CORRESPONDENCE

To The Editor-in-Chief

Arab Oil and the Middle East Conflict

In his article entitled "The Illegality of the Arab attack on Israel of October 6, 1973," published in the April 1975 issue of this *Journal,* Professor Eugene V. Rostow has effectively and comprehensively refuted the thesis advanced by Dr. Ibrahim F. I. Shihata, Legal Adviser to the Kuwait Fund for Arab Economic Development, in part II of his article "Destination Embargo of Arab Oil: Its Legality under International Law" (published in the October 1974 issue of the *Journal,* p. 591 ff.). Permit me, Sir, to add some comments on Dr. Shihata's article.

In the introductory part of his article, Shihata repeats the standard Arab argument that the "Jewish State" suggested in General Assembly resolution 181(II), November 29, 1947 "was to cover an area of about 5,655 sq. miles, compared to about 907 sq. miles owned by Jewish settlers and agencies at the time and to about 10,249 sq. miles which formed the total area of Palestine under British Mandate." (Shihata, p. 591, n. 1). He also makes similar computations with regard to the territory within Israel's armistice lines between 1949 and 1967.

Quite apart from the fact that such calculations seem to confuse the question of *sovereignty* over land (*"imperium"* of Roman law) with that of *ownership* over it (*"dominium"*), they are also likely to convey the misleading idea (and this, apparently, is their purpose in Arab propaganda) that five-sixths of the territory of the proposed "Jewish State" and eight-ninths of the territory actually controlled by Israel between 1949 and 1967 were Arab lands. However, what this Arab version conveniently omits to state is the fact that about 50 percent of the territory of Mandatory Palestine and about 70 percent of the territory allotted to the "Jewish State" included the Negev (with approximately 4,500 sq. miles) which was government land. Known as Crown or State Lands, this was—and still is—mostly uninhabited arid and semiarid territory which had originally been inherited by the British from Turkey and then in turn passed in 1948 to the Government of Israel (*see* Government of Palestine, *Survey of Palestine, 1946,* p. 257). These lands had not been owned by Arab farmers, or, for that matter, by any farmers, either under the Mandate period or under the preceding regime.

Shihata also fails to mention the fact that the General Assembly resolutions affirming the rights of Arab refugees to return to their homes (Shihata, p. 591, n. 2) have consistently spoken of those refugees "wishing to return to their homes and *to live in peace with their neighbours.*" [1]

[1] Paragraph 11 of General Assembly resolution 194(III), December 11, 1948; emphasis added. Reference to this resolution has been made in the subsequent annual resolutions of the General Assembly on the Arab refugee problem. It appears that the requirement linking the return of refugees to their homes with their willingness to live in peace with their neighbors was first dispensed with by the General Assembly in its resolution 3236(XXIX), November 22, 1974, following the appearance before it of Yasser Arafat the preceding week.

In discussing the legal effects of Security Council resolution 242 of November 22, 1967, Shihata maintains that whatever doubts may have existed in the past regarding the binding character of that resolution, have now been dispelled by Security Council resolution 338 of October 22, 1973, which "calls upon" the parties to start immediately the implementation of resolution 242 in all of its parts. He believes that the language "calls upon" is sufficient evidence of the binding character of a Security Council resolution (*see* Shihata, p. 603). As is well known, until 1971 the general view prevailed that Security Council resolutions adopted under Chapter VI of the Charter were of a merely recommendatory character. However, in its controversial advisory opinion on Namibia of June 21, 1971, the International Court of Justice ruled that "the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. . . . The question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council" ([1971] ICJ 4, at 53).

Even if one accepts the Court's contextual approach, it is still difficult to see how the language "calls upon" in itself could be indicative of the binding character of a Security Council resolution. This language is, to say the least, ambiguous and open to different interpretations. After all, the language "calls upon" frequently occurs in purely recommendatory General Assembly resolutions. To give but one example: General Assembly resolution 2533(XXIV) of December 8, 1969 "calls upon" the members of the Special Committee set up to consider the principles of international law concerning friendly relations "to devote their utmost efforts to ensuring the success of the Committee's session," this clearly being a hortatory provision.

The deference towards General Assembly resolutions displayed by Shihata throughout his article apparently does not extend to the original partition resolution of November 1947. One would be interested to learn what Shihata's evaluation is of the Arab rejection of that resolution and the subsequent attempts to thwart it through violence and military intervention. After all, it was Arab defiance of that resolution (which was accepted by the Jewish side at the time, on condition of reciprocity) that lies at the root of the four wars and all the bitterness and suffering (including that of the Arab refugees) that have bedevilled the Middle Eastern scene ever since. A selective respect for UN decisions is therefore, to put it mildly, legally curious. The steamrolling in recent years in the General Assembly of pro-Arab resolutions adopted by the votes of the Arabs, the Soviet bloc, and their supporters is not indicative of any legal conviction of the international community, as is suggested by Shihata. A much more plausible explanation of this phenomenon is that it reflects the parliamentary situation within the United Nations itself which counts among its members 20 Arab States but only one Jewish State. To this should, of course, be added that the greater part of the known oil deposits in the world is found not under the ground of Israel but of the Arab States.

Shihata is not unaware of these geological realities: in his introductory remarks he rightly states that "production of oil beyond certain limits did not make economic sense for many Arab countries. Their depleting crude was increasingly converted into depreciating dollars and pounds yielding in fact a lower economic return than that achieved by simply keeping it in the ground. Worse still, this conversion was taking place in countries with

few alternative resources and with a rather limited absorption capacity for generated funds" (Shihata, p. 591). It would be difficult to state the true character of the Arab oil embargo problem in more precise and concise terms. So stated, it becomes clear that the Arab-Israel conflict is used as a convenient pretext to disguise the true state of affairs. The arguments advanced by Shihata are thus revealed to be the legal *"Ueberbau"* for a situation that, from the analytical point of view, merits separate treatment and consideration.

YEHUDA Z. BLUM

TO THE EDITOR-IN-CHIEF

The Arab Oil Weapon—A Mild Response to A "Skeptic" [1]

The fundamental jurisprudential question that Mr. Smith did not openly address is whether the UN Charter and its stated purposes and principles are a part of "law" or are merely "moral" principles devoid of legal significance. This leaves aside a further question: whether patterns of shared "moral" perspectives are, indeed, legally relevant (see H. L. A. Hart, *The Concept of Law* 7–8, 16, 56, 181–207, *passim* (1961)). You have Mr. Smith's answer; you have ours. But let us be more precise.

It was John Austin and the early "positivists" who said that both constitutional and international law are merely forms of "positive morality." All of us are probably aware of the Austinian hesitation to call international law "law." As Hart observed, "it is quite obvious why hesitation is felt . . . International law lacks a legislature, states cannot be brought before international courts without their prior consent, and there is no centrally organized effective system of sanctions" (*id.* at 3).

Nevertheless, through time most have come to recognize that international "law" does exist. And almost all seem to agree that the UN Charter, as a primary treaty (see Charter, Art. 103), constitutes an important part of international "law." We simply do not agree that our consideration of Charter terms and principles and authoritative UN resolutions which are useful for measurement of community consensus as well as authoritative interpretations of Charter provisions constituted a mere "moral appeal to 'goal-values'." As any honest reading of our article discloses, the statement actually made refers to "legal policies (goal-values)" and not to "moral" values (transcendental or otherwise). Further, the critical concern was not the "inquiry into Arab motivations" as such, but the content of the UN Charter.

Moreover, we do not consider it to be "politically" realistic to equate "law" with, at one extreme, raw power (naked force) or, at the other, a world government. Even in a highly organized social process, the fact that several murderers walk the streets without sanction does not mean that there is no law against murder or that such a law has not been violated.

That there is no world government with effective power to enforce all laws, we concede. That there is no world court to provide effective legal "sanction" of all violations of international law, we concede. That the United States might, someday, have to use military force to sanction relevant violations of international law, we reluctantly concede. But that might

[1] *See* Stephen N. Smith, *Re "The Arab Oil Weapon": A Skeptic's View*, 69 AJIL 136 (1975), commenting on Jordan J. Paust and Albert P. Blaustein, *The Arab Oil Weapon —A Threat to International Peace*, 68 AJIL 410 (1974).