

THE PERILS OF POSITIVISM: A RESPONSE TO PROFESSOR QUIGLEY

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I. INTRODUCTION

Professor Quigley's article is a classic demonstration of the perils of positivism. Putting factual errors to one side — and they are numerous — its fatal flaw is jurisprudential. It treats legal rules as if they were machines entirely divorced from their context of history and policy, capable of answering legal questions without thought or deliberation.

Quigley is dubious about the proposition that Iraq committed an act of aggression by invading and attempting to annex Kuwait in 1990. He regards Iraqi claims against Kuwait as substantial, even if, in his opinion, they did not quite justify Iraq in seizing and swallowing the country by force. He argues, however, that because the world community has severely punished Iraq for what it decided was a violation of Article 2(4) of the United Nations Charter,¹ it should apply the same remedies against Israel for what Quigley regards as clear-cut Israeli aggression against Egypt in June, 1967. He accomplishes this breath-taking feat of legal legerdemain by assuming that the infallible way — indeed, the only way — to discover whether a state has violated Article 2(4) of the Charter is to determine who fired the first shot. After a thin, questionable, and incomplete review of the events surrounding the opening moments of the Six Day War in June, 1967, Quigley concludes that Israel did indeed fire the first shot, and therefore should be quarantined or bombed and invaded until it purges itself of aggression — at least by evacuating the territories it occupied during the Six Day War. Unless this is done, Quigley concludes, the United States and the United Nations Security Council (Security Council) will stand condemned for applying a double standard in their interpretation and application of the Charter.

A. The Definition of Aggression

The definition of aggression in international law is hardly the simplistic formula that Quigley advocates. Aggression is a complex phenomenon which appears in many factual contexts. The spectrum of aggression ranges from the Cuban missile crisis, when no shots at all were fired, to situations like those in Korea, Greece, Berlin, Nigeria, and

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1. U.N. CHARTER art. 2, para. 4.

the Corfu Channel crisis. The recent litigation before the International Court of Justice about whether United States aid to the contra rebellion in Nicaragua was a legitimate act of collective self-defense or an act of aggression must also be considered.² Both the Security Council and scholars are required to evaluate many factors beyond Quigley's talismanic "rule" in most cases of alleged aggression.³ The reports of four or five international committees and commissions, innumerable books and articles, the judgments of the Security Council and the International Court of Justice, and above all the pattern of behavior of states, all go far beyond Quigley's "first shot" principle in defining the legal concept of aggression.⁴

But, even if, *arguendo*, one could accept Quigley's rule for a moment, he is wrong about who fired the first shot in the Six Day War. The Quiglean first shot was Egypt's use of force in May, 1967, to seize the Straits of Tiran and close that international waterway to Israeli cargo and shipping.⁵ The second "shot" of the war was the mobilization of Arab armed forces around Israel, carried out by Egypt, Jordan, Iraq, Saudi Arabia, and Algeria.⁶ Syria joined the fray later in the week of active hostilities. As Quigley implies, international law has always considered the mobilization of troops to be both a threat to and a breach of the peace in international law which justifies the use in self-defense of whatever amount of force is reasonably necessary under the circumstances to cure the delict.⁷ By May, 1967, these acts of hostility took place against a background of steadily accelerating guerilla

2. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 104-06, 119-23 (June 27). See also OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 113 (1991) (discussing *Nicaragua* in an analysis of Article 2(4) of the Charter); Oscar Schachter, *Disputes Involving the Use of Force*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 223 (Lori F. Damrosch ed., 1987).

3. See DEREK W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 249-68 (1958); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 119-26 (1988); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 62-66, chs. 3-4 (1961); SCHACHTER, *supra* note 2, chs. 7-8 (1985); JULIUS STONE, CONFLICT THROUGH CONSENSUS 177-88 (1958) (listing United Nations documents relevant to the definition of aggression). See also C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Recueil des Cours d'Academie de Droit International 451 (1952 II) (discussing the history of aggression as a legal concept).

4. In their classic book, *Law and Minimum World Public Order*, McDougal and Feliciano dispose of Quigley's approach, and like attempts to reduce complex ideas to simple formulas as futile, although careful analysis of all the relevant variables can clarify the policies necessarily involved in the judgment that a given instance of coercion is aggression. MCDUGAL & FELICIANO, *supra* note 3, at 61-71, chs. 3-4. On Quigley's "first shot" test, McDougal and Feliciano quote Judge John Bassett Moore's dry observation that "the law does not require a man who believes himself in danger to assume that his adversary is a bad shot." *Id.* at 63-64 n.154 (quoting 6 JOHN BASSETT MOORE, COLLECTED PAPERS 445 (1944)).

5. See John Quigley, *The United Nations Action Against Iraq: A Precedent for Israel's Arab Territories*, 2 DUKE J. COMP. & INT'L L. 195, 207-08 (1992).

6. *Id.*

7. See *id.* at 206 n.87.

infiltration, mainly from Syria and Jordan, which persisted for more than nine months. Even the notorious General Assembly Resolution of December 14, 1974 — the so-called Consensus Definition of Aggression — rejects Quigley's rule.⁸ Article 2 of the Resolution declares that the first use of armed force in contravention of the Charter shall constitute only prima facie evidence of an act of aggression, and notes that the Security Council in its judgment may take other relevant circumstances into account.⁹ After listing seven categories of acts it deems illegal under Article 2(4) of the Charter,¹⁰ Article 4 carefully notes that "the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."¹¹

Israel's action in June, 1967, was a reasonably proportionate defensive response to an armed attack.¹² The attack consisted in the first instance of the closing of the Straits of Tiran and a huge Arab mobilization all around Israel, backed by violent calls for a Holy War to destroy Israel.¹³ Given escalating guerilla infiltrations of increasing sophistication and intensity, and the location of the Straits of Tiran, the destruction of the Arab armies in the Sinai Desert by Israel was not only proportional to the Egyptian delict — it was the only possible military response.

On the first day of hostilities, Israel passed a message to Jordan through the United Nations and the United States government, asking Jordan to stay out of the war in exchange for an Israeli promise not to attack Jordan or otherwise violate the Armistice Agreement.¹⁴ King Hussein rejected the Israeli offer. Thus, he created the West Bank problem which has bedeviled Middle Eastern politics ever since. Jordan was the military occupant of the West Bank and East Jerusalem since the 1948 war — a war of naked Arab aggression. The Arab attempt to annex the areas in 1950 was not recognized by the international community. Even without reference to the agreement of 1957, pursuant to which Israel withdrew from the Sinai Desert, Israel had the legal right

8. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, 143, U.N. Doc. A/9890 (1974). For a devastating analysis of the definition of aggression, see STONE, *supra* note 2.

9. G.A. Res. 3314, *supra* note 8, art. 2.

10. *Id.* art. 3.

11. *Id.* art. 4.

12. Quigley spends a good deal of time seeking to demonstrate that despite the Armistice Agreements of 1949, Israel's neighbors are in a state of war with Israel and are therefore entitled to use force at will, except as otherwise restrained by international law. See generally Quigley, *supra* note 5, at 212-13. If the Arab states enjoy the privileges of belligerency against Israel, how can Quigley deny the same privileges to Israel?

13. See NADAR SAFRAN, *FROM WAR TO WAR* ch. 6 (1969); Charles W. Yost, *How It Began*, 46 FOREIGN AFFAIRS 304, 315 (1968). The message was also passed by U.N. personnel at Israel's request.

14. The author officially delivered the Israeli message to the Jordanian Ambassador in Washington, and the American Ambassador to Jordan delivered it to the Jordanian Foreign Minister in Amman.

to use force in response to Egypt's actions in May, 1967. Under international law, every state has the right "to protect itself by preventing a condition of affairs in which it will be too late to protect itself," according to Secretary of State Elihu Root — one of the finest American international lawyers.¹⁵

B. The Suez Crisis Agreement — History Sets the Stage

In addition, an international agreement authorized Israel to use force under the circumstances. The Suez Crisis of 1956-57 was settled by an agreement between Israel and Egypt which expressly recognized Israel's right to use force in self-defense if the agreement was violated.¹⁶ It required Israel to withdraw from the Sinai Desert, which it had occupied in 1956, in exchange for a series of promises made by Egypt; all of which were later broken.¹⁷ Egypt undertook to prevent its territory from being used as a base for attacks against Israel; to keep the Suez Canal and the Straits of Tiran open to Israeli shipping; and, in due course, to make peace with Israel.¹⁸ The agreement specifically provided that if Egypt used force to close the Straits of Tiran, Israel would be entitled to use force in self-defense under Article 51 of the Charter.¹⁹ This feature of the agreement was expressly guaranteed by the United States.²⁰

Since President Nasser of Egypt felt he could not negotiate an open, public agreement with Israel, the settlement was negotiated secretly, and its terms were set out in a series of public statements.²¹ I still have a

15. Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT'L L. 427, 432 (1914).

16. See generally Eugene V. Rostow, *Legal Aspects of the Search for Peace in the Middle East, Address Before the Sixty-fourth Annual Meeting of the American Society for International Law (Apr. 24, 1910)*, in 64 AM. J. INT'L L. 64, 65-71 (1970) (discussing the settlement process that occurred in 1957).

17. See THEODORE DRAPER, *ISRAEL AND WORLD POLITICS: ROOTS OF THE THIRD ARAB-ISRAELI WAR* 19-22 (1968); HERMAN FINER, *DULLES OVER SUEZ* ch. 17 (1964); D. BEN GURION, *ISRAEL: A PERSONAL HISTORY* 522-36 (1971); EUGENE V. ROSTOW, *LAW, POWER, AND THE PURSUIT OF PEACE* 78 (1968); Eugene V. Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1973*, 69 AM. J. INT'L L. 272, 278-79 & n.16 (1975) [hereinafter *Arab Attack*]. See also Nicholas Rostow, *Diplomatic Patchwork: The United States and the Settlement at Suez, 1956-57* (1972) (unpublished paper, on file with Yale University Library) (offering the fullest treatment of this episode thus far).

18. *Arab Attack*, *supra* note 17, at 278-79.

19. DRAPER, *supra* note 17, at 19-24.

20. See ROSTOW, *supra* note 17, at 279.

21. The statements were made by Egyptian, Israeli, United Nations, British, and United States officials in Cairo, Jerusalem, London, and the United Nations Headquarters in New York. The documents reflecting the agreement between Israel and Egypt appear in U.S. CONGRESS, SENATE COMMITTEE ON FOREIGN RELATIONS, *A SELECT CHRONOLOGY AND BACKGROUND DOCUMENTS RELATING TO THE MIDDLE EAST 139-82* (1967) (prepared by the Library of Congress, Legislative Reference Service); U.S. DEPARTMENT OF STATE, *UNITED STATES POLICY IN THE MIDDLE EAST, SEPT. 1956-JUNE 1957*, at 175-348 (1957).

Department of State book of Middle East documents of the period, bound in standard General Printing Office brown paper. It was given to me by a friend, who was a highly respected colleague in the State Department who participated in negotiating the agreement. He put paper clips on a dozen or so pages so that I could conveniently follow the scenario as it was recorded and carried out. One of the most important terms of the agreement was set out in an aide memoire by Secretary-General Dag Hammarskjöld: if Egypt ever tried unilaterally to remove the United Nations peacekeeping forces in the Sinai, or to close the Straits of Tiran, the Secretary-General would call the Security Council into session immediately and block such initiatives until a peaceful resolution of the conflict could be reached.²²

However, when Nasser requested the withdrawal of the United Nations peacekeeping forces from the Sinai in May, 1967, Hammarskjöld's successor, U Thant, acquiesced immediately without following the agreed procedure Hammarskjöld and his colleagues had laid down. Thus, Nasser made the Six Day War inevitable when he expelled the peacekeeping forces from Egypt, and deployed troops and artillery to the Straits of Tiran. Secretary of State Rusk said that Nasser's action "cut our throat from ear to ear," since the United States took great responsibility in negotiating the agreement and in persuading Israel to withdraw from the Sinai.²³ President Eisenhower took the position that Nasser's violation of the agreement engaged the national honor of the United States since the United States was involved in the agreement.²⁴ He assured then Senator Johnson that he would support whatever action Johnson decided to take in upholding that agreement.²⁵

22. The main documents in the controversy over Hammarskjöld's aide memoire and its fate are reprinted in JOHN NORTON MOORE, *ARAB-ISRAELI CONFLICT: READINGS & DOCUMENTS* 1044-55 (1977).

23. That agreement was brokered by the good offices of the United States, the United Kingdom, and Dag Hammarskjöld, the Secretary General of the United Nations at the time. The content of the agreement was powerfully influenced by the Chairman of the Senate Armed Services Committee, Senator Lyndon B. Johnson, who held up committee consideration of President Eisenhower's Middle East Resolution until he, Senator Johnson, was satisfied that the settlement was fair. For a recent discussion, see *Hearing of the Near Eastern and South Asian Affairs Subcomm. of the Senate Foreign Relations Comm.*, Fed. News Serv., May 10, 1991, available in LEXIS, Nexis Library, Omni File. See also INDAR JIT RIKHYE, *THE SINAI BLUNDER: WITHDRAWAL OF THE UNITED NATIONS EMERGENCY FORCES LEADING TO THE SIX-DAY WAR OF JUNE 1967* (1980) (detailing the events surrounding the agreement as well as reprinting relevant documents for the period).

24. See *supra* part I.B. (information from the author's copy of a State Department book of Middle East documents).

25. *Id.*

C. The Question of United States Complicity

In any event, Quigley is wrong about the first shot on the Sinai front, and about United States complicity in the war.²⁶ I can attest from personal knowledge that neither Johnson nor Rusk knew that Israel intended an immediate attack on the large and growing Arab forces in the Desert and their air support in Egypt. The United States government was of course aware that such action was likely. The administration tried vehemently to head off the war, both by extremely active diplomacy and by preparing with Great Britain, the Netherlands, Australia, and Iran, to send a convoy of merchant vessels escorted by an allied naval flotilla to reopen the Straits of Tiran.

Quigley makes much of Nasser's argument that Israel was preparing to attack Syria, and that Egyptian military preparations in the Sinai were simply designed to deter and, if necessary, to defeat an Israeli invasion of Syria.²⁷ There is no truth in this familiar myth. The Soviet propaganda apparatus and the Jordanian radio taunted Nasser for pretending to be the protector of the Arabs and for ignoring Israel's large-scale preparation to attack Syria.²⁸ But, there was no such Israeli deployment, according to British and United States intelligence and to the reports of United Nations observers.²⁹ Prime Minister Levi Eshkol of Israel invited the Soviet Ambassador in Jerusalem to go up to the Golan Heights and inspect Israeli troop dispositions for himself. The Ambassador declined the invitation.³⁰ Moreover, the United States government received reports of scattered Egyptian firing before Israel moved.³¹

II. THE CONTEXT OF THE ARAB-ISRAELI CONFLICT

Quigley's focus on the last few days before the Six Day War exploded in June, 1967, reveals the shallowness of his legal analysis. No legal judgment about the issue of aggression and self-defense in the Six Day War is possible unless the war is examined in the full context of history as a stage in the Arab war against a Jewish political presence in Palestine. This war began when the Balfour Declaration was

26. Quigley, *supra* note 5, at 222.

27. *Id.* at 208-10.

28. See generally ROSTOW, *supra* note 17, at 77 (discussing Arab spokesman who taunted Nasser).

29. See Arthur Goldberg, *U.N. Security Council Continues Debates on Near East; Soviet Proposal Condemning Israel Rejected*, DEP'T ST. BULL., July 3, 1967, at 3, 5-6.

30. Yost, *supra* note 13, at 309.

31. For a major study of the subject, see William Quandt, *Lyndon Johnson and the June, 1967 War: What Color Was the Light?*, 46 MIDDLE EAST J. (forthcoming Spring 1992).

promulgated in 1917.³² Except for the Egyptian—Israeli peace agreement adopted in 1979, the war has continued since then.

A. The Conflict is Simple

The Arab war against Israel is a tragic subject. Like the problem of Ulster, or the plight of the Kurds, the Arab-Israeli conflict is difficult and intractable, but it is not without hope, either. Egypt made peace with Israel under Prime Ministers Sadat and Mubarak; there is much more opinion like that of Sadat and Mubarak in the Arab world than appears on the surface.

After the First World War, the peace treaty between Turkey and the victorious Allies — the Treaty of Sèvres — stripped Turkey of its Arab territories.³³ Most of those territories became independent Arab states.³⁴ Four areas of the region, Syria, Lebanon, Mesopotamia (Iraq) and Palestine, became League of Nations mandates.³⁵ Pursuant to Article 94, the mandates for Syria and Iraq recognized those areas as states "subject to the rendering of advice and administrative assistance by a Mandatory power until such time as they are able to stand alone."³⁶ The Palestine Mandate, which gave a geographical definition to the word "Palestine" for the first time in history, had an entirely different character.³⁷ The area designated as Palestine by the Palestine Mandate included what are now recognized as Israel and Jordan, in addition to the West Bank, the Gaza Strip, and the Golan Heights.³⁸ In accordance with Article 95 of the Treaty of Sèvres, the Palestine Mandate provided that the Mandatory, the United Kingdom, was responsible for putting the Balfour Declaration into effect, "in favour of the

32. Letter from British Foreign Secretary, A.J. Balfour to Lord Rothschild (Nov. 2, 1917), reprinted in MOORE, *supra* note 22, at 885 [hereinafter Balfour Declaration] (photographic reproduction of original in the archives of the British Museum).

33. Treaty of Peace Between the Allied Powers and Turkey, Aug. 10, 1920, reprinted in 15 AM. J. INT'L L. 179 (Supp. 1921) [hereinafter Treaty of Sèvres].

34. *Id.* at 200-01 (establishing independence of Syria, Mesopotamia, and The Hedjaz).

35. British Mandate for Palestine, 8 LEAGUE OF NATIONS O.J. 1007 (1922) [hereinafter Palestine Mandate]; French Mandate for Syria and Lebanon, 8 LEAGUE OF NATIONS O.J. 1013 (1922). Trusts under the supervision of the League See also Rostow, *Arab Attack*, *supra* note 17, at 286 & n.33; Paul S. Riebenfeld, *Israel, Jordan, and Palestine* (1974) (manuscript on file with the Yale University Library) (an authoritative study of the Palestine Mandate).

36. Treaty of Sèvres, *supra* note 33, at 200.

37. Palestine Mandate, *supra* note 35, at 1007.

38. In 1923, the Golan Heights, which had been part of the Palestine Mandate, was exchanged by the British for a piece of the territory held by the French, who held the mandates for Lebanon and Syria. That exchange of territory was protested at the time it was made on the ground that it was forbidden by the French and British mandates. In addition, Article 5 of the Palestine Mandate makes the Mandatory "responsible for seeing that no Palestine territory shall be ceded or leased to or in any way placed under the control of, the Government of any foreign Power." *Id.* at 1008.

establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country. . . ."³⁹ The omission of the word "political" from Article 95 of the Treaty of Sèvres and the corresponding language of the Palestine Mandate were not accidental. They reflected the fact that the primary purpose of the Palestine Mandate was the establishment of a national home for the Jewish people in Palestine, not the right of self-determination of the indigenous population. The meaning of that commitment is explained in the 1937 report of the Palestine Royal Commission.⁴⁰

From the beginning, Arab officials attacked the Palestine Mandate. They argued that it was beyond the powers of the Allies and the League of Nations to take territory from the Turks and label it the new Jewish national home. In their view, the people who lived in the territories became sovereign at the end of the Ottoman empire in accordance with what they claimed was the international legal principle of self-determination.⁴¹ Since there have always been Jews in Palestine, and especially in Jerusalem, most Arabs conceded that Jewish people living in these territories also had a right to share in the exercise of the right of self-determination as a traditional minority in a Muslim state.⁴²

39. *Id.* The Palestine Mandate authorizes the United Kingdom to be the Mandatory for Palestine in administrating Palestine and putting the Balfour Declaration into effect. *Id.* The language of the Palestine Mandate mirrors Article 95 of the Treaty of Sèvres. See Treaty of Sèvres, *supra* note 33, at 1007 ("[I]n favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.").

40. President Wilson stated on March 3, 1919: "I am persuaded that the Allied nations, with the fullest concurrence of our own Government and people, are agreed that in Palestine shall be laid the foundations of a Jewish Commonwealth." *Palestine Royal Commission Report*, July 1937, in 6 REPORTS FROM COMMISSIONERS, INSPECTORS, AND OTHERS 24 (1936-37).

41. *Cablegram Dated 15 May 1948 from the Secretary-General of the League of Arab States to the Secretary-General of the United Nations*, U.N. SCOR, 3d Sess., Supp. for May 1948, at 83-88, U.N. Doc. S/745 (1948) [hereinafter *Cablegram*]. See also HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW* 65 (1973); JULIUS STONE, *ISRAEL AND PALESTINE, ASSAULT ON THE LAW OF NATIONS* 85 (1981). See generally IBRAHIM ABU-LUGHOD, *THE ARAB-ISRAELI CONFRONTATION OF JUNE, 1967: AN ARAB PERSPECTIVE* 96 (1970); Richard A. Falk & Burns H. Weston, *The Relevancy of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991) (discussing Arab rights to self-determination); W.T. Mallison, Jr., *The Zionist-Israel Juridical Claims to Constitute the Jewish People Nationality Entity and to Confer Membership in It: Appraisal in Public International Law*, 32 GEO. WASH. L. REV. 983 (1964) (rejecting all Jewish claims in Palestine and asserting exclusive Arab rights to self-determination in Palestine).

42. See *Cablegram*, *supra* note 41, at 88 (discussing a "just solution" according to the Arabs which would create a United States of Palestine which would "guarantee to all minorities the safeguards provided for in all democratic constitutional States affording at the same time full protection and free access to Holy Places").

The debate between these two views has continued in the same terms for seventy-five years. The Jewish people and the State of Israel have relied on the Palestine Mandate which recognizes the Jewish people's historic connection to the land; the Mandate conferred on the Jewish people the right of "close settlement" first on the whole territory of the Mandate, and then on the part of the territory west of the Jordan River.⁴³ They have also relied on all that has evolved from the Palestine Mandate: the establishment and recognition of Israel and the long and uniform line of Security Council decisions affirming the Mandate — first urging, and then ordering the Arab states to make peace with Israel.⁴⁴ On the other hand, the Arabs say that neither the principal Allies in the First World War nor the League of Nations had the authority to do what they did. They argue that the Palestine Mandate was void, and that when the United Kingdom gave up the Mandate in 1948, the inchoate state of Palestine came into being, and the people who lived there became sovereign.⁴⁵ The Arabs contend that the administration of the territory under the Palestine Mandate was, and the existence of Israel in parts of Palestine now is, a continuing aggression against the sovereignty of the Palestinian people which justifies armed resistance as a form of self-defense.⁴⁶

There is no reconciling these two positions. Chaim Weizmann, the first President of Israel, said the Arab-Israeli conflict is not a struggle between right and wrong, but between two rights: the decision of the society of nations to encourage and protect the return of the Jewish people to the land from which they had been driven by the Romans, on the one hand, and, on the other, the claims of the people who were then living in the country to self-determination.⁴⁷ Peace in the area can only be achieved if the Arab nations follow Egypt's example and accept the legitimacy and legality of the Palestine Mandate, the Peace Treaty with Turkey,⁴⁸ and the existence of Israel as a sovereign member of the society of nations.

B. The State System Versus A Natural Law Right to Sovereignty

The central theme of the story is thus a conflict. On one side are the imperatives of the state system, which has fully and repeatedly

43. Palestine Mandate, *supra* note 35, at 1007-08.

44. See *Arab Attack*, *supra* note 17, at 278 & nn.13-14.

45. CATTAN, *supra* note 41, 63-89. See also *Cablegram*, *supra* note 41, at 86 ("Now that the Mandate over Palestine has come to an end The right to set up a Government in Palestine pertains to its inhabitants under the principles of self-determination . . .").

46. CATTAN, *supra* note 41, at 38-41. See *Cablegram*, *supra* note 41, at 87.

47. See, e.g., Howard Goller, *Shamir Trip Bolsters Israel's U.S. Image*, Reuters, Apr. 12, 1989, available in LEXIS, Nexis Library, Omni File.

48. Treaty of Peace, July 24, 1923, 28 L.N.T.S. 11.

recognized the authority of the victorious Allies, Turkey, the League of Nations, and the Security Council. On the other side is the resistance of the Arab world to the Security Council decisions in the name of a "natural law" right of sovereignty vested in the people who lived in the territory in 1918. Quigley's one-dimensional article does not examine the issues against this background. Instead, Quigley undertakes the impossible feat of attempting to explain the Arab position and policies not as a prolonged revolt against the rules of the state system (that is, a revolt against the rule of law), but as a faithful compliance with those rules and the principle of self-determination. Quigley totally ignores the fact that self-determination is not accepted by international law as an absolute principle, but one among many factors which may be invoked to justify peaceful change.⁴⁹

There are four basic reasons why the Arab War against Israel has played a significant part in the quest for a stable balance of power which has dominated the life of the state system since 1914: the size and special problems of Islam in a political order which has been Eurocentered until recently; the world-wide importance of the oil and geography of the Middle East; the attempt of the Soviet Union for many years to exploit Arab hostility to the existence of Israel as a weapon in its struggle to outflank and dominate Western Europe, and to gain influence in the Third World; and the emergence of the so-called Palestinian cause as a prominent symbol of the Third World's effort to liquidate the last vestiges of European colonialism. In the west, Palestinian self-determination has been a staple of fashionable radicalism for a long time.

C. Israel's Right to Exist — the Debate

The argument about Israel's right to exist has persisted for seventy-five years, and has involved far more than scholarly debate. Four full-scale international wars of aggression were waged against Israel in 1948, 1956, 1967, and 1973. Furthermore, Israel has suffered countless border raids, riots, and acts of terrorism — many of them involved the international use of force. As far as Israel is concerned, even the Suez Crisis of 1956 was a war of Arab aggression. Britain, France, and Israel attacked Egypt in 1956. Each had separate grounds for claiming the right to use force in self-defense. Egypt nationalized the Suez Canal, allegedly in violation of British and French treaty rights. In addition, Egypt gave aid to the insurrection against French rule in Algeria, which was then an integral part of metropolitan France. The Israeli claims were quite different. Israel asserted that it was denied the

49. Eugene V. Rostow, 'Palestinian Self-Determination': *Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUDIES IN WORLD PUB. ORDER 154 (1979).

right to use the Suez Canal and the Straits of Tiran, and that Egypt had failed to prevent its territory from being used as the staging ground for guerilla attacks against Israel. The Security Council treated Israel differently from Britain and France. Britain and France were asked to leave the area and withdraw their troops; the Israelis were not asked to withdraw from the Sinai until the Egyptians made the promises mentioned earlier.⁵⁰

One of the key features of the Palestine Mandate, which will be discussed in the peace negotiations initiated by President Bush, is the right it confers on "the Jewish people" to undertake "close settlement" in the entire area of Palestine west of the Jordan River, including the West Bank, the Gaza Strip, and East Jerusalem.⁵¹ Under Article 25, the mandatory power had authority to "postpone or withhold" Jewish close settlement in the area of the Mandate east of the Jordan river — what is now Jordan.⁵² Since the Security Council never accepted the recommendation of the General Assembly in 1947 to partition Palestine into an Arab and a Jewish state, the right of the Jewish people to make "close settlement" in all of western Palestine survives, protected by Article 80 of the Charter. In the long diplomatic controversy over the Jewish right-to-settle in the occupied areas, this issue has not yet come into play. The legality and propriety of Jewish settlements has been discussed almost exclusively under Article 49 of the 1949 Geneva Convention, dealing with the law of military occupation.⁵³ It cannot be postponed or avoided any longer because the present negotiations are an attempt to carry out Security Council Resolutions 242 and 338: to make peace, and to terminate the occupation. Under the Mandate, the Jewish right of settlement in Palestine west of Jordan confirms Israel's legal claim to the West Bank, East Jerusalem, and the Gaza Strip.⁵⁴

D. Impacts of the Arab-Israeli Conflict

The intensity of the Arab-Israeli conflict, and its role in some of the most contentious issues of world politics since the First World War, have corrupted our political, and sometimes even our scholarly vocabularies for dealing with the subject. Thus, words have taken on new meanings. The only possible legal definition of the word "Palestine," for example, is that given by the British mandate for Palestine.⁵⁵ The word

50. See *supra* part I.B. and notes 20-21 (discussing the Egyptian promises which were made when the Suez crisis was settled).

51. Palestine Mandate, *supra* note 35, at 1008, 1012. See also Rostow, *supra* note 49, at 155-62; Eugene V. Rostow, *Bricks and Stones*, NEW REPUBLIC, Apr. 23, 1990, at 19, 20-22.

52. Palestine Mandate, *supra* note 35, at 200.

53. Geneva Convention Relating to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3548, 75 U.N.T.S. 287, 318.

54. Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344 (1970).

55. See Palestine Mandate, *supra* note 35, at 1007 (discussing all inhabitants of Palestine

"Palestinian" should mean persons who live or have the legal right to live within the area of Mandatory Palestine: Jews, Arabs, Druze, Christians, and others as well.⁵⁶ This is the definition used in the Charter of the Palestinian Liberation Organization.⁵⁷ Yet, the term has come in popular usage to denote the Arab inhabitants of the West Bank and the Gaza Strip, who are certainly Palestinians, but by no means the only Palestinians. Similarly, the word "Arab" is often used in a political sense — Quigley does so — as if the West Bank, the Gaza Strip, and the eastern part of Jerusalem were always a recognized part of Jordan or another Arab state. With the establishment of Jordan and Israel in 1946 and 1948, these areas of Palestine were allocated neither to Jordan nor to Israel, and remain parts of the Mandate; their future should be determined in accordance with its terms. As the prolonged litigation and the diplomatic solution of the controversy over the South African mandate for German South West Africa confirm, trusts do not vanish when trustees die, resign, or otherwise terminate their function as trustees.⁵⁸ In the case of the mandates, the sanctity of the trust is protected by Article 80 of the Charter, which provides that "nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties."⁵⁹

The consequence of the prolonged storm over the Palestine question is the emergence of two levels of discourse in the United Nations, among the governments, in the press, and in the literature: a serious level, and a level of political theater. When the Arab states threaten a war in which Israel might be destroyed or seriously damaged, the major nations take a sober and, on the whole, conscientious view of the conflict. Thus, there is a long and consistent line of Security Council resolutions dealing with Palestine, starting in 1948.⁶⁰ Many of these resolutions are legally binding decisions, and they call upon the Arab states to make peace with Israel and to establish secure and recognized boundaries to replace the

irrespective of race or religion in defining the area for which the Mandatory is responsible).

56. *Id.*

57. Palestinian National Charter, reprinted in STONE, *supra* note 41, at 162.

58. The International Court of Justice wrote, "The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary and the disappearance of one or the other could not affect the survival of the institution." *Legal Consequences for States of the Continued Presences of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 32 (June 21).

59. U.N. CHARTER art. 8.

60. See U.N. SCOR, 11th Sess., Supp. for May-June 1956, at 72, U.N. Doc. S/3609 (1956); U.N. SCOR, 10th Sess., 688th mtg., at 20, U.N. Doc. S/PV.688 (1951); U.N. SCOR, 6th Sess., 547th mtg., at 1, U.N. Doc. S/agenda 547 (1951); U.N. SCOR, 4th Sess., 1st Ser., 436th mtg. at 2 (1949); U.N. SCOR, 3d Sess., Supp. for Nov. 1948, at 13, U.N. Doc. S/1080 (1949); U.N. SCOR, 3d Sess., Supp. for July 1948, at 76, U.N. Doc. S/902 (1948).

armistice demarcation lines established in 1949.⁶¹ On the other hand, when the subject of a particular dispute is regarded as of minor importance, and Israel is not in particular danger, some of the major states cynically tend to indulge in political theater; they pass nonbinding resolutions that are designed to sound favorable to Arab opinion.⁶²

E. The Future of the Arab-Israeli Conflict

As this comment is being prepared, the United States and Russia are sponsoring two conferences between Israel and its neighbors. One is designed to establish a degree of autonomy for some of the Arab parts of the West Bank, as recommended by Egypt, Israel, and the United States at Camp David in 1979. The parties to the negotiations are Israel, Syria, Lebanon, and a delegation representing both Jordan and the Arab inhabitants of the West Bank. Representatives of thirty-six nations have convened for the multilateral talks which will deal with a number of issues of concern to the region: water, security arrangements, energy, economic cooperation, tourism, health, and agriculture among others. The broad mission of both sets of negotiations is to facilitate agreements to implement Security Council Resolutions 242 and 338.⁶³ Resolution 242, adopted after the Six Day War of 1967, calls on the parties to replace the 1949 Armistice with agreements of peace, and sets forth the principles which should govern their negotiations.⁶⁴ Resolution 338, accepted after the Yom Kippur War of 1973, makes Resolution 242 legally binding, and orders the parties to carry out "negotiations . . . aimed at establishing a just and durable peace . . . immediately and concurrently with the cease-fire."⁶⁵

III. SECURITY COUNCIL RESOLUTIONS 242 AND 338

A. The Arab Misinterpretation

For twenty-four years, the Arabs have pretended that the two Resolutions are ambiguous and that they can be interpreted to suit their

61. See *supra* sources cited in note 60.

62. See generally ALLAN GERSON, *THE KIRKPATRICK MISSION: DIPLOMACY WITHOUT APOLOGY: AMERICA AT THE UNITED NATIONS, 1981-1985* (1991) (discussing the United Nations position on particular resolutions).

63. George Bush, *Address to the Mideast Peace Conference, Madrid, Spain (October 30, 1991)*, in Fed. News Serv., Oct. 30, 1991, available in LEXIS, Nexis Library, Omni File; *Bush's Road Map to Mideast Peace*, BOSTON GLOBE, Oct. 31, 1991, at 18; *Middle East Peace Conference, Time Need Not Be the Enemy*, FIN. TIMES, Oct. 31, 1991, at I4.

64. S.C. Res. 242, U.N. SCOR, 22d. Sess., at 8, U.N. Doc. S/INF/22/Rev. 2 (1967).

65. S.C. Res. 338, U.N. SCOR, 28th Sess., at 10, U.N. Doc. S/INF/29 (1973) (calling upon parties to "start immediately after the cease-fire the implementation of Security Council Resolution 242").

hearts' desire.⁶⁶ Some European, Soviet, and United States officials have allowed the Arab spokespeople to delude themselves and their public opinion — to say nothing of western public opinion — about what the resolutions require. It is even common for responsible journalists to report that Resolution 242 is deliberately ambiguous, so that the parties are equally free to rely on their own readings of its key provisions.⁶⁷ Nothing could be further from the truth.

Security Council Resolution 242 provides that Israeli occupation can continue until "a just and lasting peace" is achieved.⁶⁸ There can be no debate that the basic command of the Resolutions is to achieve peace through negotiations.⁶⁹ This provision, the heart of the Resolution, reflects the bitter experience of 1957, when the United States and Great Britain persuaded Israel to withdraw from the Sinai in exchange for Nasser's promises.⁷⁰ Because Nasser broke all his promises, the Western Allies and the Soviet Union made the occupied territories a gage for peace — that is, to allow Israeli occupation and administration until peace was actually made.⁷¹ Soviet Ambassador Dobrynin said at the time that the package deal of Resolution 242 — no withdrawal at all without peace, and then withdrawals only to secure and recognized boundaries — was the only occasion during the Cold War when the Soviet Union used the phrase, package deal, in a positive sense.⁷² When peace is made, the Resolution calls for Israeli withdrawal to "secure and recognized" boundaries.⁷³ In this regard, Resolution 242 built on the text of the Armistice agreements of 1949: the General Armistice Agreement provided that the "Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the

66. See Harry J. Lipkin, *Benelux or Yugoslavia in the Middle East?*, JERUSALEM POST, Dec. 29, 1991, at Op.

67. See, e.g., Thomas L. Friedman, *Syria Approves Bush's Plan for a Mideast Conference*, N.Y. TIMES, July 19, 1991, at A1 ("[R]esolution 242 of 1967 is written in deliberately ambiguous language . . ."); Jim Hoagland, *Carter Seeks to Ease Rift with Israel*, WASH. POST, Aug. 9, 1979, at A15.

68. S.C. Res. 242, *supra* note 64.

69. The requirement of Resolution 242 cannot be met by a new document purporting to renounce any claims of belligerent rights. The right to make claims of belligerent rights was given up in the Armistice Agreements of 1949, as the Security Council confirmed in 1951. See e.g., S.C. Res. 95, U.N. SCOR, 6th Sess., at 10, U.N. Doc. S/2322 (1951); S.C. Res. 118, U.N. SCOR, 11th Sess., at 18, U.N. Doc. S/PV.743 (1956).

70. See *supra* part I.B.

71. Interview with William P. Rogers, Secretary of State, in 62 DEP'T ST. BULL. 217, 218-19 (1970) ("We have never suggested any withdrawal until there was a final, binding, written agreement that satisfied all aspects of the Security Council resolution."). See *Arab Attack*, *supra* note 17, at 272.

72. ROSTOW, *supra* note 17, at 464.

73. S.C. Res. 242, *supra* note 64, at 8.

Palestine question."⁷⁴ This feature of the armistice agreements was proposed by the Arabs.

B. Quigley's Interpretation

Quigley's treatment of Security Council Resolution 242 is evasive and unconvincing. He gives no sense that his argument involves more than the question of whether Ruritania fired the first shot in its war with Luisitania. He does not even mention Security Council Resolution 338, which makes Resolution 242 legally binding. His first reference to Resolution 242 appears on page 195.⁷⁵ Quigley contrasts the "United Nations action against Iraq . . . with the . . . action taken against Israel for its occupation of *the* Arab Territories."⁷⁶ He writes that "the United Nations reacted much more swiftly to challenge Iraq than it did against Israel. The rapid action against Iraq reflected a double standard at the United Nations."⁷⁷ For a man as familiar with the literature as Quigley, inserting the definite article before the word "territories" in this sentence cannot be an oversight. Nor can it be excused. The omission of the definite article in that sentence was the focal point of five and a half months of intense and highly publicized diplomatic negotiation.⁷⁸ At a later point, Quigley returns briefly to the question of whether Resolution 242 creates an unconditional Israeli obligation to withdraw from all the territories it occupied in 1967 — that is, to repeat its 1957 mistake of withdrawing without peace.⁷⁹ Quigley concludes that the Resolution "left it unclear whether Israel was obliged to withdraw only after a settlement with its neighbors."⁸⁰

He finds ground for this alleged ambiguity by quoting a statement in the preamble to Resolution 242 in which the Security Council notes the "inadmissibility of the acquisition of territory by war."⁸¹ No one seems to know how this phrase crept into the draft of the Resolution. I was out of the country when it made its appearance. At the time it

74. General Armistice Agreement, Feb. 24, 1949, Israel-Egypt, art. V(2), 42 U.N.T.S. 251, 256. See also General Armistice Agreement, July 20, 1949, Israel-Syria, art. II(2), 42 U.N.T.S. 328, 330; General Armistice Agreement, Mar. 23, 1949, Israel-Lebanon, art. II(2), 42 U.N.T.S. 286, 290; General Armistice Agreement, Mar. 13, 1949, Israel-Jordan, art. II(2), 42 U.N.T.S. 303, 306.

75. See Quigley, *supra* note 5, at 195.

76. *Id.* (emphasis added).

77. *Id.* at 227.

78. See, e.g., *Israel's Good Reasons to Be Wary of Soviet Mideast Initiatives*, N.Y. TIMES, Aug. 17, 1985, at I22. See also Lord Caradon, MACNEIL/LEHRER REPORT (Mar. 30, 1978) ("We didn't say there should be a withdrawal to the '67 line; we did not put the 'the' in. We did not say all the territories, deliberately We did not say that the '67 boundaries must be forever.") [hereinafter Lord Caradon].

79. Quigley, *supra* note 5, at 218.

80. *Id.*

81. See *id.*

seemed too absurd to make a fuss about since more than two-thirds of the boundaries in the world were established by war. The phrase has always been treated as either a rhetorical flourish devoid of content, or as meaning that territory should not be acquired by aggressive war. It is inexplicable that Arab spokespersons are now emphasizing the principle of the inadmissibility of the acquisition of territory by war. If seriously applied, that principle would destroy Jordan's right to claim any of the West Bank since Jordan occupied that territory in the course of a war of open aggression in 1948.

Quigley attempts to bolster his interpretation of Resolution 242 by quotations from Resolutions of the Security Council, the General Assembly, and the United Nations Commission on Human Rights.⁸² The Security Council Resolution he quotes merely reaffirms the Council's views that are expressed in Resolution 242: the acquisition of territory by force is inadmissible, and the prolonged Israeli occupation should come to an end in accordance with the principles and provisions of Resolutions 242 and 338.⁸³ It adds nothing to those Resolutions. Quigley's quotations from resolutions of the General Assembly are typical instances of political theater.⁸⁴ They have no legal effect under the Charter except as "recommendations."⁸⁵

The simplest evidence that Quigley's contention is without substance is the fact that the Security Council and the parties have always interpreted Resolution 242 as authorizing Israel to remain in occupation until the parties make peace and then to retire to "secure and recognized boundaries"; this need not be the same as the armistice line.⁸⁶ This is what was written by all former officials and publicists of the United Kingdom and the United States who participated in the negotiations.⁸⁷ It was the basis of Ambassador Jarring's futile mission after the Six Day War, and the basis also for the peace between Israel and Egypt.⁸⁸ The Resolution could not be challenged even if there were convincing evidence that Israel initiated the 1967 war because the world community views the 1967 war simply as an episode in the Arabs' seventy-five years

82. *Id.* at 218-19.

83. S.C. Res. 242, *supra* note 64, at 8.

84. Quigley, *supra* note 5, at 219.

85. These have no legal effect other than as recommendations because under the Charter the General Assembly has only that authority, except for housekeeping, nonsubstantive matters. See U.N. CHARTER ch. IV.

86. See Harry V. Lerner, *Bush's New Reading of 242*, JERUSALEM POST, May 15, 1991, at Op. (discussing then-Secretary of State William Rogers interpretation of Resolution 242 — that until Israel's boundaries were established, Israel is entitled to stay); Eric Rozenman, *After the Shamir Plan*, JERUSALEM POST, Nov. 23, 1989, at Op-Ed.

87. See Writings and Statements of Lord George-Brown, Lord Caradon, Ambassador Arthur J. Goldberg, President L.B. Johnson, J.L. Hargrove, Ambassador Yehuda Blum, Michael Stewart, and Secretary of State William Rogers, *quoted in* ROSTOW, *supra* note 17, at 465-72. See also Lord Caradon, *supra* note 78 (chief British negotiator of Res. 242).

88. Rostow, *supra* note 16, at 68-69.

of war against the Jewish political presence in the Middle East; Israel's occupation of the territories is viewed as a ploy for inducing the Arabs to end that war.

Quigley's argument has become a conspicuous element in Arab propaganda since Iraq's invasion of Kuwait. By attempting to demonstrate that Israel was the aggressor in the Six Day War, the Arab spokespersons and apologists in the West who make this argument obviously hope to discredit Resolutions 242 and 338. Their collateral attack on the Resolutions is doomed to failure, not only because it is specious, but because it reveals so clearly that the true goal of those who make it is to drive out the Israelis, as the Crusaders were driven out of Palestine centuries ago.

C. The Potential for Peace

Some fifteen years ago, a Belgian friend told me that the Balfour Declaration was a noble experiment that had failed. Israel would have to be liquidated, he said, as the other European colonies in Asia and Africa were being liquidated. "We in Belgium will take our share of the refugees," she added. Israel is not a European colony, however, but a nation. It has become a nation through a harsh and bitter experience of building a creative civil society under conditions of unremitting warfare and siege.

Resolutions 242 and 338 offer the world the only possible opportunity for a peaceful outcome of this prolonged conflict. The Arabs can have peace with Israel, and much more, if, but only if, they accept both the letter and the spirit of Security Council Resolutions 242 and 338, which derive from the Palestine Mandate, the Charter, and their history. If, however, they persist in the war they have been waging against the Jewish national home in Palestine for the past seventy-five years, Israel will inevitably annex the territories in dispute at a politically convenient moment, and the world will accept that outcome. Seventy-five years of Arab resistance to the mandatory decisions of the world community are enough.

D. A Solution: The European Experience

Jean Monnet, the father of the European unification movement, believed that many apparently intractable political conflicts could not be solved directly, but might be transformed by changing their circumstances.⁸⁹ Monnet suggested that the hostility between France

89. See PASCAL FONTAINE, *JEAN MONNET, A GRAND DESIGN FOR EUROPE* 41 (1988) (discussing unification as a solution in a note by Monnet dated Aug. 5, 1943).

and Germany should not be approached head-on, but might be resolved over time if both countries became part of a European Community.⁹⁰

Monnet's procedure might work in dealing with the Arab war against Israel. Instead of arguing endlessly — and often fighting — about the rights of self-determination of the Palestinian Arabs, the most promising course should be the so-called Benelux Solution.⁹¹ This approach advocates an economic union of the entire territory of Palestine, or at least of the area of Palestine west of the Jordan River, guaranteeing freedom of movement within the confederation and special arrangements for the Holy Places of Jerusalem. This idea has been recommended by every serious body which has studied the Palestine problem since the Peel Commission Report of 1936; it was the theme of the General Assembly's Partition Resolution of 1947;⁹² and, it was the essence of the peace plan Israel proposed in 1967 and will always be willing to accept. In such a setting, the exact political boundary between the Jordan and Israel, and the issues surrounding the legality of the Arab and the Jewish states of Palestine should become easier to settle. While Israel might have to give up part of its right under the Mandate to make "close settlement" in the West Bank in order to achieve such a result, a Benelux Solution could achieve two goals more important to Israel: to make peace, and to maintain Israel's existence as a predominantly Jewish state.

90. *Id.* at 43.

91. G.A. Res. 181, U.N. Doc. A/519, at 131 (1947).

92. *Id.* See also Glenn Frankel, *Israelis Say Nothing New in Latest PLO Initiatives*, WASH. POST, Nov. 14, 1988, at A16 (discussing General Assembly Resolution 181 which proposed an economic union in 1947).