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Jeffrey H. Joseph

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Beyond Khartoum: Peacekeeping Forces, Imposed Treaties and Regional Conflict †

I. Introduction: International Law, Foreign Policy and the Arab-Israeli Conflict

We are now living through "crucial hours," which will decide the chances for an interim agreement between Israel and Egypt. . . . We cannot be sure that a separate agreement will be reached on the opening of the canal, but the chances are not negligible. — Abba Eban, Foreign Minister of Israel, April 18, 1971.¹

The most logical answer would be to introduce a United Nations peacekeeping force on the east bank of the canal . . . (it) could serve not only as a guarantor of an interim Suez arrangement but also as a model for future United Nations peacekeeping on a broader scale to assure a final Arab-Israeli settlement. — *N.Y. Times* editorial, April 21, 1971.²

Four years after the conclusion of the Arab-Israeli War of 1967 no peace solution exists. Until recently, the tone of the peace negotiations have been characterized by the nihilistic policy of no negotiations and no peace advanced by the leaders of the Arab states following the war at the Khartoum Conference.³ In August of 1970 the proposals made by Secre-

*J.D. Candidate, 1973, University of Baltimore School of Law; A.B. 1969, George Washington University; president, Woodrow Wilson Society of International Law and Politics.

†This paper was one of two joint winners of the Henry C. Morris International Law Contest. The other winning paper immediately precedes this article.

¹*N.Y. Times*, April 18, 1971, at 17, col. 1.

²*N.Y. Times*, April 21, 1971, at 40, col. 2. Prior to the recent canal proposals, Egyptian Foreign Minister Riad favored an imposed solution in the guise of a Four Power solution and the use of a U.N. peacekeeping force. *LeMonde* (English weekly), January 13, 1971, at 1, col. 4. At the same time, the Israelis rejected both an imposed solution and a U.N. peace force. *N.Y. Times*, February 8, 1971, at 8, col. 3. "Israel has apparently rejected the use of U.N. forces in the area east of the canal." *N.Y. Times*, May 13, 1971, at 17, col. 6.

³The Khartoum Conference was an attempt by the leaders of the defeated Arab States to formulate a common Arab policy to counter the expected Israeli diplomatic offensive. It was unfortunate the leaders chose to formulate a rather negative policy position. In view of the decentralized nature of the international legal system, it is the author's position that primarily through the policies of major national actors that international law has relevance in managing regional conflict and strengthening both the international legal system and the international

tary of State Rogers and their subsequent acceptance introduced a measure of conciliation on both sides. The optimism that surrounded these proposals can be fulfilled only when the formulation and execution of United States foreign policy adequately considers the international legal context. Such a policy requires the bringing to bear of legal factors on two specific policy issues: peacekeeping and imposed treaties.⁴

Both peacekeeping forces and coerced agreements are viable means for managing regional conflict.⁵ This is the case under both the U.N. Charter and the 1969 Vienna Convention on the Law of Treaties.⁶ The latter being the multilateral convention codifying rules of customary international law.⁷ The U.N. practice surrounding the withdrawal of the United Nations Emergency Force,⁸ the international force that was positioned between the Israeli and the U.A.R. forces from 1956 to 1967, and an analysis of Article 52 of the Vienna Convention, that declares void all treaties coerced by the threat or use of force, indicate the need for certain legal strategies and foreign policies.⁹ Such strategies and policies are required in order to foster both an interim and a more encompassing solution to this interminable conflict.¹⁰

community. See generally Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L. Q. 295 (1959).

⁴"The relationship between international law and foreign policy has long posed a perplexing problem for scholars." Malawer, *A Juridical Paradigm for Classifying International Law in the Foreign Policy Process: The Middle East War, 1967*, 10 VA. J. INT. L. 348 (1970).

⁵This essay endeavors to elucidate the relevance of international law in fostering a viable policy attempting to manage the Arab-Israeli conflict. For a collection of essays on the general topic of the relevance of international law, see THE RELEVANCE OF INTERNATIONAL LAW, K. Deutsch and S. Hoffmann, eds. 1968).

⁶This essay discusses the impact of the legal setting upon the international political order. The principal point . . . is to consider the impact of the extralegal setting of international society upon the tasks and prospects of the international legal order. R. FALK, *LEGAL ORDER IN A VIOLENT WORLD VII* (1968).

⁷*Vienna Convention on the Law of Treaties*, U.N. Doc A/Conf 39/27 at 25 (1969). See Rosenne, *The Temporal Application of the Vienna Convention on the Law of Treaties*, 4 CORNELL INT'L L. J. (1970). Rosenne, *Law of Treaties: Guide to the Legislative History of the Vienna Convention* (1970).

⁸For a collection of documents relating to UNEF, see R. Higgins, *The United Nations Emergency Force (UNEF), 1966-1967, United Nations Peacekeeping, 1946-1967—Documents and Commentary* 221 (1969).

⁹"Since every Power wants to turn its interests, ideas and gains into law, a study of the 'legal strategies' of the various units . . . may be as fruitful for the political scientist as a study of more purely diplomatic, military or economic strategies," Hoffman, *Vietnam and American Foreign Policy*, in II THE VIETNAM WAR AND INTERNATIONAL LAW 157 (R. Falk ed. 1969) [Hereinafter cited as Hoffman].

¹⁰The following presents the Arab and Israeli views on several international legal aspects of the Arab-Israeli conflict: *Colloque de Juristes Arabes sur la Palestine—La Question Palestinienne* 1968 and N. Feinberg, *The Arab-Israel Conflict in International Law*. (1970). For more extensive analysis of Article 52 and the withdrawal of UNEF, see Malawer, *The*

II. Coerced Treaties and a Middle East Settlement: Coercion only by the Security Council

A. The Vienna Convention on the Law of Treaties: Broad Interpretation, by the New States, of Article 52.

A treaty is void if its conclusion has been procured by the *threat or use of force* in violation of the principles of law embodied in the charter of the United Nations.—Article 52 (Emphasis added).

The provisions of the present convention are without prejudice to any obligation in relation to a treat which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's *aggression*.—Article 75 (Emphasis added).¹¹

What is the impact of a policy of imposing a peace treaty or an interim agreement on Israel and the Arab States in the light of the Article 52–75 prohibition? What legal strategy ought the United States pursue in order to formulate a valid agreement between Israel and the Arab States?¹²

At the Vienna Convention, the 'third world' nations considered that the term 'force' in Article 52 meant any form of military, economic or political pressure. They contended any treaty brought about by use of any force was to be considered void.¹³ They contended the use of the Charter Article 2(4) phrase "threat or use of force" in Article 52 was intended to declare void all 'unequal treaties,' not merely treaties coerced by military force. The new states introduced the Nineteen-State Amendment at the First Session of the Vienna Conference that requested the draft Article 49 (later numbered 52) to explicitly include reference to all economic and political pressure.¹⁴

The Nineteen-State Amendment was not pressed to a vote because of a compromise with the states not favoring the amendment. The compromise was that a declaration would be issued by the Conference denouncing the

Withdrawal of UNEF and a New Notion of Consent, 4 CORNELL INT'L L. J. 25 (1970); and S. Malawer, *A New Concept of Consent and World Public Order: "Coerced Treaties and the Convention on the Law of Treaties,"* 4 VAND. INT'L L. 1 (1970).

¹¹*Vienna Convention on the Law of Treaties (United Nations Conference on the Law of Treaties)*, U.N. Doc. A/Conf. 39/27 (23 May 1969); *Convention on the Law of Treaties*, 8 INT'L LEGAL MAT. 679, 698, 707 (1969).

¹²The United States has recently signed the convention, but the convention has not yet come into force. 9 INT'L LEGAL MAT. 873 (1970).

¹³"... (W)ord 'force' as employed in the United Nations Charter and in Article 49 (52) of the draft covered all forms of force starting with threats and including . . . more subtly forms such as technical and financial acceptance or economic pressure in the conclusion of treaties." Statement by Mr. Mutuale of the Democratic Republic of the Congo. U.N. Doc. A/CONF. 39/SR. 20, at p. 2.

¹⁴*Draft Report of the Committee of the Whole on its Work at the First Session of the Conference*, U.N. Doc. A/CONF. 39/c.1/L.370/Rev. 1/Vol., 11 (27 January 1969) at p. 250.

use of all force. This would not be a part of the Convention, but it would be an integral part of the Conference. The "Draft Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty,"¹⁵ was adopted at the First Session without a formal vote.¹⁶

The "Declaration of Condemnation" stated,

The United Nations Conference on the Law of Treaties . . . condemns the threat or use of pressure in any form, military, political, or economic, by any state, in order to coerce another state to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent. . . .¹⁷

In the Second Session of the Conference, the Draft Declaration was adopted by 102 votes to none, with 4 abstentions.¹⁸ As an additional component to the compromise, a draft resolution was introduced, "Requesting member states to give to the declaration (of condemnation) the widest possible publicity and dissemination." This resolution requiring wide-spread dissemination was adopted by a vote of 99 in favor and 4 abstentions.¹⁹ This Dissemination Resolution stated that the "Prohibition of the Threat or Use of Military, Economic and Political Coercion in Concluding a Treaty" should be brought to the attention of all member states as well as organs of the United Nations.²⁰ It was the intent of the sponsors of this resolution that the Article 52 prohibition would apply to all international organizations, including the United Nations.

The Dissemination Resolution was incorporated into an additional resolution, the "Final Act of the United Nations Conference on the Law of Treaties."²¹ The Declaration of Condemnation and the subsequent "Dissemination Resolution" is strong evidence of a worldwide expectation as to the content of the prohibition contained in Article 52.

B. Suggested Foreign Policy and Legal Strategy: Coercion if Necessary

The United States ought to consider the expectation of the new states based on the history of Article 52, before formulating a policy of whether or not to impose a treaty by either military or non-military force. By adopting a legal strategy to the problem of peace settlement of the

¹⁵*Id.* at 251.

¹⁶*Id.* at 252.

¹⁷*Id.* at 254.

¹⁸U.N. Doc. A/CONF. 39/SR. 20 at p. 5.

¹⁹U.N. Doc. A/CONF. 39/L.4, A/CONF. 39/L.5, and A/CONF. 39/SR. 20 at p. 5.

²⁰U.N. Doc. A/CONF. 39/L. 32/REV. 1 (12 May 1969).

²¹*Final Act of the United Nations Conference on the Law of Treaties*, U.N. Doc. A/Conf. 39/20 (23 May 1969); *Final Act of Law of Treaties Conference*, 8 INT'L LEGAL MAT. 728, 735 (1969).

Arab-Israeli conflict, the United States needs to consider the non-technical legal meaning of the Declaration of Condemnation and Dissemination Resolution.

While a policy that does not encourage the use of force is, perhaps, morally ideal, it is politically wrong.²² This is the case given the decentralized nature of the International legal order and a weak United Nations. A policy of sponsoring a negotiated peace settlement is an optimal solution, but satisfaction may be had by imposing a solution on regions that have fallen into international anarchy.

The preferable legal strategy for the United States, is to define force only as military force. This would facilitate the use of economic and political threats by either the great powers or the U.N. to coerce these regional states into an agreement, while still not violating Article 52. However, if military threats are required, the legal strategy emphasizes that Article 75 of the Convention permits the Security Council to impose a settlement by the use of military force. To contend that the term 'aggression' in Article 75 is to be defined in the context of Charter Article 39, which equates aggression to a "threat to the peace," as the necessary condition precedent for imposing a solution.²³ Such a threat to the peace exists when regional states mutually threaten use of force under the doctrine of anticipatory self-defense.

It is suggested that the above policy (imposed treaties out of necessity) and legal strategy (limiting Article 52 to military force and a broad definition of the aggression limitation of Article 75) is necessary in order to manage the particular conflict under discussion in both the interim and the long-run. Such a policy and legal strategy may be applicable to other regional disputes in order to maintain a minimum world order.

III. International Peacekeeping Forces: Problem of Consent

Any inquiry of a general character in the field of international law finds itself at the very start confronted with the doctrine of sovereignty. . . . For the theory of sovereignty of States reveals itself in international law mainly in

²²“(O)ur approach, which stresses the dependence of legal norms on political realities, should also put us on guard against proposals or legal attempts aimed at banning the resort to force, as long as this remains a fragmented world, self-help . . . may also be at times the only available method of law-enforcement; to condemn it altogether because of its potential dangers may well pervert *peace at the cost of justice* and law, and then undermine peace ultimately.” Hoffmann 156. (emphasis added).

²³Article 39 states, “The Security Council shall determine the existence of any *threat to the peace*, breach of the peace, or *act of aggression* and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.” (Emphasis added).

two ways. . . . The First aspect, according to which the State is not bound by any rule unless it has accepted it expressly or tacitly. . . .²⁴

A. UNEF Experience: Restrictive Interpretation of Consent

The precedent established by the withdrawal of UNEF was the unilateral right of the host country to request the withdrawal of the peacekeeping force, absent explicit consent by the host state to the contrary. The following text discusses the validity of this proposition and the impact of it on the relevance of international law in settling the Arab-Israeli conflict.²⁵

UNEF was formed under the authority of the General Assembly. It was an agreement between the Egyptian Government and the Secretary General that placed the force in Egypt with the consent of the Egyptian Government.²⁶ The General Assembly merely authorized the Secretary-General to seek the establishment of UNEF,²⁷ and to administer UNEF.²⁸

An essential element in the provisions of the bilateral agreement (Good Faith Aide-Memoire) related to the interpretation of the purpose of the force. The former Secretary-General and President Nasser decided, in the text, that the force would remain until the "task" was completed. Each agreed to act with "good faith" towards the other.

When U Thant was called upon to construe the Good Faith Aide-Memoire in response to the UAR request withdrawal of the force in 1967, he gave very little weight to the official reports of the former Secre-

²⁴H. Lauterpacht, *The Science of International Law and the Limitation of the Place of Law in the Settlement of International Disputes*, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 82 (1933). Also at 434, 436. "In this vindication of the dignity of their science international lawyers are confronted with two tasks, whose performance ought not, it is believed, to be delayed much longer. . . . This is the reason why it is a duty incumbent upon the lawyer to adopt a critical attitude . . . in the interest not only of the dignity of the science of international law, but also of an effective peaceful organization of the international community which it is the legitimate business of international lawyers to promote."

²⁵The following quote and references are quite instructive. "In the Middle East it is not too late to reintroduce a serious peacekeeping and peacemaking capability." L. Bloomfield, *The United States, The Soviet Union and the Prospects for Peacekeeping*, 24 INT'L ORGAN. 548, 52 (1970). "Hussein is on record as favoring a joint U.S.-Soviet peacekeeping force." N.Y. Times, December 14, 1970, at 1, col. 4. "The U.S. has indicated a willingness to participate in a peacekeeping role in the Middle East but not in joining an exclusive U.S.-Soviet force." N.Y. Times, December 24, 1970, at 1, col. 5. The United Nations Association of the United States has recommended the establishment of a standby force; however, one not composed of forces from great power countries, *United Nations Association of United States of America, Controlling Conflicts in the 1970's*, 40 (1970). These proposals are currently being discussed by the Committee of 33 of the General Assembly. See also 579 INT'L CONCILIATION 44 (1970).

²⁶*Good Faith Aide-Memoire*, U.N. Doc. A/3375 (20 November 1956).

²⁷Resolution 998 (ES-I), U.N. GAOR, 2nd Emergency Special Session, Supp. 1., U.N. Doc A/3354 (1956).

²⁸Resolution 10001 (ES-I), *Id.*

tary-General. U Thant did not interpret the Good Faith Aide-Memoire as encompassing any "task," but to supervise the withdrawal. He did not assume the consent to act in good faith given by President Nasser in 1956, explicitly or implicitly covered the ten-year-old functions being performed by UNEF in 1967 (supervising the 1949 Armistice Agreement). U Thant rejected Hammarskjöld's views contained in an official report on UNEF made in October 1958. Hammarskjöld had stated:

... were either side to act unilaterally in refusing continued presence or deciding on withdrawal, and were the other side to find that such action was contrary to a good faith interpretation of the purpose of the operation, an exchange of views would be called for towards harmonizing the positions.²⁹

By rejecting the former Secretary General's view contained in his October 1958 Report, U Thant accepted the Egyptian-favored definition of UNEF's "task" as stated by the Egyptian delegate to the General Assembly in 1958.

In other words, as must be abundantly clear, this Force has gone to Egypt to help Egypt, with Egypt's consent, and no one here or elsewhere can reasonably or fairly say that a fire brigade, after putting out a fire would be entitled or expected to, claim the right deciding not to leave the house.³⁰

Secretary General U Thant recognized, in his final report on UNEF, that the right of a host state to request unilaterally the withdrawal of peacekeeping forces was a basic defect in the peacekeeping machinery.³¹

The experience with the withdrawal of UNEF most certainly points up the desirability of having all conditions relating to the presence and the withdrawal of a peacekeeping operation clearly defined in advance of its entry into the territory of a host country . . . (often) time cannot be taken to negotiate agreements on detailed conditions in advance of the entry.³²

Secretary General U Thant correctly identified the necessity for formulating a withdrawal formula, in order to help maintain peace in the international system and which would be agreeable to the host state. The United Nations' practice makes it clear a state's consent in peacekeeping treaties is restrictively interpreted.³³ If consent is not broad enough it may be withdrawn unilaterally by the subjective determination of the host state.

²⁹ *UNEF Experience, Report of the Secretary General*, 13 U.N. GAOR, Annexes, Agenda Item No. 65, U.N. Doc. A/3943 at 158 (1958).

³⁰ 11 U.N. GAOR, Agenda Item No. 66 at 348 (1956).

³¹ Final Report by *Secretary-General U Thant on UNEF*, 22 U.N. G.A.D.R. Annexes; U.N. Doc. A/6672 (1967).

³² *Id.* at 2.

³³ As to the general question of the existence or non-existence of the principle of restrictive interpretation of treaties, the following is instructive. Leonhard argues that the International Court adheres to a restrictive view of interpreting treaties. A. Leonhard, *The Teleological Approach to Treaty Interpretation*, DE LEGE PACTORUM (D. Deener, ed. 1970). But see D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of*

B. Suggested Foreign Policy and Legal Strategy: Need for a Standard Clause Governing Consent and Security Council Imposition Absent Consent

Having discussed the precedent established by the withdrawal of UNEF, a legal strategy and policy can be suggested in order to foster the use of peacekeeping forces in order to maintain regional and international peace.

The preferable policy is that a Middle East peacekeeping force ought to play a role in assuring a prior agreed settlement by the parties. If possible this force ought not to be imposed. It ought to be subject to the explicit consent of the states concerned. The terms for the withdrawal of that consent, therefore, the terms for the withdrawal of the force ought to be made explicit.

The legal strategy needed to foster the aforementioned policy is to attempt to formulate a standard provision that is to be included in all agreements utilized in stationing the force on the territory of a host state. The clause ought to contain as a condition precedent that the consent of the host state cannot be withdrawn until the 'task' (which needs to be specified) is completed. If there is disagreement this ought to be determined by the Security Council. Only as a last resort ought the Security Council impose force on a state contrary to its consent.

It is suggested that the above policy (use of a peacekeeping force with the consent of the host state) and legal strategy (the need to formulate a standard clause governing the nature of the consent of the host state) ought to be the primary policy. However, the United States ought also to adopt a policy of imposing a peacekeeping force through the Security Council if a host state refuses to consent to the force. The alternate legal strategy needed to be adopted is to emphasize the powers of the Security Council under Article 39. The Security Council has the authority to impose a force under its Charter mandate in cases of threat to the peace.³⁴

The United States ought to adopt the aforementioned as alternate policies and strategies. These policies are rooted in the study of the withdrawal of UNEF; they are relevant to the settlement of the Middle East conflict in both the short- and long-run.

International Law, 64 AM. J. INT'L L. 892 (1970). D'Amato argues that it is the manifest intent that is controlling, not merely the text of a treaty, Morrisson argues that "Whatever the implications of this are for the restrictive interpretation rule generally in international law, it appears certain that the rule is dead as far as the European Human Rights Convention system is concerned." Morrisson, *Restrictive Interpretation of Sovereignty-Limiting Treaties: The Practice of the European Human Rights Convention System*, 19 INT'L & COMP. L.Q. 361 at 375 (1970).

³⁴See note 23, *supra*.

IV. Conclusion: Coerced Treaties and Peacekeeping Forces

In summary, the conclusion of this paper is that by taking into account, past developments in the Middle East and international law, appropriate policies and legal strategies relating to coerced treaties and peacekeeping forces can be developed in order to formulate a viable Middle East peace. The policies and strategies suggested above are intended to prevent a return to the apparently nihilistic policies espoused at Khartoum in 1967 and to move beyond them in the direction of peace. The field of international law-foreign policy is a meaningful field of inquiry that can make a contribution to both an interim and permanent settlement of the Arab-Israeli conflict, and, in general, to the settlement of regional conflicts.