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Negotiations and Agreements Are Better Than Legal Resolutions: A Response to Professor John Quigley

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COMMENTARIES

NEGOTIATIONS AND AGREEMENTS ARE BETTER THAN LEGAL RESOLUTIONS: A RESPONSE TO PROFESSOR JOHN QUIGLEY

*Shimon Shetreet**

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I would like to congratulate the 1998-99 Editorial Board of the Case Western Reserve Journal of International Law and the Fredrick K. Cox International Law Center at Case Western Reserve University School of Law for its yearlong symposium on the Legal Foundations for Peace and Prosperity in the Middle East. This symposium represents a very valuable contribution in ongoing efforts to promote the building of organized societies, good governments and constitutional structures in the region. I also thank the Editorial Board for its key assistance in editing this Comment.

I. INTRODUCTION

A Comment to Professor John Quigley's article¹ on the role of law in the permanent settlement in the Israeli - Palestinian conflict is a difficult exercise. This is because it requires reference to almost each and every legal aspect of the Arab - Israeli conflict, whereas the scope of a Comment must, by nature, be limited. Nevertheless, Quigley's article requires a response that illustrates the alternative, and currently prevailing, point of view.

With this in mind, this Comment first illustrates that Quigley's proposed approach to substitute the current process of negotiations and agreements with politically imposed "international legal norms" is unjustified and impracticable. In fact, Quigley suggests to turn the academic or political application of legal norms to "facts" according to one version of those facts by applying "international legal norms," according to one version of interpretation of those norms which he advances.

However, this proposed process runs counter to the over twenty year success of the current approach since the Camp David accords. In fact, Quigley has already expressed the positions advanced in his article in previous scholarship.² These positions have already been critiqued by other scholars.³ Hence, and with all due respect to Quigley, his proposed solution should be rejected by the international legal community.⁴

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

² See, e.g., John Quigley, *The Oslo Accords: More than Israel Deserves*, 12 AM. U. J. INT'L L. & POL'Y 509 (1997); John Quigley, *Loan Guarantees, Israeli Settlements and the Middle East Peace*, 25 VAND. J. TRANSNAT'L L. 547 (1992).

³ See, e.g., Eugene Rostow, *The Perils of Positivism: A Response to Quigley* (1992) 2 DUKE J. COMP. & INT'L L. 229; Louis Beres, *Response to John Quigley*, 12 AM. U. J. INT'L L. & POL'Y 509 (1997); Louis Beres, *The Oslo Agreements in International Law, Natural Law, and World Politics*, 14 ARIZ. J. INT'L & COMP. LAW 715 (1997).

⁴ The author wishes to emphasize his support for the approach presented by Prof. Hiram E. Chodosh. See Hiram E. Chodosh, *Reflection on Reform: An Introduction to the Symposium - Legal Foundations for Peace and Prosperity in the Middle East*, 31 CASE W. RES. J. INT'L L. 427 (1999). The desire to see the implementation of reforms and integration of civil society values in the emerging society in the Palestinian Authority is fully justified. But the actors from outside must be patient and considerate. They should be very careful to refrain from paternalism and from exercising imposition of specific models or machineries. Each society has its own social climate and unique circumstances. Models from other countries cannot be transplanted into a society as the Palestinian community, as well without proper adjustments. This requires a proper process of adjustment, including patience and time. This is even more the case within emerging societies in their formative years. I therefore share Prof. Chodosh's approach

Following this argument, this Comment will then demonstrate that Quigley's proposed "international legal norms" are not the only version of these norms.⁵ Indeed, there are strong positions expressed in international legal scholarship which formulate legal norms quite differently than does Quigley.⁶ Consequently, when these alternative views are applied to the Israeli-Palestinian conflict, they produce different conclusions than those advanced by Quigley. Moreover, the facts alleged by Quigley can be formulated in quite a different way which also produces different conclusions, including the issues of borders, settlements, refugees, and the status of Jerusalem.

II. NEGOTIATIONS AND AGREEMENTS HAVE PROVED MORE SUCCESSFUL THAN LEGAL APPLICATION OF NORMS

Quigley rejects the negotiations and agreements approach that has been successful in resolving conflict in the Middle East among the parties to that conflict – the Arab States, the Palestinians and Israel. These accomplishments include the 1979 peace treaty with Egypt, the 1994 peace treaty with Jordan, and the ongoing peace process with the Palestinians under the Oslo framework. Instead, Quigley suggests abandoning these negotiations and adopting an approach of politically imposed legal resolution based upon "international legal norms" of his construction.

Since 1948, the Arab-Israeli conflict has produced recurrent armed conflicts and violence. Resolutions of the United Nations and other international organizations utterly failed to produce satisfactory solutions. After recurrent wars and too much blood shed, the Arab - Israeli conflict began to be resolved by negotiations and agreements.

explicated in his article and commend his advice to all those who are involved in Palestinian legal reform efforts.

⁵ In fact, Quigley has limited his resources to one school of thought with little or no reference to the alternative views of, among others, Eugene Rostow, Julius Stone, Ruth Lapidot Yehuda Blum, or Yoram Dinstein. See, e.g., Eugene Rostow, *Peace as a Human Right*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 215 (1983); Julius Stone, *Introduction to the Peace Process Issue: The Peace Process: Legal Issues*, 15 ISR. L.REV. 157 (1980); Ruth Lapidot, *The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace between Egypt and Israel*, 77 AM J. INT'L L. 84 (1983); Yehuda Blum, *From Camp David to Oslo*, 28 ISR. L.REV. 211 (1994); Yoram Dinstein, *Arab-Israeli Conflict from the Aspect of International Law*, 43 U. N.B. L. J. 301 (1994). An attempt to use the works of these and other scholars, and application of alternative arguments and positions, could have qualified or perhaps changed the final results of Quigley's thesis, or at least would have made his analysis more balanced.

⁶ See generally, e.g., Theodor Meiron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT'L L. 542 (1978); Yaacov Bar-Shimon, *ISRAEL AND THE PEACE PROCESS 1977-1982: IN SEARCH OF LEGITIMACY FOR PEACE* 338 (1994).

First, Israel and Egypt were able to develop the Camp David framework in 1978 and the resultant 1979 Peace Treaty between Israel and Egypt.⁷ In 1993, the Oslo Declaration of Principles was agreed upon between Israel and the Palestinian Liberation Organization (P.L.O.), followed by Gaza and Jericho Agreement in May 1994, the 1994 Israel - Jordan Peace Treaty,⁸ and the Washington Interim Agreement of September 1995.⁹

All of these peaceful agreements were conducted and achieved through negotiations, predominantly among the parties concerned and with the important assistance of the United States. For example, U.S. President Jimmy Carter was instrumental in the achievement of the Camp David accords.¹⁰ President Bill Clinton was also very helpful in supporting and promoting the Oslo Accords after these were formulated in bilateral negotiations between Israel and the P.L.O. The United States, led by President Clinton, was also active in the Israel - Jordan Peace Treaty by witnessing, signing and supporting that agreement.

Not only did the United States support the peace process in its formation, but it has provided ongoing political and financial support to further buttress peace between Israel and Egypt, providing civil and military assistance to Egypt generally equivalent to that provided to Israel. In addition, the United States has given economic assistance to Jordan, and organized donor conferences to support the Palestinian Authority, which in the last four years has yielded over \$2 billion dollars.

These negotiation and agreements achievements fail to impress Quigley. He does not approve of bilateral negotiations and agreements that have produced the above listed host of achievements and binding obligations for peace and prosperity. Quigley is also not satisfied with the role of the United States in the peace process. He suggests substituting the negotiations and agreements approach with ambiguous, undefined "international legal norms" imposed by

⁷ Ding and Koenig, *Treaty of Peace between Egypt and Israel: Demarcation of Internationally Recognized Boundaries*, 83 AM. J. INT'L L. 590 (1989); Camp David Agreements, Sept. 17, 1978, Egypt-Isr.-U.S., 17 I.L.M. 1466 (1978).

⁸ David Relsner, *Peace of the Jordan*, 4 JUST. 3 (1995); The Peace Treaty with Jordan (1995); Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan of October 26 (1994).

⁹ Declaration of Principles on Interim Self-Government Arrangements of September 13, 1993, 32 I.L.M. 1525; Agreements on the Gaza Strip and the Jericho Area of May 4, 1994, 33 I.L.M. 622; Agreement on Preparatory Transfer of Power and Responsibilities of August 29, 1994, 33 I.L.M. 941.

¹⁰ Michla Pomerance, *U.S. Involvement in Sinai: 1975 as a Legal-Political Turning Point*, 20 ISR. L. REV. 299 (1985).

outsiders on Palestinian - Israeli relations to formulate the permanent settlement between Israel and the Palestinians.

In spite of problems that invariably arise in international negotiations, *the process has produced results*. The fact of the matter is that it was this approach that made it possible for Israel to establish peace with Egypt. It was this approach that is to be credited with the Peace Treaty between Jordan and Israel as well as the significant peace achievements to date with the Palestinians.

Given the success of the current negotiations and agreements approach, Quigley's alternative approach should not be accepted. It is unwise to reject a successful model that has proved in reality that it can bring peaceful achievements and instead adopt a model that has not been successful in the past – neither in the region nor elsewhere. Nor is it wise to reject the positive role of United States engagement in the process, substituting instead untested parties from the United Nations and Europe. One should not change or replace a winning combination with a doubtful and untested process.

Principles of international law serve as bargaining tools in the hands of the parties to multilateral or bilateral negotiations for resolving disputes. They are most important as a general platform of the negotiation. In a way, the principles of international law perform the same function as the law does in domestic law negotiations, sometime called the "shadow of the law."¹¹ This is, of course, only by general analogy, and is not totally identical to the legal and actual circumstances in international legal situations. However, and again with all due respect to Quigley, to turn the law and the legal approach into the sole machinery of international relations or the sole machinery for resolution of international conflicts is wrongheaded and should not be accepted to replace the current approach of negotiations and agreements.

Moreover, the general consensus within the international legal community today is to prefer alternative dispute resolution models to adjudication in resolving disputes.¹² This wisdom should also be true in resolving disputes in the international level. The parties to the Oslo Accords agreed expressly on negotiation in order to formulate the permanent Israeli-Palestinian settlement.¹³ The general position of the parties will result in a much better process for arriving at an open resolution of the issues among the parties. Any imposed solution will be rejected by the party dissatisfied with the proposed solution.

¹¹ Cf. SHIMON SHETREET, *JUSTICE IN ISRAEL* 462 (1994).

¹² Smadar Ottolengi, *Alternative Dispute Resolution*, *ISR. L. Y.B.* 1992-1993, 535 (1994); Arie Vinshell *The Taba Affair: Issues in Compromising and Arbitration* (1985) 24(45) *INT'L DISP: SOC'Y & ST.* 32 (1985).

¹³ The Declaration of Principles, arts. IV, V, 32 *I.L.M.* 1525 (1993).

Additionally, negotiations and agreements are already an “international legal norm” because negotiations and agreements are mandated by the international community through the Oslo Accords and United Nations Security Council resolutions, thereby further undermining Quigley’s thesis. For example, UN Security Council Resolution 338 expressly confirms the principle of negotiations. Security Council Resolution 242 also strongly implies negotiations by establishing a set of principles that should be applied in the process of the “establishment of peace in the Middle East.”¹⁴ In view of these acts of the Security Council, this application should be done in the process of negotiation between the parties, not through adjudication of assumed legal norms. Indeed, even when legal application was “emP.L.O.yed” to resolve disputes, such as in the Taba arbitration between Israel and Egypt, this was done by virtue of a previously negotiated agreement between the parties.¹⁵ Moreover, the process of arbitration was agreed upon in the Taba case by the parties on a limited and carefully defined issue in keeping with the overall framework of relations between Israel and Egypt. It was shaped *by the parties to the dispute* and not left for a *post hoc* theoretical application of “legal norms” to an assumed set of “facts,” as Quigley would apply to Israeli-Palestinian relations.

III. THE ALTERNATIVE POSITION ON LEGAL NORMS AND FACTS IN THE ISRAELI – PALESTINIAN SITUATION

Quigley examines the issues of the Israeli-Palestinian conflict, and presents a legal analysis that appears greatly influenced by the Palestinian position.¹⁶ However, for the reasons that follow, the Quigley approach should further be rejected in view of the alternative legal scholarship which supports key aspects of the Israeli position, further undercutting Quigley’s purported “international legal norms.”

¹⁴ Eugene Rostow, *The Drafting of Security Council Resolutions 242: The Role of the Non-Regional Actors*, 25 N.Y.U. J. INT'L L. 489 (1993).

¹⁵ Yoram Dinstein, *The Taba Arbitration Award*, 14 TEL-AVIV U. L. REV. 57 (1989); Yoram Dinstein, *Arab-Israeli Conflict from the Aspect of International Law*, 43 U. N.B. L. J. 301 (1994).

¹⁶ The author notes that, in his view, Quigley tends to propose very absolute statements. For example, Quigley states that the “P.L.O. takes a position that is consistent with international legal norms, whereas Israel takes a position inconsistent with those norms.” See Quigley, *supra* note 1, at 381. This absolute assertion is offered without any qualification, or reservations.

A. *UN General Assembly Resolutions, As Well As Unpassed Security Council Resolutions, Are Not Binding International Law*

Quigley proposes a model of legal resolution that purports to apply “law” to “facts.” In order to be in conformity with this model, Quigley must apply to those facts only norms that can be defined in international law as “binding law.” It is well-settled that adopted United Nations General Assembly resolutions are considered merely “recommendations” and, at best, may be persuasive of what international law “should be.” However, they are not an expression of current and binding international law. Thus, it is very questionable whether Quigley is doctrinally consistent in proposing “a legal resolution” of the Israeli – Palestinian conflict by relying on General Assembly resolutions which are not binding international law.

Likewise, it is well-settled that a proposed UN Security Council resolution that fails to pass in the Security Council because one of the five Permanent Members has exercised its veto power, is, as a draft resolution, of no legal consequence whatsoever. Hence, Quigley’s reliance upon vetoed Security Council resolutions ignores that fact that such drafts have no international legal force. Thus, with all due respect, Quigley’s use of vetoed Security Council resolutions is also inconsistent with the thesis he advances.

B. *The Principles of Peace Contained in Security Council Resolution 242*

In the Oslo Accords, the parties agreed that the issue of borders should be negotiated in the permanent settlement.¹⁷ Quigley advances the proposition that legal resolution requires total Israeli withdrawal and not territorial compromise. He disregards the well established and widely supported interpretation that the language and the history of UN Security Council Resolution 242 in 1967 does not support his position for total Israeli withdrawal and instead favors territorial compromise and partial withdrawal. Moreover, he fails to give sufficient weight to the fact that Resolution 242 refers to “secure and recognized boundaries” and refer to withdrawal from “territories,” not from “the territories,” or from “all the territories.”

Likewise, Quigley fails to give due regard to the alternative position that the legal status of the West Bank relies upon the fact that it was seized by Israel in self defense, and that Jordan was not recognized by the international community as the *de jure* sovereign of the West Bank since it seized the area in 1948 during in an arguable war of aggression against the State of Israel. The same arguments and reservations are applicable with regard to the settlements. Quigley

¹⁷ See Declaration of Principles, *supra* note 9.

disregards the alternative position which justifies the establishment of settlements provided that they are established on *public land* and not *private land*. This has been Israeli policy since 1979 when the Israeli Supreme Court adjudicated the *Elon Moreh case*.¹⁸

Quigley points out that the Oslo Declaration of Principles, which recalls the language of Resolution 242, calls on Israel to withdraw from occupied territories. The controversy is over the interpretation of the term: "from territories" or "from the territories." According to Quigley, the Palestinian interpretation of the term is more consistent with history, as evident by the French text, which speaks of withdrawal "from *the* territories."

Further, Quigley suggests that occupation of territories does not give rights of any kind, according to international law, even if Resolution 242 had not been passed. Therefore, argues Quigley, Israel should withdraw from all the territories for they are occupied. This position is not accepted by Israel nor by some scholars, who hold that Resolution 242 provides for a just and lasting peace through an international agreement to be reached by negotiations.¹⁹

According to this alternative position, the presently existing settlements should be held legitimate, as Resolution 242 recognizes security as a central and vital element of the permanent Israeli-Palestinian settlement. Resolution 242 does not contain an operative instruction except to set up a special representation for promoting the agreement and reporting to the UN Security Council. Resolution 242 views negotiation as vital for maintaining peace, and sets down a set of principles for achieving peace. The principles of Resolution 242 include a just and lasting peace, withdrawal from territories, termination of belligerency, and peace within secure and recognized boundaries. Resolution 242 also refers to the free navigation through the international sea paths closed by the Arab countries during the 1967 war against Israel.

Resolution 242 does not call for full withdrawal to 1967 borders, as Quigley suggests is mandated under "international legal norms." nor to the 1967 armistice lines. The intention was to change the existing situation, not to revert to an old one. There were no recognized borders between Israel and Arab countries, except the

¹⁸ H.C. 390/79, *Dwikat v. State of Israel*, 34 (1) P.D. 1 (invalidating the military authorities' seizure of plaintiffs' lands). See also Shimon Shetreet, *International Protection of Human Rights in Israeli Law*, in ISRAELI REPORTS TO THE XII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 307 (S. Goldstein ed., 1986); M. NEGBI, *JUSTICE UNDER OCCUPATION: THE ISRAELI SUPREME COURT VERSUS THE MILITARY ADMINISTRATION IN OCCUPIED TERRITORIES* (1981).

¹⁹ See, e.g., Eugene Rostow, *The Drafting of Security Council Resolutions 242: The Role of the Non-Regional Actors* (1993) 25 N.Y.U. J. INT'L L. 489 (1993).

armistice lines. Thus, the intention was to have negotiation in order to determine the boundaries according to security arrangements. The fact that the preface to the Resolution emphasizes rejection of acquiring territories by force is of no meaningful consequence, for Israel's intention was to reach a settlement over the territories through mutual consent. Also, concerning the refugee problem, Resolution 242 calls for a just settlement. It is to be noted that the details will be left for subsequent negotiation. Peace through negotiation principle is repeated also in Security Council Resolution 338, which expressly states the principle of negotiation between the parties.²⁰

C. Settlements and the Status of Jerusalem

In reference to the civilian settlements set up by Israel, Quigley quotes Prime Minister Netanyahu that all settlements will be maintained. Quigley notes that this does not conform with international law. Quigley notes that the P.L.O. accepts the 1993 Principles Declaration that Israel would control the settlements areas during the interim period, in spite of the fact that from 1991 to 1992, during the negotiations, the Palestinians representatives asked for an end to the application of Israeli law to the settlements.

Quigley expresses the opinion that the P.L.O. position - to remove settlers - conforms with international norms which hold that an occupying power cannot change the sovereignty of the land so occupied. Quigley refers to the 1907 Hague Regulations and to the Geneva Convention of 1949, which according to prevailing views permit the occupying power to act in order to maintain a civil way of life, knowing and anticipating that it will withdraw in the future. In addition, according to Article 49 in the Geneva Convention, it is forbidden to transfer civilians to the occupied territory. Quigley also mentions that the UN condemned the settlements for violating Article 49. The UN General Assembly and the UN Security Council resolved that the settlements in the Occupied Territories of 1967 constituted violation of the Geneva Convention and thus Quigley believes that they are an obstacle to peace.

Quigley's position is misplaced because he misapprehends the history of Article 49. The Geneva Convention was signed four years after the end of the Second World War and in light of Nazi genocide during the Holocaust. These factors strongly indicate that the intention of Article 49 was to prevent what had been experienced in two world wars - expulsion and settlement. According to rules of interpreting laws that were legislated in different times, there is an essential need to check the circumstances at that time. Thus, it is

²⁰ See *supra* note 16.

clear that the establishment of Israeli settlements do not involve the element of expulsion of civilian population. All settlements have been established on *unpopulated lands*.

There is also a division of opinion as to whether Israel is to be defined as an "occupying power" and whether the West Bank and Gaza are "occupied territories." The alternative position that Quigley fails to address is that Israel is not an occupying power in Gaza and the West Bank, but rather an "administering power," and the territories are therefore "administered territories." Therefore, according to this view, Gaza and the West Bank are not occupied territories, making Quigley's analysis improper.

"Occupying power" and "occupied territory" are defined terms in international law. They refer to a situation in which, as a consequence of hostilities between two states, one of them takes control of a territory within the sovereignty of the other state. This territory is defined as the "occupied territory" and the state in control as the "occupying power." The sovereignty is not transferable. Instead, this legal distinction is designed to protect the sovereign from the occupation.

In view of this situation, and in stark contrast to the Quigley position, a number of international scholars hold that, as it concerns the West Bank, the Geneva Convention does not apply. In order to clarify this situation, the proponents of this alternative view emphasize that Israel seized the lands in self-defense.²¹ The invading countries, with arguable aggression, could not gain sovereign rights in the occupied territory. This should be viewed as a severe violation of international law. Jordan's one-sided annexation of the West Bank in 1948 lacked a legal basis in international law and is contrary to the armistice agreement between Israel and Jordan 1949. Its purpose was, among others, to freeze the legal situation that is conditioned on a peace agreement between the two sides.

In addition, the 1948 Jordanian annexation did not gain international recognition, not even by Arab countries. Additionally, Israel did not view itself as an occupying power in mandatory Palestine territories beyond the boundaries of the UN partition plan of 1947. Jordan argued before the Security Council that the purpose of the annexation was to keep the territories as a trustee, until a settlement could be reached. In 1967, when the Israeli Defence Forces (IDF) drove the Jordanian forces from the West Bank, it ejected the Jordanian forces at a time when Jordan did not enjoy sovereign legitimacy in the West Bank. Thus, per the alternative view, the Geneva Convention provisions never applied to Jordan's

²¹ Amos Shapira, *The Six Day War and the Right of Self Defense*, 6 ISR. L. REV. 80 (1971).

presence in the West Bank, and Israel is consequently not bound by it either.

Similar arguments on the position regarding settlements are also applicable to the legal resolution of the issue of Jerusalem. The legal status of Jerusalem can be presented and analyzed quite differently from the way it is presented by Quigley. According to this alternative approach, the argument of self-defense is fully supported by law and facts on the issue of Jerusalem as well. In the words of Professor Shapira,²² “[e]ven if the United Nations record on this matter falls short of establishing an affirmative finding decisively upholding the lawfulness of Israel’s action, at the very least it provides solid support for Israel’s claim to have acted in legitimate exercise of its right of Self Defense.”²³

D. Refugees and Displaced Persons

Quigley argues that on the issue of displaced persons, the law supports the Palestinian position. However, Quigley fails to distinguish between two categories of persons. One is the “refugees” of 1948, and the other, the “displaced persons” of 1967. This distinction is well-established in the Oslo Accords, which very clearly distinguish between refugees and displaced persons. The Oslo Declaration of Principles in Article V(3) refers to “refugees,” while in Article XII it deals with “displaced persons.” The Declaration of Principles provides that the issue of refugees shall be dealt with in the framework of the negotiations on the permanent settlement. As for the issue of displaced persons, the Oslo Accords provide for a committee of the parties to determine the modalities and conditions of allowing displaced persons to go back to the Palestinian Areas.

Quigley expresses his opinion that the displaced persons, as a consequence of an armed conflict, have a right to return, except when they adopt a new citizenship. Quigley cites UN General Assembly Resolution 194 (1948) concerning the Right of Return. Quigley points out that Israel rejected this recommendation, even though it is based upon international law that requires the original state or the occupying power to let the displaced persons return. Quigley also cites the Council of Europe resolution of avoiding discrimination on national background and the international law position.

²² See Shapira, *supra* note 21, at 80.

²³ Cf. Y. Blum, *THE JURIDICAL STATUS OF JERUSALEM* (Feb. 1974); M. Schwabell, *What Weight to Conquest?* 64 AM. J. INT’L L. 346-347 (1970). For an alternative view, see Gerson, *Trustee Occupant: The Legal Status of Israel’s Presence in the West Bank*, 14 HARV. INT’L L. J. 1 (1973).

Quigley rejects outright Israel's position concerning the economic situation and space. This argument, in his opinion, lacks legal and actual basis when at the same time, Israel continues to accept immigrants and encourages immigration. Quigley concludes that Israel's position does not conform to international commitments, referring to the right of return of the displaced persons.

There is a strong alternative position on the question of the application of the right of return to the Israeli - Palestinian issue. The right of return is the least developed of all the so-called "rights to travel." In spite of the fact that it has gained recognition in most countries, there is a controversy over its contents and over its limitations. Some treaties give this right to citizens only.²⁴ Also, these conventions generally refer to individuals, not to masses of displaced persons or refugees. Moreover, there is disagreement whether the right is applicable in times of emergency.

In view of the above, the relevant rules in international law give right of return to the Palestinian Arab displaced persons. This is highlighted by the fact that they lack relations with Israel, and as a result of the existing emergency state. Likewise, it is inapplicable in relation to masses of displaced persons as a consequence of *political conflicts*, not as a result of international expulsion. As regards the different UN resolutions cited by Quigley, previous resolutions do not speak of an unconditioned right of return, and later resolutions - in spite of the intention to secure this right - attach it to the right of self-determination. Those resolutions emphasize the political aspect of the problem, not its human rights elements.²⁵

E. Judicial Protection of Individual Rights in the Administered Territories

Finally, the Supreme Court of Israel exercised judicial review in the administered territories and applied international legal norms in its review of the actions of the military government.²⁶ The legality of the activity of the military government has been tested in light of three

²⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Protocol No. 4, art. 2, 213 U.N.T.S. 222; American Convention on Human Rights, Nov. 22, 1969, art. 22, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. Rev. 2.

²⁵ Ruth Lapidot, *The Right of Return in International Law, with Special Reference to Palestinian Refugees*, 16 ISR. Y.B. HUM. RTS. 103 (1986).

²⁶ See Meir. Shagmar, *Legal Concepts and problems of the Israeli Military Government - The Initial Stage*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1976-1980 (Meir. Shagmar ed., 1980); see also Shetreet, *supra* note 23. See generally Negbi, *supra* note 18.

sets of legal norms: the local law of the administered territories, international law, and Israeli administrative law.

Local law in the administered territories is multifaceted, comprising Ottoman law, British mandate regulations, Jordanian law and military orders. The legality of acts of the military government in the territories may be judged by its compliance to the local law as amended by legislation of the military government.

With regard to international law, in a series of cases the Court has accepted without question the applicability of the Hague Regulations on military government.²⁷ These apply since they are customary international law that forms automatically an integral part of Israeli domestic law.²⁸ The Attorney General of Israel in 1967, Mr. Meir Shamgar, willingly accepted the applicability of international law to military government activities.

Case law supports that the Israeli military commander in the administered territories is also subject to Israeli administrative law, and the Supreme Court accordingly has reviewed his activities in light of the principles of administrative law, particularly in matters involving human rights.

The scope and nature of review of administrative acts of the military government in the territories is generally the same as that employed with regard to the government of the state of Israel.²⁹ It is an established principle of Israeli administrative law that the Court does not substitute its judgment for that of the government agency. Nor does the Court interfere in discretionary questions of whether conditions exist necessitating the exercise of power. The Court does, however, ascertain whether the officers acted in good faith and solely for the purposes for which the authority was conferred. Other grounds for review are, for example, the reasonableness of the action,³⁰ breach of procedural rights, excess of jurisdiction and discrimination.

²⁷ Cr. A. 1/48, *Sylvester v. Attorney General*, 1 P.D. 5, (discussing applicability of Hague Regulations, in first criminal appeal in state's history); H.C. 390/79, *Dwikat v. State of Israel*, 34 (1) P.D. 1 at 8.

²⁸ Of note, the status of the Geneva Convention is to be distinguished because it forms a part of international law made by treaty. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 75 U.N.T.S. 287.

²⁹ H.C. 274/82, *Hamarah v. Minister of Defense*, 36(2) P.D. 755, 756; *see also* H.C. 572/82 *Muslah v. Minister of Defense*, 36(4) P.D. 610, 612 (citing to *Hamara*).

³⁰ In H.C. 361/82 *Hamri v. Area Commander of Judea and Samaria*, 36(3) P.D. 439, 441, Justice Barak held that a decision will not be reviewed by the Court as long as the Court is satisfied that a reasonable man would have considered the existing evidence sufficient so as to constitute the offense. "Unlawful on its face" would be a Commander's decision that does not pass this test. *See id.*

As most cases involve state security one may observe a certain measure of restraint in the exercise of judicial review. This may be illustrated by a number of cases in which the Supreme Court refused to invalidate the military commanders' decisions.³¹ In *Sachawil v. Area Commander*, for example, the Court rejected the applicant's claim that he was being singled out for punishment.³² In the *Shahin* case, the Court deferred to the government's decision to deport the appellant, assuming that the authorities would find the right balance between security considerations and the personal safety of the deportee.³³ The Court assumed that the commander would find the right balance between security considerations and the personal safety of the deportee.

It can be concluded that in this complicated situation, the state of human rights in the administrated territories has been reasonable under the circumstances. The supervisory function performed by the Israeli Supreme Court has ensured respect for the rule of law as laid down by local law, international law, and Israeli administrative law. The mere existence of such a supervisory court has allowed the residents a means of redress, and has safeguarded the principles that exist throughout the Israeli legal system.

IV. CONCLUSION

In view of the foregoing analysis, the Quigley approach should not take the place of the current process of negotiations and agreements. The current approach, probably now accepted by the majority of the international legal community, has produced tangible achievements of peace since the time of the Camp David accords. Moreover, there are alternative visions of "international legal norms" which, given the facts of the Israeli-Palestinian conflict, can result in different conclusions than Quigley proposes. Accordingly, the current negotiation and agreement approach must be retained and strengthened as a vital part of the legal foundation for peace and prosperity in the Middle East in the next century.

³¹ See e.g. *Baransi v. Minister of Interior*, 37(3) P.D. 722, 723; *Hamarah*, 36(2) P.D. 755 at 756.

³² H.C. 434/79, *Sachawil v. Area Commander*, 34(1) P.D. 464, 465.

³³ H.C. 95/85, *Shahin v. Minister of Interior*, 39(1) P.D. 798. Such conditions include deportation to a country ready to grant him or her, among other things, permanent resident status. *Id* at 798-99.