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THE MIDDLE EAST CRISIS

CORNELIUS F. MURPHY, JR.*

INTRODUCTION

The Middle East conflict is incendiary. The inability of Jews and Arabs to determine the future of Palestine peacefully has led to a deepening sense of insecurity in the entire world community — fears which become more acute as the conflict draws the Great Powers towards a Mediterranean confrontation. It is important that Americans understand the reasons for the interminable violence, if only to shape national positions toward the Near East upon intelligent understanding rather than emotional response. We must know why these two Semitic peoples, living in an area sacred to three religions, have come to a position of such vehement hostility.

Both of the following articles should stimulate intelligent discussion of the conflict. The first, by the Honorable Yoram Dinstein, Israeli Consul in New York, contains his own argument about the legitimate forms of self-defense available to Israel. The recent increase in terrorist activity makes Mr. Dinstein's article particularly timely. The second, co-authored by M. Cherif Bassiouni, Professor of Law at DePaul University, and Eugene Fisher, contains a detailed analysis of the history of conflicting aspirations in the Middle East, which are seen as a conflict between Zionism and Arab nationalism. Whether or not one agrees with their characterization, the reader will find the article rich in a historical perspective which can be of considerable value to the balanced formation of public and professional opinion.

In this introductory essay no effort will be made to evaluate each article in detail. Rather, I shall critically discuss some of the major points raised in each paper, concluding with some remarks on the means by which I believe a durable peace can be obtained.

SELF-DEFENSE

What are the legitimate uses of defensive force in the modern world? This is a major contemporary question of international order, and one for which we have no completely satisfactory answer. The Vietnam War has made the problem acute here in America, and the international community is far from a consensus as to when violent self-help is admissible in interstate relations. For Israel, the legitimate

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uses of force are a daily problem, for she has had to adopt forceful responses to manifold threats to her existence.

Normal difficulties in delineating legitimate response have been compounded by the regime of nonviolence contemplated by the creation of the United Nations. Under the Charter, primary responsibility for peace-keeping has been vested in the Security Council, with a limited use of defensive force reserved for the state which suffers an assault. Article 51 provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.¹

The controversy, of course, centers around the phrase "if an armed attack occurs." The reader who is out of sympathy with the difficulty may recall the agony which this language imposed upon those who wished to defend the action of President Kennedy interdicting the shipment of missiles to Cuba. It is to Mr. Dinstein's credit that he does not avoid these difficulties in his efforts to justify the Israeli initiatives in the June 1967 war. He concedes that the weight of authority interprets Article 51 as precluding preventive counter measures which may have been legitimate under customary international law, arguing instead that, in the light of events leading up to the commencement of hostilities, the Israeli response can be defended as the exercise of an interceptive, rather than preventive, use of force.² He elaborates further on other forms of defense to the nuances of attack which have become prevalent after the Six Day War. The reader will find of interest the distinction offered between "reprisal" — which assumes at least the complicity of the target state — and "execution," explained as the employment of force against individuals located within the territory of another state in retribution for acts which they have committed without the direct involvement of the target country.³ The increases in Arab guerilla activity make the latter category particularly pertinent to current affairs.

Much of Mr. Dinstein's argumentation is persuasive, but, on the whole, it prescinds too much from the objectives of the United Nations to be morally cogent. This is probably due to the radical state-cen-

¹ U.N. CHARTER art. 51.

² Dinstein, *The Legal Issues of "Para-War" and Peace in the Middle East*, *infra* at 468. Quincy Wright agrees that Egypt's actions constituted an armed attack, but questions whether Israel's reaction was purely defensive. Wright, *The Middle East Crisis Working Paper*, in *THE MIDDLE EAST: PROSPECTS FOR PEACE* I, 34 (I. Shapiro ed. 1969).

³ Dinstein, *infra* at 471 *et seq.*

teredness which characterizes the arguments, *i.e.*, a tendency to conceptualize problems exclusively in terms of his nation's interests. The notion of reprisal, for example, cannot be adequately understood without explicit consideration of demands for redress, a dimension which is absent from his analysis.⁴ More importantly, the entire discussion of self-defense fails to comprehend the jural significance of Israel's membership in the United Nations.

The purpose of article 51 is to justify temporary measures of self-defense pending effective United Nations intervention. But Security Council impotence is a harsh reality for Israel; the threats and use of force against her have made optimistic reliance upon international authority impossible. Yet, experience of ineffectiveness cannot be transformed into total disregard; the development of such an attitude poses too grave a danger to world order. Unfortunately, such seems to be a direction of Mr. Dinstein's reasoning. He argues that Arab assaults may reach a point where, instead of limited countermeasures such as reprisal and execution, a total war could become the justifiable reaction:

War, as a measure of self-defense, denotes a full-scale use of counterforce. Unlike reprisal, war, once launched, does not have to be proportional to the force initially employed by the enemy. It is of the essence of war that (subject to the rules of conduct in warfare, *i.e.*, the *jus in bello*) all acts designed to effectuate the overall collapse of the enemy are permissible. By way of illustration, after Pearl Harbor the United States could, and indeed did, seek the unconditional surrender of the enemy, and not merely retribution for the severe blow to its naval power.

. . . .

It would appear that Webster's test must be reconstituted, permitting the waging of war in self-defense in response to an isolated instance of armed attack, when justified by a reasonable combination of urgency and necessity. Whether this reasonable combination exists depends, of course, on the merits of each individual case.

. . . Once a State has used sufficient force to justify, in the light of reasonable urgency and necessity, response by war as self-defense it cannot demand that the State subjected to attack diminish the quantum of counterforce. . . .

Subjected to armed attacks by and from neighboring Arab countries on a daily basis, the State of Israel is continually confronted with the option to respond to force with counterforce, and,

⁴ See Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 432-33 (1969); but see the reply in Blum, *The Beirut Raid and the International Double Standard*, 64 AM. J. INT'L L. 73, 87-89 (1970).

if it so chooses, to respond by reaction, reprisal, execution, or war. . . . [I]n the long run, it would seem that another full-scale war in the Middle East cannot be averted unless an end is put to the "para-war" that persists.⁵

One can sympathize with the Israeli dilemma of whether to utilize measures of self-help or resort to a dormant supranational authority. Nevertheless, the argument for absolute defensive war cannot be reconciled with continued allegiance to the United Nations. The organization, founded to relieve man from the horrors of unrestrained violence, permits temporary use of defensive force, but only with a view to the overall preservation of life. An extreme of defensive rights is plausible only upon the assumption that United Nations' peace-keeping authority is nonexistent, a thesis which cannot be maintained in light of the historical record.

A further difficulty with the general argument lies in its implicit premise that whenever peace-keeping machinery is inoperative, the obligations of a member state to the pacific objectives of the organization correspondingly diminish. Consider, for example, Mr. Dinstein's discussion of the Security Council's Resolution of November 22, 1967, calling for an end to the status of belligerency, stressing the inadmissibility of territorial acquisition by war, and demanding the establishment of a lasting peace to be achieved by the parties with the assistance of a Special United Nations Representative.⁶

In assessing its significance, Mr. Dinstein argues that the resolution is not legally binding because it was adopted within the bounds of Chapter VI, rather than Chapter VII, of the Charter. This is premised upon the theory that only decisions, as distinguished from recommendations, of the Security Council are capable of imposing legal obligations.⁷ Chapter VI of the Charter, dealing with the pacific settlement of disputes, assigns the Council the task of recommending appropriate measures for the settlement. But although the November resolution does not *impose* legal duties, it *refers* to existing legal obligations. By a form of horizontal ordering, the member States have agreed among themselves that they will settle their disputes by peaceful means.⁸ The

⁵ Dinstein, *infra* at — (footnote omitted). "Webster's test" is a standard of overwhelming necessity used as the measure of legitimate defensive response. It was first articulated in the *Caroline* case and has been subsequently utilized to measure the full-scale use of defensive counterforce. See generally *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

⁶ S.C. Res. 142, U.N. Doc. S/8247 (1967).

⁷ For a more general analysis of the distinction, see I. OPPENHEIM, INTERNATIONAL LAW 429 (8th ed. 1955). See also *Corfu Channel Case*, I.C.J. Preliminary Objection 15 (1947).

⁸ Article 2.3 of the Charter provides that "all members *shall settle* their international

failure to account for the existence of legal duties which the Resolution recognizes but does not create is a fallacy based upon a positivistic analysis of the Charter. Because the Security Council cannot *impose* a norm under Chapter VI, a positivistic analysis concludes that the resolution is without jural significance. Geared to "vertical" forms of thought, it fails to see that a legal duty can exist even if a superior power is not authorized to threaten a sanction for its violation.⁹

The above remarks have been addressed principally against the Israeli attitudes towards force because the Dinstein article directly raises such questions. Similar criticisms can be made of Arab attitudes throughout the Middle East crisis, even though questions of force are not directly raised by the Bassiouni-Fisher paper. It suffices to note that the persistent belligerency which has been official Arab policy since 1948 is as incompatible with the objectives of the United Nations as are the extremes of Israeli theories of self-defense. Indeed, it should be said that neither side has fully comprehended the sense in which the Charter constitutes a commitment of the people of the world to peace rather than war. The inexorable logic of Israeli reasoning on self-defense, as well as the Arab commitment to Palestinian liberation, has driven both sides a long way from the modalities of peaceful settlement envisioned by the Charter. Should they continue to inflame their differences with violence, they, and the entire world, face a frightening future. Within such a framework, escalation of the Middle East arms race is assured, and further bloodshed inevitable. The potentials for death and destruction which may flow from this armed intransigence are incalculable, especially if it leads to a nuclear confrontation by the Great Powers. Thus it is imperative that antagonisms be transformed into a spirit of genuine reconciliation.

PEACEFUL SETTLEMENT

The Bassiouni-Fisher paper, devoted to problems of peaceful settlement, demonstrates how the issues can be expressed in a jural form suitable for adjudication. Framing a series of arguments generally favorable to the Arab position, the authors indicate that the basic questions are not submitted to a tribunal for resolution because of the psycho-political underpinnings of the controversy. The suggestion of adjudication requires some comment. The idea is attractive, and one which the present writer has previously supported. But further reflec-

disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art 2, para. 3. (Emphasis added.)

⁹ For a general theory of horizontalism, see H. HART, *THE CONCEPT OF LAW* ch. VIII (1961).

tion leads to a conclusion that the proposal, while inherently plausible, is not suitable for the actual resolution of the present dispute. In addition, the very raising of the possibility in a paper sympathetic to the Arab cause has ramifications which deserve consideration.

Objection could be taken to the idea of adjudication on the grounds that the matter is really a "political" controversy which is not susceptible to judicial treatment even if the differences between the parties can be expressed in legal terminology. Perhaps the article anticipates this in its analysis of the psychological aspects of the dispute. Nevertheless it should be noted that the proposals are basically unworkable because the jurisdiction of the World Court can only be effectively utilized when the general relationship between the parties is peaceful. Professor Sohn has shown how the Court can only gradually develop its authority by the careful submission of relatively innocuous questions by countries who are basically on friendly terms.¹⁰ One cannot realistically expect the Court to handle questions of vital moment to States that have been in violent conflict for over twenty years.

What is of importance are the underlying attitudes which such proposals suggest. Since the 1948 war (and especially in the November 1967 Resolution), the Security Council has endeavored to draw the participants into a posture of direct negotiation. As pointed out earlier, the parties have failed to fulfill the legal obligations to negotiate which exist even if the resolution is not of itself obligatory. But the Arab nations have consistently refused to engage in that direct discussion and exchange of differences which the nature of the conflict requires. And it must be said that the present proposals relative to adjudication appear as an extension of that evasion.

One obstacle to negotiation, which Bassiouni and Fisher correctly point out, is that Western observers tend to view the dispute as a problem of interstate relations, while, in fact, the conflict is also between the aspirations of Zionism and Arab nationalism with respect to Palestine.¹¹ It is, in this sense, a "domestic" problem because the antagonisms flow from differing interpretations concerning the internal future of an entire area. When the controversy is viewed predominately in terms of sovereign rights and responsibilities,¹² the discussion, re-

¹⁰ Sohn, *Step by Step Acceptance of Jurisdiction of the International Court of Justice*, 1964 PROCEEDINGS OF THE AM. SOC. OF INT'L L. 131-136, reprinted in 3 THE UNITED NATIONS STRATEGY OF WORLD ORDER 432 (R. Falk & S. Mendlovitz ed. 1966).

¹¹ Bassiouni & Fisher, *The Arab-Israeli Conflict—Real and Apparent Issues: An Insight into Its Future from the Lessons of Its Past*, *infra* at 399.

¹² See, e.g., the November Resolution, *supra* note 6, para. 1, ii, which provides for "The termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every state

maining on the plane of external jural relations, misses the more humanistic aspects of the conflict. The real issues are obscured and the possibilities of durable peace diminished.

A further complication is added by the shifting currents of Arab nationalism. The Palestinian Arabs, with charismatic leadership, have become a new political force in Middle East affairs. Previously represented through the existing Arab states, the Palestinians now seek to realize their aims upon their own authority. Whether they will continue to be an independent force or become assimilated with existing or restructured political entities remains to be seen; it is clearly possible that some juridical recognition may be needed to make the pending negotiations fruitful.

In any event, the Arab world — either in its existing structure or in emerging new political forces — must bring itself within the machinery for peaceful settlement envisioned by the 1967 Security Council Resolution. This involves recognition of, and negotiations with, the State of Israel. A future Palestine freely composed of Jews and Arabs may well emerge as envisioned by Bassiouni and Fisher in the conclusion of their paper, but it can only evolve gradually through mutual friendships flowing from a previous peaceful settlement.

To suggest negotiation rather than adjudication is not to argue for politics over law; the legal points raised in the Bassiouni-Fisher paper retain their relevance. However, the process of direct negotiation with Israel does affect the range of moral and legal questions which are properly relevant to the settlement. For example, the present article goes to great lengths to demonstrate that promises made to the Zionists by the British were without legal foundation, or at best, were subordinate to Arab rights.¹³ It also questions the entire process by which Palestine was partitioned by the General Assembly and the State of Israel created. While such considerations may be of indirect relevance, the very nature of the negotiating process requires a narrowing of the field of possible claims.

The historical context for responsibility is the period from 1948 to the present; a mutual assessment of conduct from that time forward is the only rational basis upon which meaningful negotiations can proceed. To flood the discussion with the entire history of Jewish and Arab aspirations is bound to assure the failure of any peacemaking efforts. Construing Arab complaints in the most favorable light, it is

in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force."

¹³ E.g., Bassiouni & Fisher, *infra* at 426-37.

clear to any impartial observer that the suggested time period provides ample opportunity for the presentation of legitimate grievances.

In urging negotiations between the participants, something should be said of the means by which they should be accomplished. Many valuable observations have been made about the technique of direct bargaining,¹⁴ but little attention has been directed towards the general negotiation structure. It is often asserted that peace can only be negotiated through direct talks between the parties acting without any outside interference. If by extraneous influence is meant pressure exerted by the Great Powers, the objection is well taken. Even if they could agree on the nature of a Middle East peace, no group of nations, regardless of their actual power, are authorized to dictate the future destiny of any part of the world community. And even if their influence is persuasive rather than coercive, Big Power peacemaking efforts simply destroy the structures of pacific settlement envisioned by the Charter.¹⁵

But if the disputants intend to negotiate without *any* intermediary, there is little chance of durable peace. The November Resolution contemplates the utilization of a Special Representative who should "promote agreement and assist efforts to achieve a peaceful and accepted settlement." It is extremely important that this aspect of the resolution be implemented.

Throughout the twentieth century, states involved in conflict have assumed the capacity to achieve a lasting peace through their own resources. These efforts have, in the main, failed. The punitive spirit

¹⁴ See the suggestions of Professor Fisher for implementation of the November resolution. Fisher, *Forum Proceedings*, in *THE MIDDLE EAST; PROSPECTS FOR PEACE*, *supra* note 2, at 53-55.

¹⁵ A belief that the Great Powers, by a broadening of their common interests, can bring peace to the world is a persistent conviction of American diplomats. Former Ambassador Ball, for example, advances the thesis that a Middle East settlement can be achieved only if the Big Four can agree upon general terms of settlement which the United Nations Representative Ambassador Jarring can then translate into concrete proposals for the disputants. Ball, *Slogans and Realities*, 47 *FOREIGN AFFAIRS* 623, 628 (1969). This, of course, reflects the view that the Security Council was meant to be an instrument by which the Great Powers could reach accord on world issues and enforce their decisions. A continuation of that interpretation, in spite of power shifts and the evolution of the United Nations as a political institution, is important because, as Mr. Ball concedes, a strong United Nations may jeopardize our nation's immediate interests. *Id.* at 640.

Objectively considered, any suggestion that *only* the Big Four can arrive at a satisfactory solution is absurd. Should the United States continue to view its role in the Middle East as that of Super Power with special peace-keeping duties, the results are likely to be disastrous. Arabs and Jews are suspicious of its motives, as well as those of the Soviet Union; the best course for the Big Four (so-called) is to follow the suggestions in a *Foreign Affairs* article which follows that of Mr. Ball: disengage themselves by restricting the flow of weapons, by avoiding propaganda efforts and most importantly, by supporting the efforts of the United Nations Representative. Lewis, *The Great Powers and the Arab-Israeli Conflict*, 47 *FOREIGN AFFAIRS* 642 (1969).

of the Treaty of Versailles directly contributed to the Second World War, and the outstanding questions arising from the European phase of that terrible conflict have never been resolved. Many would be surprised to learn that the Korean War is at the status of an armistice which looks towards an unfulfilled political settlement. And the failure of the current Paris peace talks to reach a substantive agreement should remove any doubts as to the importance of an authoritative intermediary.

It would be tragic if the parties to the Middle East conflict failed to profit from this historical experience. The only time in this long conflict that the parties have reached any significant agreement was made possible by the efforts of United Nations mediation.¹⁶ The effective presence of such assistance continues to be indispensable to lasting peace in Palestine.

¹⁶ See the discussion of the role of Dr. Bunche in the 1949 Armistice Negotiations in F. KHOURI, *THE ARAB-ISRAELI DILEMMA* 95-97 (1968).