

tional trusteeship for the City of Jerusalem after the termination of the League of Nations Mandate for Palestine. That promise for the creation of a Jewish state in the mandated territory has been fulfilled, whereas that decision in favor of the creation of an independent Arab state remains to be carried out. The international legal right of the Jewish people to found the sovereign state of Israel stands on the same legal footing as the international legal right of the Palestinian people to found a state of their own on the West Bank and Gaza Strip.

The Begin Government's pursuit of a policy tantamount to genocide against the Palestinian people in Lebanon demonstrates precisely why they require an independent state of their own in order better to protect their physical existence and preserve their cultural heritage. In the aftermath of the Second World War, similar sentiments had motivated the international community to support the creation of Israel for the protection of the Jewish people against a repetition of the Nazi holocaust. There will be no peace in the Middle East until the Palestinian people are likewise given the opportunity to exercise their international legal right of self-determination in whatever manner they choose, not in accordance with a limited set of alternatives preselected for them by the United States in collusion with Israel, Egypt or Jordan. When the Reagan Administration unilaterally forecloses the option of an independent sovereign state to the Palestinian people, it betrays the fact that the keystone of its foreign policy towards the Middle East remains considerations of Machiavellian power politics that are not entitled to the respect of other nations or the support of the American people.

#### *The Dangers of Machiavellianism*

This conclusion is corroborated by the fact that the progenitor of the Reagan Peace Plan was none other than Henry Kissinger himself, today's leading proponent of practicing Machiavellian power politics in international relations.<sup>19</sup> Since his departure from governmental office, Kissinger's self-interested posturing on subjects of such monumental importance to world peace as SALT II and the Iranian hostages crisis, inter alia, has been so highly opportunistic and unprincipled that the American people should never again listen to his pseudo-Machiavellian advice on the proper conduct of U.S. foreign policy. Unfortunately Shultz, like Haig before him, seems willing to give Kissinger's ideas another chance. Yet the world might not survive another Kissingerian "nuclear alert" of U.S. forces during some future Middle East war, as occurred in 1973.

In a nuclear world the present danger is Machiavellian power politics. The only antidote is international law and organizations. The existential choice is that stark, ominous and compelling in the Middle East.

#### COMMENTS BY W. MICHAEL REISMAN\*

Like Professor Rostow, I admire very much the initiative, courage and commitment to principles of international law evidenced by the people who conducted these field investigations and who have composed the Report that is the subject of our discussion. My admiration and affection for Dick Falk knows no bounds. However, I do have many reservations about the legal notions and appraisals in the MacBride Report, even though I start out with a set of political preferences with regard to a Middle Eastern solution that I think are quite close to those animating some drafters of the Report.

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<sup>19</sup>See THE NEW REPUBLIC, Oct. 4, 1982, at 13.

Preferences inevitably angle one's perspective and infiltrate one's judgment. Let me make explicit my political biases to help explain some of the appraisals I am about to make. I support the security of the state of Israel. I continue to support the right of the Palestinians to form their own state in the Gaza Strip and on the West Bank as the only plausible political and moral solution and the only solution consistent with and, I believe, mandated by international law. I am therefore very uneasy with efforts to "solve" the problem by selective historic definitions of what the Palestinian Mandate was, much as I would imagine a Pakistani would be uneasy about a selective definition of what India or the "subcontinent" was. These sorts of arguments play on a structural defect of the international legal process: the absence of a formal legislator who can terminate, with clear sharp cuts, obsolete or abandoned normative arrangements. Without such formal terminations, obsolete arrangements are in fact terminated, but linger on in a sort of legal sheol, from which they can be recalled by later politicians. Witness Sukarno's Mahapajit Empire and Qadhafi's claims to Chad based on the Sanussid dynasty. Nonformal terminations exist everywhere, so whoever plays the game of selective historicism had better be prepared to have it played against him.

The question is not the past. It is the future, how to design a peace system that provides minimum order and minimum human dignity to all the inhabitants of the region.

One's political preference and analysis of the Lebanon imbroglio will be very important in determining the lawfulness of the initiation, the conduct and the termination of the hostilities there. I submit that the fundamental disagreements among the three speakers reflect the unstated—at least until Francis Boyle's final comment—divergent starting points. Consider initiation: From the standpoint of an Israeli sharing the Begin perspective, the world is essentially one in which a foe supported by a superpower is ranged against Israel, challenging its legitimacy and existence. The foe has defined Israel as an unlawful regime to be removed and to be replaced by an entirely different state. The foe is engaged in constant warfare, with intermittent truces or cease-fires that largely serve its own or its superpower's strategic objectives. This analysis leads to the conclusion that the war always continues. Hence the decision about the moment of resumption of hostilities need not be left to the foe but may (and should) be selected by one's own specialists in violence.

A contrary view, which I think was reflected in the appraisals of two of our speakers, holds that there ought to be two states in the area, consistent with an international policy that can be traced back, Francis Boyle said, to the majority UNSCOP plan. From this viewpoint, moves undertaken by either side which substantially set that international program back should be considered unlawful. Hence the Israeli entry into Lebanon, rather than being viewed as either a defensive operation or a normal and neutral step in the use of power to maximize necessary political objectives, would be viewed as fundamentally unlawful because it undermines an international policy.

The appraisal of the general use of violence in situations such as these, and in particular the question of the lawfulness of initiation, must ultimately look to the expectations of elites about the globe as to what would be lawful. My impression is that the international appraisal was that the Israelis could enter Lebanon and proceed up to 25 miles or 40 kilometers. The move was widely expected and had already been discounted. The Israeli advance beyond the 40-kilometer line, I think, was perceived by these same elites as an act of aggression, a perception shared by countries favorable to and critical of Israeli policy.

The MacBride Report dwells on the fact that there were contingency plans for the invasion of Lebanon and that a number of Israeli soldiers testified that they knew

about it and had gamed or simulated it some months before. The same point was raised when the United States entered Korea. The Royal Institute, in the volume edited by Toynbee, said the United States prepared the documents for the Security Council some time before the North Koreans crossed the 38th parallel. Toynbee, the editor, correctly observed that this does not seem to be particularly significant in international politics. In international politics, one prepares for contingencies. It is often prudent to see things coming and take appropriate preparatory steps even as one tries to minimize the occurrence that will require those plans to be implemented.

Let me turn to conduct of hostilities. I was not satisfied with the Report's distinction, with manifold normative consequences, between states using high technology weaponry and states using low technology. The fact of asymmetry is used to put a burden of proof on the high technology state, indicting it virtually *per se* once hostilities commence because of the weapons it uses. In my view, it is not a helpful distinction. I also reject the Report's distinction—for purposes of appraising lawfulness of conduct in bello—between the side that characterizes itself, or whose allies characterize it, as engaged in a war of national liberation and those who do not (pp. 23-26). In the Middle Eastern situation, there are two groups vying for self-determination in the same area. Many who criticize the tendency of the Begin Government to characterize their adversaries as terrorists, dehumanizing them, diabolizing them, and removing them from the realm of political discourse, fall prey to the same error when they use the specious "national liberation" distinction.

The proportionality theory as developed in the MacBride Report (pp. 79-85) seems to assume that if a certain number of civilians are likely to be injured or killed when you protect parts of your own forces, the proportionality factor prevents you from taking what would otherwise be measures necessary to accomplish your objective. That seems to me to be a doubtful reading of the doctrine.

The assumption that some weapons are inherently unlawful, particularly cluster bombs, is unacceptable to me because of its noncontextuality (pp. 85-87). The appraisal of the use of any weapon has got to be made in context. The appropriate questions are, What was the military objective? What were the alternatives? What was the context in which it took place? and so on. The fact that weapons in contemporary warfare injure a lot of civilians is lamentable but I do not think that one can jump to the conclusion that such weapons are inherently unlawful. This should not be taken to minimize the problem. On the contrary. As the world becomes increasingly and continuously urbanized, there are going to be very few sparsely inhabited Sinais or Saharas available for mechanized warfare. The sort of political war that we are encountering in serials in the Middle East is increasingly going to engage civilians. In appraising what happened in Lebanon for the future, without regard to denunciations of the parties in that particular war, lawyers and specialists in violence will have to weigh this gloomy factor more carefully in their deliberations.

I was particularly uneasy over the MacBride Report's rather summary treatment of the massacre at Shatilla and Sabra. This dreadful occurrence has been reviewed in the Kahan Report, so we have some basis for comparison. The Kahan Report, as Dick Falk said, limited its temporal focus and did not explore certain policies and practices that may have contributed to the event. That is a fair criticism but my own feeling is that the Kahan Report represents a more craftsman-like appraisal of the facts than the very brief treatment in the MacBride Report (pp. 162-86) and reaches an equally sober and damning conclusion.

As far as the belligerent occupation by Israel (pp. 113-43), I do not know the facts as to either Israel's or Syria's occupations in Lebanon and hence cannot appraise the

Report's treatment of Israel's behavior. I will leave the POW issues to Frits Kalshoven.

#### COMMENTS BY FRITS KALSHOVEN

Francis Boyle spoke about the possible POW status of the PLO participants in the ongoing conflict in the Middle East. He referred to certain specific provisions of articles 4 and 5 of the Third Geneva Convention.

Article 5(2) states that when persons fall into the hands of another power, and there is a doubt about whether they fall under terms of article 4, their status has to be determined by a competent tribunal. The key words in that provision are "should any doubt arise." If there is no doubt, there is no need for a tribunal. Did Israel ever have reason to doubt? In past situations when PLO people infiltrated into Israeli-held territory, there have been cases before Israeli tribunals, and there have been decisions that they did not qualify as POWs.

Article 4 hinges on whether people captured belong to "a Party to the conflict." The most generally held view is that "Party to a conflict" refers to a state and the PLO does not belong to a state party to the conflict, does not want to, and cannot belong to such a Party.

It is for these types of reasons that Protocol I of 1977 on international armed conflicts additional to the 1949 Geneva Conventions for the protection of war victims<sup>1</sup> has added a further situation in which the law of war shall apply: that is, in situations in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. As Michael Reisman has already indicated, that situation is not applicable because there is not one, but two, peoples struggling and fighting for their self-determination. In any event, Israel is not a party to that instrument, and therefore it cannot apply. Thus I can see no way that captured members of the PLO would qualify as POWs.

I would like to comment on the statement made by Professor Falk. Professor Falk's summary of the MacBride Commission Report gave me a strange experience of *déjà vu*. After a while I realized what I had already seen: the same description of these events in Lebanon had come to us at the Dutch Red Cross in a lengthy document emanating from the Soviet Red Cross which described in full all these events and appealed to all other national Red Cross Societies, among them the Dutch, to join in a strong protest against the Israeli actions. Take those two reports together, and you have the peoples' reaction to violations of the law of war. I wish to add that the Netherlands Red Cross refrained from joining the Soviet initiative.

I will not enter into a discussion of all the alleged facts that we have heard described by Professor Falk. I merely want to mention that in the reporting on the events by the Dutch correspondents in Lebanon there was slightly greater evenhandedness.

One legal point—one that Michael Reisman already referred to—is the question of dubious weapons. "Dubious weapons" is a term coined by a compatriot of mine, Professor Röling. The term lost its utility, however, in 1980 when the U.N. Convention on Conventional Weapons<sup>2</sup> was concluded; this decided authoritatively what conventional weapons were banned from use and what restrictions were placed on other

<sup>1</sup>16 ILM 1391 (1977).

<sup>2</sup>19 ILM 1524 (1980).