United Nations.

The State of Israel’s Declaration of Independence of May 14, 1948, made under the immediate shadow of armed attack from the Arab states, rected as its grounds for independence the following facts:

That Palestine was the birthplace of the Jewish people, where “their spiritual, religious and national identity was formed,” where they achieved independence and created a culture of national and universal significance and wrote and gave the Bible to the world.

That Jews in exile had never ceased to pray and hope for their return to national freedom in this Land of Israel.

That efforts to return to the land had continued throughout the centuries, and in recent decades had become a mass movement, bringing a revival of the land, of the Hebrew language, and progress for all inhabitants.

That the historic connection of the Jewish people with Palestine and the right of the Jewish people to return there was internationally recognized by the Balfour Declaration of November 2, 1917, and by the League of Nations mandate.

That the contribution of the Jewish people to the victory of the freedom-loving nations over the Nazi evil entitled them to rank with the nations that founded the United Nations.

It will be noted that all these bases of Israel’s title to self-determination (summed up in a concluding affirmation in the declaration that “it is the natural right of the Jewish people to lead, as do all other nations, an independent existence in its sovereign State”) were independent of the United Nations. The bases refer, indeed, to facts existing before the United Nations itself came into existence. The preamble of the declaration did also refer to the Partition Resolution, but in terms that belie what, as we shall shortly show, the Mallisons draw from this reference. After the above
enumeration, the preamble recited that the General Assembly had, on November 29, 1947, adopted the Partition Resolution "calling for" the establishment of a Jewish state in Palestine, and that "This recognition of the right of the Jewish people to establish their State is irrevocable" (emphasis supplied). I have italicized certain of the exact words used in the proclamation, because these words in the version that the authors of Resolutions purportedly have quoted have been altered in ways that seem to support the authors' otherwise untenable assertion "that the State of Israel has placed heavy reliance upon the Partition Resolution as providing legal authority" and that that resolution "is the preeminent jurisdical basis for the State of Israel." The authors change the verb "call for" to "authorize," which in context it cannot mean, for the words "call for" rather refer forward to the operative paragraph in which the proclamation states the readiness of the new state to cooperate in implementing Resolution 181(II). They also take liberties with the above-quoted words, which state that the United Nations "recognition" of Israel is "irrevocable." This in context means that the preceding five titles to self-determination justify "this recognition" by the United Nations. The authors under examination (still within quotation marks) substitute for the word "recognition" the word "resolution." Thus, the whole purport is changed to one that supports their claim (shortly to be examined) that the Partition Resolution must bind Israel forever, even though it never came into legal operation at all due to the Arab states' rejection of it and armed aggression against it, and against the State of Israel. They inject, without warrant, into the proclamation the statement that "This resolution by the United Nations . . . is irrevocable," (emphasis supplied), an injection, perhaps accidental, but still obviously helpful to their attempt to say that Israel remained and still remains bound by the Partition Resolution despite the fact that the Arab states and other authorities concerned rejected it, and aborted it by the war of aggression they launched against Israel.

We return then to the question to which this section is devoted, namely, what would have been the legal binding effect of the Partition Resolution if its coming into operation had not been aborted by the Arab state rejection and related aggression against Israel? The answer is that the Plan of Partition with Economic Union there set out would, if accepted, have bound the state of Israel and the Arab states, including the new 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. This also, as already indicated, was the view expressed by the state of Israel. On the other hand, as even these authors had to admit, the Arab states rejected it, and of course (though these authors do not mention the highly relevant fact) they also used armed aggression to destroy the plan. 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 came into being in fact or in law.

ABORTION BY ARAB REJECTION AND AGGRESSION

The chronology of events is vital in assessing whether Resolution 181(II) could affect sovereign titles in the territories involved. That resolution recommended to the mandatory power the adoption and implementation of the majority UNSCOP plan as revised, requested the Security Council to "take measures" to implement it, called upon the inhabitants of Palestine to take necessary steps to put the plan into effect, and appealed to all governments and all people to refrain from any action that might hamper or delay it. The plan attached envisaged termination of the mandate and withdrawal of British forces not later than August 1, 1948, and that the Arab and Jewish states and the "Special International Regime for the City of Jerusalem" should come into existence not later than October 1, 1948. It described future boundaries for these in parts 1-3 of the plan therein attached. It also included chapters on holy places, religious buildings and sites (Ch. 1), religious and minority rights (Ch. 2), and citizenship, international conventions, and financial obligations (Ch. 3).

The Jewish Agency for Palestine reluctantly accepted this resolution on the understanding that despite the negative attitudes of the Arab states in the General Assembly, they would accept the appeal of that body to oppose its implementation by violent means—an understanding implicit in the reciprocity of international legal relations founded on consent. The Arab states, however, rejected the resolution as infringing Arab rights, and as ultra vires of the General Assembly; and they proceeded in May 1948 to attempt to seize the whole of Palestine by armed aggression. Consequently, all basis for bringing the plan into legal operation was destroyed by the Arab states in May, months before the date set for the four proposed territorial dispositions.

In the contemporary words of the U.S. representative in the Security Council in May 1948, referring to Jordan's admission of her armed invasion of Palestine and occupation of the West Bank, "we have here the highest type of evidence of the international violation of the law: the admission by those who are committing this violation." A little earlier in the same debate the Soviet representative, Mr. Gromyko—now the Foreign Minister—expressed surprise that Arab states "have resorted to such action as sending their troops into Palestine and carrying out military operations aimed at the suppression of the national liberation movement in Palestine." The national liberation movement he referred to was, of course, that which led to the establishment of the State of Israel. In Mr. Gromyko's words a few days later at the 30th meeting on May 29, 1948, "what is happening in
Palestine can only be described as military operations organised by a group of States against the Jewish State.\textsuperscript{19} 

The authors of\textit{Resolutions} pay little attention to these dates and events so critical for vesting titles in international law. After their opening vacillation as to whether the Partition Resolution was not “invalid” \textit{ab initio}, they confuse matters further by vigorously asserting (without any further ceremony about its initial “validity”) that the resolution is certainly of continuing validity today, that is, thirty years after it was prevented from coming into operation by the aborting action of the Arab states.\textsuperscript{17} And it is perhaps no coincidence that their positions on this closely parallel the positions taken by the Arab states, which the authors report as follows: \textsuperscript{18} 

The Arab States not only voted against partition, but they initially took the position that it was invalid. It is, therefore, significant [sic!] that they have subsequently relied upon it in presenting legal arguments on behalf of the Palestinians. The Arab States are now not only [sic] supporting the basic principles of the Partition Resolution, but [sic] subsequent General Assembly resolutions which are consistent with those principles as well. The Arab States were deeply disturbed\textsuperscript{11} by what they initially regarded as the violation of the right of self-determination by the Partition Resolution.\textsuperscript{20} 

Hence the miracle to be wrought by the Arab states, and by the Mallisons in their wake, is much more impressive than a mere revival of the dead. It is an attempt to resuscitate a resolution whose abortion the Arab states had themselves procured over a quarter of a century ago.

Whether this Resolution 181(II) would have been legally binding had it been allowed to come into operation is one question that I have answered in the last Section. But the present (second) question of which (if any) of these potential legal effects would come into being after rejection and aggression had destroyed the Plan—as it were in utero, before it could enter the world of legal effectivity—is quite a different question. The answer to this question seems to be that in terms of its binding nature, none of these potential legal effects ever came into being.\textsuperscript{21} Consequently, they cannot, as the Mallisons maintain,\textsuperscript{22} have “continuing validity.” 

It has already been seen that their submission faces the difficulty of the authors’ ambivalence as to whether, even \textit{ab initio}, the Partition Resolution was “valid” or “invalid.” A further difficulty is that they seem to mean by “validity” only the question whether that resolution violated what they claim to be preexisting rights of Arabs, for instance under the mandate. Because of their strangely exclusive preoccupation with “validity” in that\textit{ultra vires} kind of sense, they do not appear to direct their minds at all to the second more important question here under discussion. This is whether, in view of the situation brought about by the Arab states’ rejection and armed aggression openly aimed at thwarting the resolution and destroying the state of Israel, it ever reached the stage of entering into legal operation.\textsuperscript{23} 

The negative answer is decisively embedded in the facts of chronology rehearsed in the opening of this section. And this negative answer rests on no mere technicality. Rather is it the case that the opposite view pressed by the Mallisons is grossly repugnant to elementary considerations of justice and equity common to most legal systems, including international law. I venture to spell out some of these considerations.

The present submission is that the rejection of partition and the armed aggression by the Arab states constituted an anticipatory repudiation and frustration of the resolution and plan, the protracted use of force by these states against the latter effectively preventing them from coming into legal effect.\textsuperscript{24} But there are also certain other legal grounds, rooted in basic notions of justice and equity, on which the Arab states (and the Palestinians whom they represented in these matters) should not, in any case, be permitted, after so lawless a resort to violence against the plan, to turn around, decades later, and claim legal entitlements under it. More than one of the “general principles of law” acknowledged in Article 38(1)(c) of the Statute of the International Court of Justice seem to forbid it. Such claimants do not come with “clean hands” to seek equity; their hands indeed are mired by their lawlessly violent bid to destroy the very resolution and plan 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 to be barred by their own conduct from espousing, in pursuit of present expediencies, positions they formerly so strongly denounced. They may also be thought to be in breach of the general principle of good faith in two other respects. Their position resembles that of a party to a transaction who has unlawfully repudiated the transaction, and comes to court years later claiming that selected provisions of it should be meticulously enforced against the wronged party. It also resembles that of a party who has by unlawful violence wilfully destroyed the subject-matter that is “the fundamental basis” on which consent rested, and now clamors to have the original terms enforced against the other party. These are grounds that reinforce the pithy view of U.S. Legal Adviser Herbert Hansell that the 1947 partition was never effectuated.\textsuperscript{25} 

On any of these grounds the answer to the second question must be that the Partition Resolution and Plan, since they were prevented by Arab rejection and armed aggression from entering into legal operation, could not thereafter carry any legal effects binding on Israel.

By what appears to be an afterthought, the authors of\textit{Resolutions} seek to salvage some continuing binding effect for the Partition Resolution by suggesting that the gist of some later General Assembly resolutions, especially those concerning Palestinian peoplehood (those, I presume, adopted after 1973, as the oil weapon took hold) somehow gave new legal life retrospectively to the still-born Partition Resolution and Plan, since these later
resolutions now "constitute a worldwide consensus and support." I have already submitted in Chapter 2 that these authors have not adequately examined the limits within which votes in international bodies can be translated into rules of international law, and that, in particular, their arguments such as the above concerning recent resolutions of the General Assembly on Palestine are question-begging. That deficiency also affects this final basis of their claim that the provisions of the abortive Partition Plan of 1947 constitute binding norms of international law in 1979.

5

International Law
and Israel-Arab Relations
Since 1948

It was pointed out in Chapter 3 above that even if the authors had established (which they have not) a basis on which the aborted Partition Resolution and Plan could have "continuing" legal effects in 1979, these effects would in any case have to operate within the context of international law. That context must obviously include the consequences in international law of acts and events occurring in the intervening years. It was seen in adequate detail in Chapter 3 that unquestionable rules of international law entitle Israel to remain in Judea and Samaria (the West Bank) and in Gaza until a territorial settlement is agreed upon. The lawfulness of her entry, and unlawfulness of the Jordanian and Egyptian presence thus displaced, the unquestioned rule of uti possidetis applicable to this situation, all require that secure and recognized boundaries, possibly with ancillary territorial regimes such as demilitarized zones between herself and her neighbors, be negotiated between Israel and the neighboring Arab states.

THE "RIGHT OF RETURN"

In this light we may first proceed to examine the General Assembly resolutions on the right of return or compensation of Palestinian refugees, on which the authors of Resolutions so heavily rely. The first point, which never apparently occurs to the authors at all, is that any rule of international law requiring rights of return or compensation would have to apply equally to Jewish refugees from Arab countries, and to Arab refugees from Palestine, and that all claims to such rights should
right of “return or compensation” must not be applied equally to Jewish refugees from Arab lands, as well as to Arab refugees, all being victims of the same complex conflict. Security Council Resolution 242, as already seen, makes no such arbitrary discrimination. In their doggedly meticulous analysis of these resolutions, the authors of Resolutions nowhere refer to Jewish refugees, nor do they even seek to explain why the general juridical principles on this matter from the Magna Carta of 1215 to the International Covenant on Civil and Political Rights of 1966, which they eloquently invoke, should apply to Arab refugees and not to Jewish refugees. The point is none the less pertinent because the misfortunes of both categories arose from unsuccessful ventures in aggressive use of armed force in defiance of United Nations resolutions and of the charter by Arab states and not by Israel.

In this connection there are many strange reticences. Among these none is more remarkable than the short shrift they give to Security Council resolutions, especially the basic resolutions after the close respectively of the Arab-state-initiated wars of 1967 and 1973, namely, Resolution 242, of November 22, 1967, and Resolution 338, of October 22, 1973. After all, the full title of Resolutions concerns “Major United Nations Resolutions,” not merely major General Assembly resolutions. Amid the tangled web of doctrine about “the right of return” of Palestinian refugees, the authors decline to pay any regard to the fact that the Security Council in 1967 did not feel that it could invoke any such black-letter rules of international law as the authors assert for the unilateral benefit of the Arab side. International lawyers should surely be curious about such incongruities. Nor do the authors deign to notice the fact that the formula of Resolution 242 calling for “a just settlement of the refugee question,” lacks the deftness of their own one-sidedness in ignoring Jewish refugees from Arab lands, while insisting on redress to Arab refugees from Palestine. They might of course say in answer that the law developed after 1967. Yet, even then, they fail to notice that, as late as 1973, the Security Council reaffirmed in Resolution 338 all the provisions of Resolution 242, and called for urgent negotiation on their basis. This means (though the authors prefer not to notice it) that even in 1973 the resolutions of the Security Council, which is also a principal organ of the United Nations, had not conformed themselves to the version of international law presented by the authors of Resolutions or even these authors’ version of United Nations resolutions.

SELF-DETERMINATION PRINCIPLE

The thesis presented by Resolutions and by Self-Determination, which precedes it, requires an argument involving several steps that those authors do not adequately distinguish. Three issues must be identified, and kept distinct.
General Nature of Self-Determination Claims. Is the self-determination doctrine, whatever be its specific content, to be regarded as a precept of international law itself, or only as a consideration of policy or justice to be weighed as one among other facts and values in the interpretation and application of legal rules?

The authors of Self-Determination ask whether the doctrine is a principle or a right, a rather obscure question that they answer even more obscurely by saying that, while the answer to it is not within their ambit, they will proceed "on the axiom" that "the right of self-determination exists as a crucial element in contemporary international law and is recognised as such by the political world community." This supposed axiom is in itself ambiguous. It studiously avoids any juridical reference, and might be unexceptionable only in a textbook on the sociology of the international community. A careful lawyer knows that its central notion of a "right" may or may not refer to a legal right. It may, as Indian representative R. Rao observed in 1969, be more a function or consequence of geography than a legal right. The grave weaknesses of the process by which these authors commissioned by the U.N. Secretariat seek to demonstrate the transmogrification of this sociological observation into a precept of international law at present in force, have been exposed in Chapter 2. The legal value of their major conclusions depends inter alia on the adequacy of that demonstration, whatever the supposed content of the right of self-determination. The evidence of state attitudes contradicting the central drive of those conclusions will be presented in Chapter 6, especially under "The 1974 Definition: Defeat . . ."

Assuming a Legal Precept as to Self-Determination, What Are Its Contents? If there is already an international legal precept concerning self-determination, what it prescribes for particular situations still also depends on its contents, and on what implications can be drawn from these. These U.N. "studies" properly treat the relevant provisions of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, of 1970, as central to this question. They do not, however, appear to give any attention at all to the later and far more illuminating discussions and conclusions on this matter that led up to the relevant provisions of the Resolution A/9890 A/Res/3314(XXIX) of December 14, 1974. These will show that, even if the right of self-determination be acknowledged as now enshrined in a rule or principle of international law, what this rule or principle directs and what implications flow from this still have to be determined on vital matters. And it will be shown that these include matters bearing closely on the claims of Palestinian Arabs, which are quite overlooked by the authors of these pamphlets.

Among these is the confident assertion of both Resolutions and Self-Determination that various General Assembly resolutions (exemplified of course in the notorious P.L.O. resolution 323(XXIX) of November 22, 1974) have produced a state of international law that authorizes the use of armed force by Palestinians or states who support these against the state of Israel. That the General Assembly adopted resolutions of this tenor is unquestionable; yet the present analysis will show, in Chapter 6 under "The 1974 Definition: Defeat . . .," that there is very convincing evidence, contemporaneous with the above P.L.O. resolution, that the votes of such resolutions emphatically do not represent any such consensus of states as is capable of changing the prevailing rules of international law, or creating new rules of such law. This evidence, as will be seen, lies in the proceedings of the General Assembly's own 1967 Special Committee on . . . Defining Aggression.

Temporal Context of Application. Third, assuming that a legal precept concerning self-determination has come into existence, and that its contents are fixed, the date when this occurred becomes also of critical importance. For, like any other legal precept, this precept predicates certain facts for its operation at the relevant time. It will only operate if those facts exist at that time.

In order, therefore, to determine what legal effects such a precept can be said to produce in relation to the claims of Palestinian Arabs, two crucial questions still have to be answered. One is to the intertemporal operation of the law. If, as these pamphlets sometimes suggest, for example, that date is somewhere around 1970, the new legal precept of 1970 cannot be applied retroactively to disturb territorial allocations made more than half a century before in satisfaction of the respective claims of self-determination of the nation of Israel and the "Arab Nation" (including Palestinian Arabs) in the post-World War I settlement of that time. It has already been shown, in Chapter 1, that on this temporal ground alone, it is erroneous to conceive the claims of Palestinian Arabs as claims against Israel, and that the proper targets of these claims should include all Arab states of the Middle East as co-beneficiaries of the initial post-World War I allocation. And the Self-Determination pamphlet, perhaps unwittingly, reinforces this by its emphatic conclusion (to be later further discussed) that the recognition of the national identity of the Palestinian people did not emerge onto the international scene until 1970, almost half a century after that basic post-World War I allocation according to the self-determination principle.

The other question still to be answered, even assuming that a legal principle concerning self-determination exists and that Palestinian Arabs now qualify for "national" rights, is whether it is a fact that this national group lacks a national home. As already pointed out in Chapter 1, under "Displaced Palestinian Arabs," there already exists in Palestine a state, the State of Jordan, a majority of whose population are Palestinian Arabs, constituting indeed a majority of all Palestinian Arabs. What stands in the
be made by the Malissons in the later pamphlet, Resolutions. But it was seen in Chapter 2 above that though Resolutions opens with laborious effort to show that the “stand” of the General Assembly on a matter becomes international law, the authors of that pamphlet did not succeed in this. So that the assertion of “law” is but a premise of which proof has not even been attempted, or one whose proof has been attempted and failed.

It is thus on faith (or prejudice), rather than any juristic demonstration, that the anonymous writers of Self-Determination perform the extraordinary tour de force of elevating the self-determination principle to the level of ius cogens, which under the Vienna Convention on Treaties, Article 53, will make void any inconsistent treaty provision.6 It is to be observed that no treaty nor any serious scholar has yet given to the ius cogens any function other than the negative one of making void a treaty provision that conflicts with it. And the major study by Aureliu Cristescu in the same series states flatly that “no United Nations instrument confers such a peremptory character on the right of peoples to self-determination.”7 It should perhaps also be added that even if they had better succeeded in raising the self-determination principle to ius cogens status within Article 53 of the Vienna Convention on Treaties of 1969, and even if the ius cogens doctrine had some function beyond annulling contrary treaty provisions (neither of which conditions is fulfilled), the principle would in no way impeach Israel’s standing and rights under international law. For the only authoritative version of ius cogens in Article 53 is very precise that any taint of a treaty provision arising from conflict with ius cogens is limited to a provision that “at the time of its conclusion ... conflicts with a peremptory norm of international law” (emphasis supplied). Insofar as the establishment of the Jewish national home leading to the state of Israel was itself based on the self-determination principle, and insofar also as a Palestinian nation was neither in existence nor recognized at the relevant times, the state of Israel is doubly invulnerable to any impact of Article 53 by dint of that limitation.

Both in Self-Determination and in Resolutions, therefore, the legal nature of the right of self-determination in general is only asserted, not demonstrated. Within this hazardous frame, however, the authors produce a collage of documents critical of the Balfour Declaration, of the mandate incorporating it, and of the Jewish self-determination movement, which at latest was already institutionalized by the time of the first Zionist Congress in 1897.8 They similarly rehearse selectively the history of the British administration in Palestine,9 and the first phase of U.N. involvement up to the abortion of Resolution 181(II) by what the authors delicately call “the sending” by “the Arab States” of “forces” into Palestine. In this presentation they nowhere give any reason why self-determination as the legal right they claim it to be, did not spread its blessings over the Jewish people as well as other peoples. And this is entirely parallel, as already seen, to their treatment

way of fuller Palestinian enjoyment of this ample national endowment is the continued refusal of Jordan (which is part of Palestine) to heed the basic precepts of international law prescribing negotiations of peace and delimitation of “secure and recognised boundaries” between Jordan and Israel. Palestinian self-determination has already in fact and in law been largely realized in the area of Jordan; and the negotiation of peace with Israel would extend the ambit for self-determination even further. (See Map 3 in the Appendixes: Britain and the Jewish National Home: Pledges and Border Changes, 1917-1923.)

In order to establish claims in respect of the “national rights” of Palestinian Arabs as against the state of Israel to the validation of which most of both of these pamphlets seem to be directed, all of the above questions would have to be answered in the affirmative. Yet a number of these questions are not even noticed, let alone answered, in these “studies.” It will be shown in subsequent sections that a number of them cannot be answered in the affirmative.

IS SELF-DETERMINATION PRESCRIBED BY INTERNATIONAL LAW?

The Self-Determination pamphlet, as well as a main section of the Resolutions pamphlet, seems directed to answering the first question above in the affirmative. The former opens, however, with a seeming self-contradiction. It declares it to be beyond its scope to decide between the “various arguments,” “academic” and “juridical” as to whether the self-determination concept is a “principle” or a “right”; and declares in the same breath that it will proceed on the axiom that “the right [sic] of self-determination” is a crucial element of contemporary international life, recognized as such by the political world community. It proceeds, in short, on an axiom that begs the question that at the outset it declares to be beyond its scope, and that at the end (as we shall see) it claims to have established as law.

The demonstration proceeds by calling the views of publicists who have asserted “the right of self-determination as a principle of international law.”10 Some of these are experts whose distinction is certainly not in the field of international law;11 but as a token of objectivity it also mentions (though scarcely exhaustively) one or two publicists who held the opposed view. For the anonymous writers have perforce to admit 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.”12 Yet this, too, in no way prevents 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” and this stand “reflects the will of the international community.”13 This seems to return them to their opening axiom, unless indeed they were expecting the necessary demonstration to
of the rights of return and compensation. As many Jews as Arabs, if not
more, were displaced from their homes in Arab lands during the lamentable
struggles initiated by Arab state aggression in 1948. But it was observed,
above under "The Right of Return," that only the Arab refugees are
worth the authors' sympathy or even mention. The fact that Israel
defended its statehood by repelling the Arab states' aggression in 1948, is
relevant for these authors only as an occasion for chiding the 1948 boundaries
thus established. Equally irrelevant for them is the unlawful occupation
and annexation by Jordan of the West Bank, and Jordan's failure from 1948
to 1967 to accord the slightest degree of autonomy, let alone self-determina-
tion, to the Palestinians living there. But this is a piece with other strange
neglects of these productions of the Special Unit on Palestinian Rights of
the U.N. Secretariat, to which attention has been drawn above.21

INTERTEMPORAL LAW AND SELF-DETERMINATION

Self-Determination concludes with a section entitled "The Affirmation
by the United Nations of the Right of Self-Determination of the Palestinian
People." This section, largely duplicated in Resolutions, stresses the series
of General Assembly resolutions from 1970 onwards, but accelerating after
the use of the oil weapon in 1973. In terms of correct analysis of the legal
effects of General Assembly resolutions on issues between the state of
Israel and the Palestinian Arabs, it has a triple importance.

First, while the Resolutions pamphlet rather blurs the precise time of full
recognition by the General Assembly of the claim of Palestinians as a
national group, the Self-Determination "study" is here crystal clear and
accurate. The anonymous authors of Self-Determination point out that the
General Assembly's assertion and reassertion of Palestinian qualifica-
tion as a nation does not begin until Resolution 26/22(XXV) of Dec-
ember 8, 1970.24 They even stress, with perspicacity, but without men-
tioning 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 time relation between
Rabat affirmations by Arab heads of state of the right of self-determination
of the Palestinians and the status of the P.L.O., and the General Assembly's
adoption of the notorious P.L.O. Resolution 3230(XXIX) on November 22,
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 in the Organization of Arab Petroleum Exporting
Countries. The authors of Self-Determination admirably summarize the
main point as to national claims of the Palestinian people 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 ..."25 It is ironic that this
equilibrium underscores the intertemporal dimension as a most critical fact
relevant to the application of the self-determination concept. Applied to
Palestinian Arabs it also admits (indeed, insists) that that date is placed
around 1970, and certainly not a half-century before in 1917. The conse-
quencies of this have already been analyzed in Chapter 1.

The International Court of Justice (I.C.J.) has been insistent, not least as
regards questions of territorial title, that the rules and concepts of interna-
tional law have to be interpreted "by reference to the law in force" and "the
State practice" at the relevant period. (Majority Opinion in the Western
Sahara case, I.C.J. Reports, 1975, p. 12, esp. at 38-39). Judge de Castro in
his Separate Opinion (ibid., 127, at 168 ff.) declared the principle tempus
regit factum as a recognized principle of international law. He continued
(p. 169): "Consequently, the creation of ties with or titles to a territory must
be determined according to the law in force at the time. . . . The rule temp-
itus regit factum must also be applied to ascertain the legal force of new
facts and their impact on the existing situation." He went on to illustrate
this influence of "new facts and new law" by reference to the impact on the
 supersession of the colonial status of Western Sahara by the principles
concerning non-self-governing territories emanating from the United Na-
tions Charter and the later application to them of the principle of self-de-
termination (pp. 169-71). This limiting factor has reference to the appear-
ance of new principles of international law, overriding the different principles on
which earlier titles are based. But, of course, it can have no application to
vested titles based, as was the very territorial allocation between the Jewish
and Arab peoples, on the principle of self-determination itself.

Judge Petren, in his Separate Opinion in the Western Sahara case,
voiced apprehensions as to even initial applications of the self-determi-
nation principle, in this "as yet inadequately explored area of contemporary in-
ternational law" (I.C.J. Reports, 1975, p. 104 at 111-12). The ground for such
apprehensions would no doubt become a fortiori much graver if past self-
determination decisions of the formal organs of the international community
could be repeatedly brought into question and reopened at the whim of
coalitions of states for the time being commanding majorities in the General
Assembly. And it accords with this that Indian Representative R. Rao,
chairman of the Special Committee on the Principles of International Law
Concerning Friendly Relations and Cooperation between States, denied
that the right has any application to independent states. This was even
though he also thought that this "right" was "more a function and conse-
quence of geography than a legal right."27
General Assembly: Dismantler of Sovereignties?

SELECTIVE SELF-DETERMINATION AS PRETEXT

The authors of Resolutions obviously regard as their central mission the establishment of the self-determination claims of Palestinian Arabs at the expense of the state of Israel. This solicitude is astutely woven through section 1, in which they beg the capital question by offering the General Assembly resolutions on the rights of the Palestinians as proof that General Assembly resolutions as such make international law. It even persists through section 2, where they all but say that Resolution 181(II) of 1947 was void ab initio since, by affording some recognition to national rights of the Jewish people, it violated the "national rights" of the Palestinians. But they finally conclude, with some apparent pain, that that 1947 resolution was not necessarily void ab initio merely because it recognized the "national rights" of the Jewish people as well as of the Arabs of Palestine. The self-determination issue (they say) 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 an air of major concession. They head the title of their relevant section "The National Rights of the People of Palestine," which seems to imply that there is only one "people of Palestine" entitled to self-determination. And it is clear from all they have written, as from all the exercises of "The Committee on ... Rights of the Palestinian People," that as there is only one people of Palestine, the Arabs are the one. This logical inference from that title would have conformed openly to the claims of Article 6 of the 1968 Palestine National Covenant, that all Jews who were not living permanently in Palestine before 1917 should be barred from citizenship in the "Palestinian State" and presumably should be expelled. It would also match both the Arab states' threats and their use of military force to drive the Jews into the sea.

So there is an air of magnanimity in the admission that the Jewish people, as well as the Arabs of Palestine, might be entitled to self-determination. Yet, as these authors expatiate on this admission, it is clear that there is little reality in the air.

Proceeding throughout as if any resolution of the General Assembly is now law (despite their failure, as noted in Chapter 2 above, to provide any foundation for this), they review the assertions of Palestinian national identity in the resolutions since 1970, especially the era of the oil weapon since 1973.

They then try to make precise the geographical area, presumably within "Palestine," "to which Palestinian self-determination applies," and struggle to show how, despite the title of the section in which they do so, there may be two states in Palestine warranted by the self-determination principle, despite the fact that the self-determination these authors are vindicating is that of "the people of Palestine." 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 the legal authority, under General Assembly Resolution 2625(XXV), commonly known as "The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States," whenever any group hitherto connected with a state asserts a right to self-determination against it, to redraw the frontiers of that state in accordance with that state's view (expressed no doubt through stacked majorities) of how far the government of that target State "represents" the whole people of its territory.

This extraordinary power of the General Assembly the authors infer from the proviso in Resolution 2625(XXV) protecting "the territorial integrity and political unity" of sovereign and independent states, which follows the paragraphs of the cited declaration dealing with equal rights and self-determination of peoples, as follows:

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].
It is not proposed to canvass the question whether, assuming that the General Assembly could by resolution create for itself so drastic a legal power of cutting up or even dismantling United Nations member states, the quoted words of the declaration would base such a usurpation. For that assumption itself transcends the bounds of credulity to be expected from either international lawyers or national political leaders.

The threat thus posed to the territorial integrity and political unity and independence of all states by a General Assembly attempt to usurp such power does not need much elaboration.

The self-determination principle is now increasingly invoked not merely as against Western excolonial powers, but also within and between the populations of new states that have come to independence since World War II. Consequently, those states, too, would become subject to any such pretended and unprecedented General Assembly powers of making and unmaking states and their boundaries.

The authors themselves show some awareness of the dangers that all states may apprehend from their extraordinary proposal. They try to quiet or neutralize these by arguing that the case of Israel is a special one. The boundaries of Israel, they say, are only de facto existing “at a particular time as a result of military conquest and of illegal annexation.” This egregiously false assertion of both fact and law is lifted almost literally from the first report of the Committee on Rights of the Palestinian People, which sponsored the authors’ researches. It ignores the considered opinions to the contrary of many reputable international lawyers, as well as the rejection of any such finding by repeated actions of the General Assembly and the Security Council, as already seen in Chapter 3 above.

It is quite clear, as has been pointed out, that Israel’s standing within her territorial domains is in no sense violative of international law. This is so also as to the territories occupied in the course of self-defense against the renewed Arab states’ aggression of 1967. Israel stands ready, as international law requires, to negotiate treaties of peace with the former aggressor Arab states, including their territorial claims. It is these other states that flout the processes of international law. International law itself provides the rule to govern such a situation, namely, uti possidetis—that the state in lawful possession is entitled to stay in the territory until peace is negotiated. It follows that the resort of Resolutions to a patently untenable ground for usurpation and use by the General Assembly of this extraordinary pretense of power against Israel in no way protects other states from similar resorts. The argument in Resolutions imports no less a threat to all other states in the international community, in the lawful courses of these states within their lawful territorial domains. Whenever these other law-abiding states have neighbors who have predatory designs against them, neighbors who can find or promote, and then manipulate General Assembly majorities and self-determination claims against them, they will be vulnerable to similar machinations. The sinister game in which the committee sponsoring these international law “researches” is engaged, is a deep and wide-ranging threat to the whole international legal order, and to the United Nations itself.

In a pamphlet issued late in 1979, following Resolutions, the Committee on Rights of the Palestinian People made this threat patent. That Committee 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?” Chapter 2, under “Standing of Resolutions,” has already shown the neglect by the committee’s lawyers of the limits imposed by international law on the creation of obligations for states by resolutions that have no such effect under the charter. This makes the premise of the above argument simply false, and the conclusion (as to resolutions on the specific rights “of a particular people”) is correspondingly vitiated.

The significant point, however, is that the committee here reveals so frankly its intent to invest General Assembly majorities with binding power to disrupt, dismember, or even destroy the life of sovereign independent states, members of the United Nations, under pretext of self-determination claims of disident groups favored for the time being by those majorities. The fact that the states-victims of this Draconian power would be disposed of one by one in no way softens the threat to them all. The travesty of international law thus proposed matches the travesty of the charter involved. For, under the charter, this kind of power can only be exercised (if at all) by the Security Council under Chapter 7, and subject to the safeguards provided by Article 27.

The authors of Resolutions themselves, indeed, have finally and grudgingly admitted that Israel’s pre-1967 boundaries “may [sic] have received some [sic] international assent.” At least here they dare not ignore Security Council Resolution 242 of November 22, 1967, which clearly indicates that withdrawal of Israel armed forces was to be only from “territories occupied in the recent conflict,” and also states the principle of “the sovereignty, territorial integrity and political independence of every state in the area.” Since these provisions of Resolution 242 are there laid down as bases for the negotiations that the secretary-general is instructed to promote between the states concerned, they are in exact accord with the principles of international law that I have recalled in the preceding paragraph and examined in Chapter 3 above. Under those principles it is both wrong, and pathetically naive, to assert that the General Assembly has any power under international law to determine the boundaries of Israel that would not also expose numerous other law-abiding states to equally extravagant and unwarranted intrusions.
they not thus shunned this extraordinary opportunity, they might have made a major contribution to knowledge. Had they gone to the records of the work of the 1967 Special Committee, or even only to those of the Sixth Committee, or even only to Resolution 3314(XXIX) of December 14, 1974, they would certainly have been more guarded in leaping to simplistic conclusions. They would have found that the assertion that international law now permits armed force to be used by peoples and third states in support of liberation struggles was emphatically not accepted as international law by states, at the very time when General Assembly resolutions offered as evidence of it were being adopted.

The examination that follows will call for the reader’s close attention to the complex uncertainties and divisions of state attitudes towards assertions of this proposed new license to use force in General Assembly resolutions, which the authors of these United Nations “studies” declare to have already become clear rules of international law. The very uncertainties and divisions of state attitudes, resisting acceptance of such resolutions as international law, are worth review precisely because they manifest rejection by states of theses that are central to the conclusions of these U.N. “studies.” These rejected theses include not only the claim of a legal license of states to use force against other states in support of “liberation struggles,” but also the thesis that repeated recitals or assertion by majorities in the General Assembly have legislative effect in international law. It is the more necessary to examine this up-to-date evidence because the researchers for the Committee on ... Rights of the Palestinian People have so neglected it. The fact that this review demands a degree of patience from both this author and his readers is itself an indictment of the superficiality of that committee’s ill-researched studies. There are great dangers to international law, and to the international community, arising from the indulgence of simplistic, careless, and selective research supporting the contentions of some member states against others by organs whose constant duty should be to serve all members with impartiality. We proceed, therefore, in Chapter 6, before turning to the question of Jerusalem, to examine in some depth the views of states on the critical matter of the limits on the use of force in “liberation” or self-determination struggles, as expressed through their specially designated representatives on the 1967 Special Committee on the Question of Defining Aggression. The importance of the issues demand that we confront the complexities involved, which are inherent in the present state of international law in this crucial area.

FORCE AND SELF-DETERMINATION: CONTEXT

A General Assembly increasingly dominated by the newer states and their political allies has certainly initiated moves—for example, by the Declaration on Principles of International Law Concerning Friendly Rela-
tions and Cooperation among States, 1970 (Resol. 2625(XXV))—to invest the doctrine of “wars of liberation” with some kind of legal standing. The outcome of these moves became a main focus of contention of the Special Committee on the Question of Defining Aggression appointed in 1967, which reported in 1974. The legal position of nonstate entities, such as insurgent groups or peoples, struggling to break away from the state under whose sovereignty they live, and the lawfulness of the use of force in their support, were not even a major issue for the General Assembly’s first two special committees on the Question of Defining Aggression in the fifties.

One possible rationale for legitimation of the use of force by peoples struggling for independence, and by third states supporting them, rests on an ingenious reading of Article 51 of the charter. The “target” state, insofar as it resists the self-determination demand, is said not to be a “target” state at all, but an “aggressor” in a continuing state of “armed attack” against the people concerned. Those people, and third states giving armed support to such a people, may thus be said to be acting lawfully in individual and collective self-defense under Article 51 as “a right of self-defence of peoples and nations against colonial domination.” Some such analogical use or abuse of the scope of Article 51 seems to underlie various cumulative declarations of the General Assembly on the 1960 Resolution 1514(XV) on the Granting of Independence to Colonial Countries. This declared in paragraph 4 that “all armed action . . . against dependent peoples” should cease. Resolution 2131(XX) of 1965 declared in paragraph 3 that “the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principles of non-intervention.” And Resolution 2625(XXV) of 1970 on Principles of International Law Concerning Friendly Relations and Cooperation among States affirmed the applicability of such self-determination within existing States (paras. 3, 5, and 7 read together). We have shown in Chapter 1, under “Parallel Liberations: ‘Arab Asia’ and Jewish Palestine,” that even in Resolution 2625(XXV) affirmations of rights to struggle or assist in struggles for self-determination are hedged by prohibitions against intervention by states and against use of force to dismantle or impair the integrity of other states. Insofar as the Republic of India offered any legal basis for its armed attack on the Portuguese colony of Goa, on the Indian subcontinent in 1961, it was an analogy of the present kind. “There can be no question of aggression against your own frontier, against your own people, whom you want to liberate . . .” (Security Council Official Records, 987th Meeting, Dec. 18, 1961). A majority of the Security Council, however, rejected this reasoning in a resolution calling for withdrawal that was defeated by a Soviet veto. Despite later resolutions that clearly forbid acquisition of territory by unlawful force, this Indian seizure of territory has remained as a fait accompli.

How far does the definition presented by the 1967 Special Committee, and accepted by the General Assembly in 1974, in some way commit the states who shared in its adoption by consensus, to some form of the above thesis? How far does it treat a “people” engaged in armed struggle for self-determination, and third states assisting them, against the parent state, as engaged in collective self-defense justified under some extension of Article 51? The arguments involved, often tenuous and tedious, rest on a plurality of textual points in the Definition, as well as on various preceding resolutions of the General Assembly. The more important of these textual points and resolutions need to be recalled as a preliminary to analysis.

(1) Paragraph 6 of the preamble to the 1974 Definition refers to the duty of states not to use armed force to deprive peoples of their right of self-determination, freedom, and independence, and not to disrupt “territorial integrity.” (The last phrase, as will be seen, seems directed less to advancing struggles for independence than to protecting existing sovereign states against them.)

(2) Paragraph 7 of the preamble “reaffirms” that territory should neither be occupied nor be “the object of acquisition” by force, etc. “in contradiction of the Charter.”

(3) Paragraph 8 of the preamble “reaffirms” in general terms the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States of 1970. This declaration contains the following possibly relevant though sometimes mutually neutralizing paragraphs, some of which have already been considered in the special context of Chapter 1, above, under “Self-Determination and the International Court.”

(a) The preamble recited the obligation of states not to intervene in the internal or external affairs of any other state.

(b) It expressed the conviction that alien subjugation, domination, and exploitation of peoples are a major obstacle to international peace and security, and that the equal rights and self-determination principles are a significant contribution to contemporary international law.

(c) It expressed the conviction that any attempt aimed at partial or total disruption of the national unity, territorial integrity, or independence of a state or country is incompatible with the purposes and principles of the charter, and that these principles are worthy of progressive development.

(d) The body of the 1970 declaration condemned as unlawful armed intervention and all other interference or threats against the personality of the state or against its political, economic, and cultural elements.

(e) It similarly forbade states to “use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, States were forbidden to organize, assist, foment, finance, incite or tolerate subversive, terrorist, or
armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

(f) The declaration then, again with Olympian ambivalence, forbid the use of force to deprive peoples of their national identity, thus violating their "inalienable rights and . . . the principle of non-intervention" (emphasis supplied).

(g) A section of the Declaration headed "The Principle of Equal Rights and Self-Determination of Peoples," then proceeded as follows:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter: . . .

Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples: . . .

Every state has the duty to refrain from any forcible action which deprives peoples referred to above . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter [emphasis supplied].

The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and 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 color.

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.

(h) Each of the above and all other principles of this 1970 declaration were (according to its terms) to be construed in the context of the others. None of them could prejudice the provisions of the charter or the rights and duties of members thereunder or the rights of peoples under the charter, taking into account the elaboration of these rights in this declaration, and that the charter principles embodied in the declaration were basic principles of international law.

(4) The Declaration on the Strengthening of International Security (1970), reciting inter alia the above 1970 declaration, reaffirmed the principle that states "desist from any forcible or other action which deprives peoples, in particular those still under colonial or any other form of external domination, of their inalienable right to self-determination, freedom and independence and refrain from measures aimed at preventing the attainment of independence of all dependent peoples . . . and render assistance . . . to the oppressed peoples in their legitimate struggle in order to bring about the speedy elimination of colonialism or any other form of external domination."17

(5) Explanatory Note (a) attached to Article 1 of the 1974 definition stipulates: "In this Definition the term State—(a) is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations."

(6) Article 7 of the definition provides:

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 regimes 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.

(7) The "armed bands" item in the list of acts of aggression, as stigmatized by Article 3(g) of the Consensus Definition, covers: "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, or its substantial involvement therein."

Under the preceding Article 3(f) there is also stigmatized the action of a state "in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State."

The answer to the question what is the legal status of armed force used by or in support of a people "struggling" for self-determination must be some net result of interaction of these provisions. This is a legal question, however, and it therefore depends not only on the textual contents of the above items, but also on the extent to which the text concerned, and any resolution into which it is incorporated, have legal binding force. Starkly conflicting and mutually blocking positions on all this were apparent right up to the emergence of the final text of the 1974 definition from the Special Committee. But the following section will show that, on the central question here of force in self-determination struggles, the states that prevailed exhibited attitudes that denied the lawfulness of such use.
THE 1974 DEFINITION OF AGGRESSION:
PEOPLES AND STATES AS AGENTS AND TARGETS

At the outset there was stark conflict as to whether the entities restrained or protected by the international law precepts involving use of force are limited to states. Is aggression, in short, only a state-to-state relation? United Kingdom delegate Steel pointed to one focus of the complexly interrelated issues touching armed force and self-determination when he asserted that the aggression that the Special Committee sought to define was concerned only with the acts of one State against another State. On this basis, he insisted that the saving of self-determination struggles in Article 7 was not strictly relevant to the definition; so that the clause, if included, did no more than preserve the legitimacy of struggles by means other than use of force.20 Surprisingly, at first sight, M. Ustov of Hungary21 also asserted that Article 1 deals only with state-to-state armed force. But he removed the cause of surprise by explaining (with Soviet bloc overtones about internal dissent and the Brezhnev Doctrine) that “ordinary police action” of a state to suppress disorder within it could not possibly be caught by the definition. With no sign of awareness of inconsistency, he then went on, now in flat contrast to Mr. Steel, to say that neither the state-to-state context, nor even the armed bands provision of Article 3(g), could bring into doubt the legitimacy of armed struggles by national liberation movements, since these were “not included in the notion of aggression but [were] considered a lawful form of the use of force.”22

To reach this latter point, Mr. Khan of Bangladesh had to proceed from a denial of the state-to-state limitation, and a claim that the acts of aggression enumerated in Article 3 are such that committed against peoples or against States.23 This would, of course, if consistently followed, make serious inroads on the Soviet reservation of liberty to take “police action” against peoples, e.g., Lithuanians, Estonians, Latvians, Ukrainians, or Jews (not to speak of Hungarians and Czechs), held in subjection to its sovereignty. So also Mr. Elias of Spain,24 carrying the point to explicit extremes, thought that Article 7 not only allowed a people struggling for self-determination to invade the “territorial integrity” of a state, but also gave each people its own right of “territorial integrity,” and protected this right against the sovereign of that territory.

A barely conceivable basis for giving any “people,” as such, the rights of a state (though even then only with great strain) might be found in Explanatory Note (a) to Article 1. This provides that the term “State” is used in the definition “without prejudice to questions of recognition or to whether a State is a member of the United Nations.” That note seems related in origin to the provision in paragraph 2 of the Six-Power Draft that if the territory of a state is delimited by international boundaries, or internationally agreed lines of demarcation, it could be an aggressor or a victim of aggression within the definition, despite nonrecognition of it as a state (or of its government) by other states.25 In that meaning, Note (a) would be directed to situations such as that between Israel and the Arab states, of special significance here. A central controversy has been whether the U.N. Charter obligations of the Arab states not to resort to armed force bound them vis-à-vis Israel, in view of their refusal to recognize Israel's statehood. In this context, the note would confirm that despite their nonrecognition of Israel, their first use of armed force against her would constitute aggression. It would also confirm that their respect for their charter obligations would not imply recognition of Israel.

Another plausible reason for the New Zealand delegate, Mr. Quentin Baxter,26 referred to the case of hostilities across disputed boundaries, which by this very nature are intractable to criteria of aggression turning on the armed crossing of boundaries. He thought that the effect of Explanatory Note (a) was that the Consensus Definition would not be applicable to such cases. Since the Explanatory Note, as it were, bars any prejudice to “questions of recognition” or either state's boundaries, to apply the definition to such cases would violate this by prerequiring recognition of some particular boundary.

The kind of view that simply assimilates “people” to a “state” lacks any such plausible basis in Explanatory Note (a). For it would require the reference to “recognition” in that note to be understood as requiring that every aspiration to self-determination of a “people” living under sovereignty of an existing state be immediately treated, as soon as it emerges, as equivalent to a separate new statehood displacing or breaking away from the old state. No proponent of the assimilation of “a people” to “a state” was prepared to make such an argument explicit, nor was any prepared to accept the consequence that (under Explanatory Note (a)) such a people would have to be treated as a possible aggressor, as well as a possible victim of aggression.

THE 1974 DEFINITION: DEFEAT OF PROPOSALS TO LEGALIZE FORCE

The acts qualifying as acts of aggression under Article 3 of the 1974 Definition include: “(g) The sending by or on behalf of a State of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.” An Indonesian view27 would have extended the stigma to cover “supporting and organizing” as well as “sending” and (in the final phrase) “active participation” even without “substantial involvement.”

The history of this element of aggression definition goes back to an addition made to the Soviet proposals of February 6, 1933, on the definition of aggression to the League of Nations Committee on Security Questions,
as follows: "Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State to take in its own territory all the measures in its power to deprive those bands of all assistance or protection." This exact text appeared in later Soviet proposals to the United Nations, for instance in the drafts of 1953, presented to the first Special Committee on the Question of Defining Aggression (Para. 1[f]).

The crucial point for present purposes is the relation between Article 3(g) and the self-determination reservation of Article 7, which it may be recalled reads as follows:

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 regimes 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.

As late as 1972 when Mr. Ferencz and Professor Schwebel discussed the deliberations about "indirect aggression," the full antithesis between the self-determination saving clause (Soviet Draft, Para. 5; Thirteen-Power Draft, para. 10) and the indirect aggression armed bands provision (Art. 3[g] of the Consolidated Text) had not emerged. The Soviet draft, paragraph 6, did not save struggle for self-determination in merely vague terms, but unambiguously specified the lawfulness of its use by dependent peoples in exercising their inherent right of self-determination in accordance with General Assembly Resolution 1514(XV). The Thirteen-Power Draft, paragraph 10, contrarily, saved the charter's provisions as to "the right of peoples to self-determination, sovereignty and territorial integrity," but did not make express whether armed force could be used by them. And the Six-Power (Western) Draft was careful in paragraph 2 to make an exception to its treatment of a nonrecognized "political entity" with internationally demarcated boundaries as a state that can be the victim of aggression, precisely for cases where the political entity concerned is "subject to the authority" of the state alleged to be committing aggression against it. Some committee members resisted even this degree of concession for nonstate political entities, and thought the definition should be limited to aggression between states.

At this stage Professor Schwebel was able to speculate about the problem of nonstate entities in some abstraction from the political issues burning fiercely in the background. He wrote, by way of example, of "an entity which sought to break away from an African State," and "in the course of its rebellion attacks a neighbouring State sympathetic to the cause of the

Central Government," the aggressor against the breakaway entity. And conversely, of a European state attacking a neighboring entity that (because of its supposed revanchism) is not recognized as a state. Would not the entity be a victim of aggression? Except for the hypothetical breakaway from an African state, Professor Schwebel is obviously thinking of an entity of stable governmental authority over defined territory such as was contemplated in paragraph 2 of the Six-Power Draft above referred to. The singular case of Rhodesia (a technically nonstate entity deemed "illegal") being condemned as an aggressor by the Security Council seems to be within these parameters. To think that this precedent shows that aggression is proscribed from any quarter merely covers over, without dissolving, the central issue whether a "people struggling for self-determination" can be an "aggressor."

Professor Schwebel thinks that the whole problem is solved by the formula "without prejudice to questions of recognition" in Explanatory Note (a). And he even finds it "difficult to see why use of the concept of nonstate entities would be confusing." Such words from so perceptive a scholar as late as 1972 provide an intriguing measure of the treacherous layerings of the arrière-pensées of political warfare surrounding these matters. The words show obliviousness to the complex and often dangerous possibilities of proposals to license "peoples" who might have neither ostensible control of territory nor any stable government, and third states who choose from whatever motive to support them, to use armed force against any selected target state. It is no less intriguing, in view of the problems that the following sections will reveal, that Professor Schwebel thought at that time that the question of nonstate entities "may be readily solved."

Against this background of the failure of the Thirteen-State Draft to free the use of armed bands and other modes of indirect aggression from the stigma of aggression, there appeared in draft Article 5 of the Consolidated Text the saving clause about self-determination, which, with notable changes, later became Article 7. In draft Article 5 (as to which the Contact Group was careful to say that there was at that stage "no general agreement") the bid to legitimize use of force by nonstate groups and by states assisting them is quite explicit, following in this respect the above paragraph of the Soviet Draft. Nothing in the definition it ran was 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."

If those quoted words in draft Article 5 had survived through to the final Article 7, this would have compensated the proponents of wars of liberation for the failure (seen in the last section) of their bid to free the sending, etc., of armed bands from the stigma of aggression. The quoted words, however, did not survive. In the final Article 7, the range of conduct saved from inculpation was narrowed in various respects. The special inclusion of
“peoples under military occupation” disappeared, a matter specially relevant to the problems of the Middle East here under discussion. Not “foreign domination” as such, but only “forcible deprivation” of the charter right of self-determination was the basis of the right to “struggle.” Above all, it was stripped of any express reference to a right to use force in the “struggle,” and of third states to use force to assist. What remains in Article 7 is the blander formula of “the right of these people to struggle to that end and to seek and receive support.” As between the states utterly opposed to extending the freedom to use armed bands or other indirect aggression under the banner of “wars of self-determination” or “liberation,” and those resolved to extend this freedom and legalize (as it were) such “wars,” the latter again (and finally) failed to establish their position.

This failure is no less apparent as to Article 3(f). That paragraph qualifies as aggression a host state’s allowing forces of a foreign state to use its territory for committing an act of aggression against third states. Suppose, however, the action of these guest forces is by way of assistance to a “national liberation movement” against the third state? Mr. Omar of Libya was critical of Article 3(f), apparently because he thought it should have explicitly made an exception for such a case. If, however, such an exception were necessary to subject Article 3(f) to the qualification of the legality of armed “struggle” for self-determination, it would also be necessary (and was similarly absent) for so qualifying Article 3(g). (The saving clause in Article 7 refers without distinction to the whole of Article 3.)

If, furthermore, the provision of Explanatory Note (a) to Article 1 that the term “State” is used “without prejudice to questions of recognition,” is taken to mean that “State” includes a people that has not yet achieved statehood, Article 3(f) would be an even more serious obstacle to any license to use force in self-determination struggles. It would stigmatize as aggression not only a host state’s allowing another state to use its territory for perpetrating aggression against a third state, but also so allowing any armed elements of “a people” operating from its territory against third states, as for instance Lebanon in regard to Palestinian bands operating against Israel. The stigmatization as “aggression” might be a more severe rule than that under customary international law. This has hitherto been thought only to require a host state to abate the depredations, and on its default authorizing the victim state after due notice to enter the host territory and itself abate it. For Explanatory Note (a) to have been agreed to on the basis that it produces this more extreme result would have been most extraordinary.

In relation to Article 3(f), it was also urged that the conduct of the host state could not be stigmatized as aggression unless the aggressive hostilities against the third state were carried on with its consent. If “allowing” in Article 3(f) refers to grant of consent, this would be self-evidently correct. If that word is taken, however, to mean merely “not preventing,” doubts would persist as to the imputation of aggression in cases where, for example, the host state is genuinely ignorant of the hostilities, or impotent to end them. Such doubts as to when to attach the stigma of “aggression” do not, of course, affect the clear customary rules mentioned above imposing on the host state the duty to abate the activities and, if the host state defaults in its obligations, conferring on the victim state the liberty of taking measures of abatement. With Article 3(f), as with self-defense against armed bands under Article 3(g) discussed above, the efforts of the Thirteen-Power Draft to deny to the victim state the usual right of self-defense against aggression were thus (in one of the rare moments of clarity of drafting) rejected by the 1974 Definition. This decisively supports the present writer’s rejection of a contrary speculative thesis in Chapter 3, above, under “Aggression by Attacks by Armed Bands.”

Important questions have been raised as to the limits of the right of lawful response accorded to the victim state in these and related situations. It has been argued, for example, that forceful retaliation may further weaken the host state’s control over its own territory, may strengthen the insurgents, and even lead the host state to overstep support of them. Such prudential considerations cannot, of course, dispose of the established rights of states to abate organized violence directed against them from private or insurgent groups organized, supported, or tolerated by the host state, and to take necessary measures across the frontiers of the host state that willfully or by other default fails, after due notice, to abate them.

To say that standards of proportionality ought to be worked out for both self-defense and other forceful measures taken by a state for what customary law termed its self-preservation is, however, only to state the problem, not to solve it, nor, indeed, to imply that it can be solved. The Soviet view was that such a requirement would unreasonably hamper the victim of aggression and favor the aggressor, who in the nature of things already had the advantage of surprise as to timing, weapons, and the like. The effect of such a requirement in shifting the ex post facto burden of proof as to justification from the aggressor to his victim was also resisted. And it was argued that the drafting history of Article 51 and its designation of self-defense as an “inherent right” excluded such a requirement. The British and United States views were close to that of the Soviet Union. Most delegations, for one reason or another, thought that a proportionality requirement was in any case irrelevant to or unnecessary for the definition of aggression, or that its existence and meaning were too uncertain and required further study.

THE 1974 DEFINITION: LIMITS ON SELF-DETERMINATION RIGHTS

Even the attitudes of states discussed up to this point expose two major deficiencies in the research "studies" sponsored by the Committee on...
Rights of the Palestinian People. Firstly, these attitudes, manifested by states, contradict the simplistic assumption of the “studies” that prior General Assembly resolutions had established new rules of international law licensing the use of force in self-determination struggles. Secondly, these attitudes show the complexities of the legal arguments involved, quite glossed over by these “studies.”

The final stages in the drafting of the 1974 Definition now to be addressed give this exposure a resounding emphasis. For the prefinal (“consolidated”) text draft of the relevant article had proposed to save the right of self-determination of peoples in terms in three respects exceeding what was finally to be included in Article 7 of the Consensus Definition. First, the draft had explicitly reserved a people’s right to use force in such struggles. Second, it had implied that these people had a right to receive assistance of third states in this use of force. Third, this right to use force had been proposed to extend also to “peoples under military occupation.” The license of “peoples” to use force against states under whose sovereignty they lived, and of third states to support them in this, was strongly denied by many states. In respect of the above three points, especially the first two, these proposals were adamantly resisted, and not only by Western states. The Soviet Union and other Soviet bloc states were, for example, zealous, even while predictably supporting self-determination claims, to deny that anything in the definition could affect a state’s right to take “police action” against “dissident” movements.

On this matter “there was no general agreement as to the text to be adopted,” as the Drafting Committee carefully reported.

In Article 7 of the 1974 Definition as finally adopted, all express reference to use of force by peoples under military occupations was excised. Paragraph 6 of the preamble, reaffirming the duty of states not to use force to “deprive” peoples of self-determination had also had added to it a similar duty not to use force “to disrupt territorial integrity.” Whether the right of peoples to “struggle” includes the right to use armed force against the parent state, and the corresponding question as to the right of third states to support such struggles by force, were answered in the negative. The addition of a duty not to “disrupt territorial integrity” to paragraph 6 highlighted those negative answers since territorial integrity is an attribute of sovereign states rather than peoples “struggling” for self-determination, which may, indeed, often have no defined territorial base. The addition thus corroborates the exclusion of any license to use of force in support of a “struggle” for self-determination against the target state. The refusal of the Working Group to attribute “sovereignty” and “territorial integrity” as rights of peoples parallel to their right of self-determination, marches with this conclusion. A central thesis of the research sponsored and disseminated by the Committee on . . . Rights of the Palestinian People asserting the right of states to use armed force in support of struggles for self-determination, is thus exposed as departing grossly from the positions of United Nations members as manifest in the latest Committee on . . . Defining Aggression, in the Sixth Committee on legal questions of the General Assembly, and in the General Assembly itself, as recently as 1974.

PROBLEMATIC OF SELF-DETERMINATION

The attitudes of states manifested during the preparation and adoption of the General Assembly’s 1974 Definition of Aggression thus contrast starkly with the international law as to the use of force in self-determination struggles, attributed by these research “studies” to the General Assembly’s “lawmaking” activity. These attitudes afford thus a notable object lesson in the risks of attribution of lawmaking effect to General Assembly resolutions, with inadequate regard to the established criteria for the emergence of international law. It should also alert us to the problematical content, so far as international law is concerned, of the right of self-determination itself, about which the researchers of the Committee on . . . Rights of the Palestinian People have also presented a very simplistic account. That right, whatever its nature, is hemmed in by a whole series of legal limits and uncertainties, on some or other of which judgment in a particular case must depend. These the committee’s researchers have appeared quite to ignore. I conclude by commending some of these to their future attention.

At the threshold the question of which peoples are the beneficiaries of the saving clause in Article 7 is even more at large than is suggested by the vagueness of such complementary terms as “colonialist,” “racist,” or “imperialist.” If, indeed, the references to “self-determination” in the charter and in General Assembly declarations have established some legal (as distinct from political) principle, the legal marks for identifying a “people” having this entitlement—the “self” entitled to “determine” itself—remain highly speculative. Those who do not recognize this as a problem will do well to recall the continuing stream of violence arising from it, of which the affairs concerning Katanga, Biafra, Cyprus and Angola, Lebanon, Bougainville, and now Zaire, Western Sahara, Eritrea, are only a few of the contemporary warnings.

This threshold issue is a critical one, moreover, for some of the oldest and most powerful states, as well as for newborn and young ones. Thus, in the form proposed in the preamble, paragraph 6 and Article 7 of the 1974 Definition, that document would strictly raise questions concerning the legal rights of the Baltic peoples overrun by the Soviet Union at the opening of World War II, not to speak of the Ukrainian people or of the Soviet Union’s armed actions against the Hungarian and Czechoslovak peoples in 1956 and 1968. And such rights might even at some time be invoked by the Welsh and Scots in the United Kingdom, not to speak of the Indians and blacks of the United States, the aborigines of Australia,
and the Chinese of Malaysia, the French in Canada, the Walloons in Belgium, the Bretons in France, Basques and Castilians in Spain, the Kurds in Iraq and Iran, and many other identified peoples in Europe, Asia, and the Americas. The qualifying phrase "peoples under colonial and racist regimes or other forms of alien domination" in Article 7 is itself so subject to diverse interpretations or political perceptions as to leave such claims open now or in the future. Thus the specification "colonial and racist" will only protect the Soviet adventures as long as it commands Third World majorities in the General Assembly. The persistent Chinese charges of Soviet "imperialism," as well as the insistence of the Soviet and its satellites that the 1974 Definition does not bar "police" action by a state within its own territory, signal awareness that such issues are not finally closed. Nor, despite the surrounding rhetoric, has any finality been brought to such issues by the Helsinki Declaration of 1975.46

It aggravates this problem of vagueness, as well as the problem of competing claims to self-determination to be discussed shortly, that what delimits (if it does not actually create) the "self" that demands "self-determination," not to speak of the "self" that succeeds, is often the subversive or direct armed action of third states. Neither the definition of aggression, nor generalities about self-determination, makes much contribution to the solution of such problems.

Approaching now the situation in which claims of two or more peoples for self-determination compete with regard to the same territory, it is to be noted that Article 7 of the 1974 Definition is directed solely to peoples oppressed by states and ignores struggles of people against people. The rights of the Katangan and Biafran peoples are mostly water under the international bridge, whatever the merits of those outcomes. But the bloody struggle in Lebanon in 1975-76 involving local insurgency by Lebanese leftist forces allied with Palestine Liberation Organization (P.L.O.) forces localized in Lebanon, opposed by the Christian rightists and also by other Palestinian forces trained in and dispatched from Syria, then by regular Syrian forces, later renamed Arab "peacekeeping forces," signals again the increasing intimacy between civil strife, wars of liberation or self-determination, and international aggression. So does the claim of the P.L.O. to dismantle and replace the state of Israel. Here again, the 1974 Definition says little that is pertinent and plain. The controverted doctrine of the legitimacy of "wars of liberation" only adds to the confusion where, as in Israel and Lebanon, the "inalienable right of self-determination" can be invoked by both peoples engaged in a "struggle" to vindicate it.

There is no better example of the uncertainties than the French-Comoros affair of 1976.44 The fact that the island of Mayotte alone did not join in the overwhelming vote of the people of the Comoros four-island archipelago of December 12, 1974, in favor of independence, led France to hold a special referendum on Mayotte on February 8, 1976. No less than 99.4% of the Mayotte people then voted to remain an integral part of France. On February 6, 1976, two days before the above referendum, Comoros, which had meanwhile been admitted to the United Nations, and other states, sought in the Security Council to have this French action declared an interference in Comoros's internal affairs, from which France must desist. Comoros even declared that it was a "flagrant aggression." The draft resolution to the above effect, sponsored by Benin, Guyana, Libya, Panama, and Tanzania—defeated naturally by a French veto—received 11 votes, with Italy, the United Kingdom, and the United States abstaining.

It was not seriously challenged that while "the people" of the other three islands overwhelmingly wanted independence, the people of Mayotte overwhelmingly wanted to remain integral with France. "Self-determination, therefore, pointed both ways, according to which "self" was regarded as entitled to this right. What was the bearing on this question of the facts that (1) all four islands were, under a French law of 1912, a single administrative unit? or (2) that after the vote of December 12, 1974, Comoros unilaterally proclaimed its independence on July 5, 1975? and (3) that thereafter, on December 31, 1975, the French parliament (under its exclusive constitutional power to that end) recognized the independence of the three islands, but provided for a referendum on Mayotte's future to be held in Mayotte on February 8, 1976? or (4) that the General Assembly, by Resolution 3385 (XXX) of 1975, admitted Comoros (embracing all four islands) to U.N. Membership? or (5) that France by abstaining rather than vetoing allowed the corresponding Security Council resolution concerning Comoros's admission to pass?

Did the "self" entitled to self-determination consist only of the four islands together, either because they were while under French rule a single administrative unit, or because the General Assembly had admitted them qua single entity to Membership? Or were the people of Mayotte entitled also to this right? Neither the charter references nor the plethora of assembly declarations and recitals of the self-determination principle offer much guidance for such a problem: any more than they do for Middle East problems, as I have shown. Indeed, paragraph 4 of the section on self-determination in the 1970 Declaration on Principles ... Concerning Friendly Relations ... among States (Resol. 2625(XXV)) seems to support the French argument rather than that of Comoros. It provides: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people." (Emphasis supplied.) Yet precisely the contrary view can be inferred from the wide affirmation of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resol. 15.5(XXV)) of the principle of territorial integrity of territories destined for independence. Paragraph 6 of the above section of
the 1970 Declaration, while it requires that the territory concerned maintain
its separate and distinct status until its people exercises self-determination,
is silent as to status after such an exercise.

The self-determination principle as it applies to rival peoples both
claiming self-determination, in relation to a particular territory, is somewhat
analogous to the impasse that faces the notion of aggression when the
aggression charged is intrusion across disputed boundaries into territory of
which the invader claims that it is sovereign. If the latter (the intrusion) be
regarded as a legal impasse caused by legally undetermined entitlements in
the dimension of space, the former (the rival peoples) might be regarded as
an impasse created by legally undetermined entitlements in the dimension of
time. The answer in the Comoros case depended on whether France's
prior (and still unrenounced) claim of sovereignty could support the
Mayotte claim to self-determination, or whether Comoros's later assumption
of independence for all four islands precluded the Mayotte claim.

The problem of competing self-determination becomes, indeed, even
more difficult, whether for purposes of determining aggression or for other
purposes, where the competing claims and accompanying military activities,
punctuated by actual wars, armistices, and cease-fire agreements, have
been made over protracted historical periods. The test of priority of resort
to armed force in Article 2 of the 1974 Definition presupposes a fixed point
in time from which priority is to be calculated. Does one fix the aggression
in the Cyprus crisis of 1974 from the action of the Greek officers who led
the coup d'état, or the Turkish response by invasion, even assuming that
1974 crisis can be severed from earlier struggles? Is the critical date of
the Middle East crisis 1973 or 1967, or the first Arab states' attack on Israel
in 1948, or is it at the Balfour Declaration in 1917, or at the Arab invasions
and conquest of the seventh century A.D., or even permits at the initial
Israelite conquest of the thirteenth century B.C.? The priority question, as
well as the self-determination question, are difficult enough. They become
quite baffling when, in the course of such a long span of time, a later
developing claim of self-determination like that of the Palestinian people in
the 1960s, arises, and claims to override retrospectively the sovereign
statehood of another nation, here the Jewish people, already attained by
right of self-determination.

Finally, though without seeking to exhaust the matter, the phrase "forcibly
deprieved" of "the right of self-determination" (in Article 7) and the phrase
"the duty of States not to use armed force to deprive peoples of their
self-determination" (paragraph 6 of the preamble) raise questions to which
there is no obvious answer. Does "forcibly deprived" refer only to future or
at least contemporary acts? Or does it embrace all such deprivations that
have occurred, at however remote a time, in the establishment of a state
now existing? Considering that most, if not all, well-established states have
been founded by armed force, if not by conquest, common sense indicates

the need for some kind of statute of limitations, the precise terms of which
remain shrouded in doubt. Conversely, does a peaceable settlement in a
territory, decades or even centuries ago, become forcible deprivation of
the self-determination of the original inhabitants when these latter, at a
later time, come to a group consciousness that regards the presence of the
long-settled community as an oppression or even demands exclusive reposi-
tion of the whole territory for itself? How would this be applied to the
problems of Chinese in Southeast Asia? the European settlers of the
American continent, North and South, and of Australia? the English in
Scotland and Wales? the Indians in Fiji? and the rich variety of peoples in
India? The list could be vastly extended.

The continuous millennial connection of the Jewish people with the
territory of Palestine, the conquest of the territory by Arab arms in the
seventh century, the solemn recognition of Jewish self-determination rights
in respect of the territory after World War I, and the establishment of
the state of Israel, followed half a century later by self-recognition of a
Palestinian Arab nation as such, and as claimants to self-determination on
the same territory, create a focus for these and other problems to which
the self-determination principle offers no unambiguous directives. Yet it
has to be observed that the self-styled "research studies" disseminated by
the Committee on . . . Rights of the Palestinian People scarcely address
these unsolved problems in reaching their rather dogmatic conclusions
favoring the claims of the Palestinian people as asserted by the P.L.O.