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THE LEGAL ISSUES OF "PARA-WAR" AND PEACE IN THE MIDDLE EAST

YORAM DINSTEIN*

INTRODUCTION

History books reveal that, throughout the era of the Roman Republic, extending over five centuries, the gates of the Temple of Janus were closed to symbolize the reign of real peace only once, when the first Punic War ended. If the same method were used in our own days as a token of genuine peace in the Middle East, it is doubtful whether the contemporary gates would have been closed at any time during the past five decades. Arabs and Jews have been locked in mortal conflict for more than two generations and no end to their enmity seems to be in sight. This is important to bear in mind, if only to benefit from the sobering effect of historical perspective. Clearly, if there were an easy and simple way of reconciling the antagonists in the Middle East, an accord would have been achieved long ago. That the struggle continues is indicative of the complexity of the situation and the enormity of the problems involved. Nevertheless, history also demonstrates that disputes, however intricate and protracted, can be resolved as circumstances change. It is the duty of the statesman to steer a course that will ultimately write finis to hostilities; it is the task of the lawyer to chart for the statesman the shifting channel of human conduct sanctioned by international law. It is proposed here to examine the legal issues underlying the explosive state of affairs extant in the Middle East today, with a view toward analyzing curative measures designed to alleviate the present crisis.

FORCE: TRUTH AND CONSEQUENCES

A. The Cycle of Force

In the latter part of 1969 — more than two years after the Six Day War, twenty-one years after the establishment of the State of Israel, and fifty-two years after the Balfour Declaration—Arab governments still refuse to accept and apply the basic tenet of sovereign coexistence with

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Israel, attempting instead to drive the Jews into the sea. Almost as a daily exercise, regular army units of the Arab countries open fire across the borders of Israel, and bands of marauders and saboteurs, aided and abetted by the Arab governments, try to sow terror and disrupt life within the State. Israel, which has no intention whatsoever of succumbing, responds to the mounting tide of attacks by multiplying its counterattacks, both along its borders and deep inside Arab territories. The maddening cycle of force and counterforce frustrates the lofty aspirations of mankind, and apparently inhibits lawyers from dissecting the legal issues related to this "para-war." Yet there is method in the madness of using force, and from a legal viewpoint it is imperative to draw a line of distinction between the permissible and the prohibited.

B. *The Law of the Charter*

As a rule, current international law clearly prohibits the use of force in the relations between States; the Charter of the United Nations solemnly declares this interdiction:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Indeed, under the Charter, recourse to force is permitted only in two instances: (a) within the framework of the collective security system created by the United Nations, *i.e.*, in the implementation of enforcement measures duly undertaken by the Organization, and (b) in self-defense against an armed attack, in accordance with article 51 of the Charter, which proclaims:

> 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.

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3 This term was coined by Maxwell Taylor. See 10 M. Whiteman, *Digest of International Law* 23 (1968) [hereinafter M. WHITEMAN].

4 U.N. Charter art. 2, para. 4.

5 *Id.* For the proper interpretation of this clause, see G. Schwarzenberger, *The Law of Armed Conflict* 51 (1968). Admittedly, paragraph 4 of article 2 relates only to United Nations members, but paragraph 6 extends the scope of the proscription on the use of force by stipulating: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." Kelsen draws the conclusion that the meaning of the latter provision is that "the Charter claims to be valid for states not contracting parties to this treaty," H. Kelsen, *Principles of International Law* 348 (1st ed. 1952).

6 U.N. Charter, ch. VII [arts. 59-50].

7 U.N. Charter art. 51.
and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.\(^8\)

The concept of self-defense, as enunciated in article 51, is extremely controversial. It is easier, however, to perceive the meaning of that provision when notice is taken of the conspicuous absence of two very significant and commonly employed phrases, namely, war and aggression.

C. Interceptive Self-Defense

While aggression is a very broad term, which has come to mean different things to different people, the expression "armed attack," as it appears in article 51, is somewhat limited in scope. Aggression alone (but not armed attack) covers, *inter alia*, a mere threat of war, in which case a response by way of self-defense would be anticipatory in character.\(^9\) Since such a threat is not equivalent to an actual armed attack, preventive countermeasures are not justifiable under article 51. Admittedly, there is a strong school of thought adhering to the view that the article explicitly emphasizes only one type of legitimate self-defense, *i.e.*, the repulsion of an armed attack, without negating other types preexisting under customary international law, *i.e.*, resistance to aggression in its several manifestations.\(^10\) However, this interpretation simply does not comply with the letter and spirit of the Charter, and consequently has been rejected by most authorities.\(^11\)

Nevertheless, it is submitted that the expression "armed attack" encompasses more than the clear-cut cases of commencement of hostilities. For example, suppose that the DEW line electronically warned the United States that intercontinental ballistic missiles had been launched by State X against it. Suppose further that the Strategic Air Command (SAC), reacting instantly, directed bombers previously cruising in

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\(^8\) Id.


routine holding patterns to attack military targets in State X before the alien missiles struck their intended targets. Would it be said that, since, technically speaking, the SAC planes attacked first, the United States did not engage in self-defense authorized by the Charter? Similarly, suppose that the Japanese bombers en route to Pearl Harbor had been successfully intercepted and shot down before they actually managed to alter the balance of power in the Pacific. Would such action on the part of the United States have been interpreted as the initiation of an armed attack?\(^\text{12}\)

It is quite obvious that an actual armed attack may be initiated before the first shot has been fired. It is the embarkation upon an irreversible course of inevitable action, the crossing of the Rubicon—rather than the actual fighting—that casts the die and consummates the armed attack. Common sense requires that responsive measures undertaken at the inception of an attack be regarded as legitimate self-defense authorized by the Charter. It is inconceivable that the defending State should have to sustain and absorb a devastating, perhaps overwhelming, strike merely to prove a legal point. To all intents and purposes, self-defense in such circumstances is not anticipatory; it is simply miraculously early.

The foregoing discussion is particularly relevant to an analysis of the legality of the Six Day War. An examination of the fateful fortnight that preceded the outbreak of actual hostilities between Egypt (joined later by other Arab countries) and Israel discloses that Egypt was slowly but surely mounting a massive armed attack; and Israel responded in the nick of time with swift and successful self-defense. True, no single Egyptian step during May and June of 1967 can be subsumed per se under the heading of armed attack, but the series of actions undertaken at that time must be analyzed in the light of their cumulative effect. These actions included: (a) the unequivocal, and well-nigh incredible, saber-rattling statements of Egyptian (and other Arab) leaders; (b) the peremptory ejection of the United Nations Emergency Force from the Gaza Strip and the Sinai Peninsula, after a decade of relative stability in that theater of operations; (c) the illegal closure of the Straits of Tiran to Israeli shipping;\(^\text{13}\) and especially (d) the large-scale build-up of Egyptian forces along Israel's borders. This was not an ordinary deployment of forces; apart from the unprecedented dimen-

\(^{12}\) The Pearl Harbor example was adduced in debates in the United Nations. See 5 M. Whiteman 867-68.

\(^{13}\) On the juridical issues pertaining to the closure of the straits, see Gross, Passage Through the Strait of Tiran and the Gulf of Aqaba, 33 Law & Contemp. Prob. 125-46 (1968).
sions of the troops, guns, tanks and planes pouring into Sinai, it was impossible to disregard either the proliferation of border incidents that ensued or the tell-tale disposition of assault units. Ground troop movements, particularly in the beginning of June, resulted in ominous intelligence evaluations indicating the imminence of a spearhead strike designed to split the Israeli Negev. Persistent encroachments on Israeli airspace by Egyptian planes, and battle orders (which came into the hands of the Israel Defense Forces and were subsequently published) issued to Egyptian advance squadrons to prepare for the launching of an attack within a very short while, round out the picture. The net result of all these sinister developments was that early in June of 1967, Israel, and, indeed, most of the world, considered Egypt as practically engaged in the first phase of an inevitable armed attack. Under these circumstances, the Israeli response must be regarded not as preventive or pre-emptive, but rather as interceptive in character, bearing a striking similarity to the two hypothetical cases previously discussed. Jordan, Syria and the other Arab States that rushed in to wage war on Israel in collaboration with Egypt were simply participating in an armed attack. On the part of Israel, therefore, the Six Day War, factually ineluctable, was also legally justifiable as an inescapable act of self-defense and self-preservation.

Furthermore, inasmuch as self-defense under the Charter is authorized only pending appropriate action by the Security Council, weight should be accorded to the fact that attempts made at the United Nations to ascribe responsibility to Israel for initiating hostilities in June 1967 were uncompromisingly rebuffed.

D. The Options of Self-Defense

In view of the fact that the cycle of force in the Middle East continues to accelerate, it is interesting to examine the applicability of the Charter to the skirmishes and encounters that incessantly occur between Israel and the Arab States. In this context, it is important to note that the term "armed attack" need not be confined to an onslaught by the bulk of the armed forces of one State against another; small-scale armed attacks are still armed attacks. By the same token, self-defense can assume more than one form. The expression "self-

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14 See The Arab War Against Israel 19-28 (1967).
15 This conclusion is also reached, after a detailed analysis, by J. Stone, The Middle East under Cease-Fire 2-10, 14 (1967).
16 See Rosenne, Directions for a Middle East Settlement—Some Underlying Legal Problems, 39 Law & Contemp. Prob. 44, 55-56 (1968).
17 "If 'armed attack' means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident." Kunz, supra note 11, at 878.
defense" by itself is not descriptive in sense; rather, it is merely a term that is attached to a certain rightful course of action which involves counterforce and which is undertaken by States in appropriate cases.\textsuperscript{18} Simply stated, self-defense, like its counterpart term "armed attack," is not restricted to extended contests and total engagements. By way of illustration, suppose that an Israeli patrol, moving along the border on the Israeli side of the line, is subjected to intense fire from the other side — in violation of the Charter\textsuperscript{19} as well as the cease-fire — and suffers heavy casualties. Until the Security Council has taken the necessary measures to restore the peace, the following categories of counterforce are permissible under article 51:

1. Reaction

The dimensions of the first category are somewhat elusive, since very few lawyers, as distinct from soldiers, take special cognizance of it. For lack of a better name, it may be termed reaction. The idea is countering force with force on the spot and on the spur of the moment. In the above example, fire would be returned by the patrol, and possibly by supporting units in that sector of the line. The significant characteristic of reaction is that the exchange of fire terminates the incident, thereby avoiding the involvement of other units at other times.

2. Reprisal

Reprisal means the use of force to retaliate for a previous armed attack by another State when no other redress has been obtained. It is to be distinguished from mere reaction in that an altogether different incident develops, either with a separate unit or at another time or both. Thus, in the above example, Israeli troops would either open fire at a later date on an enemy patrol, or attack a military base from which the assailants came. Nonetheless, reprisal is still limited in scope, inasmuch as the response does not entail the use of force à l'outrance, and must be proportional to the initial, illegal, use of force by the opposing side.\textsuperscript{20}

Many international lawyers firmly believe that reprisal does not fall within the ambit of legitimate self-defense under article 51 of the Charter.\textsuperscript{21} In fact, this point of view has been upheld by a number of

\textsuperscript{18} "Self-defense is a kind of self-help." H. Kelsen, \textit{supra} note 5, at 16.
\textsuperscript{19} U.N. CHARTER art. 2.
\textsuperscript{20} This principle was laid down by the 1928 Arbitral Award in the \textit{Nautilus} case (Portugal v. Germany), 2 U.N.R.I.A.A. 1011, 1026 (1949). For a clear exposition of the \textit{Nautilus} case, see J. Brierly, \textit{The Law of Nations} 400-02 (6th ed. H. Waldock 1963).
\textsuperscript{21} See I. Brownlie, \textit{supra} note 9, at 281 (and authorities cited therein).
United Nations resolutions. However, there are authorities who take a contrary position, and, in any event, the fact of the matter is that States regard reprisals as far from passé. Indeed, all major powers have had recourse to reprisals in recent years, to wit, the United States in the Gulf of Tonkin, the United Kingdom in Danaba, France in Sakhiet, and the Soviet Union in the Chinese border incidents. Thus, it is not at all surprising that one commentator has reached the following conclusion:

It seems clear that on the doctrinal level Israel is not entitled to exercise a right of reprisal in modern international law. Such clarity, however, serves mainly to discredit doctrinal approaches to legal analysis.

International law is created and determined by the practice of States—not by lawyers, regardless of their erudition and expertise, or by the misguided resolutions of nonlegislative bodies. Efforts to institute textbook tenets of international law, confusing the lex lata with the lex ferenda and widely ignored by States, only serve to perpetuate the layman's belief that the international legal system is a chimerical notion.

Even in terms of sheer rationality, since war, the ultimate weapon, is generally accepted as a legitimate form of self-defense (in response to an armed attack), it is incomprehensible that the use of a lesser weapon, a part rather than the whole, should be regarded as objectionable. If war is a permissible form of self-defense under article 51 of the Chapter, a fortiori measures short of war, or more specifically, reprisals, are also permissible.

3. Execution

Like reaction, the third category of self-defense is not always recognized as an independent mode of counteraction. Although it is occasionally designated necessity, the term "execution" seems preferable. It signifies the retributive employment of force within the terri-

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22 For a recent example, see S.C. Res. 270, 24 U.N. SCOR, 1504th meeting 1 (1969).
23 See, e.g., MANUAL OF PUBLIC INTERNATIONAL LAW, supra note 11, at 754: "armed reprisals that are taken in self-defence against an armed attack are permitted." See also E. Colbert, Retaliation in International Law 202-03 (1948).
24 See 14 KEESING'S CONTEMPORARY ARCHIVES 20,241 (Aug. 22-29, 1964) [hereinafter KEESING'S].
26 Id. at 16,203 (May 31-June 7, 1958).
tory of another State directed against individuals who have committed acts of force on their own responsibility, i.e., without the complicity of their government. Execution is similar to reprisal, except that it is not directed against a government, and usually occurs only when a government is unable or unwilling to control the situation along its border. For example, it might be utilized where an Israeli patrol is attacked, not by the regular troops of a neighboring Arab country, but by a band of marauders whose base is located in that country (obviously, if the marauders were abetted by the authorities, the legal position in respect of governmental responsibility would be equated to the use of regular troops). Execution would be accomplished, for instance, if an expeditionary force was sent to eliminate the saboteurs' camp across the border.

The most famous historical precedent for this type of self-defense is to be found in the *Caroline* case. In 1837, during the McKenzie Rebellion in Canada, a large number of Canadian insurgents, as well as unauthorized American citizens sympathetic to their cause, gained control of an island on the Canadian side of the Niagara River. The steamboat *Caroline* was used to transport men and materials from the American bank to the rebel-held island. When British protests failed to sever the line of supplies, a British unit crossed the American border under cover of night, boarded the vessel and sent her drifting to the Falls. In the course of the incident, several American citizens were killed and others were injured. The United States, alleging a violation of American sovereignty, lodged a protest with the British government, and the British, in turn, contended that they had acted in self-defense. Subsequently, Lord Ashburton, a special British envoy, was dispatched to Washington to settle the controversy. In a note addressed to him, Secretary of State Webster, discussing the British assertion of self-defense, maintained that the “necessity of that self-defence... [must be] instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” Lord Ashburton’s reply apparently satisfied the United States, and the case was closed. But Webster’s criterion made history and came to be viewed as transcending the specific circumstances of the episode — meaning the issue of execution — and applicable to self-defense in general. Even in our own time, the International Military Tribunal in Nuremberg applied Webster’s test as a basis for

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32 Jennings, *supra* note 30, at 92, calls the *Caroline* case the "locus classicus of the law of self-defence."
evaluating, and rejecting, the German allegation that the invasion of Norway had come under the aegis of self-defense.33

4. War

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.34 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. However, inasmuch as war is the ultimate means of destruction, it is clear that not every isolated instance of an armed attack by one State gives the other party a right to plunge into all-out war in self-defense. It is here especially that Webster’s yardstick may be relied upon for measuring the justifiability of self-defense. Yet, if his words are to be accepted literally, it will become virtually impossible to justify war as a response to the isolated use of illegal force. Presumably, he derived his high standards from the general principles of Anglo-American domestic criminal law pertaining to self-defense. If this presumption is correct, it can only demonstrate the danger inherent in drawing analogies from the domestic law to the international legal system. When a man is assaulted, and his life imperiled, one can say that there is no moment for deliberation and no choice of means. But when an isolated act of illegal force is committed against a State, there is sufficient room for deliberation. Moreover, in a well organized country the frontline command will not unleash full-scale war (as distinct from reaction or reprisal) by way of self-defense without first securing approval from army headquarters or, preferably, the government. This is a process that takes more than a few moments, and particularly in a democratic State, where the wheels of government turn slowly, the procedure may indeed consume a long period of time. Jessup is of the opinion that

[t]elegraphic or radio communication between the officer and his superiors can be taken as a counterpart of the impulses in the ner-

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33 I Trial of the Major War Criminals (1947) I.M.T. 207.
34 Levontin says about war: “It is unlimited in object in the sense that every war may be regarded, potentially, as undertaken with a view to the total subjugation or *debellatio* of the enemy. This is the chief distinction between war and reprisals.” A. LEVONTIN, THE MYTH OF INTERNATIONAL SECURITY 63-64 (1957).
vos system of the individual whose brain instructs his arm to strike.  

However, in the international arena response to pressure is not reflexive; instead it is engendered by the contemplation and deliberation disqualified by Webster.

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. The two elements of urgency and necessity are separate and distinct. From the standpoint of urgency, war cannot be initiated in self-defense several years after an isolated case of illegal use of force by another State. From the viewpoint of necessity, if a single rifle shot is fired by an armed soldier across the border from State A to State B, and hits a tree, State B is scarcely in a position to respond with war. The situation changes, however, when a thousand cannons are thundering; in this regard, it can be said that quantity may turn into quality.

It should be pointed out that recourse to war in self-defense is a right and not a duty. Consequently, even if a State is entitled to resort to war by way of self-defense, it does not have to exercise that right. For instance, it may choose not to respond to force with counterforce because of the military supremacy of the attacking country. The State subjected to an armed attack may also deem it adequate to respond with less rather than with more force, as by undertaking reprisals. However, the choice, or, if you please, the option, between war and reprisal belongs only to the State under attack, and not to the aggressor State. 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 so as to respond merely with reprisal and not with war. Thus, although the United States had an option to respond to the attack on Pearl Harbor with war or reprisal, the Japanese did not have a similar option (even had they desisted from further hostilities). This is important to remember in relation to a possible thermonuclear strike that is not followed by other military moves: the option of whether to respond with war is given exclusively to the State which has been attacked; a contrary rule would expose the victimized State to what Herman Kahn calls "post-attack blackmail."  

35 P. JESSUP, A MODERN LAW OF NATIONS 164 (1950).
36 H. KAHN, ON THERMONUCLEAR WAR 171 (1960).
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, if it so chooses, to respond by reaction, reprisal, execution, or war. If the option since June 1967 has been exercised in such a way that repetition of major war has been avoided, this is simply due to what cynics may term "the triumph of hope over experience." But in 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. For the individual who becomes a casualty on the borders of Israel, it is immaterial whether his injury occurred in genuine war or in what lawyers may dub a "status mixtus." Peace, as pointed out by Litvinov a generation ago, is indivisible.\(^{37}\)

**PEACE: MISSION IMPOSSIBLE?**

**A. The Security Council Resolution**

The Arab-Israeli conflict, after so many years, has generated so much heat and so little light that those seeking an end to the fighting seem to be reaching for a star that is in a constant state of eclipse. Groping their way in the dark, they tend to grasp at any handy support, the most popular being the famous Security Council Resolution No. 242 of November 22, 1967, which states:

*The Security Council,*

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

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

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

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

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

   (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to

\(^{37}\) Address by M. Litvinov, League of Nations, Geneva, Switzerland, July 1, 1936.
live in peace within secure and recognized boundaries free from threats or acts of force;

2. **Affirms further** the necessity

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

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

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

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

4. **Requests** the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.38

One can hardly deny Resolution 242 the standing of an important milestone in the long and arduous efforts to resolve the crisis in the Middle East. At the same time, one should realize several shortcomings. The Resolution, by dint of its repetitive, if occasionally conflicting exegeses,39 is threatening to acquire the force of Scripture. Theoretically, however, it is not binding, in a legal sense, on the parties to the dispute, inasmuch as it was adopted within the bounds of Chapter VI of the Charter.40 Chapter VI, in contradistinction to Chapter VII, does not empower the Security Council to issue decisions imposing legal obligations on United Nations members. Furthermore, in practical terms, Resolution 242, imperceptibly but perhaps inexorably, is losing its basic relevance. The most immediate and crucial problem in the Middle East today is that, all along the cease-fire borders, fighting virtually never ceases. The cease-fire that brought the June 1967 war to an end came about as a result of a series of directives emanating from the Security Council.41 The Council’s call for a cease-fire is certainly to be considered as the most overriding and momentous step taken by the United Nations since the outbreak of the war. The November Resolution is complementary in character; it is supported

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39 For an illuminating examination of the text of the resolution, see Rosenne, supra note 16, at 55 et seq.
by the short-lived cease-fire, and makes sense only in the light of the minimal tranquility prevailing in the Middle East in November of 1967. Since the underpinning of tranquility has been shattered in the interim — by deliberate Arab resolve to observe the cease-fire no longer — the position of Resolution 242 becomes ever more precarious. Hence, unless the barometer of belligerency in the Middle East shows a remarkable change for the better, the Resolution may, in time, simply join the ranks of many previous dinosaur-like pronouncements of the United Nations: interesting, impressive and irrelevant.

B. Just and Lasting Peace

Whatever the fate of Resolution 242 as a whole, one salient point which transcends the details of the text is the emphasis, in the preamble as well as in the heading of paragraph 1, upon the need for “a just and lasting peace” in the Middle East. Peace between Israel and the Arab countries is incontrovertibly the crux of the issue in the region; what counts in the final analysis is not resolutions but solutions, not a piece of paper but peace. Peace in what sense? To paraphrase what President Franklin D. Roosevelt once said, peace should be regarded not as an end to the last war, but as an end to the beginning of the next one.\(^4\)

Surely, so much blood has been shed between Arab and Jew in half a century that no half-measures can conceivably be expected to halt the chain reaction of force and counterforce, attack and counterattack. After decades of fighting, mutual distrust has reached such proportions that fragmentary agreements to suspend hostilities are doomed to become just another rung in the continuing process of escalation. If experience is the name we give to our mistakes, consider the experience of the last twenty years. The 1949 armistice arrangement collapsed, the 1956 United Nations guarantees system failed, and now, the 1967 cease-fire structure is disintegrating before our eyes. Only a fresh beginning, a totally new framework, a new frame of mind, can possibly create new opportunities. Peace is not the only alternative left to the antagonists in the Middle East, but all others have been tried and found wanting.

Durable peace cannot be encapsulated in a mere document calling for the cessation of hostilities. A real peace treaty, in the meaning of orthodox international law,\(^4\) is required. And the treaty, to be successful, must be accompanied by the proper state of mind. Going through the motions will not suffice; attitudinizng will be fatal. The

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\(^4\)Speech written by Franklin D. Roosevelt, Jefferson Day broadcast, Apr. 13, 1945.  
\(^4\)See 2 L. Oppenheim, supra note 11, at 605-15.
maintenance of a technical-legal state of belligerency is simply irreconcilable with peace.\footnote{On whether or not the status of belligerency is in conformity with contemporary international law, see N. Feinberg, The Legality of a "State of War" after the Cessation of Hostilities Under the Charter of the United Nations and the Covenant of the League of Nations (1961).} A fortiori, actual measures in support of terrorist activities, interference with navigation in international waterways, and, for that matter, even economic warfare, are anathema to peace. Warlike peace is a guarantee of war. To guarantee peace is more complicated, but an absolutely essential element is the existence of an open frontier between neighboring countries, which means daily contact, mutual susceptibility to cross-currents of thought, and, finally, reciprocal respect for each other's point of view.

C. Direct Negotiations

The question of how to bring about peace in the Middle East remains unanswered. It is popular to refer in this context to modality. Perhaps, however, modality should simply be considered in terms of the famous categories laid down by Kant:\footnote{I. Kant, Critique of Pure Reason 80 (1st ed. 1781).} peace is nonexistent at the moment rather than existent; it is possible rather than impossible; and it is necessary rather than contingent. The methodology is secondary in importance. Israel has always insisted on direct negotiations as the best course of action,\footnote{Oppenheim states: "The simplest means of settling State differences, and that to which States as a rule resort before they make use of other means, is negotiation." 2 L. Oppenheim, supra note 11, at 6-7.} and yet has fully supported the Jarring mission.\footnote{This was established in paragraph 3 of Resolution 242. S.C. Res. 242, 22 U.N. SCOR, 1382d meeting 8 (1967).} It may be argued that direct negotiations are not always the most effective first step towards a détente between hostile States, but it seems that the total and adamant refusal of the Arab governments to entertain even the thought of ultimately having a face-to-face confrontation with Israel demonstrates that they do not seriously contemplate peace. Every day lethal face-to-face confrontation between the parties takes place at the front line and it is not easy to envisage an about-face by remote control. Regardless of whether direct negotiations are essential at this stage, the parties will eventually have to utilize this method to solve their problems. In fact, direct negotiations between Israel and the Arab States have already taken place in 1948 and on subsequent occasions on the technical as well as on the political level. And it appears that when they have to do so, and more importantly, when they desire to do so, the Arabs can confront the Israelis not only in combat.
D. Big Power Intervention

Four Power conferences, Two Power conferences, and other similar consultations, as long as they exclude the parties to the dispute, are historical anachronisms which are destined to failure. The era of the Concert of Europe, in which Super-Power Gunboat Diplomacy predominated and the fortunes of the world were determined in the inner councils of benevolent overlords, is over. Peace between Israel and the Arab countries will be achieved not when a button is pressed in Washington or Moscow, but only when both parties to the conflict realize that it is they who must find a solution. When they are sufficiently disillusioned with outside attempts at peacemaking, peace may cease to be an illusion.

E. Redemarcation of Boundaries

The issue of peace in the Middle East is closely linked to the question of boundary redemarcation between Israel and the Arab States. This controversy provides one of the best illustrations of the vicious circle in which hostile States inevitably find themselves after an extended period of mutual distrust. In a reign of peace, real estate is not of paramount importance; but peace does not come with the speed of light. Until the adversaries are completely assured that the conflict is truly over, there is a tendency to insist upon the control of certain strategic positions, which are regarded as essential to security. When such security demands are not satisfied, apprehension only rises and the exigency of retaining the vantage points looms larger. In the case of the Middle East, the Arab governments at times seem to desire a return to conditions existent on the eve of the Six Day War. On the other hand, Israel looks upon these very conditions as the cause of the war, and, by avoiding future vulnerability, hopes to prevent a repetition of the conflict. In fact, it should be noted that after every major war in the Middle East, the Arabs have demanded the restoration of the status quo ante the last bellum, while fully preparing for the next one. As long as the Arabs continue to dream of eliminating Israel totally from the map of the Middle East, Israel feels that it has certain indispensable security needs. Accordingly, it does not relish the idea of foregoing strategic gains — hard won in a war not of its own choosing — unless and until a new era of peace dawns. Israel is both prepared and willing to negotiate the future of all newly acquired territories — but only in peace talks. Even in the reunified capital of Jerusalem, which had been ravaged by an unnatural division into two cities between 1948 and 1967, Israel does not seek to exercise exclusive control
over the Holy Places of Islam and Christianity, and is favorably disposed
to a discussion of workable arrangements.48

From the peace talks will emerge the agreed delineation of what
Resolution 242 terms “secure and recognized boundaries.” Such
boundaries are not necessarily the cease-fire borders, but evidently
they do not overlap the pre-June 1967 demarcation lines either, for
those were neither secure nor recognized (as was demonstrated by the
war itself). Admittedly, the preamble of the Resolution does pay some
lip service to the concept of “the inadmissibility of acquisition of
territory by war,” but this high-sounding principle is in conflict with the
historical record sanctioned by international law. If every State today
were to abandon those portions of its territory that were acquired as
a result of war, half of the globe would change hands. Moreover, if
acquisition by war is inadmissible, one might question what right the
Kingdom of Jordan had in the West Bank,49 and, in addition, what
right Egypt had in the Gaza Strip. It would appear that territory
which can be gained by the sword can also be lost by the sword.

To the extent that the concept of nonacquisition of territory by
war has any basis in general international law, it can be anchored
only to the well-known Stimson Doctrine,50 which prescribes nonrecog-
nition of “any situation, treaty or agreement” produced by an illegal
use of force.51 The essence of the Doctrine is that a State should not
attain new rights under international law as a result of its breach of
that law: ex injuria jus non oritur.52 However, that Doctrine is only
relevant to the case in which the change in the situation is spawned by
an illegal use of force; it is inapplicable whenever the new state of
affairs stems from a legal use of force, i.e., successful self-defense. The

48 On the subject of Jerusalem, see E. LAUTERPACHT, JERUSALEM AND THE HOLY PLACES
(1968).
49 Indeed, Jordan’s sovereignty over the West Bank is challenged by Blum, The Missing
Reversioner: Reflections on the Status of Judea and Samaria, 3 ISRAEL L. REV. 279, 281
50 See Wright, Legal Aspects of the Middle East Situation, 33 LAW & CONTEMP. PROB.
5, 24 (1968).
51 The original Stimson statement of January 1932 related to the obligations imposed
by the Kellogg-Briand Pact for the Renunciation of War. See 1 G. HACKWORTH, DIGEST OF
INTERNATIONAL LAW 334 (1940). Shortly thereafter, the Assembly of the League of Nations
adopted a resolution adding a reference to the League’s Covenant. LEAGUE OF NATIONS,
OFF. J. SPEC. SUPP. 101, at 87-88 (1932). See McNair, The Stimson Doctrine of Non-Recog-
nition: A Note on its Legal Aspects, 14 BRIT. Y.B. INT’L L. 65-74 (1933).
52 The Stimson Doctrine, as formulated in terms of nonrecognition, is questionable
from an analytical viewpoint. The rule of nonrecognition of situations produced by illegal
use of force would be meaningful only on the basis of an underlying assumption that
recognition of such situations can somehow make an impact on the international legal
position (apparently by removing the stigma of unlawfulness). Since, however, the assump-
tion is quite dubious, the issue of recognition or nonrecognition may very well be devoid
of legal significance. See H. Kelsen, supra note 5, at 293-94.
aggressor may be barred from reaping the fruits of his crime against peace, but the victim of an armed attack, in the event that he emerges victorious, is not subject to the same disqualification. Since Israel exercised self-defense in the Six Day War, its victory was not an *injuria*, and a new *jus* would be eminently proper.53

Finally, a word of caution must be added with regard to the future of the territories under discussion. Large geographical areas cannot be put into deep freeze; life goes on, and while hostilities continue, and negotiations fail to materialize, numerous *faits accomplis* take place almost as a matter of course. Fortifications are constructed, roads are built, paramilitary settlements are established, and interests become vested. The victor, in the words of Scott Fitzgerald, belongs to the spoils. What was reversible in 1967 may prove difficult to reverse in 1970, and entirely irreversible in 1973. Consequently, if the Arabs are sincerely interested in recovering most of their territorial losses, and not merely in uttering self-fulfilling prophecies about Israeli expansion, they must begin negotiating sooner rather than later.

**F. Other Problems**

It almost seems unnecessary to state that earnest negotiations between Israel and the Arab States, once commenced, can and should encompass all outstanding issues. The whole spectrum of relations in the Middle East should be exposed to close scrutiny, thereby providing, for the first time, an excellent opportunity to heal some festering wounds. That the plight of the Arab refugees and displaced persons will be high on the list of priorities is beyond question. This is a humanitarian problem that has not yet been solved, simply because of overriding political considerations.54 Once the deck is cleared, there should be no insurmountable obstacle to finding an acceptable formula for accomplishing the integration of the refugees into a productive life in the Middle East.

**CONCLUSION**

The main thing is for the Arabs to awaken from their day-dreams, and to correct their optical illusion that Israel does not exist. They must realize that "sometimes the faculty of judgment is misled by the influence of imagination."55 In brief, they must learn to accept reality. With less emotion, there is a good chance for motion toward a viable peace.

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53 "As against a State in the position of Israel, acting in lawful self-defence, the principle *ex injuria non oritur ius* is simply not applicable." J. Stone, No Peace—No War in the Middle East 32 (1969).

54 On the subject of the refugees, see Refugees in the Middle East: A Solution in Peace (1967).

55 I. Kant, *supra* note 45, at 295.