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FOREWORD

This symposium consists of papers prepared in connection with a regional meeting of the American Society of International Law which was held at the Duke University School of Law on March 8 and 9, 1968. The meeting was arranged by the Duke International Law Society, to whose student officers and members the symposium's special editor wishes to express his appreciation, both for their work on the conference itself and for making the papers available for publication here.

The title of the conference and symposium, "The Middle East Crisis: Test of International Law," is perhaps provocative in embracing two subjects—law and the Israeli-Arab conflict—which are no doubt regarded by many informed people as having little in common. Discussions of legal aspects of the case therefore inevitably involve divergencies of approach on the part of different authorities, as is reflected in the papers which follow. Any attempt briefly to assess the import of these papers, as in this editorial Foreword, would seem to necessitate an explanation of the view of law against which the assessments are to be made. In the editor's view the general conception of international law may be divided, for present purposes, into two categories.

First, international law may be, and has traditionally been, viewed as consisting of an existing network of legal relationships among states. As stated in the Statute of the International Court of Justice, these relationships are based on treaty, customary international law, the general principles of law recognized by civilized nations, and the writings of qualified authorities. The Statute and the United Nations Charter, of which the Statute forms a part, recognize the legal nature of these relationships and the legally binding nature of judicial decisions in determining questions of the interpretation and application of the Statute and the Charter in particular situations. Thus, peoples and governments, in subscribing to the Charter—the most important treaty in existence—have given their endorsement to this conception of international law. In addition to the decisions and opinions of the International Court of Justice and of other competent international tribunals, the writing of legal authorities also contributes to the jurisprudence of this legal system.

Editor's note: In the footnotes in the symposium, the symbols "U.N. GAOR" and "U.N. SCOR" refer respectively to the official permanent, printed records of the General Assembly and Security Council, including debates of those organs. The symbols "A/PV" and "S/PV" refer to records of General Assembly and Security Council debates which appear in mimeographed, and usually provisional, form prior to the appearance of the printed "Official Records."

The other conception of international law herein postulated has its roots in the observable fact, perhaps best exemplified by the Middle East situation itself, that the area of international relations concerned with the handling of important disputes and situations has little in the way of a legal system capable of bringing about solutions conforming to the goal of peace and security. This approach to law has as its center the problem of how to develop a system, in the nature of a working constitutional system, capable of achieving this goal. The real test of law in this conception is that relevant pronouncements of competent authorities (such as the International Court and the Security Council and General Assembly of the United Nations) should receive at least that degree of compliance that preserves peace and security. The basic prerequisite of such a system must evidently be a minimal consensus among peoples and governments as to the meaning of justice in matters of international concern and as to means of achieving it. The goal must be pursued through channels by no means restricted to law as such—for example, through efforts to diminish social and economic inequality among peoples—but it must also, it is believed, be pursued by legal means in the broad constitutional sense.

Many if not all of the papers in this symposium contain aspects bearing on both of the two concepts mentioned above. Among those which appear predominantly concerned with the first-mentioned concept is that of Professor Quincy Wright, which defines thirteen legal issues arising out of the Middle East situation and undertakes to suggest how relevant rules have been complied with or violated by parties to the conflict. Likewise, Professors Leo Gross and Majid Khadduri follow the general approach in analyzing the relations of states in regard to use of the Gulf of Aqaba and the Suez Canal, respectively.

The papers prepared by official representatives of three of the four states mainly concerned in the controversy also follow the traditional approach. Ambassador El-Farra of Jordan argues that the Charter of the United Nations has been violated in the international handling of the Palestine case. Ambassador Tomeh of Syria discusses various aspects of the refugee question, while Mr. Elaraby, First Secretary of the Permanent Mission of the United Arab Republic to the United Nations, concentrates attention upon the early Partition Plan and armistice agreements.

Ambassador Rosenne of Israel defends the legality of Israel's actions and positions not only as to the rights and obligations of the parties under existing, or allegedly existing, rules but also, of course, in reference to the change of relationships involved in the very establishment of the State of Israel.

The question of change falls within the second broad conception of law under discussion. However, this area of legal inquiry is concerned not only with questions arising from demands for change in existing situations but also with most of the important questions arising from alleged breaches of existing, or allegedly existing, legal relationships. While this latter category of disputes is precisely that which would be appropriate for judicial determination, the practical impossibility of obtaining the

necessary submission of the parties to this procedure is one of the better known facts of international life. Disputes of this kind, which one or more parties refuse to submit for adjudication, join the other main category—disputes arising from demands for change—to form the area of disputes and situations which must be handled politically. There are frequent indications that this “political” area is outside all law. One way of describing the conception of law under discussion is as embracing the task of transforming this political area into one governed by the rule of law in the broad, or constitutional, sense.

A matter of great importance, in this latter respect, would appear to be the building up, in the minds of governments and peoples, of a set of substantive principles which may be drawn upon as the basis for solutions of disputes. Several of the papers in this symposium are concerned with the discussion of substantive principles which might contribute to the solution of the Middle East situation and which can readily be argued to constitute constructive contributions to a broader development such as just mentioned. Professor Don Peretz defines the suggestion of a binational Palestine in light of recent developments; his approach is realistic, fully recognizing that this idea seems to have more compelling logic to the outside world than it does to the parties to conflicts involving clashes of rival nationalisms. Professor Shepard Jones surveys religious, historical and other relevant factors in the problem of Jerusalem, and concludes by endorsing some degree of internationalization as having advantages not only for the city itself but for the broader problem of which it is a focal point. Dr. Luke Lee brings arguments to bear in favor of the internationalization of major international canals; centered on the problem as it arises in connection with Suez, this paper also considers the advantages of such a course applied to other strategic canals.

The building and functioning of international institutions is perhaps as important as the development of substantive principles to the goal embraced by the second concept of law under discussion. However, being different in kind, the two aspects of the problem are difficult to compare. One such procedural or functional aspect, namely that of fact-finding by bodies such as truce observation corps, is discussed by Professor Thomas Franck and his colleague. Based on recent studies of human physiological and psychological factors, his paper questions the ability of such bodies to make truly objective findings and suggests a consequent modification in the nature of the function itself.

Finally, the paper prepared by this editor is based on a view which finds it difficult to foresee that the Middle East crisis can be settled in a secure manner except as part of a broader development of law capable of establishing peace and security on a worldwide basis. Even if, by some seeming miracle, peace and security should descend on the Middle East in the absence of such a broader development, it is only to be expected that other intractable disputes will continue and that new ones will arise from time to time in a gradually descending spiral of insecurity leading to

ultimate world war. Such would seem, on the basis of history, to be the nature of the world without a minimally adequate rule of law or constitutional system. The question of the relationship of law to a given major dispute becomes, in this view, not how law can be used to resolve the dispute but rather how the dispute can be handled to advance the rule of law. The paper considers that such handling has an inescapable effect on world opinion, which may, however, be either progressive or retrogressive. It employs the Palestine case as a model for discussing the proposition that effective law might be advanced through endeavors, governmental and private, to evolve a sound theory of the Charter and to seize such opportunities as might arise in the handling of concrete cases to transform that theory into reality in the minds of governments and peoples.

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