

**The Role
Of International Law
In Achieving Justice and Peace
In Palestine-Israel**

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The Mallisons were in Geneva, Switzerland, in January, 1974 where they presented the paper which is published herewith at a meeting of the World Conference of Christians for Palestine. While in Geneva they also met with officials of the International Committee of the Red Cross and other inter-national organizations which are committed to increasing the role of international law including that part of international law which is designed to protect war victims. Dr. and Mrs. Mallison are presently engaged in a study of the international law of war.

It was a great day for the human race—the new day of Creation—when the idea dawned that every man (and woman) is a human being, an end in himself, with a claim for the development of his own personality, and that human beings had a dignity and a worth, respect for which is the firm basis of human association.

Charles E. Merriam¹

I. Introduction: The Concept and Applicability of International Law

The term "Palestine-Israel" may be disturbing to those who regard the mere mention of one or the other of the words as offensive. The words are used together here to indicate concern with the human rights and values of individuals without discrimination on a religious or national basis. This does not imply recognition or acceptance of particular states or governments. States and governments must be evaluated in terms of their protection of individual rights and values on a non-discriminatory basis.

The first question which may be put to those who attempt to achieve objectives through international law is: What is meant by international law? In basic conception, international law consists of a common body of norms or principles which are used in the solution of diverse problems. It is essential that such norms or principles be applied consistently in order to promote the objectivity and uniformity associated with "law" as opposed to *ad hoc* or unprincipled decision-making in which a different rule is developed for each problem. Upon the basis of this premise, international law may be accurately regarded as a set of uniform principles which require at least minimum standards of reasonable and humane conduct in the world community.

It is also important to recognize that the principles of international law are established by consent and agreement. Express agreement is usually termed treaty or conventional law, and implicit agreement is usually termed customary law. Both are based primarily upon the consent of states as manifested by their governments, although other participants including international public bodies and individuals have a role to play.

Among the public bodies which act in the development and acceptance of international law, the United Nations is particularly important. The U.N. Charter is a multilateral treaty agreed to by its members, as well as being the basic constitution for the world community.

A third element is indispensable to a practical conception of international law. Even the

most just and widely accepted principles of law, such as those contained in the United Nations Charter, are ineffectual in protecting human rights unless they are actually enforced and sanctioned. International law involves a whole sanctioning process ranging from exclusive reliance upon persuasive procedures at one extreme to heavy reliance upon coercive measures at the other extreme, with many intermediate stages including economic sanctions. Sanctions may be most constructively conceived as a continuous process rather than an isolated series of unrelated events. As a general approach, the more coercive sanctions should be increasingly used where the persuasive ones have been found to be ineffective. There are very few situations either in international or municipal law where enforcement procedures are either completely effective or totally ineffective. The most relevant questions concerning sanctions, consequently, are: How effective is the present sanctions process and what steps may be taken to improve it?

A fourth element which requires specification is that among the institutions created to serve mankind, the state is not above international law. Since states and their governments have the preeminent role in making international law, it is essential that they be held accountable for full compliance with it. As a practical matter this means the personal accountability of government officials which was established in international law by the Nuremberg Trial before the International Military Tribunal. The Nuremberg Principles of the individual responsibility of government officials adopted by the United Nations General Assembly² are applicable to officials of all governments.

A second question may be asked concerning international law: Is it a relevant and practical means to achieve justice and peace in Palestine-Israel? The cynics may point to the actual decision-making process in the Middle East in general and in Palestine-Israel in particular. It may be stated with assurance that the great powers have used power politics, including a large measure of military methods, to deal with the problems of this area. From this accurate premise it may be erroneously deduced that international law has been a failure in the Middle East. It would be far more accurate to conclude that international law has not even been tried. The unprincipled power politics played in the Middle East have papered over the fundamental causes of the conflict situation and dealt, at best, with the results of injustice and violation of law.³ Of course, when national officials are specialists in dealing with the overall context of great power relations and are distinctly non-specialists in dealing with the Middle East, it is tempting for them to exercise their specialty. This technique requires no knowledge of or even interest in the human values which are involved in the Zionist-Palestinian and the Middle East conflict situations. The outcome of this approach to the problems of the area has been a further militarization accompanied by

an indefinitely protracted conflict and the increasing destruction of human and material values.

Because of the dismal failure of the techniques which have been utilized, international law is no longer only an ideal alternative. It is also the only practical alternative to an indefinite continuation of the present situation. It may be predicted with considerable assurance that if the present Middle East Peace Conference is to reach toward peace based upon justice, it will have to employ the principled criteria of international law. Another so-called "practical" settlement based upon naked power bargaining and calculation will, at best, provide a short interlude between intense hostilities.

II. The Basic International Law Principles Which Are Applicable to a Peaceful Settlement

A. The Protective Legal Principles in the Juridical Background

While this analysis is primarily concerned with the present and future opportunities for peaceful settlement through law, a brief consideration of the juridical background may be helpful. The two examples employed are selected because they are stated in the Declaration of the Establishment of the State of Israel to be the dual legal bases of that state.⁴ The first of these is the Balfour Declaration of November 2, 1917 which contained a first safeguard clause that specifically provided that it was "clearly understood that nothing shall be done which may prejudice" the basic rights of the Palestinians.⁵ The second is the United Nations General Assembly Palestine Partition Resolution of 1947⁶ in which Part I, Section B(10) (e) requires the constitution of each state established pursuant to the Resolution to contain a provision

guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association.

Mr. Henry Cattan, in a careful legal analysis, has demonstrated beyond any doubt that both the Balfour Declaration and the Palestine Partition Resolution are invalid under the criteria of international law.⁷

Assuming, however, for purposes of legal analysis only, that they have some standing

in law, it is difficult to see how they can be relied upon as authority for the establishment of the State of Israel unless the limiting provisions designed to protect individual human rights are enforced. If there is at least some validity in law for the Declaration and the Resolution, it is not possible to derive authority from these instruments unless the limitations upon the authority are also observed. One of the most fundamental features of international law is that it is a body of principles imposing limitations upon the exercise of national power. These limitations in the Balfour Declaration and the Partition Resolution were not left to inference or to the axiom that juridical instruments must be applied in their entirety, but were enunciated with clarity and precision.

Because of the lack of enforcement of these and other analogous provisions in the past, it must be emphasized that protective and limiting provisions in a future peace are only useful to the extent that they are enforced and sanctioned. One may hope, in spite of past performance, that all of the participants in a peace settlement will carry out its protective provisions in good faith. If this is not achieved, however, there must be a world community assumption of responsibility for enforcement.

B. The Protective Legal Principles of the Contemporary Law of War

The Israeli belligerent occupations brought about by a war of conquest in 1967 raise, among other issues, questions concerning the consistency of the occupation with the requirements of the applicable Geneva Civilians Convention of 1949.⁸ Article 49(6) of the Civilians Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The negotiating history of this provision shows that it was adopted in reaction to the notorious Nazi practice of removing the "inferior" indigenous population and transferring racial "aryans" or Germans into the territory.⁹ It is a prohibition upon "creating facts" in occupied territory by the establishment of colonies comprised of the occupant's nationals. The Government of Israel has systematically violated this provision in occupied Egypt and Syria as well as in Jerusalem,¹⁰ and has also violated article 49(1) which prohibits individual or mass "forcible transfers" and "deportations" of civilians from occupied territory.

The common article 1 of each of the 1949 Conventions provides in full: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The International Committee of the Red Cross *Commentary* on the Civilians Convention states: "[It] is clear that Article 1 is no mere empty form of words but has been deliberately invested with imperative force."¹¹ This obligation to ensure the respect of the other parties is directed particularly to the great powers, but they have not,

thus far, enforced it upon the Government of Israel. The Special Political Committee of the U.N. General Assembly passed a resolution on November 26, 1973 by a vote of 109 to 0 which determined the applicability of all four of the Geneva Conventions of 1949 to the Middle East conflict and all the occupied territories. It is significant that only Israel, Costa Rica, and Malawi abstained.

The Government of Israel now has an outstanding opportunity to demonstrate its adherence to international law by immediately implementing the Geneva Conventions of 1949. This requires not only carrying out the terms of the Civilians Convention but also of the other three Conventions for the Protection of War Victims. For example, Article 4A(2) of the Prisoners of War Convention¹² requires that members of "organized resistance movements" which are "operating in or outside their own territory, even if this territory is occupied" are entitled to prisoner of war status upon capture provided that they meet the same criteria applicable to regular armed forces. The Government of Israel has not, thus far, honored this treaty obligation in its treatment of captured Palestinian guerrillas.

In appraising this opportunity, the Government of Israel should recognize that the Geneva Conventions of 1949 comprise a system of human rights which are so elementary that they must be observed even in wartime. It is noteworthy also that the Government of Israel was one of the leaders of the 1949 Geneva Diplomatic Conference in urging the adoption of the provisions which are now incorporated into these Conventions.

C. The Security System of the United Nations

Article 2, paragraph 4 of the U.N. Charter provides:

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 of the Charter provides that nothing in the Charter shall be interpreted as impairing "the inherent right of individual or collective self-defense." This article does not create the right of self-defense, but preserves the right which had been previously created in customary international law. Article 51 combined with Article 2(4) establishes a world public order system. It is a security system designed to promote individual and national

security which prohibits the use of international coercion for aggressive purposes, including against "the territorial integrity or political independence of any state," while preserving the "inherent" or customary law right to use coercion for defensive purposes. These provisions were written into the U.N. Charter at San Francisco with the assent of all of the original members and under the leadership of the five great powers which have permanent seats in the Security Council.

Mr. Cattan has demonstrated in his book entitled *Palestine and International Law*¹³ that where the provisions of the United Nations Charter and the authorized actions of its organs have been flouted or ignored over a period of time, there is a United Nations obligation of intervention to maintain the principles of the Charter and to provide sanctions and enforcement to establish peace through justice and law.

In view of the long continuing intensive hostilities and wars of conquest accompanied by territorial expansion and belligerent occupation, it must be doubted that there is any substance left to the United Nations security system as applied to Palestine-Israel and the Middle East. In the continuing conflict situation, the principal victims have been civilians: Palestinians, Lebanese, Syrians, Jordanians, and Egyptians. It is in the interest of all of these victimized peoples to re-establish the United Nations security system as an effective public order which will allow decisions to be made through the peaceful procedures required by the United Nations Charter. This is an interest which the Arabs share fully with the inhabitants of Israel. Even though it would be contrary to the perceived interests of the inhabitants of Israel to re-establish a viable United Nations order system in which no civilian persons could be the victims of military attack and dispossession from their homes. It must, therefore, be a primary task of the Geneva Peace Conference to effectuate the security system of the United Nations and to take all necessary steps to insure that future decisions are taken by peaceful rather than by coercive means. This is a signal opportunity for the great powers to abandon their role as military suppliers and to honor their obligations under the Charter. The re-establishment of the security system is in the interests of all of the peoples of the Middle East as well as that of the world community. The first purpose of the United Nations enunciated in Article 1 of its Charter, it should be recalled, is to "maintain international peace and security."

D. The Right of Self-Determination of Peoples Applied to the People of Palestine

The second purpose of the United Nations enunciated in the Charter is to "develop friendly relations among nations based on respect for the principle of equal rights and self-

determination of peoples . . . “

Article 55 further stresses the indispensable relationship between equal rights and self-determination by providing that peaceful and friendly relations shall be "based on respect for the principle of equal rights and self-determination of peoples" and that the United Nations shall promote, *inter alia*:

universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 makes it clear that the provisions of Article 55 are legally obligatory.

On December 8, 1970 the General Assembly of the United Nations, by more than the two-thirds vote required for important questions, decided that the people of Palestine are entitled to self-determination:

Bearing in mind the principle of equal rights and self-determination of peoples enshrined in Articles 1 and 55 of the Charter of the United Nations and more recently reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among Nations, [the United Nations General Assembly] *Recognizes* that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations.¹⁴

The previous year the United Nations General Assembly, for the first time, and also by more than the two-thirds vote required for important questions, recognized that the Palestinians are a people who are entitled to their basic rights under the United Nations Charter.¹⁵ In view of the dispersed and homeless character of the people of Palestine for more than a quarter of a century, it is difficult to overestimate the necessity for and the importance of these resolutions.

It is appropriate to emphasize that the right of self-determination is designed to liberate and not to enslave. Alleged claims to the right of self-determination which are, however well disguised, a technique of denying self-determination to others are inconsistent with the United Nations Charter and must be recognized as immoral and illegal. In addition, the United Nations and its member states must take appropriate enforcement measures to

ensure that the non-discriminatory provisions of Article 55 of the Charter are observed in practice. A pre-eminent example of this kind of discriminatory law which violates the Charter is the Israeli Law of Return.¹⁶ Under its terms, a member of "the Jewish people" as defined in Zionist public law who is born anywhere in the world has a right to immigrate to Israel and to become an instant Israeli citizen upon arrival. Neither this law nor any other Israeli law grants the right to return to a Palestinian Moslem or Christian who is born in the country and is now living in exile, or to the child of such a person. The meaning of the Law of Return, and particularly the Zionist juridical meanings of the term "Jew" and "the Jewish people," has become one of the most important subjects of litigation in the Israeli courts. The Zionists regard this type of litigation as necessary to maintain the "Jewish" characteristics, that is the discriminatory and segregationist features, of the State of Israel. In contrast, Jews recall that Nazi Germany used analagous juridical criteria involving the tracing of ancestry of individuals in ascertaining "German" and "Aryan" identification.

The basic Charter Principle of self-determination is not designed for the benefit of abstract entities, but like other protective principles of international law, it is designed for the benefit of people on the basis of equality. The principle of equal justice for each individual is not a new one, but its importance must be emphasized. One of the most convincing statements of this principle and the necessity to apply it in all situations, is the address by Professor Israel Shahak at the most recent Annual Convention of the Association of Arab-American University Graduates in the United States, entitled "Equal Justice for Every Human Being." Professor Shahak states:

I believe that the principle of "Equal Justice for Every Human Being", *if taken seriously*, and not as a slogan, is the minimal humanistic principle to establish such a concord [between Palestinians, Israelis, Arabs and Jews].

III. The Role of the People of Palestine and the Palestine Liberation Organization in a Peaceful Settlement

Over the past several years the identity of the People of Palestine as a distinct national group which is entitled to all of its rights under the United Nations Charter in particular and international law in general, has been increasingly recognized. In recent years the Palestine Liberation Organization's legal status as a public body and its moral authority have been considerably enhanced."¹⁷ The most important result of these developments is that the people of Palestine are no longer in the position where others will speak for them.

They now represent themselves and can specify their objectives and plan their methods of implementation. It is difficult to see how any peace settlement concerning Palestine-Israel in particular or the Middle East in general can be successful without the participation of the Palestine Liberation Organization as an internationally recognized public body. The purpose of this participation is not to legitimize a lawless "settlement," but to achieve the Palestinian rights which have long been established in law but not yet enforced. There are no circumstances which could justify Palestinian participation in or assent to the Munich-type surrender. If such a surrender should be imposed without Palestinian participation it would, like the so-called Munich "peace" of 1938, be a prelude to further war. Palestinian participation is also desirable because the Zionist-Palestinian conflict is basic while the conflict between Israel and the Arab states is derivative. Based upon experience, the latter conflict cannot be resolved without a just solution of the basic one. A Palestinian presence should also have an impact upon the great powers who must act upon their responsibility to achieve a peace based upon effective implementation of the principles of the Charter including self-determination and the prohibition of aggression and conquest.

A reflection of the views of Al-Fateh was reported by Eric Rouleau in *Le Monde* on November 6, 1973. Mr. Rouleau stated that he was told that the "historic leaders" of the Palestinian movement had decided unanimously to participate in the peace conference if they are invited. An Al-Fateh leader was quoted as stating:

Not all our militants are necessarily realistic. We for our part have undertaken a detailed analysis of the regional and international situation in the light of which we have reached the conclusion that it is imperative, in the supreme interest of the Palestinian people, to accept a compromise. We are determined to prevent King Husayn from having the opportunity to get his hands again on West-bank Jordan and Gaza-territories inhabited exclusively by Palestinians. I myself come from Jaffa, but I am resigned to its remaining under the Israeli flag. We will not be the first or the last to accept what is often the cruel verdict of history. We are not going to be more revolutionary or intransigent than the Germans, the Vietnamese or the Koreans, who have acknowledged for good or ill the division of their respective countries. Furthermore, peace with the State of Israel could open the way again for slow evolution leading to the reunification of Palestine, which would one day become the joint homeland of Jews and Arabs.¹⁸

The significance of this statement is that it represents a Palestinian approach to a ne-

gotiating process, the objective of which is to achieve a peace based upon as much justice as may now be achieved in this imperfect world. Some Palestinians will doubtless disagree with the expressed views and they have the right to participate in the development of the Palestinian national policies. The democratic achievement of a representative Palestinian program is not an easy task in view of the dispersion of the people combined with the large number who are living under occupation. In the event of failure, however, those who are not Palestinians will again be in the position of speaking and acting for the Palestinian people. Success will require not only a general Palestinian approach, but specific views on particular issues. Self-determination, for example, although a legal right, is not a one-dimensional matter. Its implementation requires many specifics including, among others, detailed territorial arrangements.

It should be recalled that the instruments of Zionist discrimination and oppression in Palestine-Israel have not been established in a day or indeed in even as short a period of time as a half century. Zionist beginnings, at the latest, were at the First Zionist Congress in Basle, Switzerland in 1897. From there they have proceeded one step at a time in a carefully planned program utilizing diplomatic, juridical, military, and publicity instruments.¹⁹ There is, unfortunately, little reason for the proponents of equal rights for each individual to believe that they can accomplish their objectives in a year or even in the lifetime of particular individuals. They can, however, make a significant start. If they seize the opportunity to make such a start, their successors will have a foundation to build upon. The initial foundation will probably not be much more than the basic security system of the United Nations Charter which protects the Palestinians and other peoples of the Middle East from aggression and coercion. It must, however, be enforced. The longer range objective of an optimum order system in which each individual may achieve values that go far beyond those of basic order should be built through the planned and coordinated use of all the instruments of national policy. In addition to the well-known military instrument, diplomatic, economic, and educational tools are available for those who will use them.

Among the available tools, it is particularly important to make use of international law conceived as a comprehensive decision-making process which can be used to move from a situation of conflict to one of basic order and then to optimum order. It does not move in this direction automatically, but it has been moved in the past and it can be moved again. The "shrinking" of the world through the modern technology manifested in transportation, communications, and weapon systems makes a viable peace a world community interest as well as a national and regional interest in the Middle East. Anyone who regards the existence of a world community as a fiction or a future ideal should consider the impact of

the Arab oil embargo on the industrialized states. The empirical evidence is that we are now living in one world both politically and economically.²⁰ The urgent need is to achieve corresponding progress in law.

There is a view which regards international law as a convenient facade to conceal the activities of the great powers in making decisions based upon military force and without regard to the U.N. Charter or other principles of law. While there are grounds for caution, the difficulty with this view is that it leaves international law in the hands of the opponents of law and justice. The rights of de-colonization and self-determination prescribed by the United Nations Charter have been achieved for most peoples. The achievement in many places, Algeria for example, has not been easy, but it has been eminently worthwhile. In an era in which freedom is increasingly indivisible, we can no longer tolerate a situation in which some African peoples are excepted from elementary rights taken for granted by most of the human race.

Let us now use international law to first achieve basic order and then optimum order in Palestine-Israel. This task requires the dedication and perseverance of men and women who share a common commitment to universal moral values as exemplified by the religions of Judaism, Islam and Christianity.

NOTES

1. Systematic Politics 329 (1945).

2. 1 U.N. GAOR 1144 (1946); G.A. Res. 95(I); U.N. Doc. A/236 (1946). The principles also appear in 45 Am. J. Int'l L. Supp. Off. Docs. 125 (1951).

3. The most recently declassified and published United States Government materials which demonstrate this appear in [1947] Foreign Relations of the United States, vol. 5, pp. 999-1328 (1971).

4. 1 Israel Laws (auth. transl.) 3-5 (May 14, 1948).

5. The text of the Balfour Declaration appears in Mallison, The Balfour Declaration: An Appraisal in International Law in Abu-Lughod (ed.) The Transformation of Palestine at 60 (1971).

6. G.A. Res. 181(11) (Nov. 29, 1947). The text of the resolution appears in Cattani, Palestine and International Law: The Legal Aspects of the Arab--Israeli Conflict, Appen. III

(pp. 181-194) (Longman, 1973).

7. Cattan, *supra* note 6 *passim*.

8. 6 U.S. Treaties 3516; TIAS 3365; 75 U.N. Treaty Series 287.

9. 4 I.C.R.C. Commentary 283 (Pictet, ed. 1958).

10. See, e.g., M. Mehdi, *Israeli Settlements in the Occupied Territories*, *Middle East Int'l* [London] 21 (Jan. 1973); J. Cooley, *Israelis Put Down Roots in Arab Soil*. *Christian Science Monitor*, May 30, 1973 at 7, cols. 1--6.

11. *Supra* note 9 at 17.

12. 6 U.S. Treaties 3316; TIAS 3364; 75 U.N. Treaty Series 135.

13. Cattan, *supra* note 6 at 161-72.

14. U.N. Gen. Ass. Res. 2672C.

15. U.N. Gen. Ass. Res. 2535B.

16. 4 Israel Laws (auth. Transl.) 114 (1950, as amended).

17. See W.T. and S.V. Mallison, *The Juridical Characteristics of the Palestinian Resistance: An Appraisal in International Law*, 2 *J. Palestine Studies* No. 2, p. 64 at 70-72 (Winter, 1973).

18. 3 *M.E. Monitor*, No. 21, p.1(Nov. 15, 1973).

19. The development of the Zionist juridical structure is analyzed in Mallison, *The Legal Problems Concerning the Juridical Status and Political Activities of the Zionist Organization/Jewish Agency: A Study in International and United States Law*, 9 *Wm. & Mary Law Rev.* 556 (1968) and published as a monograph by the Institute for Palestine Studies, Beirut.

20. The dependence of the United States upon the "Third World" in particular respects is described in Bergsten, *The Threat from the Third World*, *Foreign Policy* No. 11, p. 102 (Summer, 1973).