

# TRANSFER OF ARMS TO COMBATANTS AND THE CONTROL OF FORCE: THE ARAB-ISRAELI CASE

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The arms race by parties to the Arab-Israeli conflict has reached staggering proportions. The question naturally arises as to the role of international law and organization in regulating the supply of arms to governments and guerrillas in that conflict situation. On the one hand, the scope and danger of the arms race is evident. Even before the 1967 war, Middle East governments had received approximately ten times as much military hardware as Latin American governments,<sup>1</sup> despite the fact that Latin American politics are also prone to violence. And while there is controversy over the value of military hardware supplied to the Middle Eastern region since the 1967 war, it can be easily demonstrated that the arms race has escalated in almost every dimension.<sup>2</sup> On the other hand, international law and organization have demonstrated no great capacity for regulating arms transfer throughout the international political system in the period since 1945. Thus the question is posed whether the dangers of the Arab-Israeli conflict in the 1970's might lead to a breakthrough in the regulation of arms to combatants. This basic inquiry necessitates examination of the fundamental obstacles to arms control and a determination of whether these obstacles preclude any form of arms control and any positive role for international law and organization.

## PRIMARY OBSTACLE: THE NATURE OF THE POLITICAL SYSTEM

The fundamental obstacle to arms control of any legal or institutionalized nature is the fact that the Arab-Israeli conflict constitutes a revolutionary zone in the Middle East political system. Where there is little limitation on ends and means and where there is little moderation of objectives and tactics, there will be little relevancy for a formal restraint

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<sup>1</sup>See J. HUREWITZ, *MIDDLE EAST POLITICS: THE MILITARY DIMENSION* 3-6 (1969); cf. NADAV SAFRAN, *Appendix C* in *FROM WAR TO WAR: THE ARAB-ISRAELI CONFRONTATION 1948-1967*, (1967).

<sup>2</sup>See generally J. HUREWITZ, *supra* note 1; cf. *Christian Science Monitor*, Apr. 1, 1971, at 19, col. 1. One view estimated Soviet arms to the U.A.R. in 1970 to be worth \$2,500 million. For U.S. views of Soviet shipments of arms for 1967-1969, see *N.Y. Times*, Jan. 25, 1970, § E, at 4, col. 1.

system.<sup>3</sup> It is unfortunate but true that in the Arab-Israeli conflict there has been slight agreement on the nature of regional order desired; thus there has been slight obligation toward restraining norms.<sup>4</sup>

A number of actors in Middle East politics can be termed revolutionary. The Soviet Union, the main supplier of arms to those advocating revolutionary change, must be regarded as a regional actor for purposes of this analysis. And Soviet foreign policy toward the Arab-Israeli conflict and the Middle East in general is one of "controlled revolution." Indeed, the Middle East is now the main area where the Soviet Union hopes to change the previous status quo that was favorable to the West.<sup>5</sup> The Soviets have long regarded arms transfer as a useful instrument of influence-building in the Third World of Afro-Asia,<sup>6</sup> and the Arab-Israeli zone of the Middle East is of primary importance to the Soviets in that general quest for influence. It is probable that the Soviets have yet to attain military parity with the West in either the Mediterranean or Indian Ocean areas.<sup>7</sup> And it is probable that Soviet clients have yet to attain bilateral parity with Israel.<sup>8</sup> Thus there is little reason to expect the Soviet Union to be content with the status quo and seek formal controls on arms shipments to the region. Soviet public endorsement of arms control in the region has not been followed up by serious negotiation in private with the United States.<sup>9</sup>

There are factors in the Arab-Israeli conflict that lead the Soviets into

<sup>3</sup>For an excellent treatment of this subject see Hoffmann, *International Systems and International Law*, in THE INTERNATIONAL SYSTEM 205 (1961). For purposes of present analysis, revolution is defined as the quest for extensive, imminent, and frequently violent change.

<sup>4</sup>See generally Falk, *Respect for International Law and Confidence in Disarmament*, in 4 THE STRATEGY OF WORLD ORDER: DISARMAMENT AND ECONOMIC DEVELOPMENT 354 (1966).

<sup>5</sup>It has become dangerous for the U.S.S.R. to challenge the European status quo, and in Asia the Soviets cannot be sure that alteration of the status quo would not work to Chinese advantage. But in the Middle East, Western commitments are ill-defined, and the Chinese influence is weak. The region is a natural gateway to East Africa and the Indian Ocean area.

<sup>6</sup>See W. JOSHUA & S. GIBERT, *ARMS FOR THE THIRD WORLD: SOVIET MILITARY AID DIPLOMACY* (1969).

<sup>7</sup>See Martin, *The Changing Military Balance*, in SOVIET-AMERICAN RIVALRY IN THE MIDDLE EAST 61 (J. Hurewitz ed. 1969); Christian Science Monitor, Nov. 18, 1970, at 13, col. 1.

<sup>8</sup>Operational parity must necessarily be subjective. Thus it is problematical whether or not Israel would now be deterred from the type of preemptive strike it used in 1967 because of Russian SAM's and Russian pilots in the U.A.R. It is probable that such a strike would now be more costly; in that sense the U.A.R. may be approaching parity. Remaining is the problem of defining what would be unacceptable levels of cost for Israel.

<sup>9</sup>A 1967 Soviet draft resolution in the Security Council containing reference to arms control seemed to be a guise to get Western support for the draft. See A. LALL, *THE UN AND THE MIDDLE EAST CRISIS 1967*, at 256-57 (1968).

A Kosygin statement calling for a halt to the regional arms race was couched in abrasive terms hardly conducive to serious negotiation on the subject. See N.Y. Times, July 2, 1968, at 2, col. 3.

a prudent challenge to the West rather than a reckless one. There is the danger of some form of direct confrontation with the United States, which has been perceived as being to neither superpower's advantage. There is the danger that the Chinese will successfully penetrate the region themselves and that the Soviets may need to cooperate in some way with the West to check the Chinese. There is the danger that the various Arab groups will "waste" Soviet military investments through premature actions, thus leading to political repercussions for Soviet leaders in the Kremlin. And it could be argued that out of these factors will come a Soviet desire for restraining the arms traffic on a mutually agreed basis. It is suggested here, however, that still other factors in the political system make this an unlikely contingency.

The Palestinian movement to regain Arab control of Palestine is one of these factors. Apparently Soviet leaders have perceived an ideological need to give official support to Palestinian claims of anti-imperialism and pro-national self-determination.<sup>10</sup> And while the Soviets have been less than consistent in their position vis-à-vis the Palestinians, the Soviets have supplied arms to the Palestinian guerrillas indirectly, *i.e.*, through various Arab governments.<sup>11</sup> The Soviets have tried to restrain the guerrillas at various times and have "re-interpreted" *fedayeen* claims because of Palestinian rashness that conflicts with some Soviet objectives.<sup>12</sup> But in spite of this conflict of interest the Soviet Union has continued to supply the guerrillas with conventional small arms. It has perceived that keeping the Palestinian question before both Middle East elites and masses helps to keep the area anti-Western, in that Zionism is pictured as a front for Western imperialism. "Controlled tension," therefore, has been seen by the Soviets as facilitating their penetration of the Middle East.<sup>13</sup>

Like the Palestinians, the "progressive" Arab states that are military clients of the Soviet Union have a revolutionary input into the political system that reinforces the basic Soviet tendency to challenge the previous order. Syria, Iraq, Algeria, and Libya give public endorsement to

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<sup>10</sup>See, *e.g.*, Dmitriev, *The Arab World and Israel's Aggression*, 9 INT'L AFFAIRS 20, 23 (Sept. 1970). "Palestinian guerrilla activity in the occupied area and other forms of resistance to the invaders are undoubtedly justified." *Id.* at 23.

<sup>11</sup>For a public commentary on arms to the Palestinians, see *Christian Science Monitor*, July 13, 1970, at 5, col. 4.

<sup>12</sup>The Soviets seem aware that some guerrilla actions—by encouraging Israel to maintain control of the territories for security reasons—thwart Soviet efforts to achieve Israeli withdrawal. In addition to Dmitriev, *supra* note 10, also see Kruglov, *The Palestine Liberation Movement*, N.Y. Times, Sept. 17, 1969, at 13, col. 1.

<sup>13</sup>See generally Campbell, *The Soviet Union and the Middle East*, "In the General Direction of the Persian Gulf" Part II, 29 RUSSIAN REV. 247 (1970).

the revolutionary claims of the Palestinians, thus helping to keep alive the ideology of anti-Zionism. Moreover, these states provide direct support to the guerrillas in many ways. Yet, these states at times fail to follow the directives of Soviet policy and prove exceedingly resistant to Soviet pressures.<sup>14</sup> Thus the Soviets find themselves providing arms aid to all of these but Libya, plus non-military aid; but these sizable investments have not led to extensive influence for the U.S.S.R. on a number of issues.<sup>15</sup> Yet, most governments find it difficult to cut commitments; and aid, once undertaken, is difficult to end. The Soviet Union is no exception in its dealings with the "progressives."<sup>16</sup> Having established itself as "big brother" to Arab causes, the Soviet Union finds it difficult to extract itself from undesirable ventures for fear of losing face and friends.<sup>17</sup>

Related to these considerations of why the Arab-Israeli conflict has helped transform Middle East politics into a revolutionary system is the pertinent fact that the Soviets are not the only arms supplier in the area, and they may supply arms in part to compete with other backers of revolutionary causes.<sup>18</sup> China, since the end of its cultural revolution, has shown renewed interest in the Middle East and has supplied the Palestinians with small arms via Iraq.<sup>19</sup> This Chinese role, especially in the context of the more general Sino-Soviet conflict, makes it difficult for the Soviet Union to enter arms control agreements. The Soviets are already being charged with revisionism of Marxism-Leninism and collusion with the West. Thus they must worry about "keeping up with the Maos" and maintaining a revolutionary appearance among those who

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<sup>14</sup>Unsuccessful Soviet efforts to get Syrians to adopt less radical views, such as indorsement of Security Council Resolution S/242 (1967), can be followed in N.Y. Times, May 13, 1969, at 13, col. 1; July 5, 1969, at 1, col. 7; and Aug. 13, 1970, at 6, col. 4.

<sup>15</sup>See generally W. LAQUEUR, *THE STRUGGLE FOR THE MIDDLE EAST* 184 *passim* (1969).

<sup>16</sup>Hence, should the U.S.S.R. desire to extract itself from support of certain Arab policies, it would face similar problems to those confronting the U.S. as it tries to extract itself from extensive support of Saigon.

<sup>17</sup>An important complication in this situation is that some perhaps less revolutionary Arab parties, such as the U.A.R., may request arms from the Soviet Union for what appears to be legitimate defense needs, thus bringing pressure to bear on the supplier to provide arms for ostensibly nonrevolutionary purposes. This analysis would also relate to the Jordanian requests to the U.S. and U.K. On the importance of the problem of distinguishing legitimate security interests for arms control, see Kemp, *Arms Traffic and Third World Conflicts*, [1970] INT'L CONCILIATION, No. 577, 7, 70 *passim*. In general, Third World governments have shown little interest in arms control on controversial weapons. See generally *Issues Before the 25th General Assembly: Disarmament and Arms Control*, [1970] INT'L CONCILIATION, No. 579, at 31.

<sup>18</sup>For a discussion of the problem of arms control regulation when there are many suppliers of arms, see D. EDWARDS, *ARMS CONTROL IN INTERNATIONAL POLITICS* (1969).

<sup>19</sup>See Christian Science Monitor, July 13, 1970, at 5, col. 5.

espouse a revolutionary ideology.<sup>20</sup> Then too, France has not been content with the status quo in the Middle East under both the De Gaulle and Pompidou governments. While the thrust of French policy has been directed more towards undermining United States influence than towards support of regional revolutionary elements per se, French interest in supplying arms to Libya, Tunisia, and others complicates an already complicated situation.<sup>21</sup> The French role is basically analogous to the Chinese position in that the readiness of these secondary suppliers to provide arms reduces the incentive of the primary suppliers to halt or reduce their arms flow, for the recipients could obtain the arms elsewhere.<sup>22</sup>

Thus the Arab-Israeli zone of Middle East politics is indeed revolutionary, with revolutionary elements in the region requesting arms and with suppliers from outside the region willing to support violent challengers to the present order.<sup>23</sup> In this context, the prospects for formal, institutionalized restraints on arms transfer are not encouraging.

#### SECONDARY OBSTACLE: THE NATURE OF THE LEGAL ORDER

Law is generally a dependent variable, and the nature of the international legal order is derivative from the nature of international politics.<sup>24</sup> Still, one can identify certain characteristics of the legal order, even if they exist as dependent rather than independent variables. The Arab-Israeli conflict and the question of arms control brings a number of these characteristics into sharp relief.

Some law, especially the law of the United Nations Charter, is so

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<sup>20</sup>For a thorough treatment of this consideration in Soviet foreign policies, see A. ULAM, *THE UNFINISHED REVOLUTION* (1964).

<sup>21</sup>For a recent review of French global arms policies, see *Christian Science Monitor*, Jan. 19, 1971, at 9, col. 1.

<sup>22</sup>Arms flow to the Middle East is further complicated by private transactions. Although the number of private sellers has decreased since World War II, state purchase of arms from private dealers is not inconsequential in the area, as demonstrated by J. HUREWITZ, *supra* note 1, at 438-39. Non-state purchases are also important. The Palestinian groups have been able to make private purchases through wealthy Palestinians in Kuwait and Saudi Arabia.

<sup>23</sup>It is to be stressed that, while the overall context is revolutionary, arms needs for non-revolutionary, security interests contribute to the arms race. Those actors who wish to achieve a balance of power to prevent major violence may, and do, view their arms acquisition as "legitimate" and acquisition by their competitors as provocative. This, of course, is how the United States and its clients view the situation. But it is conceivable that the U.S.S.R. might view the situation in precisely the same terms: An effort to achieve U.A.R. parity with Israel could be seen as pursuit of a balance of power, with U.S. arms seen as destabilizing. *See* note 17 *supra*.

<sup>24</sup>While this point of view is shared by a number of schools of legal thought, it receives its strongest support from the sociological school currently "chaired" by Myres S. McDougal. *See* McDougal, *Some Basic Theoretical Concepts about International Law: A Policy Oriented Framework of Inquiry*, 4 J. CONFLICT RESOLUTION 337 (1960).

general and ill-defined that the legal order fails to provide stable expectations as to what is impermissible behavior. Perhaps the major deficiency in the current legal order is the failure to illuminate clearly what is illegal force and what constitutes aggression.<sup>25</sup> Secondly, because the international legal order is basically horizontal where authority is decentralized among co-equal decision-makers, these authoritative decision-makers are not likely to proceed beyond the adversary stage in those conflicts where state security is perceived to be involved.<sup>26</sup> And thirdly, nonauthoritative third-party review of claims is necessarily so complex that it is unrealistic to expect an immediate consensus to emerge in support of a given interpretation.<sup>27</sup> Quasi-authoritative review by such third-parties as the General Assembly or Security Council acting under Chapter Six of the Charter suffers from the same problem, compounded by the nonlegal preconceptions that state representatives bring to these bodies. All of these characteristics lead to the conclusion that there is not likely to be an effective legal judgment that would lead to any sort of "injunction" against arms shipments to a given party to the Arab-Israeli conflict.

The lack of consensus as to what constitutes impermissible force is easily observable in claims related to the origin of the 1967 Arab-Israeli war. It is perhaps generally accepted in the West that the United Arab Republic was aggressive in mobilizing and deploying troops in the Sinai, making bellicose statements, ordering the withdrawal of UN troops, and blockading the Gulf of Aqaba to Israeli shipping. Particularly in the light of United States arguments at the time of the Cuban missile crisis that aggression can occur without armed attack,<sup>28</sup> this Western view would seem to be the correct interpretation. A counterclaim, however, has increasing validity as more facts come to light. While there is no doubt that provocative statements and actions were undertaken by the United Arab Republic which could conceivably be termed aggress-

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<sup>25</sup>It is not necessarily true that international law is any more general than domestic law. The meaning of "force" and "aggression" is no more or less clear than the meaning of "interstate commerce," "pursuit of happiness" or "equal protection of the laws" on a prima facie basis. See Fried, *How Efficient is International Law?*, in *THE RELEVANCE OF INTERNATIONAL LAW* 93 (1968).

<sup>26</sup>For a conception of International law in terms of an adversary process see Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 133 (1968).

<sup>27</sup>This is obviously the case with nonauthoritative review of the U.S. role in Vietnam. See, e.g., 1 & 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* (R. Falk ed. 1968-1969).

<sup>28</sup>For a critical overview of legal arguments made during that crisis, see Gerberding, *International Law and the Cuban Missile Crisis*, in *INTERNATIONAL LAW AND POLITICAL CRISIS* 181 (1968).

sion through a nonlegalistic process of legal reasoning,<sup>29</sup> it is not certain that Israel was free from legitimate charges of aggressive behavior. At the time of the Israeli first strike against the air forces of the U.A.R. and Syria, the U.A.R. was engaged in negotiation with the United States to avoid violence, and there was some probability that the crisis could be resolved without coercion. Israel was informed of the impending visit of an Egyptian official to Washington and, according to one source, had agreed to await the outcome of that visit before taking any decisive action.<sup>30</sup> In this context, the evaluation of Israel's claim of the permissibility of a preemptive first strike as a legitimate act of self-defense becomes at least more complex and perhaps more dubious, since the strike may have occurred at a time of decreasing probability of violence. It is certainly more difficult to argue that arms should be denied to the U.A.R. because it has no legitimate defense needs at this point or that it wishes the arms only for aggressive purposes.<sup>31</sup>

The other problematical characteristics of the legal order already identified—its horizontal nature and lack of a third-party consensus—are best treated in conjunction and can be examined by inquiry into the merits of Palestinian claims to employ violence.<sup>32</sup> The growth of Palestinian nationalism and guerrilla organizations has been marked since 1965-1967.<sup>33</sup> While no one group or ideological position is fully representative of the Palestinian movement, at least three basic claims can be ascertained when various statements and doctrines are converted to legal arguments. The first claim is that there is a right to employ

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<sup>29</sup>See the discussion of aggression in M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 170-71 (1961).

<sup>30</sup>M. COPELAND, *THE GAME OF NATIONS* 276-77 (1969); cf. *Christian Science Monitor*, Oct. 3, 1970, at 1, col. 1. See also W. LAQUEUR, *THE ROAD TO WAR* (1969); Yost, *The Arab-Israeli War: How It Began*, 46 *FOREIGN AFFAIRS* 305, 317-18 (1967-68).

<sup>31</sup>This treatment of the immediate origin of the 1967 war is intentionally limited for purposes of illustration. A full treatment of the question of aggression in the Arab-Israeli conflict is infinitely complex, given non-Western perspective on the subject. A number of parties view the question in extended historical perspective, arguing that Zionist capture of much of Palestine constituted initial aggression and that violence is now permitted as self-defense against that continuing aggression. Some Western legal scholars have accepted that argument within certain time spans. See, e.g., Q. WRIGHT, *THE MIDDLE EAST: PROSPECTS FOR PEACE* 21-22 (I. Shapiro ed. 1969).

<sup>32</sup>Identification and evaluation of Palestinian claims to use violence are immensely complex. The presentation here is drawn from a longer study, *The Palestinians and the Arab States*, by J.L. Taulbee and D.P. Forsythe. The paper, which was presented at the 1971 National Convention of the International Studies Association, is forthcoming in *ETHNICITY AND NATION-BUILDING: LOCAL AND INTERNATIONAL PERSPECTIVES* (Bell & Freeman eds. 1972).

<sup>33</sup>See Harkabi, *Fedayeen Action and Arab Strategy*, *Adelphi Papers* No. 53 (1968); Hudson, *The Palestinian Arab Resistance Movement: Its Significance in the Middle East Crisis*, 29 *MIDDLE EAST J.* 291 (1969); Sharabi, *Palestine Guerrillas*, in *SUPPLEMENTARY PAPERS* (Georgetown Center for Strategic and International Studies 1970).

violence to "liberate" Palestine in the "just war" of national self-determination and anti-imperialism. The second is the right to coerce Israel into accepting the principle of refugee choice regarding repatriation or compensation. The third is the right to use violence to resist illegal Israeli occupation in Arab territory since the 1967 war.

It is intellectually possible to make judgments about these competing claims by invoking international legal principles and modifying them to fit the particulars of the Arab-Israeli conflict. For example, the following line of analysis will reject the first two claims, but accept the third with modifications. Logically, arms could be denied for the first two causes, but not for the third.

The claim to use violence for Palestinian national self-determination cannot be accepted by any legal system that values order. Israel has achieved legitimacy through effective control of territory since 1948; this control has been collectively approved by UN membership and has been widely approved through bilateral recognition.<sup>34</sup> Moreover, the idea of self-determination, while no doubt of wide acceptance, is so qualified in application that its legal status has always been clouded.<sup>35</sup> Further, the Security Council has rarely dealt with Israel as a colonial state as it has with South Africa, Rhodesia, and Portugal. Still further, acceptance of Security Council Resolution 242 of November 22, 1967,<sup>36</sup> by almost all states, including the Soviet Union, the United Arab Republic, and Jordan confirms the legitimacy of Israel.

The claim to use violence as a sanction to enforce the right of refugee choice between repatriation and compensation is more complex. One area of controversy concerns the status of General Assembly Resolution 194<sup>37</sup> and its paragraph eleven, which approved the right of repatriation for refugees from the 1948 war, or of resettlement with compensation, provided those opting for repatriation desired to live in peace. Like other Assembly resolutions passed repeatedly by large majorities including the major states, General Assembly Resolution 194 is now argued by some to constitute an expression of customary international law which is legally binding.<sup>38</sup> On the other hand, Israel has long argued,

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<sup>34</sup>For a complete explanation of this position, see WRIGHT, *supra* note 31, at 10-11.

<sup>35</sup>Even those governments that support the principles of self-determination against white, minority regimes limit the application of the principles in other situations. For a general discussion, see Emerson, *The New Higher Law of Anti-Colonialism*, in *THE RELEVANCE OF INTERNATIONAL LAW* 152 (1968). The recent conventions on political and cultural rights, adopted by the General Assembly, both affirm the right of self-determination, but definitions and ratifications are lacking.

<sup>36</sup>22 U.N. SCOR, 1382d meeting 8 (1967).

<sup>37</sup>G.A. Res. 194, U.N. Doc. A/810 at 21 (1948).

<sup>38</sup>The following sources provide useful discussion on the status of Assembly resolutions. O.



*inter alia*, that the refugees are hostile to the state of Israel and that repatriation is unacceptable for security reasons—which is permitted by the terms of the Resolution.<sup>39</sup> The failure of the Arab parties to define clearly their intentions with regard to the future of the refugee problem, coupled with the fact that large-scale and rapid repatriation could logically lead to a challenge to the state of Israel, gives basis to the Israeli position, once the legitimacy of Israel is accepted as an imperative for regional order. This reasoning, however, does not lead to permission for rejection of the right of refugee choice per se. Zionism does bear some direct responsibility for the departure of some Arab refugees.<sup>40</sup> Moreover, one plan for implementation of refugee preference under General Assembly Resolution 194 provided Israel with a veto right over any refugee deemed potentially subversive by Israel, in a limited and gradual process of mutual repatriation and resettlement.<sup>41</sup> In the last analysis, General Assembly Resolution 194 would seem a reasonable framework for settlement of the refugee problem, with modifications.<sup>42</sup> But no claim to unilateral enforcement of rights under General Assembly Resolution 194 can be entertained until Arab parties cease to use refugee repatriation as a weapon against the security of Israel. This is not only impermissible under the terms of the Resolution but also constitutes an unreasonable demand on the state of Israel. International legal guidelines can only be effective on the basis of mutual reciprocity. When Arab parties demonstrate clearly a recognition of the right of Israel to security, then Israel has a reciprocal obligation to counteract the hardships which its existence created. Moreover, no order of relationships will prove stable if principles of equity are ignored. Israel cannot achieve legal endorsement of its claim to a rightful place in the Middle East on

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ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966); J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969); R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); Lande, *The Effect of Resolutions of the United Nations General Assembly*, 19 WORLD POLITICS 83-105 (1966); White, *A Framework for Analyzing International Law-in-Action: A Preliminary Proposal*, 13 INT'L STUDIES Q. 46 (1969).

<sup>39</sup>Israel also claims that G.A. Res. 194 is not binding and that Israel does not have responsibility for the creation of the refugee problem. For a new overview of the refugee situation see D. FORSYTHE, UNITED NATIONS PEACEKEEPING: THE CCP AND OTHER SUBSIDIARY ORGANS, (forthcoming); Forsythe, *UNRWA, The Palestine Refugees and World Politics: 1949-1969*, 25 INT'L ORGANIZATION 26 (1971).

<sup>40</sup>See G. Stevens, *Arab Refugees: 1948-1952*, 6 MIDDLE EAST J. 281-86 (1952). See also J. DAVIS, THE EVASIVE PEACE 53-60 (1968).

<sup>41</sup>For further discussion on this point, see D. FORSYTHE, *supra* note 39, and Johnson, *Arab vs. Israeli: A Persistent Challenge to Americans*, 18 MIDDLE EAST J. 1 (1964).

<sup>42</sup>Nothing in G.A. Res. 194 would preclude resettlement from leading to the creation of an Arab state of Palestine on the West Bank should Jordan agree to that contingency.

the basis of power politics alone, and only attention to the status of the Palestine refugees will bring that formal endorsement from the Arab world.

Finally, the claim to use violence to resist illegal Israeli occupation of territory since 1967 must be evaluated in terms of two competing principles. The first is the clear norm in international law that acquisition of territory by force and conquest does not grant title.<sup>43</sup> The competing principle is that occupation is legal pending conclusion of a treaty terminating the state of war.<sup>44</sup> The question of when, if at all, Israeli occupation becomes illegal rather than legal centers on whether or not Israeli claims in the bargaining leading toward a settlement are: (a) accepted by Arab parties to the treaty, or (b) compatible with international law should a treaty not be forthcoming. There is, in law, no obligation for Arab parties to accept by treaty a situation that would otherwise be illegal. Further, there is no legal claim that Israel can make with validity to support its presence in certain occupied territories, once the uncontested owner of the territory has accepted the legitimacy of Israel and renounced belligerency toward the Zionist state. Thus Israel has no claim to any part of Sinai, including Sharm-el-Sheik, since U.A.R. acceptance of Security Council Resolution 242<sup>45</sup> and offer of treaty; and it is difficult to see why any conception of the legal order should preclude violent resistance to Israeli occupation, in that area. Questions relating to the future of the Golan Heights would seem similar to Sinai, especially in the light of increased facts about the Syrian-Israeli conflict in that area—*viz.*, Israeli take-over of contested land for farming as a precursor of Syrian shelling from the Heights.<sup>46</sup> However, Syrian rejection of Security Council Resolution 242 must be taken into account. Questions pertaining to the West Bank and East Jerusalem are of a different nature in that Jordan's claim to these areas was contested in the pre-1967 period in much of the Arab world. Thus with regard to these latter areas there would seem to be room for *de novo* reasoning, within the confines of certain legal principles.<sup>47</sup>

It is suggested here that the above, all-too-brief outline of one line of legal reasoning about Palestinian claims to use violence demonstrates

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<sup>43</sup>An excellent treatment of this proposition is in G. VON GLAHN, *LAW AMONG NATIONS* 260-64 (1964).

<sup>44</sup>*E.g., id.*

<sup>45</sup>*Supra* note 36.

<sup>46</sup>There is little literature on this subject. It is partially treated in an analysis of U.N. supervision of armistice lines in the Middle East in D. BROOK, *PREFACE TO PEACE* 85-113 (1964).

<sup>47</sup>This point is developed further in Taulbee & Forsythe, *The Palestinians and the Arab States*, *supra* note 32.

the way in which international law can function to provide a framework of analysis for what is a reasonable resolution of competing claims. But it is also suggested here that because the very existence of both Zionism and Palestinian nationalism is considered to be at stake, neither of these primary parties will consent to move beyond the adversary stage of making self-serving claims, to the adjudicatory stage of impartial, authoritative third-party review. Moreover, because the Palestinian movement has become intertwined with the collective pride and identity of various Arab ethnic groups, the Palestinians will have sufficient support to resist capitulation to Israeli claims. And as noted in the earlier section of this essay, they will be able to acquire arms from outside the region, in part because of their ideological orientation. Thus the competing claims can continue unresolved in any definitive manner.

Also, it cannot be expected that detached students of international law will readily agree on this line of reasoning any more than one expects a legal consensus on the United States role in Viet Nam. Some students of law are obviously not detached from the emotional contents of the Arab-Israeli conflict. Others disagree over the importance of competing principles when there is not a definitive guide to the conflict of norms. This variety of legal interpretation, while not unusual, does little to create reinforcement for those arguments articulated by states that are in keeping with the needs of minimum order and equity.

#### WHAT FUTURE FOR ARMS CONTROL?

It is difficult to identify one factor, of any type, that is conducive to formal, institutionalized arms control in the Arab-Israeli conflict. On the contrary, one can enumerate factors tending to preclude such restraints. The Arab-Israeli zone of Middle East politics is revolutionary, in varying ways and in varying forms, but still revolutionary. The international legal order cannot authoritatively ascertain either primary or major state aggression, nor can it satisfactorily review adversary claims regarding guerrilla violence and state responsibility in that regard. No agreements to bar arms to certain parties will be forthcoming, therefore, from this type of legal reasoning. In addition to these two fundamental obstacles to arms control, there are others. In particular, the nature of the arms in question has proved difficult to subsume under legal regulation. No definition has been achieved, nor is one probably possible, to distinguish offensive from defensive weapons, prior to their usage.<sup>48</sup>

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<sup>48</sup>There are some weapons that are basically defensive, such as ABM systems. But most weapons can be defensive or offensive, particularly since a second-strike offensive is now the core of defensive strategy. In the Arab-Israeli conflict, efforts to distinguish offensive from defensive weapons

Then too, small and conventional and relatively inexpensive arms are the most difficult to regulate, as they have high military utility for legitimate defense needs in the Third World.<sup>49</sup>

Paradoxically, all of the above does not eliminate arms control *per se* from the Arab-Israeli conflict. In fact, arms control of a tacit nature has always been part of that struggle.<sup>50</sup> Both the Soviet Union and the United States have barred certain weapons from transfer, primarily nuclear weapons. The Soviets have also refrained from providing their clients with intermediate or long-range surface-to-surface missiles, as opposed to surface-to-air anti-aircraft missiles. The Soviets also seem to have refrained from providing the Egyptians with any great supply of amphibious assault vehicles that could be used across the Suez Canal and have apparently kept Soviet pilots away from the canal. And both the Soviets and the Americans have delayed shipments of arms during crucial periods of bargaining, in order to signal serious intention and to spur confidence in mutual trust. The process was quite evident during the spring and summer of 1970 leading up to the start of a regional cease-fire. Thus the two primary suppliers have unilaterally and tacitly imposed some restraints on themselves, sometimes at the cost of friction in the supplier-client relationship. Of course it cannot be denied that the quantity and sophistication of arms in the Arab-Israeli zone have still increased over time.<sup>51</sup>

There is some slight possibility that a limited or general Arab-Israeli agreement might lead to more formal control over arms shipments, but it would seem that this possibility is not a very great probability.<sup>52</sup> There is a general reluctance among states to commit themselves to formal rather than informal restraints.<sup>53</sup> Emphasis is placed on flexibility rather than on the advantage of stable expectations of state behavior.<sup>54</sup> Flexibility may be desired for fear the agreement will be violated and

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are, in general, futile exercises in semantics. See Kemp, *Arms Traffic and Third World Conflicts*, *supra* note 17, at 22-25.

<sup>49</sup>For an excellent chart, see Kemp, *Arms Traffic and Third World Conflicts*, *supra* note 17, at 43.

<sup>50</sup>On the subject of tacit, informal arms control, see Fisher, *Arms Control and Disarmament in International Law*, in 4 STRATEGY OF WORLD ORDER: DISARMAMENT AND ECONOMIC DEVELOPMENT 69 (1966).

<sup>51</sup>See J. HUREWITZ, *supra* note 1, at 438-88.

<sup>52</sup>On the question of whether a negotiated settlement must precede successful arms control, or vice versa, see D. EDWARDS, *supra* note 18, at 161-63.

<sup>53</sup>The subject is treated thoroughly in Deutsch, *The Probability of International Law*, in THE RELEVANCE OF INTERNATIONAL LAW 57 (1968).

<sup>54</sup>See L. HENKIN, HOW NATIONS BEHAVE 269 (1968).

<sup>55</sup>*E.g.*, INTERNATIONAL LAW AND POLITICAL CRISIS (L. Scheinman & D. Wilkinson eds. 1968).

the same conflict will be resumed. And flexibility may be desired because of not wanting to be restricted in similar conflicts in other areas. In this latter regard, the Soviets would probably be reluctant to limit formally arms transfers to "liberation" movements like that of the Palestinians for fear of setting a precedent that could prove bothersome when related to Soviet support of other such movements.

#### WHAT ROLE FOR INTERNATIONAL LAW?

Any inquiry that focuses on international law only as a restraint system in time of crisis is destined to arrive at a pessimistic conclusion.<sup>55</sup> Of the many functions of international law, restraining states in the process of coercion is only one.<sup>56</sup> This task of law is clearly the least capably performed in the international legal order, not only because of the easily apparent deficiencies in the collective management of sanctions, but also because all law tends to be ignored when threats to existence and security occur.<sup>57</sup>

Yet the use of legal analysis by nonauthoritative third-parties may contribute to what has been called "a climate of opinion" in world politics<sup>58</sup>—what might be termed an international political culture. One of the functions of law is to serve as a socializing agent, a communicator of basic assumptions about the nature of proper authority and appropriate rules of the "game" of politics. It may be that this is the most important function of international law in crisis situations,<sup>59</sup> in that legal reasoning by third-parties may lead states to increased awareness of their shared, long-term, real national interests. In the perspective of immediate problems, however, law will be extremely marginal in producing formal, institutionalized commitments to arms control in the Arab-Israeli conflict.

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<sup>56</sup>See, e.g., W. COPLIN, *THE FUNCTIONS OF INTERNATIONAL LAW* 26-167 (1966), wherein the author identifies law that establishes jurisdiction, regulates coercion, and maximizes socio-economic development. See also Hoffmann, *International Systems and International Law*, *supra* note 3, at 205.

<sup>57</sup>See generally Deutsch, *The Probability of International Law*, *supra* note 53.

<sup>58</sup>See generally W. COPLIN, *supra* note 56, at 186-94; Coplin, *International Law and Assumptions about the State System*, 17 *WORLD POLITICS* 615 (1964-65).

<sup>59</sup>See *INTERNATIONAL LAW AND ORGANIZATION* 2-3, 9-11 (R. Falk & W. Harneider eds. 1968).