

The Illegality of the Arab Attack on Israel of October 6, 1973

Author(s): Eugene V. Rostow

Source: *The American Journal of International Law*, Vol. 69, No. 2 (Apr., 1975), pp. 272-289

Published by: American Society of International Law

Stable URL: <http://www.jstor.org/stable/2200268>

Accessed: 24-04-2016 15:08 UTC

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at
<http://about.jstor.org/terms>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



American Society of International Law is collaborating with JSTOR to digitize, preserve and extend access to *The American Journal of International Law*

THE ILLEGALITY OF THE ARAB ATTACK ON ISRAEL OF OCTOBER 6, 1973

By Eugene V. Rostow *

In part II of his article, *Destination Embargo of Arab Oil: Its Legality under International Law*,¹ Mr. Ibrahim F. I. Shihata defends the legality of the armed attack on Israel launched by many Arab states, with Soviet assistance, on October 6, 1973. "Egypt and Syria," he writes, "as the states vested with sovereignty, but illegally deprived of actual control, over territories occupied by Israel were . . . entitled to seek redress for the protection of their territorial integrity. Under the UN system they were probably under the obligation to resort first to peaceful methods. This they have done in vain for more than six years. Egypt, in particular, expressed officially its readiness to enter into a peace agreement with Israel containing all the obligations provided for in Security Council Resolution 242 (1967) as broadly elaborated by the Special Representative of the UN Secretary-General, Ambassador Jarring. In response, Israel defiantly insisted on territorial expansion."² Under these circumstances, he

* Sterling Professor of Law and Public Affairs, Yale University. As Undersecretary of State (1966-1969), I was Chairman of an Interdepartmental Control Group responsible for preparing, proposing, and supervising the execution of the plans of the United States Government for dealing with the Middle East crisis of that period. Perhaps I should add that while the views expressed in this article are those I have developed in the course of my teaching and study in the field during the last five years, they coincide with the official positions of the United States Government during the period of my service, and, it is believed, since that time.

¹ 68 AJIL 591, 598-608 (1974), hereafter cited as SHIHATA.

² SHIHATA, 607. It is important to note that Mr. Shihata correctly bases his argument on the only possible legal ground for his claim, the law of Article 51, and the relation between Article 51 and Article 2(4). He does not invoke the theories which seek to justify the international use of force in behalf of "Wars of National Liberation." Thus Mr. Shihata does *not* contend that the Arab armed attack of October 6, 1973, was justified in order to vindicate an alleged right of the Arab inhabitants of Palestine to use force internationally in behalf of their claims of self-determination, or pursuant to resolutions of the Arab League viewed as a regional arrangement under Chapter VIII of the Charter. Such arguments would justify the international use of force to destroy a state, and are incompatible with Article 2(4) of the Charter, its most fundamental principle, which assures each state protection against the threat or use of force against its territorial integrity or political independence, "or in any other manner inconsistent with the Purposes of the United Nations." The theory of such "Wars of National Liberation" has been consistently rejected by every authoritative process of international decisionmaking on many occasions since 1945.

The argument for a right to wage war internationally in behalf of the right of peoples to self-determination under Article 1(2) of the Charter was made by Yasir Arafat in his speech before the General Assembly on November 13, 1974. Mr. Arafat asserted that the Palestine Mandate and all the decisions and other resolutions of the Security Council flowing from it are null and void, and that the existence of Israel in

argues, both Egypt and Syria (which had never accepted any version of Security Council Resolution 242 or given any assurances to Ambassador Jarring) had an inherent right of self-help under customary international law, or of self-defense under "a broad reading" of Article 51 of the Charter, in what he asserts was no more than an attempt to recover those territories by force.³

Presumably Mr. Shihata would add that because in his view Egypt and Syria were legally exercising their right of self-defense in attacking the Israelis on October 6, 1973, states other than Egypt and Syria had the right under customary international law and under Article 51 to assist Egypt and Syria in the name of the principle of collective self-defense, until the Security Council decided otherwise.

Mr. Shihata's legal justification for the Arab attack of October 6, 1973, then, depends upon a chain of related propositions: (1) that in 1973, at

parts of the territory of the Palestine Mandate is therefore a deprivation of the rights of the Palestinian people to self-determination—a standing "armed attack" against those "rights." For this reason, he claimed a right to use force internationally to achieve a single unified state in the entire territory of Palestine. (In international law and international relations, the word "Palestine" can only mean the territory of the Palestine Mandate, which remained under British Administration until the end of the League, and the establishment of Transjordan and Israel as separate states.) *New York Times*, Nov. 14, 1974, at 22–23. On the status of these contentions in international law, see Rostow, *Book Review*, 82 *YALE L. J.* 829, 842–55 (1973); Q. Wright and M. Khadduri, *The Palestine Conflict in International Law*, in M. KHADDURI, ed., *MAJOR MIDDLE EASTERN PROBLEMS IN INTERNATIONAL LAW* 25–26 (1972): "The recognition of a distinctive people, whether within a colony or the home territory of a state, or scattered throughout the world, is inconsistent with the rights of the state within whose territory they live. Such recognition involves political and legal change but, in accord with the Charter, must not involve the use of force by outside states." The General Assembly resolution defining aggression (UN Doc. A/Res 3314 (XXIX), Dec. 14, 1974) fully accepts the view that rights of self-determination can be vindicated only by methods which are in conformity with the Charter. Art. 7, Art. 3(f) and (g). For full text, see *Official Documents* section, *infra* p. 480.

³ SHIHATA, 607–08. Mr. Shihata makes two inconsistent arguments on this point: (1) that the continued occupation by Israel of the territories it conquered in 1967 (in the course of exercising its own right of self-defense) is an "armed attack" for purposes of Article 51; and (2) that Article 51 is not in any event relevant, since Egypt and Syria should be deemed to have a right to use force to regain those territories, as an essential aspect of their right to territorial integrity. "Without such a right," Mr. Shihata says, "state jurisdiction, let alone sovereignty, would be nothing but a sham." *Id.*, at 608.

I am unable to detect the difference between Mr. Shihata's two arguments in the perspective of the Charter, which authorizes states to use force internationally by their own unilateral decision only in cases of individual or collective self-defense, or in circumstances which do not constitute a breach of Article 2(4), *i.e.*, humanitarian interventions, and interventions to assist a state in repressing a rebellion, an attempt at secession, or a rebellion supported from abroad. The Biafran case is the paradigm of the latter class: there Soviet, British, and Egyptian assistance to Nigeria was treated as obviously lawful, while any attempt to assist the Biafrans, asserting their "right" of national self-determination as a people, was treated as a violation of Article 2(4). See Rostow, *supra*, note 2. Thus each of Mr. Shihata's alternative arguments turns on the legality of Israel's presence in the disputed territory as the occupying power.

least, Israel was illegally in possession of the territories occupied in the course of the Six Day War in 1967; (2) that Israel had refused to follow the peacemaking procedures called for, under Chapter VI of the Charter, by the Security Council in 1967, which in his view Egypt (but not Syria) had accepted; (3) that no peaceful remedies were available, and the other criteria which have evolved in international law from the *Caroline* episode, the *Alabama* arbitration, and the *Corfu Channel* case had been satisfied;⁴ (4) and therefore that Israel's presence in the Golan Heights and the Sinai as an occupying power constituted an "armed attack" on Egypt and Syria, and justified their large scale attack of October 6, 1973, as a legitimate act of self-defense. He implies that the same rationale would apply to the West Bank and the Gaza Strip as well, although neither Jordan nor Egypt could claim "sovereignty" over those disputed territories.

Mr. Shihata's chain of reasoning would be in error even if Israel's presence in the territories it occupied during the 1967 war did violate the Security Council's 1967 cease-fire resolutions and its Resolution 242. Many, many procedures of negotiation, mediation, "good offices," and conciliation, both within the United Nations and outside it, have been pressed upon Egypt and Syria by dozens of governments since 1967. All those attempts failed. The Syrian Government flatly refused to accept Security Council Resolution 242 in any form or to consider any other procedure for making peace. Until 1971, Egypt rejected many proposals that would have required it to make peace with Israel. In 1971, as Mr. Shihata notes, Egypt did agree to make peace, but only on terms which the Security Council had rejected when Resolution 242 was adopted. The heart of the dispute, nominally at least, has been whether Resolution 242 required Israeli commitment, in advance of negotiations, to withdrawal from *all* the occupied territories at issue.⁵ Under Article 33 of the Charter, the parties, or the Security Council, could have sought a judicial interpretation of Resolution 242, or an arbitration, in order to determine its meaning. All procedures for the pacific settlement of the dispute based on Security Council Resolution 242 have been rejected by Egypt and Syria. The option of making peace in accordance with that resolution was always open to Syria, Jordan, Lebanon, and Egypt.

But Mr. Shihata's major premise—that Israel's presence in the occupied territories is illegal—is an assertion which cannot be made. For the present writer, who participated officially in the negotiations which led to the adoption of Security Council Resolution 242 in November, 1967, and in the unrelenting efforts of the American Government between November, 1967, and January 20, 1969, to persuade Egypt to implement its terms, Mr.

⁴ On the history of the *Caroline* episode, see 2 J. B. MOORE, DIGEST OF INTERNATIONAL LAW 409-14 (1906); 11 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 211-36 (1968); for the *Alabama* arbitration, PAPERS RELATING TO THE TREATY OF WASHINGTON (1872-1873) 5 vols.; Corfu Channel Case, [1949] ICJ REP. 4. See I. BROWNLEE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES ch. 12-13 (1963); D. W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958); M. McDUGAL AND F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER ch. 2-3 (1961).

⁵ See *infra*, p. 283 *et seq.*

Shihata's argument is fantasy.⁶ It rests on an erroneous interpretation of Resolution 242, which was confirmed and made mandatory under Article 25 as a "decision" by Security Council Resolution 338 of October 22, 1973.⁷

⁶ Between November, 1967, and January 20, 1969, Egypt refused every proposal for a negotiating procedure that might permit the parties to carry out Resolution 242. Those involving Ambassador Jarring are reported by the Secretary-General on the activities of the Special Representatives to the Middle East, UN Doc. S/10070, Jan. 4, 1971, SECURITY COUNCIL OFFICIAL RECORDS (SCOR), SUPP. FOR JANUARY, FEBRUARY, AND MARCH, 1971, at 18 (1972) [hereafter referred to as the Secretary-General's Report]. There were many others. In the fall of 1968, the United States offered to support the terms Egypt professed to want as the price for peace, the return of the whole of the Sinai in accordance with an agreed timetable. The offer was rejected by the Egyptian Foreign Minister at the time, Mahmoud Riad. I am satisfied that the Egyptian official position on making peace, save for the abortive Jarring proposal of February 8, 1971, on which Mr. Shihata relies (discussed *infra*, at p. 285), remained the same until October 6, 1973.

⁷ The texts of the two resolutions are as follows:

Resolution 242 (1967)

The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. *Affirms* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;

(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

(a) For guaranteeing freedom of navigation through international waterways in the area;

(b) For achieving a just settlement of the refugee problem;

(c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

Resolution 338 (1973)

The Security Council,

1. *Calls upon* all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;

2. *Calls upon* the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;

3. *Decides* that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

That the "just and durable peace" required by Resolution 338 is to be negotiated in

Its view of the diplomacy of the period is untenable. And it is contradicted by every precedent defining the law of the Charter regarding the use of force by states, and the responsibility of states for the use of force from their territories. It is contradicted also by the pattern of customary international law, if it be deemed more comprehensive in this regard than the law of the Charter.

I.

The central feature of Resolution 242, and of the Security Council's cease-fire resolutions which preceded it, is that Israel is legally entitled to remain on the cease-fire lines of 1967 as the occupying power until the parties themselves reach an agreement of peace in conformity with the principles and provisions of Resolution 242. This is the famous "package deal" on which Resolution 242 rests—withdrawal for peace, and no withdrawal without a binding agreement of peace. I can find no reference in Mr. Shihata's article to this crucial fact, which both the text and the context of Resolution 242 make unmistakably clear.⁸

Instead, Mr. Shihata sets up a strawman, which he then attempts to demolish. Israel's claim to the occupation of the Sinai Peninsula, the West Bank, the Gaza Strip, and the Golan Heights, he writes, has been justified "only by alleged considerations of security and less overtly by the desire to gain territorial advantages in future negotiations. Such considerations are obviously of a political, not legal, character."⁹

But Mr. Shihata's premise is incorrect. Israel's rights as the occupying power in the territories it held as a result of the Six Day War do not rest on political considerations, claims of annexation, or bargaining tactics. On the contrary, they derive from the Security Council's cease-fire resolutions which brought the Six Day War to an end and on Resolution 242, which prescribes both principles and procedures for terminating the cease-fire regime by making peace.

Until the states concerned in the dispute make peace in accordance with Resolution 242, the Security Council decided, Israel could remain in the

accordance with the principles and provisions of Resolution 242, *see* Secretary of State Kissinger, Statement before the Geneva Conference, Dec. 21, 1973, 70 DEPT. STATE BULL. 21, 23 (1974); News Conference of Nov. 21, 1973, 69 DEPT. STATE BULL. 701, 709 (1973).

⁸ *See* Rostow, *Legal Aspects of the Search for Peace in the Middle East* [1970] PROC. ASIL, 64 AJIL (No. 4) 64; Book Review, 67 AJIL 808, 809 (1973); *America, Europe, and the Middle East*, 57 COMMENTARY 40, 52-54 (1974); LALL, *THE UN AND THE MIDDLE EAST CRISIS*, 1967, ch. 13-15 (1968); G. Rafael, *UN Resolution 242: A Common Denominator*, THE NEW MIDDLE EAST (June, 1973) 26; J. STONE, *NO PEACE—NO WAR IN THE MIDDLE EAST* (1969); *The Cease Fire of 1967: The Legal Framework*, 3 THE BRIDGE 3 (Sydney, Australia, October, 1967); *The "November Resolution" and Middle East Peace: Pitfall or Guidepost*, 3 TOLEDO L. REV. 43 (1971).

The late Professor Quincy Wright also ignored this feature of Resolution 242 in his writing on the subject. *See* Wright, *The Middle Eastern Crisis* [1970] PROC. ASIL, 64 AJIL (No. 4) 71, 73, 78-87, and Wright and Khadduri, *supra*, note 2, 27-36.

⁹ SHIHATA, 599.

territories it held after the Six Day War as the occupying power. The legality and legitimacy of its presence as occupying power is thus certified by the Security Council. That right is fully protected by the law of Article 2(4), which the General Assembly attempted to summarize and restate in its Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, in the following terms:

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character.¹⁰

The "purpose" of the Security Council in adopting Resolution 242 was unmistakable. It was confronted by a situation in which the Arabs feared that the Israelis would never withdraw from any lands they conquered and the Israelis feared that the Arabs would never make peace. The dispute over Israel's right to exist, exacerbated by Soviet political policies and programs of arms supply and military training, had already led to three major wars, a standing threat to the peace, and endless violations of the Charter through the failure of states to discharge their "duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state."¹¹

The Council therefore decided to link the two main themes of the dispute, by providing twin and reciprocal pressures both for withdrawal and for peace.

Every government involved in the negotiation and drafting of Resolu-

¹⁰ GA Res. 2625, 25 UN GAOR SUPP. 28, at 122, UN Doc. A/8082 (1970). See Rusk, *The 25th UN General Assembly and the Use of Force, Symposium, Legal Regulation of the Use of Force*, 2 GEORGIA J. INT. AND COMP. LAW 19, 25 (Supp. 1, 1972): "The Declaration on Friendly Relations appears to say that, whatever the issues between the parties in the divided states, in Kashmir, the Middle East or other places where demarcation and armistice lines are not settled international boundaries, those issues are not to be settled by the threat or use of force." The Declaration on Friendly Relations is reaffirmed in the resolution defining aggression, *supra*, note 2, which characterizes military occupation as illegal only when undertaken "in contravention of the Charter," i.e., when it is not justified under Article 51, or by the Security Council.

¹¹ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, *supra* note 10, at 123. One should add that under Article 2(4) of the Charter, and the customary international law which is its matrix, the duty of states is broader than that stated in the Declaration: it is one of nearly absolute responsibility for the international use of force from its territory. See note 4, *supra*.

Articles 3(f) and (g) of the General Assembly's resolution defining aggression, *supra*, note 2, characterize such illegal uses of force as "aggression" if the Security Council finds them to be of sufficient gravity.

tion 242 accepted this basic principle as the foundation on which Resolution 242 was built. The Soviet Union itself took the position in 1967 and 1968 that Resolution 242 represented the first occasion in the experience of the Cold War in which the Soviets used the term "package deal" in a positive sense. This is still the position of all the governments directly responsible for the text. Some now profess to differ on one aspect of the resolution, but not on its fundamental principle that there should be no Israeli withdrawal without an agreement of peace. As P. M. Martin has correctly concluded, Israeli occupation was intended by the Security Council to be "the gage for peace."¹²

The reason for this principle in the resolution is well known, but bears repeating.

The Security Council has called on the parties to make peace many times between 1948 and October, 1973.¹³ It has ruled twice that a state of war between Israel and the Arab states does not exist and therefore that the Arab states cannot legally claim the authority of "a state of belligerency" to justify the use of coercion or of armed force against Israel.¹⁴ Throughout the long and bitter years between 1948 and 1973, however, the Arab states refused to make peace, and did claim that they had belligerent rights, standing on the policy which, at a later point, was summed up in the Khartoum Resolution of September 1, 1967 adopted by the Heads of State or Government of the Arab League members and the head of the Palestine Liberation Organization: "No peace with Israel, no recognition of Israel, no negotiations with it, and insistence on the rights of the Palestinian people in their own country."¹⁵

In 1957, in the aftermath of Suez, the United States, acting as go-between, persuaded Israel to withdraw from the Sinai in exchange for a number of assurances which were transmitted to Israel by the United States in behalf of Egypt: that Israel's maritime rights through the Suez Canal and the Strait of Tiran would be respected; that Egypt would meet its international responsibilities to prevent guerrilla attacks on Israel from

¹² P. M. MARTIN, *LE CONFLIT ISRAËLO-ARABE*, ch. 7 (1973).

¹³ *E.g.*, SC Res. 54 (1948), July 15, 1948, para. 8; SC Res. 61 (1948), Nov. 4, 1948; SC Res. 62 (1948), Nov. 16, 1948; SC Doc. S/1152, SCOR, 3rd year SUPP. FOR DECEMBER, 1948, at 300; SC Res. 73 (1949), Aug. 11, 1949; SC Res. 89 (1950), Nov. 17, 1950; SC Res. 93 (1951), May 18, 1951.

¹⁴ SC Res. 95 (1951), Sept. 1, 1951, 10 SCOR, 688th meeting, paras. 98-102, at 20; SC Res. 118 (1956), Oct. 13, 1956, 11 SCOR, 743d meeting, 18. *See* Q. Wright, *Legal Aspects of the Middle East Situation*, 33 L. AND CONTEMP. PROB. 5, 20-22 (1968); United States Reply to the Arab States Representations concerning the Suez Canal and the Gulf of Aqaba, June 27, 1957, in United States Senate, Committee on Foreign Relations, 91st Cong., 1st Sess., *A SELECT CHRONOLOGY AND BACKGROUND DOCUMENTS RELATING TO THE MIDDLE EAST 179-82* (1st rev. ed., 1969). Professor Khadduri agrees that only the claim of belligerent rights could justify the closing of the Suez Canal or the Strait of Tiran to Israeli shipping—a claim rejected by the Security Council. *Closure of the Suez Canal to Israeli Shipping*, 33 L. AND CONTEMP. PROB. 147, 154-55 (1968).

¹⁵ The text appears in Y. ALEXANDER AND N. KITTRIE, *CRESCENT AND STAR*, 427-29 (1973).

Egyptian territory; and that peace would be made in due course. It was explicitly understood that if force were used to close the Strait of Tiran to Israeli shipping, Israel would be entitled to use force in reply by way of self-defense under Article 51. Great Britain, France, and the United States guaranteed the international character of the Strait of Tiran. And it was agreed as well that if Egypt should ever request the removal of UNEF forces from the Sinai, the Secretary-General would undertake negotiations, in accordance with a memorandum duly filed, to prevent that eventuality.

In deference to Egypt's political sensibilities, the international understanding of 1957 was embodied in an agreed series of statements, letters, memoranda, and silences, both in the General Assembly, at United Nations Headquarters, and in the several capitals.¹⁶

Between 1957 and June, 1967, Egypt broke every provision of the 1957 international understanding, finally obtaining the withdrawal of the UNEF forces, closing the Strait of Tiran, and mobilizing in the Sinai. A united Arab command was formed. The Arab armies were arrayed against Israel in Syria, Jordan, and the Sinai and rapidly increased in size and equipment. The Arab radio and the Arab press began to trumpet out the call for a Holy War to destroy Israel.¹⁷

This bitter experience was in every mind when the Six Day War broke out. On the first day of the fighting, President Johnson called for an immediate cease-fire and announced that the policy of the United States was to press for peace, and not a renewal of the 1949 Armistice.¹⁸ This position rested on an extended and carefully considered review of Soviet policy in the area; one of the conclusions drawn from the study was that American policy in 1956 and 1957 had turned out to be a mistake, in that the United States had not insisted on an agreement of peace in exchange

¹⁶ The full story of this negotiation and its outcome has not yet been published. One aspect of the understanding was officially disclosed in Rostow, *The Middle East Crisis and Beyond*, 59 DEPT. STATE BULL. 41, 45 (1968):

Egypt's announcement that it would use force to close the strait had another set of consequences. In 1957 the United States had taken the lead in negotiating the withdrawal of Israeli troops from Sharm-al-Sheikh and the Sinai as a whole. At that time Israel made it clear that if force were used to close the strait, it would regard itself justified in responding with force as an act of self-defense authorized under article 51 of the United Nations Charter. This carefully considered formal statement was noted at the time as part of the process of settlement. The international understanding was that the Strait of Tiran would be kept open as an international waterway. The United Arab Republic, it is true, never took formal responsibility for this understanding, as it refused to recognize Israel or to deal directly with her. But in every other sense Egypt was a party to and beneficiary of this arrangement, through which Israeli withdrawal had been secured.

See also ROSTOW, LAW, POWER, AND THE PURSUIT OF PEACE 78 (1968) (also officially cleared); D. BEN-CURION, ISRAEL: A PERSONAL HISTORY 522-36 (1971); Rostow, *supra*, note 8; H. FINER, DULLES OVER SUEZ, ch. 16-18 (1964); T. DRAPER, ISRAEL AND WORLD POLITICS: ROOTS OF THE THIRD ARAB-ISRAELI WAR 19-22 (1968); Q. Wright, *supra*, note 8, at 72. The fullest treatment thus far is C. N. Rostow, *Diplomatic Patchwork: The United States and the Settlement at Suez, 1956-1957* (unpublished student essay, 1972, on deposit at the Yale University Library).

¹⁷ See Yost, *How the Arab-Israeli War Began*, 46 FOREIGN AFFAIRS 304 (1968); N. SAFRAN, FROM WAR TO WAR, ch. 6 (1969). ¹⁸ 56 DEPT. STATE BULL. 949 (1967).

for Israel's withdrawal from the Sinai. In June 1967, neither the Arab states nor the Soviet Union would consider a cease-fire until they realized how the tide of war was running. Against the background of these events, the Arab states and the Soviet Union could not persuade a majority to condemn Israel as the aggressor in 1967, either in the General Assembly or in the Security Council. After the war, five months of intense diplomacy achieved Resolution 242, proposed and sponsored by the British Government. All the resolutions finally considered by the Security Council in November, 1967, rested on the principle of "no withdrawal without peace."¹⁹ They differed in other respects, but on this fundamental issue they were consistent. One of the things the international community said clearly in Resolution 242 was that this time Israel would not be required to withdraw without a prior agreement of peace. Unlike many Security Council cease-fire resolutions, there was no disposition in 1967 to call on one party to the hostilities to return to the position it occupied before hostilities broke out.²⁰

Lord Caradon, the British representative at the United Nations, whose devoted and effective work was of critical importance to the negotiation of Resolution 242, explained the idea of the British draft in several statements before the Council.

10. We went to both sides. We know and respect their intense feelings. We well realize that the future security and progress and happiness of their peoples depends on what we do here. It is entirely understandable, therefore, that to each point, indeed to each word, they should attach the utmost importance. Nevertheless, the representatives of both sides have been ready to consider with the greatest patience and care the representations which we have put to them. Perhaps we cannot hope that full agreement between both sides can be secured. It may be too early for such a miracle. But there has been a readiness to go back over every word and phrase, and a readiness, too, to understand the needs and views of others.

¹⁹ Draft resolutions were introduced by India, Mali, and Nigeria, UN Doc. S/8227, Nov. 7; the United States, UN Doc. S/8229, Nov. 7; the United Kingdom, UN Doc. S/8247, Nov. 16; the USSR, UN Doc. S/8253, Nov. 20. The Soviet draft resolution called for the simultaneous (1) withdrawal of Israeli forces to the lines of June 5, 1967, and (2) recognition by all states members of the United Nations in the area that each such state has a right to exist in peace and security under the Charter, and renunciation of all claims inconsistent therewith. 22 SCOR, 1381st meeting, Nov. 20, 1967, at 2. The other drafts were also based on the principle of linking withdrawal and peace.

²⁰ See Goldberg, *United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East*, 12 COLUM. J. TRANSNATIONAL L. 187, 192 (1973):

On the second day of the war, June 7, the U.N. Security Council, with the concurrence of Israel and Egypt (Syria later also agreed), unanimously voted a cease-fire. This cease-fire, however, was not conditioned upon the withdrawal of Israeli armed forces. They were, in effect, to stand in place, pending further developments. In U.N. history, this type of cease-fire is virtually unique. Generally, when a conflict breaks out, it is almost "boiler plate" for the United Nations to adopt a cease-fire resolution embracing withdrawal of the contending forces to the positions they occupied before the conflict.

Ambassador Tomeh, speaking for Syria, criticized the British draft, adopted as Resolution 242, because it provided no time limit for withdrawals, and because it made Israeli withdrawal subject to "conditions amounting to the liquidation of the whole Palestine question." 22 SCOR, 1382nd meeting, Nov. 22, 1967, at 2. No one disputed his view.

11. In the long discussion with representatives of Arab countries, they have made it clear that they seek no more than justice. The central issue of the recovery and restoration of their territories is naturally uppermost in their minds. The issue of withdrawal to them is all-important and, of course, they seek a just settlement to end the long suffering of the refugees.

12. The Israelis, on the other hand, tell us that withdrawal must never be to insecurity and hostility. The action to be taken must be within the framework of a permanent peace and withdrawal must be to secure boundaries. There must be an end of the use and threat and fear of violence and hostility. I have said before that their aims do not conflict; they are equal. They are both essential. There must be adequate provision in any resolution to meet them both, since to attempt to pursue one without the other would be foolish and futile.

13. So we have been guided by all the earlier work which has been done and by the eloquent statements which have been made by both sides, and we have endeavoured, with the help of my brother members of the Council, to set out in a draft resolution what I believe will be recognized as a sincere and fair and honest attempt both to meet the just claims of both sides and also to discharge the high responsibility of this Council.²¹

The Security Council fully recognized the difficulties of the undertaking, against the background of the tragic history of the problem. The agreements required by Resolution 242 will have to resolve many thorny and difficult controversies: security arrangements, including demilitarized zones; maritime rights; a fair and humane resolution of the refugee prob-

²¹ 22 SCOR, 1379th meeting 2 (1967). Earlier Lord Caradon had stated:

37. The Arab countries insist that we must direct our special attention to the recovery and restoration of their territories. The issue of withdrawal is to them of top priority. The Arabs want not charity but justice. They seek a just settlement to end the long and bitter suffering of the refugees. There is a recognition on all sides that a new, comprehensive, imaginative plan, as we have advocated, to deal with this desperately urgent problem is essential.

38. The Israelis tell us that withdrawal must never be to the old precarious truce. It must be to a permanent peace, to secure boundaries, to a new era of freedom from the use or the threat or the fear of hostility and force.

39. Both are right. The aims of the two sides do not conflict. They converge. They supplement and they support each other. To imagine that one can be secured without the other is a delusion. They are of equal validity and equal necessity. The recent consultations which have been going forward so energetically and continuously strongly reinforce my conviction that we in this Council now have a supreme opportunity to serve the interests of all those concerned. Every day it is more clear what should be done. Every day it is more apparent that we are not dealing with conflicting interests but with complementary interests. Justice and peace are not in conflict; they are inseparable as they are indispensable. One must go hand in hand with the other.

22 SCOR, 1377th meeting 4-5 (1967). See also *id.*, 1381st meeting 4-5.

Ambassador Adebo of Nigeria said that under the resolution withdrawal "should take place in a context in which all the countries in the area, including Israel and all the Arab states, can feel and enjoy a sense of security. We therefore subscribe very heartily to what Lord Caradon said when he stated that the Resolution must be taken as a whole." *Id.*, 1382nd meeting, 8-9; Ambassador Ruda of Argentina commented that the road towards peace required "mutual concessions . . . this means the withdrawal of troops from the occupied areas on the one hand and the cessation of belligerency on the other . . . [P]eace could not be brought about by withdrawal pure and simple, but . . . such a step must of necessity be accompanied by measures assuring peace and security." *Id.*, 15-16.

lem; and the status of Jerusalem. That is why the resolution authorized the appointment of a Special Representative of the Secretary-General to assist the parties in reaching the peace agreement called for by paragraph 3 of the resolution. Israeli withdrawal and the emergence of peace cannot, as a practical matter, go "hand in hand" unless there is a prior agreement between the parties as to the stages and terms which would govern the twin process.

This fundamental aspect of Resolution 242 was summarized by Secretary of State Rogers on January 29, 1970, in these terms:

We have never suggested any withdrawal until there was a final, binding, written agreement that satisfied all aspects of the Security Council resolution.

In other words, we have never suggested that a withdrawal occur before there was a contractual agreement entered into by the parties, signed by the parties in each other's presence, an agreement that would provide full assurances to Israel that the Arabs would admit that Israel had a right to exist in peace.

Now, that is what has been lacking in the past. The Arabs have never been willing to do that; and if that could be done, we think it would be a tremendous boon to the world.

Now, we have also provided that the security arrangements would be left to the parties to negotiate, such as Sharm-al-Shaykh, and the Gaza Strip, the demilitarized zone, and so forth.²²

II.

A second feature of Resolution 242, which Mr. Shihata does discuss, is whether "the secure and recognized boundaries" called for by the resolution—the boundaries to which Israel would withdraw after peace was agreed upon—had to be the same as the Armistice Demarcation Lines as they stood on June 5, 1967.

It should be recalled that the Armistice Agreements of 1949, save in the case of Lebanon, provide that the Armistice Demarcation Lines are not political boundaries, and can be changed by the agreement of the parties when they move from a state of armistice to one of peace.²³ Mr. Shihata

²² 62 DEPT. STATE BULL. 218-19 (1970). See also Rostow, *supra* note 17, at 81:

The essential idea of the President's statement [closely followed in Security Council Resolution 242] is that the continuation of claims of a right to wage war against Israel have become a burden to world peace. It is therefore a world responsibility, and a responsibility of the parties, to achieve an end to such claims—a condition of peace in the area. It should be a fair and dignified peace reached by the parties, not one imposed by conquest, or by the Great Powers. It should recognize each nation's right to live, and to live in security. And it should rest on the principle of the territorial integrity and political independence of all the nations of the area.

On the basis of such a peace, the other principal features of the Arab-Israeli controversy should be resolved by the parties through any procedure on which they can agree. Israeli forces should of course withdraw to agreed and secure boundaries, which should replace the fragile armistice lines of 1948 and 1949. Those armistice agreements expressly contemplated boundary adjustments when they were superseded by arrangements of peace.

²³ 42 UNTS 303, No. 656 (1949) (with Jordan); *id.*, 327, No. 657 (1949) (with Syria); *id.*, 251, No. 654 (1949) (with Egypt); *id.*, 287, No. 655 (1949) with Lebanon.

notes this aspect of the Armistice Agreements, but ingeniously contends that it is a one-way street—that it authorizes only a withdrawal by Israel to the boundaries set out for the Jewish state in the General Assembly's resolution of November 29, 1947, which recommended to the Security Council the partition of the western part of Palestine into an Arab and an Israeli state, joined in economic union, and a special regime for Jerusalem.²⁴ The Security Council never acted on the Assembly's recommendation. Its mediation efforts at the time and its decisions of 1949 following the Arab war against the 1947 resolution rested on quite different principles. In insisting on the armistice, the Security Council necessarily ruled that the Arab states had committed aggression in 1948–1949, and were being punished for their 1948–49 aggression, and their refusal to make peace.²⁵ The fundamental weakness of Mr. Shihata's one-way-street argument, beyond its errors and omissions, is that it would make aggression costless. No system of law fails to provide penalties for its violation.

But Mr. Shihata does not rely on his highly idiosyncratic interpretation of the Armistice Agreements and their relationship to the General Assembly's Partition Resolution of 1947. His basic contention is that the hotly contested provision in the British draft resolution, requiring the "withdrawal of Israeli forces from territories occupied in the recent conflict" really means withdrawal from "all the" territories occupied in the course of that conflict. Mr. Shihata's serious contention is that Israel should withdraw from the 1967 cease-fire lines to the 1949 Armistice Demarcation Lines, and not to the shadowy lines set forth in the General Assembly's 1947 Partition plan. Like the Arab governments, Mr. Shihata now treats the Armistice Demarcation Lines as political boundaries, defining the extent of "Arab" and "Israeli" territory. "The absurdity of the counterargument," Mr. Shihata writes, "is demonstrated in fact by its insistence, against the consensus of the international community, on tying the destiny of sovereign states, their history, and geography, to the absence of a definite article which is not even needed grammatically to convey the required comprehensive meaning."²⁶

But the absence of the definite article in paragraph 1(i) of Resolution 242 was fully and carefully considered—and fully understood—in the debates of the Council. As Lord George-Brown, who was the British Foreign Minister in 1967, remarked, the omission of the word "the" was deliberate.²⁷ The Soviet and Indian draft resolutions were both explicit

²⁴ Resolution 181(II) Nov. 29, 1947, GAOR, 2nd Sess. RESOLUTIONS, 31–50 (1947).

²⁵ Rostow, *America, Europe, and the Middle East*, *supra* note 8, at 50.

²⁶ SHIHATA, 604.

²⁷ GEORGE-BROWN, IN MY WAY at 226–27 (1971, Pelican ed., 1972):

This resolution set out in a most carefully balanced way what the Israelis and the Arabs would have to do to secure both peace in the Middle East and recognition of the State of Israel. I have been pressed many times to spell out exactly what the resolution meant, but I've always refused to go farther than what it says. It declares "the inadmissibility of the acquisition of territory by war" and it also affirms the necessity "for guaranteeing the territorial inviolability and political independence of every state in the area." It calls for "withdrawal of Israeli armed forces from territories occupied in the recent conflict" and also for "termination of all claims or states of belligerency."

in requiring Israeli withdrawal from *all* the territories in question. They did not prevail. Many, many attempts were made to persuade Lord Caradon and the British Foreign Minister to accept language which would require withdrawal to the Armistice Demarcation Lines. They all failed. In the end, the Council agreed unanimously on the British draft, knowing exactly what it meant: that is, that Resolution 242, resting on the Armistice Agreements of 1949, did permit the parties to make what President Johnson called "insubstantial" changes in the Armistice Demarcation Lines of 1949 as they moved from armistice to peace.²⁸

The present writer conducted dozens if not hundreds of diplomatic conversations on the subject, in Washington, in New York, in Asia, and in Europe. He never encountered the slightest doubt, disagreement, or ambiguity on the point, or support in any quarter for the view of the matter Mr. Shihata takes, beyond the formal and often cynical registration of official positions, purporting to rely on the French text. As Ambassador Ruda of Argentina said, explaining his vote for the resolution, "With regard to the formula for the withdrawal of troops, which reads:

It does *not* call for Israeli withdrawal from "the" territories recently occupied, nor does it use the word "all". It would have been impossible to get the resolution through if either of these words had been included, but it does set out the lines on which negotiations for a settlement must take place. Each side must be prepared to give up something: the resolution doesn't attempt to say *precisely* what, because that is what negotiations for a peace-treaty must be about. However unpromising it may look, the fact of the matter is that Resolution 242 is the *only* basis on which negotiations for a peace-treaty can ever be started. It is both interesting and important that, whatever is said by anybody, the one thing on which all parties are agreed is that they still claim to accept Resolution 242.

²⁸ Speech of Sept. 10, 1968, 59 DEPT. STATE BULL. 345, 348 (1968). President Johnson also said: "We are not the ones to say where other nations should draw lines between them that will assure each the greatest security. It is clear, however, that a return to the situation of June 4, 1967, will not bring peace. There must be secure and there must be recognized borders. Some such lines must be agreed to by the neighbors involved as part of the transition from armistice to peace." See also speech of Secretary of State Rogers, Dec. 9, 1969, 62 DEPT. STATE BULL. 7 (1970). This is still the policy of the United States. Secretary of State Kissinger, News Conference, *supra*, note 7, at 714-15. See testimony of J. L. Hargrove, Senior Adviser on International Law to the United States Mission to the United Nations, 1967-1970:

The provision of Resolution 242 which bears most directly on the question which you raised, Congressman, is subparagraph (1) of paragraph 1 of the resolution, which envisages "withdrawal of Israeli armed forces from territories occupied in the recent conflict."

The language "from territories" was regarded at the time of the adoption of the resolution as of high consequence because the proposal put forward by those espousing the Egyptian case was withdrawal from "the territories." In the somewhat minute debate which frequently characterizes the period before the adoption of a United Nations resolution, the article "the" was regarded of considerable significance because its inclusion would seem to imply withdrawal from all territories which Israel had not occupied prior to the June war, but was at the present time occupying.

Consequently the omission of "the" was intended on our part, as I understood it at the time, and was understood on all sides, to leave open the possibility of modifications in the lines which were occupied as of June 4, 1967, in the final settlement.

Hearings on the Middle East before the Subcomm. of the House Comm. on Foreign Affairs, 92nd Cong., 1st Sess. 187 (1971). See also Y. BLUM, *SECURE BOUNDARIES AND MIDDLE EAST PEACE* (1971).

'withdrawal of Israel armed forces from territories occupied in the recent conflict,' this does not, in our view reflect a fully rounded-off notion; and although my delegation voted for paragraph 1(i) of the draft, we would have preferred a clearer text . . ." ²⁹

Mr. Shihata makes much of the fact that the French translation of Resolution 242 reads "retrait des forces armées israéliennes *des* territoires occupés . . ." ³⁰ When the French text appeared, the British and American Governments raised the matter at once with the United Nations Secretariat, and with the French Government, to be told that the French language offered no other solution for the problem. Since the question had been debated so long and so intensively and the decision of the Council was so clear, the matter was dropped, especially since none of the people involved could think of a more accurate French translation. Mr. Shihata's argument, based on the French and Spanish texts, does not reflect differences of policy, but the anomalies of translation. Whatever content it might be deemed to possess vanished on November 20, 1974, when the French Ambassador to the United Nations, supporting the enforcement of Resolution 242 pursuant to the Security Council's "decision" in Resolution 338, spoke of Resolution 242 as requiring a return to the Armistice Lines, save for "minor rectifications." ³¹

It is quite true, as Mr. Shihata points out, that in 1971 Ambassador Jarring attempted to obtain agreement among the parties on the basis of an Israeli withdrawal from *all* the territories it had occupied in 1967. Ambassador Jarring's position was without foundation in Resolution 242. By going beyond the plain meaning of his mandate, he lost his capacity to act as an intermediary, and his mission ended in failure. ³²

²⁹ 22 SCOR, 1382nd meeting, Nov. 22, 1967, at 16. Statements by the Rt. Hon. Michael Stewart, H.C. (5th ser.) 791 PARL. DEB. 844-45 and 793 PARL. DEB. 253, 261 (1969). In the debate on the adoption of Resolution 242 Ambassador DeCarvalho Silva of Brazil remarked that the acceptance of the resolution "does not imply that borderlines cannot be rectified as a result of an agreement freely concluded among the interested states." 22 SCOR, 1382nd meeting 13 (1969).

³⁰ SHIHATA, 604, note 70.

³¹ New York Times, Nov. 21, 1974, at 4, col. 1. Ambassador Berard, the French Representative at the United Nations, had confirmed this view of the French text in the Security Council at the time Resolution 242 was adopted (22 SCOR, 1382nd meeting, Nov. 22, 1967, at 12), when he said that the phrase "*des territoires occupés*" indisputably corresponds to the English expression "occupied territories."

³² UN Doc. S/10929, May 18, 1973, at para. 46, Annex II.

Among the many unresolved mysteries of Middle Eastern diplomacy during the last seven years is why Ambassador Jarring never called a conference of the parties, or separate bilateral conferences of Israel with each of the other parties, to carry out the agreement announced by the Secretary-General of the United Nations on August 7, 1970, after the Government of Egypt had agreed to the proposals advanced by Secretary of State Rogers for ending Egypt's "war of attrition." Note by the Secretary-General on the Jarring Mission for the information of the Security Council, UN Doc. S/9902, Aug. 7, 1970. Ambassador Jarring had written to the Secretary-General:

The United Arab Republic, Jordan and Israel advise me that they agree:

(A) that having accepted and indicated their willingness to carry out resolution 242 in all its parts, they will designate representatives to discussions to be held under my auspices, according to such procedure and at such places and times as

The long, futile, and destructive debate over this feature of Resolution 242 was resolved on December 21, 1973, when the Egyptian, Syrian, and Jordanian representatives met at Geneva in the first session of the Conference, convened under the presidency of the United States and the Soviet Union, to implement Security Council Resolution 338. The Arab states did not require Israel to accept their views on total withdrawal from the territories occupied in 1967 as a condition of their attendance at the Conference.

III.

The controversy, of course, is not a matter of grammar, but of principle, international law, and the national interests of many states, including the United States. Israel had come into being in reliance on a long series of entirely legal decisions by the international community. The Treaty of Sèvres separated the Levant from Turkey, and a League Mandate authorized the establishment of a Jewish National Home in an area defined legally as "Palestine" for the first time in modern history.³³ That decision of the world community of the day was based on its recognition of the historic connection of the Jewish people with that land. The immutable character of the establishment of the Mandate and of the long cycle of international decisions and events which has flowed from it is the predicate for Resolution 338 of October 22, 1973. Arab public opinion was—and still is—profoundly convinced that the Mandate was an injustice to the Arab people of Palestine, and a violation of the League Covenant. They resisted the development of the Jewish National Home in the western part of Palestine and went to war to prevent the implementation of the General Assembly's 1947 resolution, upon which the Security Council had failed to take effective action.

The debate between these two poignant arguments has been settled by the authoritative decisions of the world community and by history. It is unthinkable that the international community could stand idly by if Israel were in danger of destruction. The moral and political convulsion which such an event would engender, with the memory of Hitler's time still fresh, is beyond calculation.

This is the ultimate thrust of Resolution 338, a binding decision of the

I may recommend, taking into account as appropriate each side's preference as to method of procedure and previous experience between the parties.

(B) that the purpose of the aforementioned discussions is to reach agreement on the establishment of a just and lasting peace between them based on (1) mutual acknowledgement by the United Arab Republic, Jordan and Israel of each other's sovereignty, territorial integrity and political independence, and (2) Israeli withdrawal from territories occupied in the 1967 conflict, both in accordance with resolution 242.

The Secretary-General correctly characterized the agreement as "an important step forward in the search for peace in the Middle East."

³³ See, D. HALL, *MANDATES, DEPENDENCIES AND TRUSTEESHIPS* (1948); J. STOYANOVSKY, *THE MANDATE FOR PALESTINE: A CONTRIBUTION TO THE THEORY AND PRACTICE OF INTERNATIONAL MANDATES* (1928); United States Department of State, Division of Near Eastern Affairs, *Mandate for Palestine* (1927); United States Department of State, Near Eastern Series No. 1, *Mandate for Palestine* (1931); J. ZASLOFF, *GREAT BRITAIN AND PALESTINE: A STUDY OF THE PROBLEM BEFORE THE UNITED NATIONS* (1952).

Security Council, with all the power and prestige of the decisions of the International Court of Justice in the *Namibia* case behind it.³⁴ "Decisions" of the Security Council, like those for Rhodesia and Namibia, are rare and not lightly voted. Under Article 25, they are legally binding on all member states.

Yet the destruction of Israel, by stealth and by overwhelming force, was precisely what was ominously threatened on October 6, 1973. In the setting of history, it strains credulity to suppose that the Syrian and Egyptian forces, had they been successful in 1973, would have stopped at the Golan escarpment, and the Armistice Demarcation Lines generally. The dream of destroying Israel, as the Crusaders' Kingdom was destroyed, has been the express basis for the steadfast Arab policy of refusing to make peace with Israel, and of their assertion, firmly rejected by the Security Council, that they have a right to claim that a state of war continues to exist between them and Israel.³⁵ That is why Security Council Resolutions 242 and 338 insist that if the Arab states wish to recover most of the territories Israel seized in the course of the 1967 hostilities, they must make peace in accordance with the principles and provisions of Resolution 242.

Mr. Shihata argues that "an agreement reached under alien military occupation through which an occupied sovereign state is forced to relinquish part of its territory is likely at any rate to be deemed null under modern international law."³⁶ This is hardly an argument to command universal acceptance in a world society which has recently witnessed many transfers of territory by agreements made while the state ceding territory has had foreign troops on its soil. The cases of Poland, East Germany, Japan, Romania, and Czechoslovakia come to mind. In any event, the Security Council has a comprehensive power to deal with threats to the peace, breaches of the peace, and aggressions, even if they arise within states. Exercising that jurisdiction, the Council has now decided that the particular circumstances of the Middle Eastern situation, and in particular the fate of the 1957 settlement and the refusal of Egypt and Syria between 1967 and 1973 to implement Resolution 242, require the policies of Resolution 338 in order to obtain the agreements of peace which it has sought in vain since 1948.

Implicit in this decision is a judgment that the continuing threat to international peace in the region, and beyond, is the Arab policy of "no peace with Israel, no recognition, and no negotiations." That policy must be overcome, the Security Council has now decided, by the agreement of the parties pursuant to Resolution 242, in the name of the principal respon-

³⁴ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 [1970], Advisory Opinion, ICJ REP. 1971, at 16. See also, Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?* 21 INT. & COMP. L.Q. 270 (1972). The more controversial aspects of the court's Namibia judgment do not arise in connection with Security Council Resolution 338, which is addressed to a problem under Article 39, and is therefore binding under Article 25, according to all the authorities.

³⁵ See note 15, *supra*.

³⁶ SHIHATA, 606.

sibility of the United Nations—its responsibility for peace. The “parties” referred to in Resolution 242 are the states of the region.

This postulate is the basis for both Security Council resolutions, now embodied in the “decision” of October 22, 1973. For this reason, the Arab attack on Israel of October 6, 1973, was the least ambiguous violation of Article 2(4) of the Charter since the North Korean invasion of South Korea in 1950. The North Korean attack, like that of the Arabs in October, 1973, crossed a demarcation line which was not an international boundary. Like the Arabs, the North Koreans claimed an inherent right under international law to use force in order to unite two parts of a nation-state which was divided by political circumstance and by international agreement—in the Middle Eastern case, by an international agreement embodied in a series of Security Council resolutions; in the Korean case, by an international agreement embodied in great power understandings and General Assembly resolutions.³⁷ In both cases, the decision of the international community was that the war was not a civil but an international war, an attack by one state against another. In the Korean case, the General Assembly and the Security Council found that the Republic of Korea was a state, “a lawfully established government.”³⁸ In the Middle Eastern conflict, of course, the status of Israel as a state had long been established by the usual criteria of recognition under international law, and by its membership in the United Nations.

In the United Nations debates on the Middle Eastern war of October, 1973, there was a notable and deliberate silence concerning the illegality of the Arab attack on the part of the United States. That fact measures the ominous recent decline in the influence of international law on international politics. The decision of the Security Council embodied in Resolution 338 speaks for itself. The premises on which it necessarily rests reaffirm the principles of the Charter, as the Security Council has long sought to apply them to the facts of the dispute about Israel’s right to exist. Resolution 338, adopted by the contemporary Security Council, authoritatively reaffirms the legitimacy of the Palestine Mandate, and the emergence of Israel and Jordan as the successor states to the sovereignty of Turkey in the territories included within the Palestine Mandate.

But Resolution 338 was not accompanied by speeches, statements, and articles elucidating the reasons on which it is based, and denouncing the Arab attack of October 6, 1973, as a breach of the peace and an aggression. Nor have the Security Council and the General Assembly made any attempt, as they did when South Korea was invaded in 1950, to rally other nations to assist Israel in the exercise of its inherent right of self-defense.

Mr. Shihata’s argument, considered here, and Mr. Arafat’s bolder argument, summarized in note 2, represent two phases of a disquieting rebellion against the norms of international law regarding the use of force by states, and from states. Those norms have taken on tangible and coherent form in a dozen or more cases since 1945. Security Council Reso-

³⁷ The documents are conveniently collected in 2 R. HIGGINS, *UNITED NATIONS PEACEKEEPING, 1946–1967* at 151–72 (1970).

³⁸ *Id.*, at 159–60.

lutions 242 and 338 have been criticized, implicitly at least, in a number of General Assembly resolutions.³⁹ General Assembly resolutions of this kind are, it is true, no more than recommendations. They cannot qualify or overrule resolutions of the Security Council, especially those which invoke the authority of Article 25. Nonetheless, the trend represents a current in world opinion which should be taken seriously.

An essential feature of all systems of law is the principle that similar cases be decided alike, if, in full context, they are indeed similar. The reciprocal rules of Article 2(4) and Article 51 define relationships based on the nature of states. They elucidate conditions essential to the peaceful coexistence of states within an international society which is and will remain a society of states, not of peoples. These rules are more necessary than ever before in an age of revolutionary transition, characterized by the presence within the states system of nations organized under different social and political ideologies. No state could accept the application to itself of the rules urged by Mr. Shihata or Mr. Arafat.

The Soviet Union would vehemently oppose the proposition that West Germany and its NATO allies had a right under Article 51 to use force internationally to redeem the national territory of Germany. Yet Mr. Shihata's argument allows no escape from this proposition. At least until the recent East German treaties were ratified, the case of a hypothetical NATO liberation of that country, as sovereign German territory held by force, cannot be distinguished from the case Mr. Shihata makes. And his argument even suggests that the international agreements recognizing the German Democratic Republic are "null," because of the presence of the Red Army in East Germany and of NATO forces in the Federal Republic. This cannot be the law.

Mr. Arafat, of course, goes much further. His thesis would authorize the international use of force to liberate the Estonians, the Uzbeks, or the Ukrainians, and would recognize the "right" of France to send regular or irregular forces into Spain to help vindicate the right of the Basques or the Catalonians to self-determination. This, too, can hardly be the law.

Looking back over our experience with war since 1945 and the arguments advanced to justify the successive and prospective Arab wars against Israel, I conclude that Maxim Litvinov was right when he used to say, nearly forty years ago, that "peace is indivisible." Litvinov's thesis, which the Soviet Union once professed to support, is the fundamental idea of the Charter. In a world of small, weak states, and strong imperial ambitions, it is the only rule that could protect the interests of all states, Western and Eastern, capitalist and communist, developed and developing, large and small. A legal rule can survive as the compass for a legal system if it is not invariably and uniformly obeyed. But it cannot survive for long as a norm unless in the end it is respected reciprocally, and equally, by all those who participate in the political process it is intended to govern.⁴⁰

³⁹ See SHIHATA, 601, note 52, and UN Doc. A/RES/3236 (XXIX), Nov. 23, 1974.

⁴⁰ Rostow, *The Role of International Law in International Politics*, an address before the Twentieth Anniversary Meeting of the Atlantic Treaty Association, The Hague, June 21, 1974, reprinted in 12 *THE ATLANTIC COMMUNITY Q.* 500 (Winter 1974-75).