QUINCY WRIGHT*

The Middle East Problem

The Security Council resolution of November 22, 1967 is believed to provide for a satisfactory solution of the middle East controversy, and it is difficult to see how there can be a satisfactory settlement except on the basis of the principles on which that resolution is based. The preamble of that resolution states three fundamental principles.

First is "the inadmissibility of the acquisition of territory by war." This principle goes beyond the principle "no fruits of aggression." It says there shall be no territorial fruits from war, using the latter term in the material sense of a considerable use of armed force. Its application, therefore, does not depend on determining who was the "aggressor" in the 1967 hostilities, a difficult question to answer. There can be no doubt that whether or not Israel was the aggressor, its occupations of territory were achieved by the use of armed force.

This principle is well established. It was accepted in the form, "no title by conquest" as "a principle of American international law by most of the members of the Pan-American Conference of 1890." It was assumed in President Wilson's Fourteen Points and generally applied in the peace settlements of World War I which required plebiscites to justify territorial transfers. It was assumed by the League of Nations as a necessary implication of the Covenant's guarantee of the territorial integrity of all members, and was particularly insisted upon by the United States in the Stimson Doctrine refusing to recognize any Japanese acquisitions by its invasion and occupation of Manchuria.

Secretary Stimson considered it an implication of the Kellogg-Briand Pact of 1929 to which the United States, though not a member of the League was a party. By this instrument nearly all states had renounced war as an instrument of national policy. The League of Nations accepted the doctrine as a necessary implication of the Covenant. The United States insisted on this principle in the Atlantic Charter of 1941 before its entry into World War II, and in the settlements after that war. The allies, it is true, made some territorial acquisitions as a result of their victory but sought to justify them by the principle of self-determination of peoples. The

*Professor of Law Emeritus, University of Chicago and University of Virginia.

principle has been considered an implication of the U.N. Charter obligation to refrain from the use or threat of force against the territorial integrity of any state (Art. 2, par. 4).

The U.N. resolution of November, 1947, partitioning Palestine and establishing the state of Israel as demanded by Zionists supported by hostilities of local guerrillas, is difficult to reconcile with this principle, especially as the rights of the "peoples" in the mandated territories was explicitly protected by the mandate and Article 80 of the Charter. This action, however, must be regarded as an act of international legislation which the General Assembly deemed necessary to meet the crisis situation which developed from the local hostilities and British resignation of its mandate. The resolution was eventually ratified by general recognition and admission of Israel to the United Nations.

The extension of Israel's occupation beyond the original U.N. grant as a result of the Arab-Israeli hostilities of 1948-49, and the armistices between Israel and its Arab neighbors negotiated in 1949 under the U.N. mediator, were justified as temporary measures to end the hostilities. The principle of no acquisition of territory by war, should, if strictly applied, require that cease-fire lines be at the frontiers before hostilities began thus preventing military occupations as well as acquisitions by force; but the overriding responsibility of the United Nations to stop hostilities justified the acceptance of the armistices, only however as temporary cease-fire lines soon to be superseded by permanent boundaries established by peaceful means.

The principle was strictly adhered to in the hostilities of 1956. Britain, France and Israel were, under pressure of the U.N. General Assembly, supported by the U.S. and the U.S.S.R., induced to withdraw to their positions before the hostilities.

The circumstances inducing acceptance of the cease-fire lines in 1967 were similar to those in 1949. They were justified as necessary to end the hostilities, but could not be regarded as conferring any rights to the territory occupied by Israel. It is unfortunate that the position taken in 1956, requiring Israel immediately to withdraw to its *de facto* frontiers before the hostilities, was not adhered to. If the U.S. and the U.S.S.R., supported by France and Great Britain, as they were not in 1956, had insisted in the Security Council, with support of the General Assembly, upon withdrawal, it might have been effected. The American pre-occupation with Vietnam and conflict with the Soviet Union on Vietnam, as well as its vulnerability to domestic Zionist pressure, were factors preventing the common position taken by the super-powers in 1956.

In any case, the principle in question clearly required that Israel gain no political advantage, in respect to the establishment of a boundary with its

Arab neighbors, by its occupation of Egyptian, Jordanian and Syrian territories. Israel would certainly be at an advantage if it negotiated bi-laterally with each of these neighbors while it occupied portions of their territories.

This review indicates that the principle is not only sanctioned by general treaties, such as the League Covenant, the Kellogg-Briand Pact and the U.N. Charter, but also by customary international law developed by state practice during the past eighty years. It is also an effectual instrument to realize the purpose to which governments have committed themselves, and which may be the price of their survival—"to save succeeding generations from the scourge of war." This purpose is not likely to be realized so long as war in the material sense or the use of armed force can, in some circumstances, be a useful instrument of foreign policy. It has always been recognized that the use of force or other duress in inducing a settlement renders it unstable.

"Peace treaties" enforced by the victor, have seldom lasted over twenty years. Since World War II it has been widely recognized that the danger that international hostilities will escalate into nuclear war and the ineffectiveness of conventional hostilities in dealing with guerrillas, have further reduced the usefulness of war or military intervention in the conduct of foreign policy and imperial expansion.

Hostilities of considerable magnitude have occurred over forty times since World War II, but most of them were instances of civil strife or colonial revolt within the domestic jurisdiction of the state, and most of the remainder were ended by a cease fire arranged by the U.N. or other international agency without gain to either belligerent, but only after large scale hostilities in the case of Korea (1950). This was not true of the Soviet intervention in Hungary (1952) and Czechoslovakia (1948, 1968), the U.S. intervention in Vietnam (1965). The Chinese invasion of India (1962) and the Indian occupation of Goa (1961). Only in the last, which involved minor hostilities, did the intervening state appear to have gained territory or other political advantage.

Furthermore, the increased utility of propaganda, economic assistance, trade controls and other non-military instruments in the conduct of foreign policy have usually made them preferable alternatives to war. If added to these conditions, limiting the utility of armed force in international relations, the community of nations, led by the United Nations, regularly employ positive measures to thwart territorial or other political advantages which a state may hope to realize by the use of armed force, the utility of such measures may be reduced to near zero. For this practical reason, apart from the importance of maintaining international law and treaties, it is of utmost importance that no state should be permitted to gain any territory

or other advantage at the expense of another state from its use of armed force.

These observations do not, of course, concern the use of force within the domestic jurisdiction of states, whether in the form of policing by the government, or riot or insurrection by dissatisfied factions. Such hostilities must, under international law, be left to the self-determination of the state where they occur. They are not international hostilities and, only if they become so because of foreign intervention or threat of such intervention, is the U.N. concerned, as it was, for example, in the Congo affair of 1960. The distinction between matters of international and of domestic jurisdiction is the basic principle of international law, giving meaning to the concept of state independence and self-determination.

The *second* principle stated in the preamble to the Council resolutions of November, 1967 is the "necessity of work for a just and lasting peace in which every state in the area can live in security." This states the basic purpose of the United Nations set forth in Article 1 of the U.N. Charter, and supported by the principles stated in Article 2 of that instrument requiring members to settle all international disputes by peaceful means, to refrain from the use or threat of force in international relations, to assist the U.N. in maintaining these principles, and not to intervene in matters essentially within the domestic jurisdiction of any state.

The danger of the Middle East situation imposes a positive responsibility upon the U.N., and especially on the Security Council and its permanent members. The Security Council has "primary responsibility for the maintenance of international peace and security" (Art. 24). In the existing state of the world and with the Great Power veto in the Security Council this responsibility can hardly be met unless the super-powers, the U.S. and the U.S.S.R., work in close harmony within the Security Council. To this end shipments of arms to the middle east states should be discontinued.

The *third* principle asserts that "all member states, in their acceptance of the Charter—have undertaken a commitment to act in accordance with Article 2 of the Charter." The statements in this article are designated "principles," but paragraph 2 makes it clear that they constitute positive "obligations" of international law, which the members must "fulfill in good faith." It is therefore, an obligation of all members "to refrain in their international relations from the use or threat 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." The only permissible uses of force by states in international relations are, therefore, in "individual or collective self defense if an armed attack occurs against a member of the United Nations until the Security Council has taken mea-

sures necessary to maintain international peace and security" (Art. 51), and in giving "the United Nations assistance in any action it takes in accordance with the Charter" (Art. 2, par. 5. See also Arts. 25, 39, 42, 43, 45, 48).

These provisions of the Charter "outlaw war" in the legal sense of a situation in which the belligerents have an *equal* right to engage in hostilities and other coercive actions permissible under the law of war, and in which other states are obliged to observe the law of neutrality requiring impartiality. Under the Charter this situation can not exist between members of the U.N. or according to Article 2, paragraph 6, between non-member states. A state of war implied a continuing use or threat of force by each belligerent upon the other forbidden by the Charter and equality between the belligerents. In the two circumstances in which the use of force is permissible—self defense and collective security action—the belligerents are *not equal*. The defenders and the states cooperating with the U.N. enjoy rights denied the aggressor. Other states need not be neutral but may assist the defender in collective self defense (Art. 51) and must assist the U.N. in action against an aggressor (Art. 2, par. 5).

The outlawry of war by the Charter means not only that armed force may not be used as an instrument of foreign policy but that other powers of belligerents permissible during a state of war such as blockades, property confiscations, visit and search at sea, etc. are not permissible. The Arab argument that the armistice of 1949, while forbidding use of armed force contrary to its terms permitted the utilization of other belligerent powers such as blockade of the Suez canal from Israel shipping has no basis. The armistices were made to end de facto but illegal hostilities and to establish temporary lines of occupation. They did not recognize a state of war. Neither party enjoyed belligerent powers.

The first and third of these principles must be observed if the just and lasting peace called for by the second is to be achieved. Article 1 of the Security Council Resolution of November 1967 is a balanced application of these principles to the Middle East situation. Israel must withdraw its armed forces from the recently occupied territories and the Arab states must renounce the claim of a "state of war," recognize Israel as a sovereign state, and declare that they will respect the territorial integrity and political independence of that state within secure and recognized boundaries.

These mutual renunciations must be simultaneous. Israel will not withdraw until assured that the Arab states will respect its rights as a sovereign state under international law, and the Arab states will not give such assurance or accept a procedure for establishing permanent boundaries until Israel has withdrawn its occupation.

The action called for by Article 1 of the resolution seems clear. The Arab States, at least Egypt and Jordan have accepted it. Israel, however, has attempted to interpret the phrase "from territories occupied in the recent conflict" as not including *all* such territories. It has professed to annex old Jerusalem and has said it will not withdraw from this, and other, occupied areas such as the Goulan heights in Syrian territory and the Gaza strip and portions of Sinai in Egyptian territory. The Security Council might well declare that the resolution means what it says and that Israel must withdraw from all the territories occupied in the recent hostilities. This is the requirement of international law and the Charter and is probably essential if the further steps toward a secure peace, those concerning determination of boundaries, navigation of waterways, just settlement of the refugees' problem, and suitable guarantees can be proceeded with. Even if accepted in principle, the first step presents difficulties in arranging stages of withdrawal, supervision, and timing in relation to Arab renunciation of force and recognition of Israel. On these questions the U.S. and the Soviet Union have been negotiating since February 1969. In his recent visit to Moscow Assistant Secretary of State, Joseph Siser apparently failed to reach an agreement.

In view of the Arab acceptance in principle of the Resolution, the major obstacle to progress seems to be the refusal of Israel to do so and to agree to withdraw from *all* occupied territories. This obstacle might be overcome by providing that the occupied territories, or those deemed critical by Israel, should not be re-occupied by Arab states after Israel withdrawal but by the United Nations. This might reduce Israel's reluctance to withdraw and would resemble the procedure by which the West Irian problem was dealt with. It should be clear that such U.N. occupation should continue until the U.N. considers it no longer necessary and may not be terminated at discretion of the government claiming the territory, as was the U.N. occupation of the Sinai boundary from 1956 to 1967.

The essential components of a "just and lasting peace" are subjective. As stated in the Unesco Constitution, "It is in the minds of men that peace must be constructed." The embittered and suspicious attitudes of Israel and its Arab neighbors must change, but such changes can only be induced and manifested by objective acts and utterances. The parties must formally recognize that each enjoys the rights of a sovereign state under international law and accept procedures first to establish permanent boundaries and later to solve other disputes. Each must affirm intent to observe its obligations under the Charter, especially to renounce the use or threat of force in its international relations. It must be appreciated especially by Israel that formal declaration or agreements induced by territorial occupation or other duress are not likely to last. A "just and lasting" peace does

not mean that all disputes and claims have been settled, but only that all parties are confident that only peaceful methods, such as stated in Article 33 of the Charter, will be used to effect settlement.

It is doubtful whether the problem of boundaries can be settled by bi-lateral negotiations of the parties. The Arabs will not negotiate until Israel has withdrawn from *all* the recently occupied territories and Israel will not negotiate if areas which it deems essential are restored to the former Arab occupant. If the occupied areas were controlled by the U.N. after Israel withdrawal, the prospects of negotiation would be improved. Furthermore, the raids of Arab guerrillas, in and from occupied areas are likely to be stimulated rather than ended by vigorous Israel reprisals and this suggests an Israel interest in genuine peace which would imply an obligation of the Arab states to end the guerrilla raids.

The problem is one with which the U.N. must deal. Israel is an artificial creation of the U.N. The U.N. ignored the principle of self-determination of peoples and the rights of the Arab peoples in Palestine, under the Mandate and Article 80 of the U.N. Charter, in order to carry out the policy of a national home for the Jewish people in Palestine, stated in the Balfour Declaration of 1917, and generally accepted in the League of Nations Mandate. Under the disturbed conditions which existed in 1947, the original concept of a cultural home in Palestine for Jews, Moslems and Christians seemed unattainable. Consequently partition was accepted by the U.N., modified by the provision for the internationalization of Jerusalem and surrounding territory, where it was thought the original idea of a cultural home for the three religious groups under international protection could be effected.

The justifiability of the original Arab objection to partition can hardly be questioned, but its acceptance by the U.N., the recognition of Israel by most states, the willingness of the Arabs at the Lausanne Conference, prior to the armistices of 1949 to accept Israel within the boundaries proposed in the original U.N. resolutions of 1947, the admission of Israel as a member of the U.N., and its continued existence as such for a period of twenty years, indicates that it must now be considered a sovereign state under international law.

In view, however, of its origin and the continued hostility of its neighbors, it remains a special responsibility of the United Nations, particularly to establish its boundaries.

It is suggested that after the mutual renunciation of hostilities and withdrawal from occupations called for by the Security Council Resolution of 1967 have been effected, the U.N. should invite the parties to negotiate boundaries directly or with aid of a mediator. If agreement is not reached

within a year (either then, or perhaps before the negotiation begins), the U.N. should negotiate with the parties a forum in which, if negotiation fails, boundary claims can be debated and decided. This procedure would be similar to that by which the Mosul dispute between Turkey and Iraq (then under British Mandate) was settled in 1926. The Lausanne treaty of 1924 provided that if not settled by negotiation within a year the League Council would give a definitive decision.

It should be understood that Israel has no generally recognized boundaries beyond those provided for in the original U.N. resolution of 1947. The armistice lines of 1949 and 1967 established merely cease fire lines. The armistices of 1949 have, however, served as *de facto* boundaries for twenty years so have a somewhat different status from those of 1967.

Among the forums which might be considered for settling the boundaries are the Security Council acting under Article 38, or the General Assembly acting under Article 14; but in either case the agency should be given by the parties power, not merely to recommend, but to *decide* the boundary. Another possible forum might be the International Court of Justice given by the parties authority to decide on the boundary *ex aeque et bono* as provided in Article 36, paragraph 2 of the Court Statute. It is clear that the deciding authority should not be limited by existing international law, but should be free to consider all the factors—political, economic, social and cultural which the parties might advance.

In such decisions the opinion of the inhabitants of the disputed territory has often been given much weight. Plebiscites have been arranged to determine their wishes in accord with the principle of self-determination of peoples. In view, however, of the movements—forced and voluntary—of the population of Palestine, the opinion of neither the present population nor that at any particular moment of history would seem appropriate. If the inhabitants of Palestine at the time of partition had been allowed to determine, Israel would have received no more, perhaps even less as suggested by Count Bernadotte's Report shortly before his assassination, than the original partition proposal. If the present population were to determine, Israel would probably get most of the territory within the armistice lines of 1949 and perhaps some in the territory occupied in 1967. The fate of the plebiscite proposed for the Tacna Arica area between Chile and Peru in 1925, when each was shipping in population to assure its victory in the plebiscite, indicates the problem. This boundary was finally settled by agreement of the parties. Claims, other than the wishes of the present, or past population, would have to be considered in determining Israel boundaries as they were in the partition resolution.

Another possible forum would be an *ad hoc* arbitral tribunal composed

of neutral arbitrators. This was suggested as the final procedure, by the General Act for the Pacific Settlement of International Disputes, originally signed by twenty-three states under auspices of the League of Nations in 1928, and brought up to date by the United Nations two decades later but signed by only a few states.

Clearly, the problem of negotiating a forum acceptable to the parties would be difficult, whether before or after a year of negotiation, and would require considerable pressure by the U.N. and the Great Powers acting within it. U.N. occupation of the territory would assist, especially if it implied responsibility of the U.N. to partition the occupied territory if the parties failed either to agree on a boundary or on a forum with power to decide.

The remaining issues, it is believed, can be settled if the major issues of Israel withdrawal from the recently occupied areas, Arab renunciation of hostility to Israel, and establishment of permanent boundaries, are effected.

Israel should have free access to the Suez canal. The intent of the Constantinople Convention was to make all states third party beneficiaries assuring them the right of navigation in time of peace and war. This privilege has been enjoyed by the United States and many other non-parties to the convention. The Egyptian right of defense and responsibility to protect the Canal, recognized by the 9th and 10th Articles of the Convention were expressly limited by Article 11 which said such measures "shall not interfere with the free use of the canal." If Egypt actually wishes a stable peace it should be willing to accept the United Nations resolution of 1951 supporting Israel's right to navigate the canal as provided for in the convention, and in any case should be ready to carry out its commitment of 1957 to submit all issues concerning the interpretation and application of the Constantinople Convention to the International Court of Justice.

The same is true of the issue of access by Israel to the straits of Teran and the Gulf of Aqaba. The Gulf appears to be a portion of the high-seas because four states, including Israel, front on it. Under the Corfu straits decision of the I.C.J. and the Territorial Seas convention of 1958, such waters are open to innocent passage of the vessels of all states.

The problem of refugees has resisted settlement because of Arab desire to win sympathy for the human misery involved, and Israel's unwillingness to admit more hostile Arabs to its territory. United Nations resolutions have called for settlement or compensation of the refugees by Israel, and if both parties are genuinely desirous to bury their hatchets Israel should be prepared to carry out this obligation in the spirit in which Germany has compensated Israel for Hitler's persecutions of Jews.

The problem of Jerusalem presents difficulties. The original partition

resolution, and several subsequent resolutions of the General Assembly, supported the internationalization of Jerusalem and surrounding areas to assure access to the holy places of the three religious groups. Two General Assembly resolutions of July 1967 denied Israel's right to annex old Jerusalem which it had occupied. The division of the city from 1949 to 1967 and the refusal of Jordan to admit Jews was unfortunate. Israel's large investment in western Jerusalem, which it has occupied since 1949, makes internationalization of the large area contemplated improbable.

The problem is an aspect of the general boundary question and should be dealt with in the way suggested. Israel's annexation should not be accepted, and like the other occupations of 1967, eastern Jerusalem might be placed under United Nations control until a settlement is reached. Israel administration of the whole of Jerusalem, with agreements placing the Holy places under United Nations guarantee with a U.N. supervisory commission in the area, might be considered. Such agreements should prevent in the future such serious violations of Arab rights in Jerusalem as have occurred during the Israel occupation.

Whatever the procedures accepted to settle the major problems of boundaries, the results should be incorporated in a treaty signed by Israel and its Arab neighbors. The whole should be placed under guarantee of the U.N., and the permanent members of the Security Council. Separate agreements should probably be made in respect to the Canal, the Gulf, the Refugees and other issues including the use of Jordan waters, but they should also be guaranteed by the U.N. It should be recognized that any complaint of violation of any of these agreements should immediately be placed before the Security Council, and if it failed to act because of a veto, the issue should go to the General Assembly as provided in the Uniting for Peace Resolution of 1950. This procedure proved effective in the hostilities of 1956.