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**PLURALITIES OF JUSTICE, MODALITIES OF PEACE:
THE ROLE OF LAW(S) IN A PALESTINIAN-ISRAELI
ACCOMMODATION**

Perry Dane *

Among the great slogans of street politics is “No justice! No peace!” John Quigley’s contribution to this journal’s recent symposium on “The Legal Foundations of Peace and Prosperity in the Middle East”¹ does not quite take up this motto. Quigley speaks a more specialized language than the street marcher, so his credo is closer to “No law! No peace!” He also stands in a more complex relation to officialdom. Though he pickets outside the gates of the official Israeli-Palestinian negotiations, he claims the imprimatur of the established international community. Nevertheless, Quigley’s thesis parallels the demonstrator’s chant in its structure. Both try to intertwine a normative argument with an acid warning.

Quigley’s normative argument is that the current Israeli-Palestinian negotiations threaten to “violate rights on the Palestinian side”² on such issues as borders, settlements, displaced persons, and Jerusalem. Quigley admits that negotiations must look to what is “politically feasible.”³ But he claims that the stance of the Palestinians is so close to the demands of international law, and the stance of Israel so at variance with that law, that just letting the parties compromise their differences, without the facilitating hand of the organs of the international community, would violate “legal principle”⁴ and fail to vindicate legitimate Palestinian interests.

Quigley’s warning is that a “non-law based”⁵ agreement – which is to say one that did not include Israeli withdrawal from essentially the entire West Bank and Gaza, and at least portions of Jerusalem, the dismantling of Israeli settlements, and repatriation of the Palestinian diaspora – would leave unacknowledged Palestinian rights festering. Palestinians could still raise their rightful claims, and “the United Nations would face a choice between following legal principle, or following the PLO-Israeli agreement.”⁶ More to the point, Palestinians angered by the failure of the

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¹ John Quigley, *The Role of Law in a Palestinian-Israeli Accommodation*, 31 CASE W. RES. J. INT’L L. 351 (1999).

² *Id.* at 352.

³ *Id.* at 351, 373.

⁴ *Id.* at 377.

⁵ *Id.* at 376.

⁶ *Id.* at 377.

agreement to vindicate their rights, could resort to violence,⁷ presumably threatening not only Israel but also the Palestinian leadership and world community that allegedly betrayed them.

Each of the two intertwined strands of Quigley's argument could be challenged on its own terms. Regarding his normative claims, an alternative story would go something like this:⁸ Israel was attacked in 1948, at the moment of its birth, by an Arab world that rejected the United Nations effort to partition mandatory Palestine into Jewish and Arab states. From 1948 to 1967, Jordan occupied the West Bank and the eastern part of Jerusalem, and Egypt occupied the Gaza Strip. Neither of these Arab states tried to beget an Arab Palestinian state in those territories. In 1967, faced with mortal threats from its neighbors, Israel fought a war and, among other things, captured the West Bank, eastern Jerusalem, and the Gaza Strip. As the only state successor to mandatory Palestine, Israel arguably has a better claim than any other entity to those territories, though it is willing to negotiate away most of those lands in return for peace. During the 1948 war, many Palestinian Arabs left Israel, some willingly. But an approximately equal number of Jews were expelled from Arab lands, and were absorbed at great cost by the new Israeli state. Palestinians might have a right of "self-determination." But vindicating that right does not necessarily require a state with a particular set of borders and political arrangements. In light of all this, Quigley's absolutist and intense positions on borders, settlements, displaced persons, and Jerusalem are, at the least, debatable as a matter of international law.

Even if Quigley's view of international law were correct, his practical analysis would be incomplete. The fact is that even the most dovish Israeli government could not go as far as Quigley demands. The reason is partly political. But it also reflects realistic concern for Israel's security. Thus, even on Quigley's terms, the choice is not between a good accord and a flawed one, but between a flawed accord and none at all.

⁷ See *id.* at 352.

⁸ See generally JULIUS STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* (1981); ELIHU LAUTERPACHT, *JERUSALEM AND THE HOLY PLACES* (1980); Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L.J. 457 (1991); Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1 (1973); Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict: Meaning, Myth, and Politics*, 21 N.Y.U. J. INT'L L. & POL. 465 (1989); Eugene V. Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. IN WORLD PUB. ORD. 147 (1979); Stephen M. Schwebel, *What Weight to Conquest?*, AM. J. INT'L L., 1970, 344; Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968). I do not mean by citing these various legal analyses more sympathetic to the Israeli position to endorse all their arguments. The point is only to provide a counterweight to Quigley's account.

Injecting international overseers, as Quigley urges, might only spur the parties to posturing and brinkmanship, not promote a better result.

More telling, Quigley ignores the moral courage of the present Israeli government, and of the Israeli majority that supports the peace process. By seriously bargaining with the Palestinians, Israelis are knowingly risking their existence. If they concede too little, they chance failure in the talks. Quigley might also be right that if they concede enough to reach a pact, but no more, they invite Palestinian disenchantment and more violence. Yet if they concede too much, they risk strategic vulnerabilities that would tempt some Palestinians, or others, to set out to destroy Israel for good. Even if that effort failed, its result would be terrible – for Israelis, for Palestinians, and for the world. Nevertheless, Israelis are venturing ahead, for the sake of peace, and justice.

Prudential arguments are most useful as prods, not alternatives, to nuanced normative reasoning. But the willingness of both Israelis and Palestinians to talk despite their grievances and misgivings suggests that Quigley underrates the normative *and* practical appeal of peace. Peace is not worth having at *any* price. But it is worth having at *some*, even high, price. The United Nations charter enshrines both justice *and* peace as goals,⁹ and arguably gives peace the higher priority.¹⁰ Some of the very norms that Quigley cites, such as the illegality of acquiring territory even in a just war, reflect that tradeoff.¹¹ *Sometimes*, an “unjust peace is better than a just war.”¹² An imperfect agreement between Israel and the PLO might move some dissidents to violence. But others, exhausted by war and seeing the fruits of coexistence, might be moved to moderation.

⁹ See, e.g., U.N. CHARTER, art. 2, para. 3 (“all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”).

¹⁰ See RICHARD FALK, *REVIVING THE WORLD COURT* 42 (1986); see also ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* (1986); I. Pogany, *Religion, the Palestinian-Israeli Conflict and International Law*, in *INTERNATIONAL LAW AND ARMED CONFLICT* 93, 93-96 (Agd Bradney ed., 1992). For balanced appraisals of the respective roles of peace and justice in modern international law, see, e.g., ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* (1993); SHELDON M. COHEN, *ARMS AND JUDGMENT: LAW, MORALITY, AND THE CONDUCT OF WAR IN THE TWENTIETH CENTURY* 60-71 (1989); Sir Francis Vallat, *The Peaceful Settlement of Disputes*, in *CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR* 155 (1965).

¹¹ See Bert V. A. Röling, *The Ban on the Use of Force and the U.N. Charter*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 3 (A. Cassese ed., 1986); Vallat, *supra* note 10.

¹² I have seen this aphorism attributed to Cicero. See, e.g., *DICTIONARY OF QUOTATIONS* at 736 (1968).

I do not, however, want to spend most of the few pages allowed to me debating Professor Quigley head on. Instead, I want to scout out another perspective. The Middle East conflict involves not only two peoples, but also at least two normative landscapes, vying in the same space. This suggests the utility of a “legal pluralist” approach to the problem.¹³ Legal pluralism is both a thesis about the nature of law and norms, and a methodology of discourse. If Professor Quigley sees in the present negotiations a terrible tension between “law” and desire, then both the thesis and the discourse of legal pluralism could illuminate how that tension might be eased.

Legal pluralism, at its core, is the proposition that nation-states do not hold a monopoly on the creation or articulation of law. Religious groups, indigenous peoples, economic actors, the denizens of cyberspace, and other forms of community can, under appropriate circumstances, possess a law of their own that other legal systems should at least acknowledge. Legal pluralism, at its best, appreciates the often-constructed character of identity, and the provisional, fleeting, aspects of normative system-building. But it treasures such fluidity, and in any event emphasizes the similarly contingent character, in the larger sweep of things, of the system of nation-states.

In one important sense, the role of international law today is itself an affirmation of legal pluralism, in that it challenges the crudest forms of state exclusivism. But to the extent that international law becomes monistic, one-dimensional, and imperial, it simply reduces to a variation on state exclusivism, if one notch higher in lexical order.¹⁴

Consider, for example, Professor Quigley’s discussion of the legal status of Jerusalem. Quigley can find no colorable basis law for Israel’s claim to sovereignty over Jerusalem – not only the Eastern part captured in 1967, but even the Western part held since 1948.¹⁵ But if this is true in international law, which I doubt,¹⁶ that only speaks to the insufficiency of that law. Can it be irrelevant that Jerusalem was the capital of the Jewish

¹³ See Perry Dane, *Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959 (1991) (presenting my own views on legal pluralism, and citations to some classic sources). For valuable citations to recent discussions of legal pluralism in the specific context of international relations, and its relation to the process of globalization, see Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 641-44 (1999).

¹⁴ Cf. SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* (1996) (rejecting the “single-value approach” to law in favor of the pluralistic approach of polycentricity).

¹⁵ See Quigley, *supra* note 1, 371-73.

¹⁶ See generally LAUTERPACHT, *supra* note 8. See Ruth Lapidoth, *Jerusalem – Some Jurisprudential Aspects*, 45 CATH. U. L. REV. 661, 671-76 (1996) (reviewing the range of positions on Jerusalem’s international legal status).

Commonwealth until Roman legions overran it? Is it irrelevant that Jewish law considers Jerusalem to be the holiest spot on Earth, that Jews pray in the direction of Jerusalem, and that the text of those prayers constantly refers to Jerusalem?¹⁷ Is it irrelevant that, long before the dawn of modern Jewish nationalism, Jews not only longed to return to Jerusalem, but also braved great hardships to fulfill that longing, so that for many centuries the city has included a Jewish presence?¹⁸ Is it irrelevant that Mount Zion, a hill in Jerusalem, became a metaphor for the entire land of Israel, so that when secular Jewish nationalism did arise in the nineteenth century, it called itself *Zionism*? Is it irrelevant that the contemporary Israeli passion for Jerusalem – secular and religious – enshrined in a Basic Law,¹⁹ stems in part from the trauma of Jordanian occupation of the Eastern part of the city, when barbed wire and no-man's lands scarred the landscape, the Jewish Quarter of the Old City was razed, and Jews were denied access to the Western Wall?²⁰

For some, these would be clinching arguments. A genuine legal pluralism, however, will not have it so easy. If the Jewish legal view of Jerusalem is relevant, so are the Islamic legal view and the Christian view.²¹ If the normative map of Zionism is relevant, so is the normative map of Palestinian nationalism. For that matter, we even need to take seriously the considered stance of some Arabs, grounded in both nationalist and Islamic presumptions, that the very existence of the State of Israel is “a cancerous growth implanted in their body by the West.”²²

A truly adventurous legal pluralism might take in even more angles. Consider, for example, that Jerusalem is an ancient place, older than any of the groups that claim it, with its own complex history. If, as some argue, ordinary cities deserve more juridical dignity than statist legal doctrine typically accords them,²³ then Jerusalem deserves such dignity a hundredfold. This might mean two different things. We might look to Jerusalem as a polity – a present community of people. Or we might look to Jerusalem as a cultural and legal entity in its own right, whose

¹⁷ See generally Stefan C. Reif, *Jerusalem in Jewish Liturgy*, in *JERUSALEM: ITS SANCTITY AND CENTRALITY TO JUDAISM, CHRISTIANITY, AND ISLAM* 424 (Lee I. Levine, ed., 1999).

¹⁸ See Yossi Beilin, *ISRAEL: A CONCISE POLITICAL HISTORY* 13 (1992); C.H. Dodd & M.E. Sales, *ISRAEL AND THE ARAB WORLD* 25 (1970)

¹⁹ Basic Law: Jerusalem, Capital of Israel, 1980, 34 L.S.I. 209 (1979 - 1980) (declaring that “Jerusalem, complete and united, is the capital of Israel.”).

²⁰ See Dan Kurzman, *GENESIS 1948: THE FIRST ARAB-ISRAELI WAR* 343-402 (1970).

²¹ Cf. Silvio Ferrari, *The Religious Significance of Jerusalem in the Middle East Peace Process: Some Legal Implications*, 45 CATH. U. L. REV. 733 (1996).

²² Peter Mansfield, *A HISTORY OF THE MIDDLE EAST* at 346 (1991, Penguin ed. 1992).

²³ See, e.g., Gerald E. Frug, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999).

legitimate interests reflect the entire sweep of its history and the larger human communities that pray for its peace.²⁴ Law has treated Hindu idols as legal persons whose own best interests determine who should have custody of them.²⁵ Lawyers have entertained the possibility of giving standing to trees.²⁶ According juridical dignity to a city is no more far-fetched. Indeed, while the international regime for Jerusalem contemplated in the United Nation's 1948 partition plan for the Palestinian Mandate is no longer either practical or normatively compelling, the instinct of specialness that helped motivate that plan is surely still both.

Recognizing the juridical dignity of Jerusalem might not itself yield determinate results. Both competing parties, after all, claim to speak on the city's behalf, and finding an authoritative and objective guardian ad litem would be hard. Nevertheless, the exercise is a useful thought experiment, in that it puts a critical question – what is in the best interests of Jerusalem? – on the table. At least, it might suggest that the physical division of the city between 1948 and 1967 should be an object lesson, not a baseline, for any future accommodation.²⁷

Legal pluralism invites us to loosen the bounds of legal discourse and listen to a variety of contradictory voices, including voices we can only imagine. But cataloging this variety cannot be the end of the matter. Conflicting normative worlds necessarily encounter, and try to make sense of, each other, and legal pluralism can help describe the terms of such encounters.

Legal encounter occurs along many dimensions. It can be violent or peaceful, solipsistic or accommodating. But particularly relevant to the

²⁴ Cf. Sarah Harding, *Value, Obligation, and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999) (discussing intrinsic value of sites of cultural heritage, including Jerusalem).

²⁵ *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, 52 L. R. I. A. 245 (1925) (Privy Council case arising out of India).

²⁶ See CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (1972). See also *Sierra Club v. Morton*, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting). Stone's ideas, though they did not find their way directly into legal doctrine, did help inspire the notion of an environmental ethics grounded in a pluralistic moral and legal discourse. See CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987); Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1 (1994). For an effort to extend these ideas explicitly to the international law arena, see Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, AM. J. INT'L L., Jan. 1991, 21.

²⁷ See Adnan Abu Odeh, *Religious Inclusion, Political Inclusion: Jerusalem as an Undivided Capital*, 45 CATH. U. L. REV. 687 (1996) (presenting a particularly eloquent meditation on the possibility of an undivided Jerusalem that meets the aspirations of both Jews and Arabs, Israelis and Palestinians, written by the former Jordanian permanent representative to the United Nations).

Israeli-Palestinian conflict is the possibility that the parties can make some sense of each other's claims from *within* their own normative worlds. It is vital in this conflict, as in others, to appreciate not only the mutually exclusive possibilities in each side's normative claims, but also the more generous strands of thought, and the intellectual and affective resources, that might be available to bridge those contradictions.

Jewish law, for example, has available to it both pragmatic and ethical arguments for supporting peaceful compromise with the Palestinians, even at the cost of giving up control over lands that Jewish law considers to be part of Israel's patrimony. Even the sacredness of Jerusalem can serve the interest of accommodation: Under most views of Jewish law, Jews may not set foot on most of the Temple Mount, the contentious platform on which the First and Second Temples once stood, and which is now home to Islam's Dome of the Rock.²⁸

Meanwhile, secular Zionist ideology, despite its expansionist strains, has its own logic, beyond the lure of peace, for accepting territorial compromise: As current Israeli leaders have stressed, the "Jewish and democratic" state of the Zionist dream would have to give up either its Jewish or its democratic character if it kept territories occupied by large numbers of non-Jews.

Arab and Islamic normative discourse has its own tools for pragmatic and ethical accommodation. Indeed, in Islamic legal and political thinking, the problem of Israel and Palestine is fundamental – the latest instance of dilemmas of self-definition and encounter that go back many hundreds of years.²⁹ In early classical Islamic theory, polity and religion fused. Moreover, the relationship between the international Islamic polity and the non-Islamic world – known as the "realm of war" – was inherently adversarial. As Islamic expansion ran into obstacles, however, including the re-conquest of the Iberian Peninsula by Christian forces, that theory of perpetual conflict had to accommodate the reality of an encroaching non-Islamic world.³⁰ Islamic jurists had to decide whether a

²⁸ See *Temple Mount Faithful v. Attorney General*, H.C. 4185/90 (S.Ct. Israel Sept. 23, 1993), reprinted in 45 CATH. U. L. REV. 861, 906-909 (1996).

²⁹ See generally MUHAMMAD ASAD, *THE PRINCIPLES OF STATE AND GOVERNMENT IN ISLAM* (Pap-Board Printers Ltd. 1986) (1961); CYRIL GLASSÉ, *THE CONCISE ENCYCLOPAEDIA OF ISLAM* 87 (Harper & Row, Publishers, Inc. 1989) (1989); MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955); BERNARD LEWIS, *THE POLITICAL LANGUAGE OF ISLAM* (1991); Abdullahi Ahmed An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 317 (1987); Christopher A. Ford, *Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis*, 30 TEX. INT'L L.J. 499 (1995); Majid Khadduri, *The Islamic Theory of International Relations and Its Contemporary Relevance*, in *ISLAM AND INTERNATIONAL RELATIONS* 24 (J. Harris Proctor ed., 1965). My summary here is obviously cursory in the extreme.

³⁰ For a particularly interesting and theoretically illuminating account of that accommodation in the work of one important medieval Islamic thinker, see Robert W. Cox,

Moslem could, in good conscience, even live in a non-Islamic polity. And they had to explain how Moslem governments could enter into ordinary diplomatic and commercial relations with non-Islamic rulers. The solution was to posit the possibility of an extended truce in which the inherent state of war, while not abjured, was put in very long term abeyance. Islamic jurists and theologians have over the centuries worked out the practical and theoretical shape and limits of that truce in great detail.

Meanwhile, the classical view of Islamic polity also faced an internal challenge.³¹ In principle, the realm of Islam is one religious-political entity. While the original unity of the Islamic empire did not survive long past the death of its founder, the various Islamic states, until at least the end of the nineteenth century, each saw the others' as rebels and pretenders to a universal mandate. Secular Arab nationalism has absorbed the ideal of unity, so that the very existence of separate states is, by some accounts, a bit of a scandal. Palestinian self-definition, in particular, has felt this tension: Palestinian identity is closely tied to the aspirations and ideology of a larger Arab movement. But if Palestinians are merely a branch of the Arab nation, it is not clear why the principle of national self-determination requires yet one more Arab state, in addition to the twenty or so that already exist. The answer that Palestinians would give, of course, is that they are a distinct people that is also a part of a larger Arab whole, and that their struggle is consistent with the aspiration to eventual Arab unity.³² This is, in fact, an answer consistent with the larger vision, still held by some Moslems and Arabs, of a single polity divided in practice into a multitude of entities that only the outside world describes as distinct "nation-states."³³

Towards a Post-Hegemonic Conceptualization of World Order: Reflections on the Relevancy of Ibn Khaldun, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 132 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

³¹ See generally BASSAM TIBI, GEORGIA AUGUSTA UNIVERSITY OF GÖTTINGEN CENTER FOR INTERNATIONAL AFFAIRS, ARAB NATIONALISM: BETWEEN ISLAM AND THE NATION-STATE (3rd ed. 1997); MALIK MUFTI, SOVEREIGN CREATIONS: PAN-ARABISM AND POLITICAL ORDER IN SYRIA AND IRAQ (1996).

³² See THE PALESTINIAN BASIC LAW (Third Reading) (1998) (Palestine) translated by Saladin Al-Jurf, reprinted in 31 CASE W. RES. J. INT'L L. 495, art. (1) (1999) (stating "Palestine is a part of the Great Arab Homeland and the Palestinian Arab people are part of the Arab nation. Arab unity is the goal towards which the Palestinian people are striving").

³³ See Bassam Tibi, *The Fundamentalist Challenge to the Secular Order in the Middle East*, FLETCHER F. WORLD AFF. Winter-Spring 1999, 191, 191-92 (noting that in one view, "each of the existing Arab states – nation-states by the definition of the international system – were considered in Arabic to be a *dawlah qitriyya* (local state), not a *dawlah qawmiyya* (nation-state). Underpinning this distinction is the belief that only the pan-Arab state encompassing all of the Arab lands could be a real nation-state.").

In a deep sense, then, *both* the existing State of Israel and a possible future State of Palestine challenge certain deep themes in Islamic and secular Arab thinking. But it is surely an opening to accommodation to realize that these are challenges of a sort that Arabs and Moslems have been facing, and methodically and imaginatively working through for a long time.³⁴ For Palestinians situated in an Islamic or Arab normative framework, peace with Israel might, from the view of eternity, be a merely contingent, imperfect, concession to living with a “cancer,” but in one sense no more so than accommodation to the modern state system as a whole. More affirmatively, the influence of Islamic thought can give Palestinians a healthy skepticism about the ontological centrality of the nation-state – any nation-state – and a more fluid sense of the relevance of borders and political arrangements to any state’s essential character.³⁵

I do not want to be a Pollyanna. If the normative vocabularies of both Israelis and Palestinians allow for reconciliation, they also put up obstacles to such reconciliation. Yet if an agreement *does* come, it will surely have something to do with such internal normative moves. Even an Israeli dove, for example, might bristle or even turn into a hawk, reading Professor Quigley’s dismissive, single-minded analysis. But an appeal to Jewish, Zionist, or humanist values, along with a reasoned weighing of the alternatives, and the psycho-political dynamics of the negotiating process itself, might yield results that go at least some way to Quigley’s goals.

The potential of Jewish, Zionist, Islamic, and Arab nationalist thought to understand the imperatives of encounter through their own normative lenses suggests yet another theme in the discourse of legal pluralism. We sometimes assume that peace and stability require agreement on fundamental questions. As the philosopher Nicholas Rescher points out, however, trying to shove the range of different normative stances in the political and social world into an overarching consensus is neither necessary for peace and stability, nor even always desirable.³⁶ All that is required is a certain amount of acquiescence and tolerance by the competing factions.

When competing normative communities try to make sense of each other’s rights and claims, they do so through their own frames of

³⁴ See David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT’LL. 819 (1993) (providing an account of Islamic theorists’ struggle to make sense of the relationship between the state system and public international law, on the one hand, and Islamic international jurisprudence on the other).

³⁵ Cf. Cox, *supra* note 30, at 157 (“[T]he state in Muslim history never attained the absolute claims accorded it in European history. . . . This is particularly significant at the present time, when states, repositories of organized power, are perceived as intermediate between the *telos* of Islamic peoples and the achievement of a reunified Islam.”).

³⁶ NICHOLAS RESCHER, *PLURALISM: AGAINST THE DEMAND FOR CONSENSUS* (1993).

reference. As long as those perspectives can reach a *modus vivendi*, they need not converge, or reach agreement on all points. Whatever the outcome of the Israel-Palestinian talks, for example, Palestinians would be entitled to see it as in some sense provisional and to continue to see the entire land as their rightful patrimony, while pledging to forego force in pursuit of that vision, and accepting the security structures necessary to guarantee that pledge. Israelis, meanwhile, would be entitled to see the entire land as Eretz Israel, their homeland, even if part of it was carved out into a Palestinian state.

More profoundly, the possibility of this sort of double visioning can itself yield some of the practical vocabulary for compromise. The most promising proposals for a resolution to the conflict over Jerusalem, for example, transcend the zero-sum language of sovereignty,³⁷ and, while keeping the city united, imaginatively promote functional compromises sensitive to each side's practical and ideological priorities.³⁸ In the end, then, legal pluralism can be valuable, not only as a ground for claims, but also as a resource for their adjudication and adjustment.

This essay's appeal to legal pluralism in the context of an international conflict should have prompted several questions. Does recognizing diverse normative worlds render impossible any judgment of their conflicting claims? What is left for international law in this pluralistic vision? And how can all this be made to work in the real life of the world community?

³⁷ Cf. Moshe Hirsch, *The Future Negotiations over Jerusalem, Strategic Factors and Game Theory*, 45 CATH. U. L. REV. 699, 712, 717 (stating "The basic structure of the dispute between Israel and the Palestinians over Jerusalem has strong features of a zero-sum game. The parties perceive the conflict over East Jerusalem chiefly as a territorial dispute. Each party is interested in gaining full and exclusive sovereignty or control over all parts of the eastern City. Needless to say, these preferences are bitterly opposed, as any gain for one party directly entails a loss for the other. . . . [A]s long as the situation has the basic features of a zero-sum game, the prospects for a compromise between Israel and the Palestinians is significantly reduced." But those prospects might increase if the "game" can be expanded into geographical or symbolic domains that do not have a zero-sum character.); Antonio F. Perez, *Sovereignty, Freedom, and Civil Society: Toward a New Jerusalem*, 45 CATH. U. L. REV. 851, 851 (1996) (stating "much like today's system of states, the debate concerning sovereignty over Jerusalem is a prisoner of the history of international law - a history that has been told in the language of absolute and undivided sovereignty of the state.").

³⁸ See, e.g., "Ze'ev Schiff, Beilin and Abu Mazen Drafted a Document on Final Status; Agreed to Establish a Palestinian State," HA'ARETZ, Feb. 22, 1996, at 1 (discussing unofficial paper outlining, *inter alia*, possible future arrangements for Jerusalem) on file with author; MOSHE HIRSCH et al., WHITHER JERUSALEM? PROPOSALS AND POSITIONS CONCERNING THE FUTURE OF JERUSALEM (1995); John V. Whitbeck, *The Road to Peace Starts in Jerusalem: The "Condominium" Solution*, 45 CATH. U. L. REV. 781 (1996); Perez, *supra* note 36; Adnan Abu Odeh, *Two Capitals in an Undivided Jerusalem*, 71 FOREIGN AFF., Spring 1992, at 183.

All these questions, it seems to me, can be answered together. Legal pluralism – like other forms of pluralism – does not imply relativism or indifferentism.³⁹ None of us need to shirk from the duty of judgment, even as we recognize that others have their own duty of judgment. International law is especially important in the dynamic of judgment, not as a “higher law,” but as the principal legal discourse of the organized international community.⁴⁰ But a sensitive and open international law, while not succumbing to relativism, will also accept its own need to make sense of other legal conversations, of both states and other normative communities.

In fact, international law in this century has been much more dynamic and extemporaneous than Professor Quigley’s sometimes flat teleology seems to admit. Once conceived as mainly embracing relations among states, international law has incorporated a concern for individual rights. It has articulated a doctrine of self-determination of peoples, in creative tension with its respect for state autonomy.⁴¹ It has begun to appreciate a universal duty to the environment and global welfare. It has reshaped the very notion of sovereignty, allowing for its functional division in ways previously thought incoherent.⁴² It would be no great leap for international law also to recognize the relevance of religious claims and nation-constructing ideologies in its calculations of international equity. Indeed, there is a good argument that, as relevant to

³⁹ See HILARY PUTNAM, *Pragmatism and Relativism: Universal Values and Traditional Ways of Life*, in WORDS AND LIFE 182, 192-96 (James Conant ed., 1994); RESCHER, *supra* note 35, at 117-26.

⁴⁰ For an eloquent discussion of the interplay between internationalist and local normative visions, see Nathaniel Berman, *Legalizing Jerusalem or, Of Law, Fantasy, and Faith*, 45 CATH. U. L. REV. 823 (1996).

⁴¹ See generally MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (rev. ed. 1996); ERIC STEIN, CZECHO/SLOVAKIA: ETHNIC CONFLICT, CONSTITUTIONAL FISSURE, NEGOTIATED BREAKUP (1997); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177 (1991); Edward M. Morgan, *The Imagery and Meaning of Self-Determination*, 20 N.Y.U. J. INT’L L. & POL. 355 (1988); Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, COLUM. HUMAN RTS L. REV., Fall 1997, 91.

⁴² See generally J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT’L. ORG. 107 (1994); Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEG. STUD. 425 (1999); Symposium, *Theoretical Perspectives on the Transformation of Sovereignty*, 88 AM. SOC’Y INT’L. PROC. 1 (1994). See also Lapidoth, *supra* note 16, at 682-85 (discussing the relevance of such developments, including the new concepts of functional sovereignty being used to describe the law of the sea, to possible solutions of the Jerusalem problem).

the Middle East conflict, it has already done so, beginning as far back as the Palestine Mandate.

Even if a genuine legal pluralism does not find its way into the doctrinal machinery of international law, it can become part of the language of consensual bilateral and multilateral relations. That is where the practical work of the current Israel-Palestinian talks comes in. Professor Quigley's misgivings about the talks resemble the claim that "alternative dispute resolution," whatever its attractions to the disputants, disserves the legal order by sidetracking the vital work of publicly articulating legal values.⁴³ I understand that concern. I appreciate too that the Israel-Palestinian talks are, in part, exercises in power and in calculation. But the talks are also more than that. They are an occasion for the parties to grope for the human and the conceptual bonds that can overcome, without erasing, their differences. They are also the occasion for each party to reexamine its own assumptions, and to re-imagine its view of the other.

Simply comparing the results of Israel-Palestinian talks against a preset legal yardstick is radically incomplete. The talks, potentially, can themselves be a dynamic, if painful, setting for the articulation and constitution of legal norms. They can, at their best, give rise to a juris-generative moment, in which the clash of perceptions produces new sparks of illumination.

At the end of the day, these sparks of illumination might help reshape the substance of international law itself.⁴⁴ From its earliest days, after all, international law has been built, at least in part, on such dynamic, on-the-fly, processes of articulation. Even if that does not happen, and even if some analysts deem the results of the Israeli-Palestinian talks to be illegitimate, the overall legal and political landscape will probably still, in practice, make room for the peace and justice that the parties have articulated for themselves.

All this brings us back to Quigley's most urgent practical warning: that a Middle East accord that "does not accord with legal requirements"⁴⁵ will foster disaffection and violence by Palestinians whose views and claims remain unrepresented. It is precisely here, however, that legal pluralism – whether or not you agree with my jurisprudence – reappears as a fact on the ground. If some Palestinians do violently reject an Israeli-Palestinian pact, it will probably have little to do with international law. Even if Israel does have the better of the international law argument,

⁴³ See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

⁴⁴ Cf. ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 103-66 (1971) (discussing circumstances under which bilateral and multilateral treaties can help define the substantive content of "customary" international law); Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988) (same).

⁴⁵ Quigley, *supra* note 1, at 374.

some groups, such as Hamas, might still resist a settlement from within their own view of Islamic law and politics. For that matter, even if an agreement met Quigley's criteria for a just settlement that would not be enough to satisfy dissenters who reject Israel's very existence.⁴⁶

I said earlier that support for the compromises necessary to peace is likely to arise out of the internal normative dynamics of each side to the talks. If this is true for the natural supporters of compromise – the doves and the moderates – it is even truer for its intuitive enemies. If there is any hope that an Israel-Palestinian agreement will “stick”⁴⁷ as against its potential opponents, the source of that hope is in the deployment of argument, authority, and political give-and-take by the supporters of the accommodation. On the Palestinian side, one might hope that the creation of a Palestinian state, however deficient in Palestinian eyes, will itself change the normative dynamic, even for Hamas, and even for those who continue to live outside Palestinian borders.

In sum, the point of any negotiating process is not only for the two sides to make peace with each other, but for each side to make peace with itself, or at least as much peace as necessary. If the history of other negotiated conflicts is any guide, the lure for the critical mass of supporters on both sides will, at the end of the day, not be justice alone, or peace alone, but some combination of peace, justice, calculation, fatigue, and faith.

⁴⁶ Quigley deals with this sort of possibility obliquely, but only in the context of discussing *Israeli* dissidents. Quigley, *supra* note 1, at 375.

⁴⁷ Quigley, *supra* note 1, at 374.

