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The Palestinian People and Their Political, Military and Legal Status in the World Community

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that while the decision in *Mahan*¹⁴⁰ could be accepted as a logical extension of *Reynolds*, the decision in *Gaffney*, because its effect could possibly result in the negation of population equality as the paramount goal of reapportionment,¹⁴¹ is entirely inconsistent with prior opinions which applied the requirement of equal protection to reapportionment.

IRWIN RUBIN

The Palestinian ~~Refugees~~ People and Their Political, Military and Legal Status in the World Community

. . . His Majesty's Government view with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine. . . .¹

. . . This right ("of the Jewish people to national rebirth in its own country") was recognised in the Balfour Declaration of the 2nd November, 1917, and re-affirmed in the Mandate of the League of Nations. We hereby affirm both, which, in particular, give international sanction to the historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.²

. . . We do not consider the Arabs of the land an ethnic community nor a people with a distinct national character.³

The Lord giveth and the Lord taketh away. Praised be the name of the Lord.⁴

During the long winter following the most recent Middle Eastern conflict many Westerners have asked poignant questions for the first time.

Reynolds and Abate). Population is controlling and these other factors are not justifiable where there are substantially greater deviations. *Id.* at 934. *But cf.* *Wells v. Rockefeller*, 394 U.S. 542, 553-556 (Justice White dissenting).

¹⁴⁰ This takes for granted the fact that the rational test is applicable in state apportionment cases. Of course, if the test is one of strict scrutiny, only the "absolute equality" principle would be acceptable in all cases.

¹⁴¹ Since there is a fixed valid deviation, this leaves open the possibility whether or not proof may be admitted that population was not the prime goal of the legislators.

¹ Quoted from the text of the Balfour Declaration, appearing in STEIN, *THE BALFOUR DECLARATION* (1961).

² ISRAEL, *LAWS, STATUTES, ETC.*, Laws of the State of Israel (authorized trans.) (Tel Aviv, 1948). This passage is of particular significance as it is quoted from Israel's Declaration of Independence.

³ "An Open Letter to Y. Galili," *Arab World* XV, no. 9 (1969) at 3.

⁴ JOB 1:21.

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Why have we an oil shortage? Who are the Arabs? What do Egypt, Syria and Saudi Arabia want from us? Should the United States pressure Israel to return the occupied territory in the Sinai and in Golan Heights to Egypt and Syria respectively? But, what about Israel's security? How can we implement a lasting peace between Israel and its Arab neighbors?

Depending on the various levels of consciousness of the person asking the question, the spectra of questions raised above represents the thinking of most individuals from the man on the street to Henry Kissinger at the impending Geneva Peace Conference. Yet, regrettably, no one seems to focus upon the rights, status or suffering of the Palestinian people, forcibly living in exile, since the creation of the State of Israel, in more than a cursory manner. The general thrust of these not infrequent examinations of the Palestinian "problem" has often been framed in terms of a larger political and legal struggle, *Arabs v. Jews*. So framed, any meaningful discussion of the Palestinian people as a separate political entity having a legal status of its own in international law and world affairs, has been totally submerged in the larger legal and ideological conflicts of the other Middle Eastern belligerents or, at best, treated merely as tangential to these larger conflicts.⁵

The thrust of this comment will be two-fold. First, it will examine the reasoning behind the world community's refusal to recognize the Palestinian people and/or its voice in exile, the Palestinian Liberation Organization (P.L.O.), as political entities worthy of legal and political status within the world community. This examination will necessarily entail not only an analysis of Western attitudes on the subject but also an evaluation of the attitudes of Israelis and the people of other Arab nations toward the Palestinians and their tragic plight, as the latter have in some way contributed to Western thought and policy-making. Moreover, the attitudes of the Palestinians themselves and of their official organ, the P.L.O., must be made apparent so that one may understand their role in shaping their own legal and political destiny in the international community.⁶

The second object of this comment is to demonstrate that the Palestinian people, through the P.L.O., already possess the status of a public body in international law and have the *legal right* to carry on both political-legal and military resistance against the State of Israel in accordance with the U.N. Charter and the Geneva Prisoners of War Convention of 1949. This point is most significant in that it should dispel the commonly held notion that the belligerent Arab states can speak or act in *parens patriae* for the homeless "refugees" of Palestine.

⁵ See generally, *The Middle East Crisis: Test of International Law*, 33 L. & CONTEMP. PROBLEMS no. 1 (1968).

⁶ In part a discussion of these attitudes will be based on personal encounters with Palestinians and members of the P.L.O. both in the U.S. and during residence and frequent visits to the Arab world. Reflections of my own encounters will be implemented by other material to be cited *infra*.

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The people of Palestine through its representative, the P.L.O., must be seated at Geneva or any other Middle Eastern peace conference and must have an equal voice as a signatory to any treaties or resolutions ratified by Israel and the Arab states, if a meaningful solution to Middle Eastern belligerency is ever to be effectuated in a manner consistent with the preservation of human rights and the fulfillment of concepts of justice acceptable to the world community.

I. THE PALESTINIANS AS A POLITICAL ENTITY

A. *A Brief History of Palestine*

The area known as Palestine is bordered by the Mediterranean on the east, the Jordan River on the west, the Golan Mountains and the Sea of Galilee on the north, and the Negev and Sinai Deserts on the south. The Palestinians are descendants of the biblical Abraham, Semites by race, who have continuously inhabited that same area known as Palestine for time immemorial. Since 1948, after the creation of the State of Israel on that same territory, the inhabitants of that area are living in forced exile.

Ever since 634, Semitic Arabs incorporated this region in the Islamic nation after defeating the Roman occupiers, who in 70 A.D. had expelled the Jews. Few Jews had remained on that land since the Diaspora, but not all of the inhabitants were Jews and not all Jews left Palestine. When the Arabs drove the Romans out of Palestine, they rescinded the decree of banishment from Jerusalem, but few Jews returned until the nineteenth century.⁷

The territory and population of Palestine has always remained an identifiable entity from either the Roman Empire, the Islamic nation, or the Turkish Ottoman Empire. When the Turks were driven out of Palestine during World War I by Arab and British forces, England, with the help of the League of Nations, established a colonial regime in Palestine. The mandate system, although a colonial device, spoke of "the provisionally independent State of Palestine," thus further underscoring the identifiable character of the territory and its inhabitants. The mandate system was predicated on the existence of a Palestinian entity which was to acquire complete independence.⁸ The administration of Palestine under the mandate reinforced that fact through the establishment of legislative, executive and judicial bodies. Palestine had a flag. Its nationals carried passports recognized abroad. In effect, with the exception of carrying on its own foreign affairs and of being subject to internal limitations imposed by England similar to Egypt or India, Palestine was seised of all the indicia of a national state. Yet, subsequent to the events leading to the proclamation of the

⁷ THE CAMBRIDGE HISTORY OF ISLAM, (eds. Holt, Lambton & Lewis) (1970).

⁸ *Id.*

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State of Israel in 1947-1948, the Palestinians ceased to be a "people" and became "refugees" and Palestine ceased to exist as an identifiable region.

B. Contemporary Palestinian Politics

One of the most interesting developments to come out of the 1967 War, the frequent commando raids by the Palestinian resistance from 1968 to 1972, and the 1973 conflict in the Middle East is the increasing awareness on the part of Westerners as well as Middle Easterners that the Palestinians are a distinct political community.

For nearly twenty years the Western world has viewed the Palestinians in "charitable" and "humane" terms as *refugees*,⁹ a people whose lamentable destiny was the product of irreconcilable regional and world forces. From time to time, visual and touching accounts have been given of the miserable conditions of their existence in refugee camps, thus spurring well-meaning individuals and organizations to increase or supplement the amount of aid that had been given to them.¹⁰ If any questions were raised, they went to only technical matters such as whether the Palestinians were evicted from their homeland or whether they left of their own volition; whether UNRWA figures regarding the number of refugees were in fact accurate; whether the seven cents-worth of daily rations per refugee was too much or too little; whether the United States and other Western powers should increase or diminish their voluntary contributions; how many Palestinians could be realistically repatriated to Israel in the event of a political solution; and how could the remainder of the Palestinians be resettled in the Arab countries with or without international assistance. In short, the Palestinians were regarded as a tragic people whose suffering could be alleviated if "common human decency" and genuine "goodwill" on the part of all were to prevail.

In the Middle East itself, the view of the Palestinian has been somewhat more complex. The Israelis have seen the Palestinians as an unfortunate and underdeveloped people whose sordid life could have been ameliorated long ago were it not for the cynical leadership in the neighboring Arab states.¹¹ Even those Israelis who have felt some pangs

⁹ See G.A. RES. 194 (1948) which while granting the "refugees" a right to return to their former homeland and to compensation for lost property, never admitted to the reality that these "refugees" constitute a "people." See also S.C. RES. 242 (1967) as a continued misunderstanding of the nature of the Palestinian problem. The resolution referring to the Palestinians stated as follows:

. . . 2. affirms the necessity . . .
 (b) for achieving a just
 settlement of the *refugee*
 problem . . . (emphasis added)

¹⁰ A. BOBER, *THE OTHER ISRAEL—THE RADICAL CASE AGAINST ZIONISM* (1972).

¹¹ U. AVENARY, *ISRAEL WITHOUT ZIONISM* (1968), at 129.

of guilt in this human tragedy often assuaged their conscience by arguing that these *refugees* were the problem of their kinfolk; that the Palestinians left their homes of their own accord and with the prodding of radio broadcasts from neighboring Arab capitals; and that except for a relatively small number, Israel could not allow all the Palestinian refugees who so wished to return to their homeland without jeopardizing the Jewish State's security and upsetting its ethnic composition, thereby calling into question its very *raison d'être*. Moreover, many Israelis have felt that Israel has absorbed a vast number of Jewish immigrants from Arab nations; and since Israel had settled those Jewish immigrants, it was only fair and proper that the Arab states should settle the Palestinian Arabs in their midst.

In the Arab world, there has not been a single or uniform attitude that is all pervasive toward the Palestinians. Instead, there were, and perhaps still are, a number of attitudes depending on the ideological orientation and socio-economic status of the Arab observer, despite all that has transpired since the 1967 War, the military activities of the Palestinian Resistance, and the volatile cease-fire following the most recent hostilities between Israel, Syria and Egypt.

To the Arab nationalist, the Palestinians are the first and foremost uncomfortable reminder of what he keenly feels to be the worst calamity to befall the Arab nations in modern times. The nationalist's sense of personal involvement in the lot of the Palestinians has not stemmed from his humanitarian impulses or from his sense of compassion, but from his political consciousness and his nationalistic perceptions and aspirations. This should not be taken to imply that such a person is callous or insensitive to the plight of the Palestinians, but merely to state that his feeling of outrage has been more directed at the origins and political consequences of the Palestine problem than the result of his revulsion of the nature of the Palestinian people's existence in refugee settlements. In fact, it is doubtful that many ardent nationalists have been fully acquainted with the conditions of life in the refugee camps; and even if they are so acquainted, it is quite possible that their sense of empathy has been blunted by their familiarity with not too dissimilar standards of living prevalent amongst their own compatriots. Nevertheless, it is the nationalist's feeling of shame that the Arabs have been unable to stem the forces of Zionism that wounds him; it is his sense of soiled honor that grieves him; it is his frustration at having been unable to erase a grave political injustice that constantly gnaws at him. Subsequently, the Palestinians are a living spectre constantly recalling these distressingly uncomfortable multitudes of passion. And the intensity of these aroused emotions is so overwhelming that it generates as a defense mechanism a disposition to lash out at the Palestinians themselves and to accuse them of having been the cause of the current Arab Predicament.¹²

¹² Such conclusions have been drawn from my encounters with zealous Arab nationalists, principally in Cairo, Beirut, and Damascus.

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There are, however, those Arabs whose ideological commitment to the cause of Arab nationalism is less complete, and to whom Palestinians have not been as much a source of deep anguish as they have been a stumbling block in the pursuit of personal aspirations. It is these individuals who, while sharing in the all-pervasive yet somewhat vague yearning for Arab unity, and while capable of emotional involvement, in times of heightened Arab-Israeli tensions, are nonetheless more intimately concerned with the attainment of personal goals and the satisfaction of material desires. On a day-to-day basis, it is not the refugees in the camps that concern them, but the educated, skilled, urbanized, and entrepreneurial Palestinians who have established themselves in all sectors of the neighboring Arab societies, and who have gradually come to be perceived as competitors in the marketplace, schools, and in certain corridors of political power. Ordinary feelings of resentment, jealousy, envy and hostility, common to all such situations, where real or imaginary fears of displacement have given rise to class or group tensions, are further aggravated by those Palestinians who have (1) continued to maintain their separate national identity despite the acquisition of the legal benefits of provisional citizenship from the host countries; (2) assumed a posture of superiority through derogatory references to the governmental, administrative, and organizational machinery of the Arab states and through constant reminiscences about how things were done in Palestine; and (3) chided other Arabs for their lack of preparation and weak resolve in their confrontations with Israel. Understandably enough, these factors have hardly served to endear the Palestinians, who in the eyes of many Arab neighbors have come to be looked upon as a "plague" in their midst.¹³

It would be presumptuous and inaccurate to suppose that the above classifications exhaust all the feelings and attitudes regarding the Palestinians that are current throughout the world. There are probably as many reactions to the Palestinians as there are individuals. However, what is common to all these views is *that none of them sees the Palestinians as a corporate political entity, possessed of preferences and aspirations, and having an independent will of its own that is sufficiently crystallized as to have merited consideration in the determination of affairs in the region during the past twenty years.* On the contrary, the underlying supposition that is frequently manifested in the discourse of individuals at all levels of public accountability, Arab, Israeli, or Westerner, is that the Palestinians are a malleable group that can be politically distended or constricted to conform to the shape of any political agreement that may ultimately emerge. They are essentially regarded as a problem, an impediment or a cancer, whose solution, removal or excision must be accomplished in order that

¹³ PALESTINE—THE ARAB-ISRAELI CONFLICT, (ed. R. Stetler) (1972).

the larger and more significant goal of peace may be reached. Just exactly how this task is to proceed, or what will become of the Palestinians has never been clearly spelled out. Instead, vague generalities are given. An example is the November 1967 resolution of the U.N. Security Council which calls for a "just settlement of the refugee problem."¹⁴ Some world leaders have spoken of an "honorable" solution. Others talk of "fair" compensation. Some discuss "minimum" repatriation, while still others advocate "resettlement." Aside from the simple fact that no one seems to know exactly what is meant by "just," "honorable," or "fair," or how many would be repatriated, or where the remainder would be "re-settled" there is an implicit assumption that the Palestinians will meekly accept, and comply with, whatever scheme that may be worked out by others. Indeed, one suspects that there exists a commonly held notion that the Palestinians are regarded as morally obligated to submit to any solution that may be devised by the international community no matter how repugnant or unpalatable they may deem it.

Most important, however, in obtaining a thorough understanding of contemporary Palestinian politics is the query: *How has the Palestinian Arab community, once an active political body, reacted to the suggestions of the world community that they are an amorphous entity whose character can be molded to suit the predilections of others?* The answer to this question may be found in an analysis of the tragic events commencing with the creation of the State of Israel and remaining untermiated as of the present date.

The consequences of the 1948-49 Arab-Israeli conflict are clear. Aside from the fact that the majority of Palestinian Arabs found themselves suddenly as refugees, with all the humane, legal, economic, social, and psychological liabilities that this naked status entailed, politically speaking they had become a bludgeoned group. They were scattered throughout the neighboring Arab states, denied the requisite of freedom of movement across state boundaries, their leadership discredited and defunct. Whatever rudiments of organization they had possessed in Palestine was now tattered and irrelevant. Furthermore, the immediate issue before them was no longer the fundamental question of the future of Palestine, but of their right to return to their homes, lands, and possessions, and to escape the deprivations and indignities which their newly acquired refugee status often brought.

Efforts to revive old political networks through the establishment of a government in exile met with little enthusiasm on the part of the younger westernized Palestinian intelligentsia, who were often contemptuous of the policies and personalities of the past and who could no longer be intimidated into silence as they once were. In addition, the cre-

¹⁴ S.C. RES. 242 (1967).

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ation of a vigorous and vociferous Palestinian movement would not have met with universal approval from every Arab quarter. Thus, the Palestinians, lacking adequate organization, inexperienced in the channels of twentieth century diplomacy, wanting in the necessary apparatus with which to wage a diplomatic offensive, unskilled in the techniques of propaganda, and devoid of the unequivocal support of a major world power or the advocacy of a powerful constituency therein,¹⁵ were in no position to mount an effective campaign in international forums.

It would have seemed natural in such circumstances for the Arab states to step forward and fill this diplomatic void of the Palestinian people. The Arab states were independent political units, recognized by the international community, possessed of all the indicia of sovereignty, and having representation in world capitals as well as in the United Nations. Their reach and influence extended into circles to which the displaced, disorganized mass of Palestinians had no access.

However, this step forward by the Arab states met with an impasse. The Arab states, in the aftermath of the 1948-49 defeat, became steeped in a tumultuous soul-searching process which unleashed a period of severe political instability and which gave added impetus to a long-held desire to adjust the pattern of relationships with the major world powers that derived from a colonial past. The general consensus of the Arab states was that the "Palestinian question" could not be tackled until internal political and economic stability were accomplished, goals that were deemed attainable only after the shackles of the colonial era had been entirely removed. Subsequently, for the next few years the Palestinians had to take a back seat to such matters as the Egyptian revolution of 1952, agrarian reform, withdrawal of British troops from the Suez, future military ties with the West, the Baghdad Pact and construction of the Aswan Dam.

The 1956 Suez Crisis, rather than refocusing attention on the Palestinians, served only to divert attention from them. The conflict over Palestine, once a localized dispute, had now assumed global proportions. In addition to dragging in England and France, it now brought the ominous prospect of the United States and Russian involvement. The issues posed transcended those of the region; the peace of the world was deemed at stake. The likelihood of nuclear warfare, in an ever-shrinking world in which local and regional conflicts could no longer be neatly separated from total world disorder, had rapidly impinged on the consciousness of human beings worldwide.

However, even when the spectre of nuclear disaster had faded, the Palestinians did not come into view. The international community was too concerned with the immediacy of the issues attending Suez to pay them any heed. Instead, the resources of the U.N. and the imaginations of

¹⁵ A good example would be the Jewish vote and influence in the United States.

its statesmen were devoted to such matters as the future of the Suez Canal, the effectuation of Israeli, British, and French withdrawal of forces from Egypt, the creation and deployment of a U.N. Emergency Force, demilitarization, Sharm El Sheikh, the Straits of Tiran, international shipping, and the Gulf of Aqaba. Ironically enough, the more complex and magnified the *Palestinian question* became, the less visible were the *Palestinians*.

The events surrounding the Six Day War in 1967 hardly served to change the picture. Apart from the bevy of humanitarian resolutions calling upon Israel to allow the Palestinians to return to their homes (resolutions similar to the many that had been passed over the last twenty years by various organs of the U.N.), the plight of the Palestinian people did not activate great concern. If anything, it was further submerged. Though the November 1967 Security Council resolution "affirmed . . . the necessity . . . for achieving a just settlement of the refugee problem,"¹⁶ the bulk of that resolution was directed at such questions as the termination of belligerency, withdrawal of Israeli forces, acknowledgement of sovereignty, boundaries, territorial inviolability, navigation through international waters, inadmissibility of territorial annexation by conquest and demilitarization.

However, though they may have been drowned out in the U.N., in the Middle East itself the Palestinians were gaining recognition. In the aftermath of the shattering defeat of the Arab armies in the Six Day War, many elements converged to bring them into prominence.

It became obvious to nearly everyone that the traditional methods employed by the Arab states in dealing with Israel had proven to be a failure. It was also clear that the highly vocal Arab leadership which had been so shrill prior to the 1967 War had now been tarnished. It became further evident that the remnants of the old Palestinian leadership, symbolized by Ahmed Shukairy, was subservient to the will of the Arab League and some of the members of the League could no longer claim the allegiance of the Palestinians. Out of this morass of defeat, came the voices of hitherto silent and not-too-prominent younger Palestinians such as George Habash, present leader of the Popular Front for the Liberation of Palestine (PFLP) and Yasir Arafat, current head of the Palestinian Liberation Organization. These young Palestinians were much more performance oriented than their predecessors, far less given to pompous pronouncements, better adept at organizational skills, and far more possessed of a sense of political realism.

An examination of the history of the past two decades no doubt finally convinced these young Palestinians of the futility of their dependence on the Arab states. They clearly saw that instead of saving Palestine for the

¹⁶ *Supra*, note 14.

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Palestinians, the Arab states only succeeded in surrendering more of the territory to Israel after each attempt. Furthermore, some of the Arab states were now so anxious to preserve their own territorial integrity that in exchange for Israeli troop withdrawals they were about to concede the loss of Palestine through the recognition of Israel and the ending of all belligerent claims.

The general feeling among this younger generation of Palestinians has been and continues to be that the road returning to Palestine can only be paved by the Palestinians themselves. They have drawn inspiration from the activities of the Algerians, Cubans, Tupamaros, and Vietnamese, and many of them are well-versed in the literature of guerilla warfare and national liberation. Some of the Palestinians have established contacts with these groups and have received valuable training from them.

After the 1967 War, the principal Palestinian resistance groups, the P.L.O. and P.F.L.P., under the supervision of their leaders, Yasir Arafat and George Habash, mounted attacks in Israel and in the occupied territory through their military arm, Al Fateh. These attacks were seized upon by the Arab people and their governments as a sign that the struggle with Israel had not yet ended and the war itself was far from over. Subsequently, contributions came pouring in from all corners of the Arab world, Egypt, Syria, Saudi Arabia, Kuwait, Libya. Money, supplies, and weapons were sent. And in the publicity given the Israeli raid on the Palestinian resistance camp in Karamah, Jordan, recruits were easily obtained. The resistance movement captured the imagination of not only the Palestinians in the refugee camps but also university students, doctors, lawyers, engineers and other professionals. Almost overnight what was only an incipient resistance movement turned into a well structured and intricately woven organization.

The object of the resistance movement is quite simple: the return of the Palestinians to their homes in a Palestine or an Israel that would be de-Zionized. That is, Palestine would revert to its old self when it consisted of two communities working in harmony side by side under a political arrangement whereby Judaism would not bestow any special privileges. Toward that goal the members of the Palestinian resistance, *fedayin* (self-sacrificers), are willing to risk anything including the ever-increasing likelihood of escalation and total conflict. Their frequent operations in the area of hijacking, commando raids into Israel, and foreign assassinations over the past five years do well to emphasize their lofty commitment.¹⁷ It is the stance of the Palestinian resistance fighters and the policy of principal voice, the P.L.O., that they will neither allow the Arab governments to assume control over them, or to restrict their commando

¹⁷ See F. Jabber, *The Palestinian Resistance and Inter-Arab Politics*, (RAND Corp. pamphlet) (1971) for a documented account of commando raids and guerilla operations within Israel. See also PALESTINE—THE ARAB-ISRAELI CONFLICT, *supra* note 13.

activities. This is evidenced by the *fedayin* clashes with the Jordanian and Lebanese armies over the past three years.¹⁸

However, there is a tendency in certain quarters, particularly in Israel, to play down the military effectiveness of the *fedayin*. The argument that has been presented in the Western press is that the Palestinian resistance is obviously no match for the Israeli Army. They are merely a small thorn in its side. And that in the final analysis they fall into the category of a nuisance which cannot, in all reality, pose a serious threat to the survival of the Jewish State.¹⁹

However, such a view would appear to be quite myopic. For Israel, the continual resort to military measures cannot help but prove corrosive. An alleged democratic society cannot maintain its professed character with repression in its midst. The impact of emergency laws enacted, of violence and counter violence, and of the deep hatreds that have been engendered would most certainly shake the foundations of any society. Reliance on force would become automatic and the continued suspension of civil liberties would be constitutionally debilitating. It seems that the greatest threat to Israel is the one rising from within itself as a result of its increasing dependence on military force. No society espousing democratic principles can ultimately maintain its values and at the same time be a praetorian state.

Israel must realize that the Palestinians are not only a living reality but also a corporate political entity if peace is ever to be achieved. It does not do Israel, the neighboring Arab states, the West, or the world community any service to pretend that the Palestinians never existed. Unlike what many Zionists would have the world believe, Palestine was neither a land without a people to be earmarked for a people without a land nor was it a desert which the Israelis made bloom in a span of twenty-five years. Palestinians lived there for centuries. They worked their fields, planted their crops, ran their small industries and tended their commerce. They were not as technologically advanced as the European Zionists who came to settle in their midst, but that does not mean that the Palestinians are second class human beings who can be continuously expelled to give way to Israeli settlement and security problems. Nor does it mean that they can be herded into a corner of the West Bank, integrated economically but deprived of citizenship rights. Such notions are untenable not only to the P.L.O. but also to the Palestinian people individually,²⁰ who are not quite willing to concede that the Universal Declaration of Human Rights is inapplicable to them.²¹

¹⁸ Jabber, *supra* note 17, describes the incredible frequency of *fedayin* clashes with the regular armies of Jordan and Lebanon.

¹⁹ Y. Harkabi, *Fedayin Action and Arab Strategy*, Adelphi Papers, no. 53 (London Institute for Strategic Studies) (Dec. 1969).

²⁰ See PALESTINE—THE ARAB-ISRAELI CONFLICT, *supra* note 13.

²¹ See "THE UNIVERSAL DECLARATION OF HUMAN RIGHTS," approved by the G.A.

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II. THE STATUS OF THE PALESTINIAN RESISTANCE IN INTERNATIONAL LAW

The function of international law is thought of as providing the basic legal principles, founded upon justice, by which peoples and individuals may achieve their human rights. This function is unequivocally expressed in the U.N. Charter which is the fundamental law or constitution of the world community. Its supremacy is so important that article 103 of the Charter specifically provides that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The Preamble of the United Nations Charter also gives unequivocal support for the conception of international law which is advocated here. It states:

We the Peoples of the United Nations (are) determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations small and large, and to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.

Among the basic purposes of the Charter which are set forth in article I. are the following:

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . .

It is clear that the Palestinian people have not received their basic human rights without distinction upon the basis of religion or their rights

of the U.N. on Dec. 10, 1948. Art. 13 provides that:

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and return to his country.

as a people, including the right to self-determination. On the contrary, the Palestinians, along with several African peoples, have been systematically deprived of these rights. These peoples have been repeatedly subjected to "the scourge of war" and intense and continual coercion which, although illegal, are very real.

This situation has obviously led to a deep distrust of international law by many Palestinians and their leaders. From their viewpoint international law is no more than a façade behind which the large powers and their military and political protégés among the smaller powers may implement decisions based on military force without regard to the basic human rights of other peoples.

It is, therefore, essential to add the requirements of adequate enforcement and sanctions to any conception of international law to make it practical and meaningful. International law is no more self-enforcing than are the traffic laws in Berkeley, Beirut, or Cairo. To provide effective enforcement it is necessary to improve existing sanctions and to create new ones rather than merely to deplore the present inadequate enforcement situation. Enforcement must be viewed as a comprehensive sanctioning process rather than as a group of spasmodic and uncoordinated enforcement efforts.

A. The Legal Status of the Palestinian Military Resistance

Among the aspects of a resistance movement which are affected by international law is the military aspect. Therefore, it is necessary to evaluate the legal status of the Palestinian military resistance, both organized (*Al Fateh*) and unorganized (Black September), under the criteria of the international law of war.

1. ORGANIZED RESISTANCE

A lawful resistance movement must be comprised of individuals who are privileged combatants under the international law of war. According to that law, a privileged combatant is one who is entitled to the benefits and protection of prisoner of war (P.O.W.) status if captured. Thus, attention should be directed to that segment of international law which identifies these individuals. The applicable international agreement is the Geneva Prisoners of War Convention of 1949,²² to which all of the states which have participated in the recurring Arab-Israeli hostilities are parties. The P.O.W. Convention provides that it "shall apply to all cases of declared war or of any other armed conflict" which may arise, "even if the state of war is not recognized by one" of the parties to the Convention. It is clear that the Convention applies to armed forces involved in

²² 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364.

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the Arab-Israeli hostilities whether these hostilities are regarded as "war" or merely "armed conflict." And, it is an established principle of international law that a cease-fire or armistice does not terminate a war or conflict.²³

Article 4A(2) of the P.O.W. Convention, after specifying that members of regular armed forces are privileged combatants and are therefore entitled to P.O.W. status if captured, deals with the status of "organized resistance movements." It provides that the following persons are also privileged combatants, entitled to P.O.W. status if captured:

Members of other militias and members of other volunteer corps, including those of *organized resistance movements*, belonging to a party to the conflict and *operating in or outside their own territory, even if this territory is occupied*, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.²⁴

The requirement of "belonging to a party to the conflict" does not mean the subordination of the resistance movement to a state which is a party to the conflict or the dependence of such a movement upon that state. The official commentary of the International Committee of the Red Cross on this provision of the P.O.W. Convention emphasizes that an informal relationship between the resistance movement and the state party to the conflict is sufficient. The commentary provides:

It (the requirement) may find expression merely by tacit agreement if the operations are such as to indicate clearly for which side the resistance organization is fighting.²⁵

Thus, it is clear from this article of the Convention that there was no intention to impose a higher standard on guerilla or resistance forces than that applied to regular armed forces. The requirements set forth as (a) through (d) above are designed to apply to guerilla fighters the same basic criteria which are applicable to regular armed forces. The organized character of the commando units of *Al Fateh*, the military arm of the P.L.O. and P.F.L.P., including the fact they are "commanded by a person responsible for his subordinates," is well known. The contemporary uniforms

²³ 2 OPPENHEIM-LAUTERPACHT, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY (7th ed. 1952) at 546-47.

²⁴ Emphasis is added to the quotation.

²⁵ INT'L COMM'N OF THE RED CROSS, 3 Commentary on the P.O.W. Convention 57 (1960).

of regular armed forces are designed to provide effective camouflage, and guerillas may wear a similar uniform with a "fixed distinctive sign" which may, in the case of the *fedayin*, consist of a particular type of headgear or cap, their black and white checked scarf. In the same manner, guerilla forces may carry weapons such as automatic pistols and hand grenades attached to belts under coats and comply with the requirement of "carrying arms openly." With respect to the requirement concerning complicity with "the laws and customs of war," guerillas have the same obligations as regular armed forces.

The most significant feature of Article 4 is that "organized resistance movements" are given a legal right to conduct their guerilla activities even if their own territory is occupied by the enemy. Such organized forces are entitled *as a matter of law* to conduct operations "in or outside their own territory" without regard to the question of whether or not the military occupant is adhering to the international law of war, including the Geneva Civilians Convention of 1949.²⁶ This absolute right to military resistance stands in contrast to earlier international law which undertook to prohibit resistance movements by postulating a "duty of allegiance" owed by the inhabitants of occupied territories to the military occupants. The experiences of World War II were undoubtedly taken into account in the writing of the P.O.W. Convention and of the Civilians Convention. Such experiences no doubt indicated that it was impossible to separate resistance forces from civilian population. Article 68 of the Civilians Convention also emphasizes this change by stating flatly that a civilian protected person in the occupied territory "is not a national of the occupying power" and "is not bound to it by any duty of allegiance." Since civilians who are not participating in the resistance have no duty of allegiance to the military occupant, it is clear, by implication, that organized guerilla forces who comprise the military resistance have no such duty to the occupying power without regard to whether or not the occupant adheres to its obligations under the Civilians Convention.

Thus, the P.O.W. Convention gives to the organized military resistance forces of the P.L.O./P.F.L.P., *Al Fateh*, the same status as privileged combatants under international law which it accords to the regular armed forces of any nation.

2. UNORGANIZED RESISTANCE

Article 4A(2) of the P.O.W. Convention does not specifically deal with the legal status of unorganized resistance forces. The Report of Committee II at the Geneva Diplomatic Conference of 1949 made it clear, however, that participating nations at that Conference did not, in specifically according P.O.W. status to captured members of organized resistance

²⁶ 75 U.N.T.S. 237, 6 U.S.T. 3516, T.I.A.S. No. 3365.

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movements, attempt to restrict or deny basic international legal protections to unorganized guerilla-type resistance undertaken by inhabitants of occupied territories against an occupant's violations of international legal limitations on its authority. The report states that the Danish Delegation

asked that the Summary Record should mention that no objection had been raised, during the discussion in the Special Committee, against his view that Article (4) (of the P.O.W. Convention) could not be interpreted in such a way as to deprive persons not covered by the provisions of Article (4) of their human rights or of their right of self-defence against illegal acts. . . .

The outcome of this interpretation of the work of the 1949 Conference which adopted the P.O.W. Convention is that unorganized resistance may be lawfully conducted by the civilian population providing that the military occupant commits "illegal acts" in violation of the Geneva Civilians Convention of 1949. These unorganized resistance fighters must be accorded status as privileged combatants even if they do not meet all of the requirements which are specified for organized resistance forces in article 4 of the P.O.W. Convention.

Thus, the legality of the acts of unorganized resistance forces is dependent on the occupying power's failure to act in accordance with international law. The principal law on this subject is contained in the Geneva Civilians Convention. This Convention was written in the shadow of World War II when an overwhelming majority of states in the world community were determined to prevent a repetition of the terrible acts carried out under the Nazi occupations in Europe and the Japanese occupations in Asia. The State of Israel and all of the Arab states involved in the recurring hostilities are parties to the Geneva Civilians Convention and there is no question that it is applicable, at least in territories occupied by Israel since 1967. Even the United States Government has taken the position that the Civilians Convention applies to and limits the Government of Israel. Ambassador Yost stated this in the U.N. Security Council on July 1, 1969 and added that the U.S. Government has "so informed the Government of Israel on numerous occasions since July, 1967."²⁷ Since international law is not self-enforcing, it is most regrettable that the U.S. Government did not follow its words with actions designed to implement them.

For an appraisal of the Israeli government's role in the more recently occupied territories since the 1967 hostilities, several reports of U.N. investigations (made without Israel's cooperation) and the resolutions of various organs of the U.N. are available.²⁸ A recent example is the U.N.

²⁷ 61 U.S. STATE DEP'T. BULL. 76, 77 (July 28, 1969).

²⁸ These resolutions, from 1967-1971, are collected in *Palestine: Concordance of United Nations Resolutions 1967-1971*, (eds. F. Sayegh & S. Soukkary) (1971).

Human Rights Commission resolution of March 23, 1972.²⁹ It states in part that the Human Rights Commission is:

Gravely concerned with all acts and policies that affect the status or the character of those occupied territories and the basic rights of the inhabitants there of, such as:

- (a) The declared intention to annex certain parts of the occupied Arab territories,
- (b) The establishment of Israeli settlements on those territories and the transfer of parts of its civilian population into the occupied territories,
- (c) The evacuation, transfer, deportation and expulsion of the inhabitants of occupied territories,
- (d) The destruction and demolition of villages, quarters and houses and the confiscation and expropriation of property,
- (e) The denial of the right of the refugees and displaced persons to return to their homes,
- (f) Collective punishment and ill-treatment of prisoners and detainees,
- (g) Administrative detention and holding prisoners incommunicado

Each of the above quoted portions of the Commission's resolution deals with an express violation of one or more provisions of the Geneva Civilians Convention of 1949. It follows that in view of the illegal character of the Israeli military occupation, there is ample authority in international law for Palestinian resistance groups such as Black September to conduct unorganized military resistance. This legal authority is further strengthened by the U.N. General Assembly Resolution of December 6, 1971,³⁰ which recognizes the legality of the fight for basic rights of the Palestinian people and of specified African peoples.

B. The Status of the Political-Legal Resistance of the Palestinian People

In appraising both military and political-legal resistance, it must be recognized that there are many close relationships between the two and that it would be inaccurate to attempt to draw a rigid distinction between them. But it is difficult to see how military resistance can be a significant factor unless it is connected with a viable entity and an accompanying political institution. Thus, if legal status can be obtained for the entity and the institution, the entire resistance is strengthened.

1. THE SUBJECTS OF INTERNATIONAL LAW: PUBLIC BODIES

Subjects of international law are no longer limited to national states. Among the subjects of international law, international public bodies or

²⁹ U.N. HUMAN RIGHTS COMM'N. 28th Sess., 1161st Meeting; U.N. Press Release HR/812 (1972).

³⁰ See text accompanying note 40 *infra*.

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organizations are of particular importance. One definition of a public body is that it is a non-territorial government. Although particular public bodies may be governments in exile, this is not a necessary characteristic of public bodies as a group. In general, the group is comprised of entities established for public purposes which, like states, are subjects of international law. A memorandum of the Secretary-General of the U.N. has described the current situation as follows:

Practice has abandoned the doctrine that States are the exclusive subjects of international rights and duties.³¹

Public bodies are usually created as subjects of international law through the explicit multilateral agreement of states, that is, through implication drawn from an appraisal of their substantive powers. The U.N., despite its pre-eminent position as the principal general-function public body, is not explicitly constituted as a public body by its Charter. However, the International Court of Justice in the *United Nations Reparations Case*³² determined that the U.N. has legal status as a subject of international law by necessary implication from the substantive powers granted to it by the Charter. The Court found the U.N. to be a "subject of international law and (a public body) capable of possessing international rights and duties . . ."³³ The present significance of this case is that it illustrates the empirical analysis which must be made in an inquiry concerning the assignment of status as a public body-subject of international law. Professor Hersh Lauterpacht has provided these criteria

In each particular case the question whether a person or body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from a preconceived notion as to who can be subjects of international law.³⁴

These criteria must now be employed in determining the public body status of the Palestinian Liberation Organization.

2. THE P.L.O. AS A PUBLIC BODY IN INTERNATIONAL LAW

Palestinian leaders have recognized that even the most elementary and well established human and political rights are not self-fulfilling and that there is a practical need for a public institution to achieve such rights. The Palestinian Liberation Organization was established in 1964 with the assistance of other Arab groups and through the authority of the League of Arab States as a public body to represent and act for the people of Palestine.³⁵ The League of Arab States has recognized the P.L.O.'s public

³¹ *Memo. of Sec. Gen. U.N. Survey of Int'l Law in Relation to the Work of Codification of the Int'l Law Comm'n., A/cn. 4/1/Rev.1, p.19 (Feb. 10, 1949).*

³² (1949) I.C.J. 174.

³³ *Id.* at 177.

³⁴ INT'L LAW AND HUMAN RIGHTS 12 (1950).

³⁵ THE PALESTINIAN NATIONAL COVENANT (1964).

and representative capacities from its establishment to the present. The overwhelming majority of individual Arab states recognize it in the same capacities as it maintains offices in a number of these states. These offices and the Palestinian officials who serve in them are accorded diplomatic status and privileges.

Some states outside the Arab world also recognize the public body status and the representative capacity of the P.L.O. It is particularly important that one of the great powers and a permanent member of the U.N. Security Council, the People's Republic of China, is one of these states, and it has extended recognition to the P.L.O. since 1965.

The U.N. has accorded unofficial observer status to the P.L.O., and its delegation in New York City works with the delegations of other states in seeking Palestinian objectives. The most important objectives are to achieve, first the recognition and then the implementation of the rights of the Palestinians and of other oppressed peoples. By working with states and other peoples for common goals, the P.L.O. has demonstrated the universal characteristics of its own goals. Through the P.L.O., the Palestinian people have an institution of their own to speak and act for them in national and international affairs. The character of the P.L.O. as a public body provides the indispensable legal status to achieve the political and legal objectives of the Palestinian people.

3. RECOGNITION OF THE PALESTINIAN PEOPLE BY THE UNITED NATIONS

Until 1969, the U.N. referred to the Palestinians as "refugees" and dealt with them in that capacity. Factually, there is no doubt that many Palestinians have been refugees since the establishment of the State of Israel as a Zionist state. Nevertheless, the Palestinians have insisted upon the maintenance of their status as a "people." On December 10, 1969, in a resolution that was adopted by more than the two-thirds majority required by the charter for important questions, the General Assembly of the U.N. stated that

Recognizing that the problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights, (the General Assembly of the United Nations is)

Gravely concerned that the denial of their rights has been aggravated by the reported acts of collective punishment, arbitrary detention, curfews, destruction of homes and property, deportation and other repressive acts against the refugees and other inhabitants of the occupied territories, (and it)

Reaffirms the inalienable rights of the people of Palestine.³⁶

³⁶ G.A. RES. 2535 B (1969).

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Thus, the General Assembly of the U.N. has recognized that the Palestinians are a people under international law and that they are entitled to the same inalienable rights as other peoples.

Articles 55 and 56 of the U.N. Charter require all member states to promote and to take action to achieve

... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The individuals comprising the people of Palestine are Palestinians of Moslem, Christian or Jewish identification consistent with the quoted non-discriminatory requirements of the U.N. Charter as well as with the Palestinian objectives of democracy and secularism.³⁷ The Palestinian people, as recognized by the U.N. General Assembly, comprise a distinct national entity which, at the present time, exists without a national state.

This recognition of the Palestinian people as a national entity provides a firm legal foundation upon which the Palestinian people under the leadership of the P.L.O. can effectuate the same rights which have been achieved by other peoples under the U.N. Charter. This recognition of the Palestinians as a people is equally important as the establishment of the P.L.O. as a public body in international law.

Yet it is well known that the Israeli government does not recognize the status of the Palestinians as a national entity. The consistent Zionist-Israeli position is reflected in the official statement of the Minister of Information of the Government of Israel in 1969: "We do not consider the Arabs of the land an ethnic community nor a people with a distinct national character."³⁸ International law, as manifested by the December, 1969 Resolution of the General Assembly, has flatly rejected this position.

C. THE FUNCTION OF LEGAL STATUS IN EFFECTING PALESTINIAN POLITICAL-LEGAL RIGHTS THROUGH THE U.N. AND INTERNATIONAL LAW

The recognition of the Palestinians as a people and of the P.L.O. as a public body, while of great importance, are not ends in themselves. The crucial test of their long-range significance exists in the ability to employ them in a functional manner to effectuate Palestinian rights.

1. *The Recognition of the Rights of the Palestinian People Under the U.N. Charter*

The factual characteristics of the Palestinian people as a national entity entitle them to inclusion among the peoples who are accorded rights

³⁷ Y. SAYIGH, *TOWARDS PEACE IN PALESTINE* (1970).

³⁸ *Supra* note 3.

as such under the U.N. Charter. Nevertheless, it is an essential step to the practical implementation of these rights to have them specifically and officially recognized by the U.N. rather than rely upon their recognition by implication from the provisions of the Charter.

On December 8, 1970, the General Assembly of the U.N., by more than the two-thirds vote required for important questions, decided that the people of Palestine are entitled to self-determination:

Bearing in mind the principle of equal rights and self-determination of peoples enshrined in Articles 1 and 55 of the Charter of the United Nations and more recently reaffirmed in the Declarations on Principles of International Law Concerning Friendly Nations and Co-operation Among Nations, (the General Assembly of the United Nations)

Recognizes that the people of Palestine are entitled to equal rights and self-determination in accordance with the Charter of the United Nations.³⁹

Thus it is clear that among the rights of the Palestinians is the right to self-determination. Specialists in international legal theory may produce arguments as to whether resolutions of the General Assembly are international law in themselves or merely evidence of a world community consensus as to the existence of international law. But whichever argument is accepted, it is evident that the Palestinian people now have the legal right to their national state.

It is a well established principle in international law that a successful revolution becomes a legal revolution. It is quite significant that the U.N. General Assembly has decided that even some revolutions which are as of yet unwon are legal revolutions because of their consistency with the basic principles of the U.N. On December 6, 1971 the General Assembly, by more than two-thirds majority (and against the continual opposition of the governments of Israel and the United States) decided that it

Confirms the legality of the peoples' struggle for self-determination and liberation from colonial and foreign domination and alien subjugation, notably in southern Africa and in particular that of the peoples of Zimbabwe, Namibia, Angola, Mozambique and Guinea, as well as the Palestinian people, by all means consistent with the Charter of the United Nations;

Affirms man's basic human right to fight for self-determination of his people under colonial and foreign domination;

Calls upon all States dedicated to the ideals of freedom and peace to give all their political, moral and material assistance to peoples struggling for liberation, self-determination and independence against colonial and alien domination.⁴⁰

³⁹ G.A. RES. 2672 C. (1970). The Palestinian right to self-determination, along with that of the peoples of southern Africa, was mentioned, in connection with the condemnation of those governments which deny the right, in G.A. RES. 2649 (Nov. 30, 1970).

⁴⁰ G.A. RES. 2787 (1971).

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The Palestinian people's resistance and "struggle for self-determination and liberation," and that of its representative organ, the P.L.O., is thus accorded a status in international law. In addition, their right to self-determination is declared to be a "basic human right." This right may be most constructively interpreted as embracing a wide variety of methods including the implementation of Palestinian rights through political-legal techniques. It is significant that the resolution calls upon those states which are committed to the ideals of freedom and peace to provide both moral and material assistance. Consequently, such assistance may not be interpreted as illegal acts of intervention.

These resolutions of the U.N. General Assembly provide the recognition of the rights of the Palestinian people and the basis in international legal authority for the Palestinians themselves and other concerned members of the world community to take steps toward their implementation.

A workable conception of international law requires not only the formulation of legal principles based upon justice, but also their effectuation. In this respect, international law operates very much in the same way that an individual operates in taking steps from ideas to words and then to actions. The words set forth in international legal principles will remain as vacuous and as misleading as Nixon's pre-1968 political rhetoric unless they are recognized as applicable to particular entities and then practically implemented through specific enforcement and sanctions. Yet, whether or not effective sanctioning processes can be applied to achieve the recognized rights of the Palestinian people through peaceful means based upon justice under international law is another question. The impending Geneva Peace Conference may render this justice to the Palestinian people, but not unless they are represented by the P.L.O. as a principal to any negotiations or treaties.

But if this justice does not come to the Palestinian people, whose tragic plight has already challenged the integrity and credibility of the United Nations and the legal principles which its Charter embodies, not only will there be oil shortages, but also continual bloodbaths, arising from recurrent instances of terror and violence, will befall Israel and its sympathetic allies in the world community.

STEFAN TOLIN

The Civil Commitment Process

The Practising Law Institute has published a handbook entitled *Legal Rights of the Mentally Handicapped*.¹ The work, as stated in its foreword, strives to organize the most significant written materials avail-

¹ B. J. ENNIS & P. R. FRIEDMAN, *LEGAL RIGHTS OF THE MENTALLY HANDICAPPED* (Criminal Law and Urban Problems No. 57, 1973).