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Is International Law Relevant?

It is, I believe, legitimate to ask whether there is a substantive role for international law in international relations. It is axiomatic that States act out of their own self–interest, dictated by political, military and economic considerations. Furthermore, international law lacks the elements one normally associates with a legal system. There is no international sovereign; there is no international legislative body; there is, in most cases, no compulsory adjudication and no enforcement body. There are scholars who argue that international law plays only a minor role in international relations, if at all. Werner Levy argues that international law is relevant 'in justification, not initiation of a foreign policy', adding that

> references to law are virtually absent in papers of statesmen responsible for the shaping of foreign policy, whether they be official correspondence with diplomats abroad, intra-office notes and messages, or personal writings in diaries and memoirs. International law usually occurs as an afterthought, when for a number of reasons the formulation of a policy decision in legal language appears desirable before its public appearance.[1]

The late American political columnist Krauthammer echoed the same theme, writing that 'turning foreign policy over to the lawyers is the laziest, the most brainless way to make policy, the law – international law – is an ass. It has nothing to offer. Foreign policy is best made without it. Go in, do what you have to do and *then* call in the lawyer to find some retroactive justification for what you've done'.[2] Textbooks on international relations and diplomacy often ignore international law completely; Kissinger's seminal book on diplomacy does not have a single entry on international law.[3] In the United States, we also may be seeing a revisionist reaction to the role of international law. For example, the

[1] W. Levi, *Law and Politics in the International Society* (1976), p. 187.
[2] C. Krauthammer, 'The Curse of Legalism', *The New Republic* 201 (1989), p. 44.
[3] Henry Kissinger, *Diplomacy* (1994).

nuclear understanding with Iran was termed a 'Joint Comprehensive Plan of Action' and not a treaty, although the prime motive in using such a definition presumably was to avoid the need for congressional approval.

Despite the predominance of realpolitik in policy discussions, it remains the case, as Henkin put it, that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[4] The cynical comments of Levy and Krauthammer may reflect the outlook of the realist school of international relations, but the reality of diplomatic life shows that international law is an integral part of the nitty-gritty of international relations. In most negotiations, there is a desire to garner third-party support for the positions advanced by the parties involved in the negotiations. Even where the third party may have political sympathy for the position of one of the sides, it is important that such third party also be assured that it is supporting a position that is legally correct. Neutral and disinterested States who follow the negotiations will find it easier to support a claim they consider legal; conversely, they will be reluctant, at least openly, to support a claim they consider illegal. Bowie writes, as regards the 1956 Suez crisis, 'by resting its access to the Straits of Tiran on the general right under international law, Israel enabled the U.S. to commit itself to vindicating that right before Israel's withdrawal without seeming to undercut Hammarskjold or the United Nations'.[5] An act or claim that is seen to be in violation of international law will seldom obtain international support. Establishing a position based on claimed rights under international law is important not only vis-à-vis third parties but as a basis for negotiations with the opposite party. Particularly in territorial disputes, it is normally only possible to negotiate a compromise after a party has established a claim of right. Another factor lending to the relevance of international law is that the aim of all international negotiations is, normally, to reach an agreement that obligates the negotiators – in other words, to reach a binding international agreement or treaty. Henkin writes 'all international relations and all foreign policies depend in particular on a legal instrument – the international agreement – and on a legal principle – that agreements must be

[4] L. Henkin, *How Nations Behave* (2nd ed. 1979), p. 47.

[5] R. R. Bowie, *Suez 1956 – International Crises and the Role of Law* (1974), p. 110. Robert Bowie was founder of Harvard University's Centre for International Affairs and former US State Department director of Policy Planning Staff.

carried out'.[6] The criteria whereby it will be judged whether an agreement reached is binding on the parties will be the criteria of international law. International law lays down substantive conditions for classifying a document as a treaty. The language of agreements is the language of international law, and international lawyers will interpret the terms of any agreement using the tools of international law.

Although precedents are not binding in international law,[7] they play a very useful role in international negotiations or in the form of State practice, when one side makes a claim that a particular precedent reflects customary international law. Following precedents also means following a well-trodden path, which has already been subjected to public and legal scrutiny. Governments, political leaders and negotiators are inherently cautious. Every young bureaucrat is, with good reason, instructed to abide by the old platitudes of 'don't reinvent the wheel', and 'if it ain't broke don't fix it'. If a legal formula has been used and accepted by States, preferably, the States involved in the negotiations, then it should not be changed.

1.1 Is International Law Relevant to the Arab-Israeli Conflict?

It could be argued that cynicism towards the importance of international law is all the more relevant in relation to the Arab-Israeli conflict where many of the States involved are totalitarian regimes that have little regard for legal norms. In the armed conflicts in Syria and Iraq, realpolitik, not law, has dominated discussions on how to deal with the chaos. Violent non-State armed groups have been active participants in the fighting in Iraq and Syria. Clearly, ISIS, Al Qaida, Hamas and Hezbollah have paid no attention to the humanitarian law applicable in armed conflict. Syria, a State member of the United Nations, has, under the leadership of Bashar al-Assad, flaunted all the basic norms of the laws of war. Even the Russian air force has apparently not been particular in applying the rules of distinction to its aerial attacks. On its borders, Israel faces Hezbollah in the North and Hamas in Gaza, two organisations classified internationally as terrorist organisations. Said postulated that, in the Middle East, international law was a tool of imperialism that served only

[6] Henkin, *How Nations Behave*, p. 319.

[7] Lord Denning stated that the 'international law knows no rule of *stare decisis*'. *Trendtex Trading Corporation* v. *Central Bank of Nigeria*, [1977] QB at 554.

to turn the Orient 'from alien into colonial space'.[8] Allain writes that international law in the Middle East was 'simply another political tool of statecraft used by the strong against the weak'.[9] Mazzawi writes, about the Arab-Israeli conflict, 'very many aspects of this problem, if not all, had a distinctly legal character. But law has not had a role in this dispute, and neither the United Nations nor the League of Nations before it have seen fit to resort to legal principles in their quest for a solution to the problem'.[10] Kurtzer's book on negotiating Arab-Israeli peace recommends that a future mediator's team should include 'legal expertise', however, the writers of the book did not include a lawyer among the many persons interviewed.[11]

Nevertheless, international law has played a role in the Arab-Israeli conflict. The Crown Prince of Jordan writes, perhaps unduly optimistically, 'analysis of those legal issues which are considered central to the current Arab-Israeli dispute can play a useful role in any attempt to move towards reconciliation of the disputants, the preparation of a dialogue between them and other interested parties and preparing the foundations of the proposals for future peaceful relations in the area'.[12]

A particularly salient factor in establishing the relevance of international law in the ongoing Arab-Israeli dispute has been the search by both parties to establish legitimacy. Fisher writes, correctly I believe, 'legitimacy and lawful authority are key components of political power'.[13] Kattan writes, interestingly, 'international law was pivotal to the development of the Jewish national home',[14] public international law 'was the very vehicle through which the Zionist project was to brought to fruition'.[15]

[8] Edward Said, *Orientalism: Western Conceptions of the Orient* (1995), p. 211.
[9] Jean Allain, 'Orientalism and International Law: The Middle East as the Underclass of the International Legal Order', *Leiden Journal of International Law* 17 (2004), pp. 391–404, 392.
[10] Musa Mazzawi, 'Book Review, Henry Cattan. *Palestine in International Law – The Legal Aspects of the Arab Israeli Conflict* (1973)', *Journal of Palestine Studies* 3, no. 4 (Summer 1974), pp. 141, 143.
[11] Daniel C. Kurtzer and Scott B. Lasensky, *Negotiating Arab-Israeli Peace* (2008), p. 63.
[12] Hassan bin Talal, *Palestinian Self Determination: A Study of the West Bank and Gaza Strip* (1981), p. 21.
[13] R. Fisher, *International Crises and the Role of Law: Points of Choice* (1978), p. 12.
[14] V. Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891–1949* (2009), p. 22.
[15] Ibid., p. 21.

There are also specific historical reasons as to why international law is particularly relevant to the Arab-Israeli conflict. The Allies in the World War I, in their attempts to rearrange the former Ottoman Empire, were, perhaps, the first to introduce international legal elements to the Middle East. In the nineteenth century, the allies might have been able to annex unilaterally the territories of the Ottoman Empire as French or British colonies, but by 1918, this was no longer the case. Thus, we find the Allies negotiating with Turkey the formal renunciation of Turkish territory outside Asia Minor,[16] and the introduction of the Mandate system as a compromise between colonialism and the right of self-determination. Although in 1918 the principle of self-determination was not a legal principle, nevertheless the Allies felt obliged to take it into their consideration. They granted self-determination to all the Arabs in the former Ottoman Empire but, as regards Palestine, they treated it as a special case, delaying the application of self-determination until the displaced Jews could return to their country and eventually become a majority.

World public opinion continues to address the dispute between Israel and the Palestinians in the terminology of international law. Many legal arguments addressed to the other side during negotiations, in conferences or in political speeches are often intended for third parties and for world public opinion. International law has become the lexicon of international legitimacy. This would explain why all sides invoke it. As the lingua franca of the Arab-Israeli conflict, international law is a common language that everyone understands and invokes, usually, to criticise the other side.

Both the Zionist movement and, later, the Palestinian national movement made strenuous efforts to obtain international legitimacy based on international law. Herzl, in his book about the proposed Jewish State, wrote, 'the land which the Society of Jews will have [*sic*] secured by international law'.[17] This search for legitimacy was considered vital in the early years of the Zionist movement as, at the time, it had no territorial jurisdiction and depended on the good will of the Western States and

[16] 'The Treaty of Peace between the Allied Powers and Turkey (Treaty Sèvres), 10 August 1920', AJIL 15 (Supp. 1921) (not ratified), p. 179; 'Treaty of Peace between the Allied Powers and Turkey (Treaty of Lausanne), 24 Jul. 1923', AJIL 18 (Supp. 1924), p. 1.

[17] T. Herzl, *The Jewish State der Judenstaat* (1896), p. 18, translated from the German by S. D'Avigdor, and adapted from the edition published in 1946 by the American Zionist Emergency Council, www.mideastweb.org/jewishstate.pd.

world public opinion. The Zionist movement worked to transfer the political promise of a 'national home in Palestine' contained in the 1917 Balfour Declaration[18] into 'hard' international law. The Zionist movement persuaded the British and French governments to incorporate the text of the Balfour Declaration into the treaty whereby the two powers divided the Middle East between them[19] and later to get the unanimous approval of the Council of the League of Nations for the text to be included in the 1922 Mandate for Palestine.[20] The British 1922 'White Paper' confirmed again that the Jewish People were in Palestine 'as of right and not on the [*sic*] sufferance. That is the reason why it is necessary that the existence of a Jewish National Home in Palestine should be internationally guaranteed, and that it should be formally recognized to rest upon ancient historic connection'.[21]

Since 1948, and particularly since 1967, the Palestinian national movement, regarding itself as the weaker partner in its dispute with Israel, has also sought to buttress its position by reliance on rights that it claims under international law. The Palestinian legal emphasis is largely based on the premise that they were the indigenous population entitled to self-determination and that the Jewish settlers are colonialists. Israel's position is that the creation of the State of Israel was based on the right of self-determination of the Jewish people. The Third World, to a great extent, has voted against Israel at the United Nations where the Palestinian position has been buttressed by a wealth of General Assembly resolutions. The Palestinian contention is that these resolutions reflect the view of the international community as to the legal issues involved. A factor lending relevance to such resolutions is that the League of Nations and later the UN have been deeply involved in the Arab-Israeli conflict and the International Court of Justice has relied upon these various United Nations resolutions.[22] A feature of the Palestinian position is their demand that any future agreement between them and Israel must reflect 'international legitimacy' as expressed in such UN resolutions. Ziad Abu-Amr writes, 'the UN participation [in

[18] Balfour Declaration (1917), http://avalon.law.yale.edu/20th_century/balfourasp.
[19] Resolution of the 1920 San Remo Conference, November 1917, www.cfr.org/Israel/san-remo-resolution/p15248.
[20] 1922 League of Nations Mandate for Palestine, http://avalon.law.yale.edu/20th_century/palmanda.asp.
[21] The 1922 British White Paper on Palestine, http://avalon.law.yale.edu/20th_ century/brwh1922.as.
[22] *See* ICJ Advisory Opinion *Construction of a Wall*, ICJ Reports 2004.

negotiations] is particularly important from the Palestinian point of view because the UN represents international legitimacy'.[23] Palestinian negotiators tend to regard it as vitally important to establish a right based on international law and not to be in a position where they have to negotiate such a right. This approach is reflected in the Palestinian insistence on Israel recognising the 'right of return' of the Palestinian refugees reflected in UNGA Resolution 194,[24] although stating that once the principle is accepted, the actual number of refugees to be returned can be negotiated.[25] The Palestinians hope that such a requirement can help to offset the perceived advantage that Israel has in any bilateral negotiations. The counter Israeli view is that UN General Assembly resolutions do not create international law. The drafters of the UN Charter knowingly refrained from granting the Assembly such power, and UN General Assembly resolutions do not necessarily even reflect existing law. This view is reflected in Weil's statement that 'neither is there any warrant for considering that by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect'.[26] Furthermore, the Israeli view is that parties to an agreement are free together to make their own decisions as to the relations between them, provided there is no violation of a *jus cogens* rule.

One explanation for this attention to international law is that a position that is seen to be in violation of international law will not obtain international support. The lack of such support can have real-life consequences. A salient example of this is the controversy over Israeli settlements in the West Bank, a controversy based nearly exclusively on the interpretation of an Article in one of the 1949 Geneva Conventions.[27] Based on this legal interpretation, Israel's settlement policy has been repeatedly condemned by Israel's allies in Europe and by the UN Security Council.

[23] Ziad Abu-Amr, 'Palestinian-Israeli Negotiations: A Palestinian Perspective' in Steven L. Spiegel, ed. *The Arab-Israeli Search for Peace* (1992), p. 29.

[24] UN Doc. A/RES/194 (III), 11 December 1948.

[25] See O. M. Dajani, 'Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks', Yale J. Int'l L. 32 (2007), p. 61.

[26] P. Weil, 'Towards Relative Normativity in International Law', AJIL 77 (1983), pp. 413, 417.

[27] Art. 49, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) (1949), 75 UNTS 287 (1949).

Terms used in the various agreements made between Israel and her neighbours, such as 'general armistice',[28] 'autonomy',[29] or 'freedom of navigation'[30] carry with them the interpretation and technical meaning of terms of international law. For example, the term 'autonomy' clearly implies non-independence. It is used when a State grants 'a group that differs from the majority. A means by which it can express its distinct identity'.[31] The phrase appears in the Camp David Framework[32] but not in the Oslo accords. The substance of the powers allocated to the Palestinian Authority under the Oslo Accords is very similar to that envisaged in the Camp David Framework. The omission of the term 'autonomy' from the Oslo Agreements was, presumably, to negate any Palestinian apprehension that they were agreeing to be an autonomous area under Israel sovereignty. The Oslo II (Interim Agreement) states, 'Israel shall continue to exercise powers and responsibilities not so transferred [to the Palestinian Authority]'.[33] This seemingly anodyne clause, in fact, could be interpreted as meaning that the West Bank continues to be under Israel military occupation as only some of the powers of the military government were being devolved to the Palestinian Authority.

Another example, the phrase 'equitable utilization of joint water resources', which appears in the Oslo accords,[34] may have seemed to the political negotiators as a banal euphemism for good neighbourly behaviour. The international lawyers involved, however, know that it can be interpreted as a technical term that carries with it the baggage of numerous rules and precedents of the international law relating to water resources.

[28] See, e.g., *Egypt–Israel General Armistice Agreement*, signed in Rhodes on 24 February 1949, www.usip.org/sites/default/files/file/resources/collections/peace_agreements/ie_armistice_1949.pdf.

[29] 'Camp David Accords; September 17, 1978', *Yale Law School Lillian Goldman Library The Avalon Project, Documents in Law, History and Diplomacy*, http://avalon.law.yale.edu/20th_century/campdav.asp ('Camp David Accords').

[30] 'Freedom of Navigation through International Waterways', UNSC Resolution 242, 22 November 1967, UN Doc. S/RES/242 (1967).

[31] R. Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts* (1997), p. 33.

[32] 'Camp David Accords'.

[33] Article I(1) *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1995, Israel Ministry of Foreign Affairs, www.mfa.gov.il/mfa/%20foreignpolicy/peace/guide/pages/the%20israeliPalestinian%20interim%20agreement.aspx.

[34] Annex II, Article 1, 1993 Israel PLO *Declaration of Principles on Interim Self-Government Arrangements*, http://avalon.law.yale.edu/20th_century/isrplo.asp.

The legal analysis of terms has also been applied to examining the text of UN Resolutions. The best-known controversy in this regard is, perhaps, regards UN Resolution 242. The preamble to this Resolution states: 'Emphasising the inadmissibility of the acquisition of territory by war.'[35] One interpretation of this phrase is that Israel 'could not gain any territory as a result of the recent conflict' and consequently had to withdraw from all the territory of the West Bank and Gaza.[36] Julius Stone objects to this interpretation, commenting that 'Arab state-favoured' interpretation 'would end with a rule encouraging aggressors by insuring them in advance against the main risks involved in case of defeat'.[37]

Although precedents are not binding in international law, the Arab-Israeli peace process is replete with the use of precedents. The text of the Egypt–Israel Peace Treaty comprises, to a large extent, cut and paste quotations from the UN Charter, the 1970 Declaration of Principles on Friendly Relations between States[38] and UN Security Council Resolution 242.[39] The language of the Israel–Jordan Peace treaty was taken, nearly verbatim, from the text of the Egypt–Israel Peace Treaty even though both sides were aware that some of the earlier phrasings, such as the dispute settlement clause, had aroused problems of interpretation. The Jordanian position was that if it had worked, albeit imperfectly, for Egypt, then they preferred that to negotiating a new formula.[40] The language of the 1993 Israel–PLO Declaration of Principles[41] closely followed the language of the 1978 Camp David Accords.[42] In each case, it might quite well have been possible to negotiate language that was more appropriate, but it would have extended negotiations considerably. When both sides

[35] Preamble, UN Security Council Resolution 242 concerning the Establishment of Peace in the Middle East, adopted 22 November 1967, UN Doc. S/RES/242 (1967).

[36] J. McHugo, 'Resolution 242: A Legal Reappraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict between Israel and the Palestinians', ICLQ 51 (2002), pp. 851, 865.

[37] Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (1981, 1982), p. 54. The different interpretations of UNSC Resolution 242 are dealt with in Chapter 11.

[38] Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Annex to UNGA. Resolution 2625 XXV (1970).

[39] UN Security Council Resolution 242 concerning the Establishment of Peace in the Middle East, adopted 22 November 1967, UN Doc. S/RES/242 (1967).

[40] D. Reisner, 'Peace on the Jordan', *Justice* 4 (1995), pp. 3, 4.

[41] 1993 Israel PLO *Declaration of Principles on Interim Self-Government Arrangements*, http://avalon.law.yale.edu/20th_century/isrplo.asp.

[42] 'Camp David Accords'.

reported home to their governments, one can assume that they would not have been subject to criticism for agreeing to a text that was taken verbatim from previous agreements and from basic UN documents. For this reason, one will find references to UN Security Council Resolution 242 and quotations from it in every major agreement signed between Israel and the Arabs. Not that Resolution 242 is a panacea but rather because the negotiators were aware that it is a formula that has been accepted by all parties concerned and hence can be quoted or referred to without fear of incurring the wrath of one's home government or parliament. A similar logic is also reflected in the way Palestinian diplomats craft UN resolutions. In order to obtain as much support as possible, they follow language either that has been used in previous UN resolutions or that is aligned with US and European positions.

Finding a legal procedure for administering a crisis can, at times, be as important as the actual outcome of the procedure. It can be an event such as the Madrid Conference, which although only a platform for set speeches, nevertheless, provided the opening for the Arab States and for the Palestinians to commence direct negotiations with Israel. In the Taba dispute between Israel and Egypt, Israel insisted on a process of conciliation and Egypt demanded immediate arbitration. A convoluted legal formula was worked out whereby the arbitration was to commence, then be suspended to enable a conciliation commission to function, and should conciliation fail, arbitration would automatically continue. Both sides claimed a legal victory.[43] When negotiating the Oslo Declaration of Principles with the Palestinians, the question arose as to whether the result would be a legally binding treaty, which would then require registration with the UN. The problem was that only agreements signed by sovereign States, or intergovernmental international organisations, can be registered with the UN, and Israel was not about to acknowledge the PLO as a sovereign State. On the other hand, both Israel and the PLO intended the declaration of principles to be a binding legal instrument. The legal formula found was to have the document attested to, as witnesses, by the leaders of the United States, Russia and the EU and then request the Secretary General of the UN to circulate the accord to all members of the UN. Thus, there was no formal act implying that it was an international agreement but a very effective declaration by the parties that they intended to abide by what they had signed.

[43] See, inter alia, E. Lauterpacht, 'The Taba Case: Some Recollections and Reflections', Isr. L. Rev. 23 (1989), p. 443.

The elements shaping the Arab-Israeli conflict undoubtedly are military, political, religious and economic interests. International law cannot, in and of itself, solve disputes as to these issues nor can it provide security nor produce friendships between nations. Nevertheless, international law can make and has made a serious contribution. Perhaps the major contribution of international law is that it enables States to reach agreements that delimit boundaries. Good fences make for good neighbours. The permanent nature of boundaries is one of the major contributions of international law to the international community. The automatic adoption by Egypt, Jordan and Israel of the old Mandatory boundaries as the boundaries between them was a clear manifestation of this principle. The Mandatory boundary with Egypt was, furthermore, adopted from the Ottoman era boundary delimited in 1906. Israel and the Palestinians eventually will also have to reach an agreement on a boundary.

1.2 Concluding Remarks

International law is relevant to the Arab-Israeli conflict; it has played an important role and will continue to do so. All parties desire that their positions be seen to be legally legitimate, such legitimacy is a political asset as regards both the other party and vis-à-vis third parties. The international language of international relations is, largely, the language of international law, this is particularly true as regards the United Nations and international organisations. Israel and the Palestinians are engaged in an intensive campaign to persuade world public opinion of the legitimacy of their respective cases. Legal precedents, although not binding, play a highly useful role in assisting the parties to reach agreement. The same is true for dispute settlement mechanisms of international law. Finally, the object of negotiations is to reach agreement. The principle that international agreements are binding is a principle of international law and lawyers, based on international law, will examine their validity and context.

Although international law undoubtedly has a role to play in the Arab-Israeli conflict, nevertheless one should always caution oneself with Brierly's aphorism 'the law of nations is neither a chimera nor a panacea'.[44]

[44] J. L. Brierly, 'Preface to the First Edition', Andrew Clapham, ed. *Brierly's Law of Nations* (7th ed. 2012–2014), p. v.