The Relevance of Principles of International Law to the Israel-Palestine Conflict

A Paper prepared

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1. Introduction

There are two ways of addressing the Israeli-Palestinian dispute. One is based on the pure balance of power between the parties, by virtue of which the diktats of the stronger party will prevail. The other is to take international law as a guide to finding an appropriate solution that is likely to be conducive to a durable peace and democratic system of government.

Historically, the first approach has proven to be disastrous in many conflicts throughout the first half of the XXth century. Consequently, after WWII, a number of international treaties and conventions were negotiated, and the scope of international law was expanded in an effort to prevent conflicts by ensuring that the solutions were not based solely on the ability of the stronger parties to impose their will. Efforts were made to ensure that civilian populations had their rights protected by the international system, particularly when they themselves were not in a position to defend such rights. The Geneva Conventions were among the results of this line of thinking. A fundamental principle that emerged from this evolution is that of the non-admissibility of acquiring populated territory by war.[1] This should be a guiding principle in determining a human rights organization's position on an issue such as the Palestinian-Israeli dispute.

However, no solution can be based on international legality only. The system of international law is not a vertical system where a superior authority can impose a solution on conflicting parties, but rather a horizontal system where power relations still have more impact than the law. Thus, some degree of disregard of international law is to be expected to accommodate the stronger party, in this case Israel. If, however, the law is completely disregarded to accommodate the stronger party, it can lead to an unsustainable solution on two grounds: i) social upheavals and further violence, particularly if those concerned feel the solution is unjust; and ii) formal challenges of the said agreements by individuals or groups, who might take it to the relevant international bodies, thus putting the agreement in jeopardy. International experts evaluate that, in the Israeli-Palestinian dispute, both modes of challenging an unjust agreement are possible and likely.[2] Moreover, a great degree of disregard for international law has been observed so far. This is the longest conflict ever addressed by the UN system: it was on the UN's very first agenda in 1945 and remains there, unresolved.

2. Which International Legal Instruments Apply?

International law is often referred to, by one or the other of the two parties, in the discussion of current violations of its rights and of the human rights of its citizens. The purpose of this paper is not to discuss these violations of international law, but rather to study what international law has to

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[1] This principle has been stated in several resolutions concerning the Middle East. It also appears in the Charter of the UN under the following formulation : "Article 4. 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".

[2] This line of thought has been argued, among others, by Quigley (1999 b).

say *about an eventual solution* to the conflict. However, these two dimensions are intimately linked. The reason is that the policy of Israel has been to create 'facts on the ground', in violation of international law, precisely in order to pre-determine the outcome of the negotiations on a permanent solution.

Our sources of international law can be narrowed down to a small number of fundamental texts that are either humanitarian law instruments or human rights law instruments, in addition to UN General Assembly and Security Council Resolutions. The first group includes the seventeen Hague Regulations of 1907, and the four Geneva Conventions of 1949 with the two Additional Protocols of 1977. The second group includes the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights, and the 1951 Convention on the Status of Refugees with its 1967 Protocol. Among the UN resolutions, the most relevant ones are the Security Council Resolutions 242 and 338, and General Assembly Resolutions 181 and 194. The first group of documents establish what an occupying power can or cannot do under conditions of belligerent occupation, and these documents are not specific to Palestine or Israel. The second group of legal istruments are human rights instruments that apply in all conditions, not necessarily in a situation of conflict. The set of UN Resolutions specifically address the conditions of a lasting peace between Israelis and Palestinians, and they have to incorporate existing customary law. Both GA Resolutions and SC resolutions are legally binding, with the difference that SC resolutions can be enforced by the UN thanks to the coercive power given to them in Chapter VII of the UN Charter.

As for the bilateral agreements between the two parties, the Declaration of Principles signed in 1993 and the Interim Agreement of 1995 are the fundamental documents to be taken into account. The Declaration of Principles is the very first document where the two parties recognize each other and accept to negotiate, which makes it the basis of the whole peace process. As for the Interim Agreement, the official analysis of the Israeli Minister of Foreign Affairs states: "The Interim Agreement sets forth the future relations between Israel and the Palestinians."[3] Its importance is thus fundamental to the relations between the two societies.

These documents have been complemented by a number of other documents and bilateral agreements that address questions of detail, but they remain the fundamental parameters of a solution.[4] Having been signed, they establish elements of the solution that have some legal value. At the same time, these are interim agreements; important modifications could be brought into the final status talks. However, such bilateral agreements can themselves be evaluated through the lens of international law to see whether they set the stage for a long term solution that is compatible with the norms underlying international law or, on the contrary, in violation of such norms. The question of the normative system underlying international law is of fundamental importance in this discussion and will be addressed below.

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[3] The official Web site of the Israeli Ministry of Foreign Affairs, in the section entitled The Israel-Palestinian Negotiations.

[4] A list of the agreements signed by the Israelis and Palestinians is provided on the site of the Israeli Ministry of Foreign Affairs, http://www.mfa.gov.il/.

According to the Legal Resources and Human Rights Center of the Society of St-Yves (Jerusalem), the Israeli High Court of Justice has defined the Israeli presence in the occupied territories of Palestine as being both belligerent occupation and administrative occupation. Israeli jurists acknowledge that the Hague Regulations of 1907 constitute customary law and that these Regulations are binding on Israel. These jurists claim that the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War is not binding upon Israel on the grounds that this is treaty law and not customary law and that there was no High Contracting Party in occupied Palestine as a counterpart to Israel, but they are virtually alone in making these claims which have no ground in international law. The quasi-totality of Western nations consider that the Fourth Geneva Convention does apply in the occupied Palestinian territories, a position that has been reiterated by the High Contracting Parties to the Convention in their December 2001 meeting. Canada agrees with this position and this is what is set out explicitly on the Web site of the Canadian Department of Foreign Affairs and International Trade (DFAIT) (http://www.dfait-maeci.gc.ca/), for example. Some of the concrete diplomatic moves by Canada have contributed to preventing or delaying a serious discussion of the application of the Fourth Geneva Convention to the Occupied Territories, as was observed when Canada worked with the US government to postpone a meeting of the High Contracting Parties in Geneva in 1999 on this issue. The meeting was indeed postponed a few minutes after its opening. The reason given was that the climate of negotiations was positive, and that a discussion of the application of the Fourth Geneva Convention might be counterproductive in that context. However, when the situation deteriorated, the High Contracting Parties met again on December 5, 2001, and did reaffirm the applicability of the Convention to the occupied Palestinian territories. In the meantime, many more violations occurred and were documented by the International Committee of the Red Cross in its Annual 2001 Report and in its statement to the December 2001 meeting of the High Contracting Parties [5].

3. Principles of International Law and their Context

A) THE NATURE OF INTERNATIONAL LAW

"International law is not rules. It is a normative system." This is the opening statement of Rosalyn Higgins in one of her important works.[6] What this means is that if there are no specific rules to determine the outcome of a given negotiation, one can determine nevertheless whether or not a given outcome is compatible with the accepted norms. For instance, one of the important norms is the inadmissibility of the acquisition of territory by war. A peace 'agreement' imposed upon one of the parties, which aims at getting that party to recognize, against its will, the control of the other party over its territory contradicts an important founding norm of the international system: that of the inadmissibility of the acquisition of territory by war.

This remark is useful in resolving the ambiguity resulting from the absence of the definite article 'the' in the English version of SC Resolution 242. It could be resolved by considering the principle and the norm behind the resolution. The principle is that peace will come on the basis of a

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[5] The full statement can be found at http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc.html.

[6] Rosalyn Higgins, *Problems and Processes; International Law and How We Use It*, Oxford University Press, 2000.

compromise asked from the Palestinians: to concede that the territory from which they were expelled in 1948 is now Israeli territory, and that Israel has a right to exist within that territory. In exchange for this recognition, Israel will withdraw from the territories it occupied in 1967 (while keeping all the territory occupied in 1948/49), in partial fulfillment of the principle of the 'inadmissibility of the acquisition of territory by war'[7]. This deal has been known as the 'land for peace' deal and has been at the basis of every single effort to find a historical compromise between Israelis and Palestinians. Its broad strokes have been accepted in principle by the Palestinians and the Israelis, but the latter have constantly tried to 'create facts on the ground' in order to keep important parts of the occupied territories.

B) THE NEGOTIATION PROCESS

The process for elaborating an Israeli-Palestinian peace agreement is subject more to political pressures than to the requirements of international law.

Indeed, resolutions to initiate an international peace conference, under the auspices of the UN, were first introduced to the UN General Assembly in the early 1980s, but received support only from a minority of States. Gradually, an increasing number of States, particularly Western States (excluding the US), changed position. By 1989, a vast majority of UN members, including Canada and most Western nations, were in favour of an international peace conference to be convened under the auspices of the UN to come to a settlement of the dispute. The protection of the rights of the Palestinian people was built into the process as explicit principles in the resolution. These included the right of return for displaced Palestinians, the right to self-determination, and the illegality of Israeli settlements in territories occupied militarily in 1967.[8] Analyzing the evolution of that process, John Quigley writes:

> That approach was abandoned, however, in 1991, when the U.S.S.R. and the United States hosted a conference in Madrid to promote instead a negotiation between the two parties alone, rather than an international conference, and with no explicit prior specification of rights to be protected. […] The disadvantage was that this approach put the international community in the background and thus reduced its ability to ensure that their agreement would remain within the bounds of what is required by international norms.

Thus, in the Madrid process, the balance of power between these two very unequal parties would be the decisive factor in determining the outcome. The US, as a co-sponsor of the Madrid process, insisted that the UN and its Security Council keep out of the process,[9] and interpreted that requirement to mean that the UN should not even pass resolutions condemning Israel when the latter violated international law by creating 'facts on the ground'.

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[7] Partial because Israel would still keep the territories occupied in the 1948/49, in contravention of this norm.

[8] GA Res. 38/58C, UN GAOR, 38th Sess., Res. & Decs. 47, UN Doc A/38/47 (1984).

[9] US Department of State, Letter of Assurances (to the Palestinian team), Oct. 18, 1991, in 6 Palestine Yearbook of International Law: 281- 282 (1990-91). Cited by Quigley (1999 a).

Quigley notes that the US considered any resolution condemning Israel an interference with the Madrid process, while most other members of the UN considered that illegal Israeli actions were interfering with the outcome of the process and thus were not constructive.

The Oslo process pushed this logic a little further, leaving the bilateral balance of power between the two parties as the decisive factor in the determination of the compromise solution, away from international law. This imbalance is aggravated by the fact that the US is both the 'broker' of the process and the staunchest supporter of Israeli claims. A renewed involvement of the UN in the process is more likely to produce a solution based on international law.

C) CURRENT CONTEXT AND VIOLATIONS

Currently, negotiations are extremely tense and accompanied by serious violations of the rights of individuals on all sides of the conflict. The violations come from the occupying power (mainly against the occupied civilian population and, to a much lesser degree, against its own non-Jewish citizens), from the Palestinian Authority (mainly against its own population) and from various non-state actors: mainly the settlers against the indigenous population, and from the violent radical Palestinian groups who have committed acts of violence against Israeli civilians. Monitoring and reporting of such violations have been done by various local and international groups. Human Rights Watch, Amnesty International and the International Federation of Journalists, among others, have written extensive and credible reports on the issue. Among local groups, both Palestinian and Israeli groups have been monitoring the situation and publishing reports, sometimes in extremely difficult conditions. It is not the purpose of this paper to document such violations, let alone analyze or recognize who is doing what and with what level of credibility. We note that the climate of violence makes the rational discussion of the issues at hand more difficult. We also note that there is no symmetry in the impact of these violations on the two societies. For the Israeli society, the violence it has experienced has created many victims among the civilian population, as well as a permanent sense of fear and insecurity in the whole population. On the Palestinian side, the violence used to maintain the military occupation has resulted in a much higher toll of civilian casualties (about three times as much in the last two years). In addition, the policies of the occupation (not always physically violent in themselves), combined with the violence used to maintain the occupation, have strangled the economy, partially destroyed the social and material infrastructures of the society, and hampered any economic and social development. The basic right to self-determination for Palestinians is still denied. It is therefore imperative to seek ways out of the conflict that are as close as possible to the norms and to the letter of international law.

The 'road map' proposed by the United States has been put on the table as the production of the present document was in its final stages. We will not discuss it here in detail, except to remark that it does not address two fundamental issues : the right of return of the Palestinians and the inadmissibility of acquiring territory by force.

i. Political Violence and Security Needs. Security, both state security and individuals' human security, is a fundamental human right and it is quite legitimate for Israel to require strong guarantees for the security of its citizens. However, security of the Palestinians is also a serious concern and should be treated with equal respect, particularly since they are the major victim, both in quantity of deaths and injuries and in qualitative terms. The fundamental principles of current

Canadian foreign policy are not symmetric in this respect : they include a concern for the security of the State of Israel (Item 1 in the official summary of these principles) but no similar concern for the security of Palestinians [10].

ii. Security as a Fundamental Right and Impunity. One way to pressure local actors to take into account the legitimate security needs of civilians is to make sure that the question of impunity will be handled according to international law once a peace deal is reached. However, this is a very sensitive issue and it is not likely to be taken into account in the Middle East peace negotiations, as the main actor in these negotiations, the US, has clearly positioned itself against the establishment of an International Criminal Court and against its jurisdiction over acts committed by US citizens.

D) THE RIGHT TO SELF-DETERMINATION

The remarks on the right to self-determination are organized around three points :

1. The recognition of this right in principle, in international law;
2. its mode of operationalization; and
3. the recognition of this right in practice in the case of the Palestinians.

We are not discussing the right to self-determination for the Israelis as it is recognized by the international community including the Palestinians (see below) and the key Arab countries, and as it is indeed realized in the form of the State of Israel.

i. The Right to Self-determination in International Law

The right to self-determination is now customary in international law, as is demonstrated by its inclusion in the *Declaration on principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, Annex to Resolution 2625 (XXV) of the United Nations General Assembly[11]. Article 73 of the UN Charter specifies:

> Members of the UN which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that *the interests of the inhabitants of these territories are paramount*, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
> a. to ensure, with due respect for the culture of the peoples concerned, their *political*, economic, social, and educational advancement, their just treatment, and their protection against abuses;
> b. *to develop self-government*, to take due account of the *political* aspirations of the peoples, and to assist them in the progressive development of their free political institutions,

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[10] **Canadian Policy on the Middle East Peace Peace Process** (key issues), http://www.dfait-maeci.gc.ca/Peaceprocess/keyissue-en.asp.

[11] 24 October 1970, Official Records of the General Assembly, Twenty-fifth Session, Supplement No.18 (A/8018).

according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
c. to further international peace and security[…] (Italics added).

The right to self-determination is indirectly recognized here as an obligation to a mandatory power to develop self-government of the indigenous population, and to take due account of the political aspirations of the peoples. The *International Covenant on Civil and Political Rights* is more explicit on the issue of self-determination. It states:

> Article 1
> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of it its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the UN.

The notion of freely determining their political status is explicitly mentioned (1.1) and the notion of freely disposing of their natural wealth is also mentioned (1.2). This first article is also found in the *International Covenant on Economic, Social, and Cultural Rights.*

2. The Operationalization of the Right to Self-determination

The two Covenants mentioned above are unambiguous concerning the universality of the right to self-determination: all people have that right. But what constitutes a 'people' ? And what form should that right take?

There are two classical situations ('ideal-types' in the Weberian sense) where the right to self-determination has been claimed. The first one is that of a colony seeking independence from a colonial power. Article 73 of the UN Charter addresses that situation specifically. The second one is that of a minority (ethnic, religious, or linguistic) within a State, seeking some form of autonomy from that State. In this second case, the people seeking autonomy are citizens of the State, but they want more independent power to run their own affairs. The autonomy can either take the form of a self-government within the existing State (which means that the people seeking self-determination are still part of the larger political entity of which they have the rights of citizenship), or it can take the form of a totally independent State.

Autonomy (without an independent State) for the West Bank and Gaza within the Israeli State would mean that Palestinians would be entitled to Israeli citizenship, a situation which is not acceptable to Israel. Autonomy within the Israeli State without citizenship extended to Palestinians would result in a situation of overt apartheid. The only conceivable form of genuine autonomy would be that of an independent Palestinian State in the West Bank and Gaza.

3. The Recognition of the Right to Self-determination for Palestinians in Practice

In 1945, when the UN Charter was adopted, Britain was the mandatory power in Palestine. In the preceding decades, its policy in Palestine had been oriented by the Balfour Declaration (1917) that promised a homeland for the Jews on Palestinian soil. The Balfour declaration states:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[12]

In 1920, the League of Nations had given the British government a mandate over Palestine. The system of mandates was established after World War I by the Treaty of Versailles. Its purpose was to implement the principles of Article 22 of the Covenant of the League of Nations:

> Article 22. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.[…]
> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. *The wishes of these communities must be a principal consideration in the selection of the Mandatory*. [13]

The British mandate over Palestine draws its rationale from this article of the covenant. However, the text of the Mandate states:

> Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country; […]
>
> Article 22. The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will *secure the establishment of the Jewish national home*, as laid down in the preamble, and the development of self-governing

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[12] See for instance http://www.mfa.gov.il/mfa/go.asp?MFAH00pp0 for the full text.

[13] The full text of the Covenant can be found on the website of the Avalon Project, Yale University: http://www.yale.edu/lawweb/avalon/leagcov.htm.

> institutions, and also for safeguarding the *civil and religious rights of all the inhabitants of Palestine*, irrespective of race and religion. (Italics added)[14]

Thus, whereas Article 22 of the Covenant of the League of Nations explicitly states that the Mandatory power must provide assistance to the people under colonial rule 'until such time as they are able to stand alone', and that 'the wishes of these communities must be a principal consideration in the selection of the Mandatory,' the Mandate given to Britain had the explicit aim of bringing another people, through migration, to establish a political entity in Palestine. The protection of the political rights of the indigenous population was not part of the British mandate, and only the civil and religious rights of the indigenous population were to be protected.

What this means is that the right to self-determination of the indigenous population of Palestine, while recognized in principle in international law, was effectively denied by the British Mandate, in violation of existing legal norms.

Today, the State of Israel is sending contradictory messages. The Oslo process does indicate that Israel is recognizing the Palestinians as a separate entity, on part of its original territory. Mr. Ehud Barak declared that there will be a Palestinian State. Mr. Ariel Sharon said he is ready to consider a Palestinian State on 42% of the occupied territories (which corresponds to 9% of historical Palestine) although his party, the Likud, defeated a motion to that effect and rejected the very idea of a Palestinian State.

This Israeli position is untenable both from a legal point of view and from a practical point of view. Short of full incorporation in Israel as citizens (a solution that neither of the two parties advocates at this moment) the only alternative to an independent Palestinian State in the West Bank and Gaza is either apartheid (Palestinians staying on the land in specified areas and with strictly controlled rights) or mass deportation of the Palestinians, a solution now overtly discussed in some Israeli circles under the euphemistic term of 'transfer'. Thus, the explanation for why Israel does not explicitly recognize a Palestinian State is not to be found in legal arguments, but in political ones and it goes beyond the scope of this paper.

The international community (including the US) is working on the assumption that there will be a Palestinian State. Canadian official foreign policy on this issue is explicit :

> Palestinian State
>
> Canada fully supports the right of the Palestinian people to self determination. We are fully supportive of the creation of a Palestinian State. But, Canada believes that while the right to a state is implicit in the Palestinian right to self-determination, the interests of the Palestinians, as well as of the peoples of the region as a whole, will be best served if that right is exercised through the negotiating process.[15]

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[14] The full text of the Mandate can be found, for instance, at http://www.mfa.gov.il/mfa/go.asp?MFAH00pr0.

[15] From http://www.dfait-maeci.gc.ca/Peaceprocess/keyissue-en.asp, as posted in December 2003.

This discussion of the right to self-determination leads us to conclude that this right is not questioned in principle, but only in practice (as the Palestinians do not enjoy it yet, more than fifty years after the termination of the British mandate). Granting this right in practice to Palestinians has been made conditional to their relinquishing part of the territory to which they are entitled as well as important aspects of their rights, which they are not willing to relinquish. This leads us to the discussion of the key issues that are being negotiated in the peace process (i.e.: borders, settlements, Jerusalem, and the rights of refugees), to examine them from the point of view of international legality.

4. The Key Issues

> A full and peaceful resolution of a conflict of this nature has many requirements. We will focus on some fundamental issues that have a direct bearing on legal rights. These are the following: the definition of the borders, settlements, the status of Jerusalem, and the rights of refugees. We first discuss a pre-condition for negotiations: mutual recognition, the lack of which has been a factor that delayed negotiations for years.

A. MUTUAL RECOGNITION

1. Background

Mutual recognition is a necessary condition for a durable peace. The State of Israel has often complained that the lack of recognition of its right to exist is a fundamental cause for concern and a source of insecurity and political violence. But it has not yet formally recognized the rights of the Palestinians to have an independent State.

2. Legal Issues

The condition of mutual recognition has almost been met. Indeed, the Declaration of Principles signed in 1993 does include some form of asymmetrical mutual recognition. The opening paragraph of the Declaration of Principles, signed on September 13, 1993, stated:

> The Government of the State of Israel and the P.L.O. team (in the Jordanian-Palestinian delegation to the Middle East Peace Conference) (the "Palestinian Delegation"), representing the Palestinian people, agree that it is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.

In a letter addressed to then Prime Minister Rabin on September 9, 1993, the Chairman of the PLO stated, “The PLO recognizes the right of the State of Israel to exist in peace and security”. In response, Prime Minister Rabin wrote:

> In response to your letter of September 9, 1993, I wish to confirm to you that, in light of the PLO commitments included in your letter, the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process.

This mutual recognition was of course a fundamental step forward. The fact that it was asymmetrical is reflected in the recognition by the Palestinians of Israel as a *State* but with no reciprocal explicit recognition by Israel of the right of the Palestinians to form a *State*, or even of the possibility that this might happen in the future. In fact, the phrase 'Palestinian State' (or equivalent formulations) appears neither in the Declaration of Principles of 1993, nor in the Interim Agreement of 1995. It does not appear in the set of issues reserved for the final status talk either. The aim of the negotiations was set in Article 1 of the Declaration of Principles:

> Article 1. Aim of the Negotiations. The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on SC Resolutions 242 and 338.

Here again, no mention is made of forming a State as a right of the Palestinian people. The right of the State of Israel to exist, on the other hand, is recognized in the Declaration of Principles and in official Palestinian documents. This means that the Oslo process was in violation of international legal norms because it did not recognize the right of self-determination of the Palestinian people. In fact, Israel has never indicated that it was prepared to to recognize a Palestinian state *with all the internationally-required attributes of State sovereignty*.

3. Conclusion

A rights-based approach would promote mutual recognition as a condition for peace. Although any workable solution will necessarily mean a mutual recognition of both states, it should be emphasized, nevertheless, that a clear recognition by *both* parties of the right of the other to have an independent State will make the search for a solution much easier. At the time of writing this report, the Palestinian Authority and the Palestinian Legislative Council had recognized the right of the state of Israel to exist, as did the vast majority of UN members. But no similar recognition had been manifested by the State of Israel of the right of the Palestinians to have a state. The Israeli cabinet had reluctantly adopted a resolution in this direction in May 2003, but the Knesset has never approved any such recognition. Moreover, even the Israeli cabinet decision refers to a state that does not have all the attributes of state sovereignty. A basic right of the Palestinians is thus denied and the right of the Palestinians to have a state *with all the internationally-required attributes of State sovereignty* must be part of any permanent solution.

B. THE BORDERS

1. Background

The very first borders of Israel were determined by GA Resolution 181 of 1947, which recommends the establishment of the State of Israel on parts of the Palestinian territory, then under British Mandate (see Map 1). It was on the basis of this resolution that the State of Israel was recognized by the international community and admitted as a member of the UN. The Arab countries rejected the resolution then and declared it 'null and void'. In the 1948 war that followed, Israel occupied a larger territory, shown in Map 2. These are the borders that are referred to by the terms: 'pre-1967 borders' or 'Green Line'. In 1967 Israel seized the West Bank (including East Jerusalem), the Gaza Strip, as well as the Golan Heights (a Syrian territory) and the Sinai Peninsula (an Egyptian territory). The Sinai was eventually given back to Egypt, but the

Golan Heights, the West Bank (including East Jerusalem) and the Gaza Strip are still under Israeli military occupation.

Map 1. Borders as determined by GA Resolution 181.
(Source: Ministry of Foreign Affairs, Israel, http://www.mfa.gov.il/mfa/go.asp?MFAH0dt70)

Map 2. Israel in pre-1967 lines.
(*Source: Ministry of Foreign Affairs, Israel, http://www.mfa.gov.il/mfa/go.asp?MFAH0dsp0)*
The terms 'Judea and Samaria' are the names given by Israel to the West Bank of the Jordan River, which was not then under Israeli military occupation.

Israel has never formally defined its Eastern borders. The peace agreement with Jordan of 1994 delimits boundaries with Jordan, but the official site of the Israeli Ministry of Foreign Affairs provides the following map under the title: Israel 1993: Borders and Ceasefire Lines (Map 3 below). It thus leaves the boundaries with an eventual Palestinian State undetermined, and it makes no distinction between territory allocated to it by GA Resolution 181 recognizing the State of Israel, territory occupied in the 1948 war, territory occupied in the 1967 war (except Sinai) and territory occupied in 1967 and which has been formally annexed. Israel has enlarged the municipal boundaries of East Jerusalem (which covers 6.5 km^2) to include significant parts of the West Bank (71 km^2), and then annexed this expanded East Jerusalem and the Golan Heights (see the section on Jerusalem below).

Map 3. Israeli borders as defined by the Israeli Ministry of Foreign Affairs.
Note that no boundaries are provided for the Eastern borders, just Cease-Fire lines.
(*Source: Ministry of Foreign Affairs, Israel, http://www.mfa.gov.il/mfa/go.asp?MFAH0dsw0*)

The international community is treating the territory occupied in 1948/49 as the *de facto* borders, ignoring GA Resolution 181, and it does not recognize the annexation of East Jerusalem and the Golan Heights. For instance, the official position of Canada is that the West Bank (including East Jerusalem), the Gaza Strip and the Golan Heights are all occupied territories (see annexed document on Canada's official position). SC Resolution 242, adopted in 1967 just after the Six-Day War, has since become the document most often quoted on the issue of borders. It reaffirms the principle of inadmissibility of the acquisition of territory by war, in reference to Israel's occupation of the territories taken in 1967 (this point is discussed further below). Thus, the clauses of GA Resolution 181 that define the territory of the State of Israel have been ignored by the international community. SC Resolution 338 reiterated the requirements of SC Resolution 242. However, while Resolution 181 recognizes Israel as a State, it also recognizes the necessity of creating an Arab State in Palestine on the Western side of the Jordan River. Detailed boundaries for each of these two States are provided in the Resolution.

2. Legal Issues

If two parties freely and jointly agree to alter their borders, then this agreement becomes a legally binding agreement.

But in the case of Palestine and Israel, there are two problems. One of the parties is not formally constituted as an internationally recognized State. Its ability to engage the whole population it represents is thus put in question unless there is a process of ratification that has internal legitimacy. Moreover, the parties do not agree on the borders, and one of the parties is trying to

coerce the other into surrendering parts of its territory, since the occupant has indicated in every possible way that it is not willing to leave the occupied territory completely.[16] Therefore, guidance must be sought in international law to determine which borders conform most closely to international norms and international legislation.

There is a consensus among scholars and political analysts that the West Bank (including East Jerusalem) and the Gaza Strip are indeed under 'belligerent occupation'. Both the US and Canada, together with the quasi-totality of members of the UN acknowledge that this is occupied territory and that the population should be protected by the Geneva Convention, a principle reaffirmed by the High Contracting Parties of this Convention. The Government of Israel, however, does not recognize this fact. Its official position is that:

> Politically, the West Bank and Gaza Strip is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations. Israel has valid claims to title in this territory based not only on its historic and religious connection to the land, and its recognized security needs, but also on the fact that the territory was not under the sovereignty of any state and came under Israeli control in a war of self-defence, imposed upon Israel.[17]

It must be pointed out that the Governement of Israel is alone in making such claims.

Connected to the issue of borders, is the issue of the expulsion of the original inhabitants of the land to make room for more Jewish immigrants coming from other countries and continents, which is openly debated not only as a principle, but also in all its logistical detail by some mainstream Jewish organizations.[18] Some of the most credible Israeli observers of the conflict such as Meron Benvenisti, former Deputy Mayor of Jerusalem, are warning that the Israeli government is setting the stage for a massive deportation campaign, which would be an even greater catastrophe than the 1948 massive expulsion of Palestinians.[19]

The fundamental norm that applies here is the inadmissibility of the acquisition of territory by war, *a fortiori* when this territory is populated. This norm has been incorporated in SC Resolution 242 of 1967, and reiterated in SC Resolution 338 of 1973.

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[16] It is well documented by official Israeli sources that the construction of new houses reserved for Jews only has been continuing throughout the process of negotiations.

[17] Israeli Settlements and International Law, Ministry of Foreign Affairs (Israel), http://www.mfa.gov.il/mfa/go.asp?MFAH0jyz0 (as posted on September 10, 2002). It should be noted that two Prime Ministers of Israel, Yitzhak Rabin and Menachem Begin, have denied that it was a war of self-defense or that it was imposed on Israel. Rabin (then Chief of Staff) said: " I do not think Nasser wanted war. The two divisions he sent to Sinai would not have been sufficient to launch an offensive war. He knew it and we knew it." (Le Monde, February 28, 1968). Menachem Begin told the Israeli Defence College in 1982 "In June 1967, we again had a choice. The Egyptian army concentrations in Sinai did not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him." (New York Times, 21 August 1982). Quoted by Professor Peyton Lyon in a message dated September 2, 2002.

[18] See for instance "The Logistics of Transfer", by Boris Shusteff, Freeman Center for Strategic Studies, July 28, 2002, http://www.freeman.org/**.** This article was reproduced on various Israeli websites.

[19] See his article in the Israeli newspaper Ha'aretz of August 16, 2002. Reprinted in appendix.

These two resolutions have been treated as the cornerstones of a peaceful resolution of the conflict, while GA Resolution 181 has been relatively ignored by the international community. Although Resolution 242 was rejected at first by the Palestinians because it referred to them only as 'refugees' (there was no mention of a Palestinian State or of self-determination in this resolution), it has been accepted by them when it became increasingly clear that the international community was supportive of the idea of a Palestinian State, even if this term does not appear in the Declaration of Principles. The Israeli government has been sending conflicting messages on this issue, with former Prime Minister Barak mentioning, for instance, that the outcome of the peace process is indeed the creation of a Palestinian State,[20] confirming the understanding of the Palestinians of the peace process, and the Likud party (now in power) rejecting the very idea of a Palestinian State.[21]

The Declaration of Principles of 1993 (the Oslo Accords) refers to both Resolutions 242 and 338. The two fundamental requirements of Resolution 242 are the following :

> [The Security Council] affirms that the fulfilment 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:
>
> > Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
> >
> > Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

The phrase: 'from territories occupied in the recent conflict' has been interpreted differently by Israel on one hand, and by the rest of the international community on the other hand. Israel claims that the fact that there is no definite article 'the' preceding the word territories means that the term does not imply that Israel should withdraw from *all* the territories. Thus, a partial withdrawal, even very small, would be a fulfilment of that requirement in the resolution. Those who oppose this view argue that the introductory paragraphs of the resolution remove the ambiguity. The second paragraph of the resolution starts with the phrase: *Emphasizing the inadmissibility of the acquisition of territory by war …* etc. Moreover, the French version of the resolution clearly states: '…retrait d'Israël *des* territoires occupés…'. In a paper published in the *Case Western Reserve Journal of International Law*, Professor John Quigley explains why the definite article was dropped during the drafting process. He writes:

> Statements by delegates at the time of passage suggest that some were reluctant to insist on Israel's withdrawal precisely to the territory it occupied prior to the 1967 war, because the territory it occupied to that date was territory it held under armistice agreements signed in 1949 with neighbouring States, agreements that were not viewed as establishing borders.

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[20] In his Opening Remarks in a Conference Call with the Council on Foreign Relations on January 8, 2001, Prime Minister Ehud Barak declared: 'The Palestinian people, who could establish their own State in the West Bank and the Gaza Strip with Al-Quds as its Capital, would be able to determine their own fate'. (Source: Israeli Ministry of Foreign Affairs Web site, http://www.mfa.gov.il/mfa/go.asp?MFAH0iz20).

[21] A position clearly established by a majority vote at a convention of the Likud party, August 2002.

> Thus, there was reluctance to require Israel to withdraw to lines that might, by virtue of such a call for withdrawal, be viewed as bearing a legitimacy that they did not in fact enjoy. [22]

He continues:

> Resolution 242 must be construed consistent with applicable international-legal norms, and these are quite clear on the matter of territory occupied during hostilities. Such territory does not fall under the sovereignty of the occupant, and its possession by virtue of occupation gives it no basis for a claim to sovereignty. Belligerent occupation yields only a right of temporary possession, not title to territory. […] Thus, even apart from what Resolution 242 may mean, Israel is under an obligation to withdraw from the Gaza Strip and West Bank.[23]

Israel does not consider the territories occupied in 1967 to be occupied territories, but rather 'disputed territories' as shown in a previous quote. It recognizes Palestinian claims only in the West Bank and Gaza, and considers that compromise must be made by the two sides *only on these territories*. The full position paper of the Government of Israel on Israeli settlements in the Occupied Territories is available at : http://www.mfa.gov.il/mfa/.

The Clinton proposal on territorial compromise that was presented at Taba was based on the June 4, 1967 lines, with some adjustments. A careful look at the proposal indicates that annexed East Jerusalem is not taken into account when calculating the percentages of land each side will keep. Moreover, only 90 to 95 percent of the remaining part of the West Bank would go back to the Palestinians, that is about 17% of historical Palestine. The *de facto* borders of Israel, already much larger than what was determined by GA Resolution 181, would then be enlarged to include more Palestinian territory and would also become *de jure* borders, in contradiction to the principle of non acquisition of territory by war. While Yasser Arafat did not accept such proposals, Ehud Barak himself was no longer in a position to accept them and to make them binding on the Government of Ariel Sharon who was to succeed him and who wanted to turn even more Palestinian territory into *de jure* Israeli territory. Thus, the Taba proposals did not produce a peace agreement.

3. Conclusion

A rights-based approach to the conflict should be predicated on the principle of the non-acquisition of territory by war, which implies that Israel would withdraw completely from all territories occupied in 1967, with a special status for Jerusalem (discussed below), and with possible minor adjustments provided such adjustments do not deprive Palestinians or Israelis of strategic portions of their land and provided such negotiations are conducted freely and not under duress. A peace proposal that does not respect this requirement would violate the principles of international law.

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[22] Quigley (1999 a).
[23] Idem.

C. THE SETTLEMENTS AND SETTLERS

1. Background

There were no settlers in the West Bank or in the Gaza strip prior to the military occupation of 1967. There had been a small number of Jewish communities in various parts of the West Bank prior to 1948, most of them residing there for religious reasons, and some of them being indigenous to the region. At the turn of the 20th century, the total number of Jewish residents in the whole of Palestine did not exceed 6% of the population. The immigration to Palestine that started with the turn of the century was mainly confined to the coastal areas, with some new communities established in what is now called the West Bank during the British Mandate, whose official aim was to help Jewish immigrants to Palestine establish a political community on Palestinian lands.

With the occupation of 1967, Israel started an aggressive policy of settling some of its own population in settlements in the newly occupied territories. Some of these settlements consisted of a few pre-fabricated houses or trailers on the top of a hill, while some others grew to the size of a small town, such as Maale Adumim near Jerusalem in the West Bank. The location of these settlements and the timing of their establishment were determined according to a policy of occupying the territory, and they served that strategic aim. In 1972, there were less than 8500 Jewish settlers in the West Bank, the Gaza Strip, and East Jerusalem. By 1992, before the Oslo Accords, their numbers had grown to close to 250 000 (roughly 200 000 in the West Bank and a little under 50 000 in the Gaza Strip). The biggest rate of growth came *during* the peace negotiations that followed the Declaration of Principles, when this number rose to close to 400 000, while Israel was negotiating on the basis of the 'land for peace' deal. During this period, the fastest rate of construction of houses in the occupied territories for the exclusive use of Jewish settlers came under Prime Minister Ehud Barak.[24]

In some instances, the settlers are not formerly Israeli citizens, but arrive directly from abroad and are given a residence in the settlements together with Israeli citizenship. Being Jewish is the only criterion used to determine whether newcomers can settle in the occupied territory. In a recent instance of such immigration, Peruvian nationals belonging to the indigenous population converted to Judaism, changed their names to Hebrew ones, and were assisted in immigrating to Israel in July 2002. They settled in the Occupied Territories and not within the Green Line.

It is also important to note that the area allocated to a given settlement is generally significantly larger than the settlement itself, and can sometimes encompass the top of neighbouring hills. This allows Israel to establish new settlements on neighbouring hills and to claim they are not new since they fall within the boundaries of an existing settlement. The Foundation for Middle East Peace and Settlement Watch evaluate the ratio of land allocated to settlements to the actual built up area to be 8:1 [25].

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[24] See for instance the article by Nadav Shragai titled Barak Was Biggest Settlement Building Since '92 in Ha'aretz, - February 27, 2001.

[25] Israeli Settlements in the Occupied Territories: A Guide. A Special Report of the Foundation for Middle East Peace, http://www.fmep.org/reports/2002/sr0203.html#5.

It is also important to note that the immigrant settlers in the occupied territories are not governed by the same laws that apply to the other inhabitants of the territory. Jewish settlers are governed by Israeli laws; whereas the indigenous Palestinian population was governed by laws in place before the occupation until the Oslo accord was signed, and then by the laws of the Palestinian authority. Finally, settlers receive more subsidies for mortgages than the average Israeli population does, and there is more public financing of houses for Jewish settlers than there is within the Green Line. Thus, the movement of settlers is not a movement of individuals wishing to settle down in a chosen area. Rather, it is a systematic policy by the State, accompanied by a master plan, calls for tender, a budget, and a strategy of occupation of the territory. Individuals who choose to live in the occupied territory often do it because houses there are subsidized, not primarily as an ideological choice. Some Israeli observers estimate that no more than 10% of the settlers are ideologically motivated. The rest are economic settlers, in the sense that the Israeli government provides facilities that they would not get within the Green Line. These economic settlers tend to live in the West Bank suburbs of the large Israeli metropolitan areas. Observers of the Israeli scene assert that most of these economic settlers would not object to moving within the Green Line if this could help the cause of peace. The following 'Settlement Facts' sheet comes from the Foundation for Middle East Peace.

SETTLEMENT FACTS

(source : ISRAELI SETTLEMENTS IN THE OCCUPIED TERRITORIES: A Guide
A Special Report of the Foundation for Middle East Peace
http://www.fmep.org/reports/2002/sr0203.html#5)

Number of settlements in the West Bank (5,640 sq. km.)**:** 130
Number of settlements in the Gaza Strip (360 sq. km.)**:** 16
Number of settlement areas in East Jerusalem: 11
Number of settlement areas in the Golan Heights: 33
Total settler population

	West Bank and Gaza Strip	East Jerusalem
1972	1,500	6,900
1983	29,090	
1992	109,784	141,000
2000-01	213,672	170,400

Total settler population in the Golan Heights: 17,000
Palestinian population:
- 2 million in 650 locales in the West Bank (including 200,000 in East Jerusalem)
- 1.1 million in 40 locales in the Gaza Strip

An estimated 100,000 Israelis, comprising 50 percent of the settler population, reside in eight settlements. The average population in the remaining one hundred forty settlements is 714.

Built-up settlement areas occupy 1.4 percent of the West Bank's 5,640 sq. km. Settlement boundaries enclose almost 10 percent of West Bank territory. In addition, with the outbreak of the al-Aqsa intifada in September 2000, Israel appears to be planning "no-go" areas between 70 and 500 meters wide around each settlement and every military installation in the occupied territories.

According to the YESHA Council, 3,000 settlers—comprising 1.5 percent of the settler population of 200,000--in the West Bank (excluding East Jerusalem) and the Gaza Strip—moved out of the settlements during 2001. This exodus was more than compensated for by natural increase and an influx of new residents, enabling the settler population to grow at a rate of 5 percent.

On August 12, 2001, *Ha'aretz* reported that the settler departure rate had exploded to 5 percent--or 10,000 people. A typical annual rate is 1 percent.

At least 360 Palestinian homes were demolished in the Gaza Strip by the IDF during the first year of the intifada. Since October 2000, Israeli authorities have demolished more than 200 houses in the West Bank. In September 1993, there were 32,750 dwelling units in the West Bank and Gaza Strip settlements. Between 1993 and July 2000, construction was initiated on 17,190 units.

Settlers in the West Bank, Gaza Strip, and the Golan Heights received government mortgages during 2000 at a rate more than twice the national average. There were 16 new mortgages for every 1,000 settlers during the year 2000, compared to 6 per 1,000 Israelis. Israel has uprooted 5.5 sq. km. of Palestinian orchards and destroyed 4.5 sq. km. of field crops.

The following map (MAP 4) shows the settlements as of October 1996. The demographic importance of these settlements is not indicated on this map.

MAP 4. Israeli settlements in the occupied territories as of October 1996.
(Source: United Nations; http://domino.un.org/unispalselect.nsf/181c4bf00c44e5fd85256cef0073c426/96fd41bb37e40f8685256b98006ec72a!OpenDocument).

2. Legal Dimension

Both the establishment of settlements and the moving of settlers into the West Bank and Gaza are a direct violation of international law, namely Article 49 of the Fourth Geneva Convention, which states, "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The fact that both words 'deport' and 'transfer' appear in the article indicates that both coercive deportation and voluntary moves (transfer) are covered by this article. Settlements also contradict Articles 23, 42, 43, 46 and 56 of the Hague Regulations. Professor John Quigley explains:

> The Hague Regulations do not address transfer of civilians but prohibit use of land in occupied territory for settlement construction. The Hague Regulations require the occupying power to administer public lands to benefit the local population, and instruct it not to confiscate private property. Thus, under the Hague Regulations, use of either public or private land for settlement construction is forbidden.[26]

Almost all countries, including the US and Canada, consider that the settlements are illegal. The official Canadian statement on the Middle East policy, posted on the Web site of DFAIT (http://www.dfait-maeci.gc.ca/), states:

> Canada does not recognize permanent Israeli control over the territories occupied in 1967 (the Golan Heights, the West Bank, East Jerusalem and the Gaza Strip) and opposes all unilateral actions intended to predetermine the outcome of negotiations, including the establishment of settlements in the territories and unilateral moves to annex East Jerusalem and the Golan Heights. Canada considers such actions to be contrary to international law and unproductive for the peace process.

The proposal presented by Ehud Barak at Camp David and later at Taba includes a provision, presented as an important compromise, that only 80% of the settlers would stay in the occupied territories.[27] If this figure was applied to the whole settler population, it would mean that roughly 320 000 settlers illegally present in the occupied territory would remain there. If we recall that the population of settlers had almost doubled in comparison to the year 1993, while the Israelis were negotiating, this means that the Israeli and American proposals include an *increase* of close to 72 000 settlers over the number present at the start of the negotiations. If the proportion of 80% was applied to the number of settlers in the West Bank and Gaza only (excluding the settlers residing in the enlarged and annexed East Jerusalem), it would give a rough figure of 171 000 settlers, which is again an *increase*, not a decrease, of 55% over the number of settlers present in the same location at the beginning of the negotiations. Barak's proposals at Camp David included provisions for the consolidation of settlements blocks in a way that would divide the West Bank into three non-contiguous areas. They were first presented at talks held at Eilat in May 2000. The Israeli newspaper Yediot Aharonot, published the following map on May 19, 2000, illustrating the Eilat proposal.

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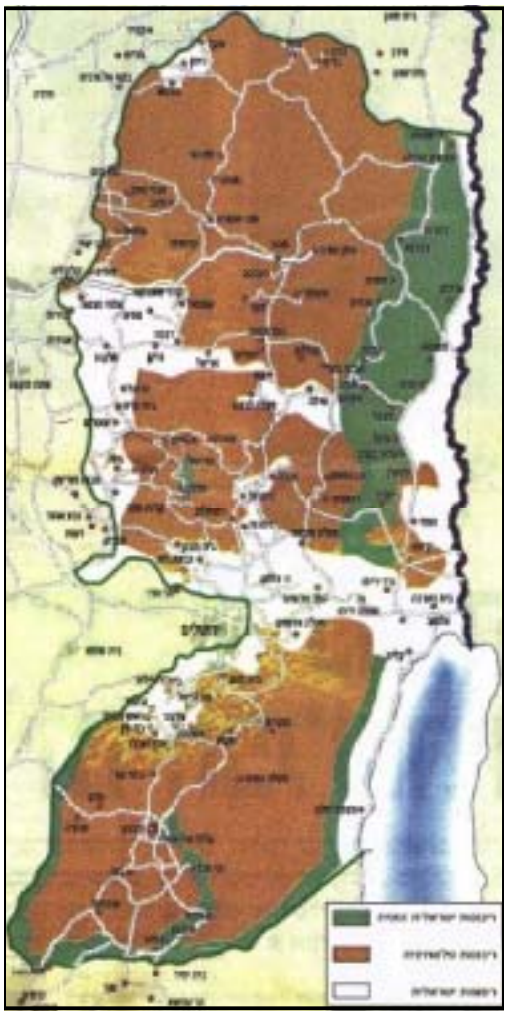
[26] Quigley (1999 b).

[27] See the (unofficial) Moratinos report (2001). This statement was confirmed by a high-ranking participant to these talks, General Danny Yamit, former Director of the Mossad and advisor to Prime Minister Barak, who was present during these negotiations. Since the Moratinos report is not official, it is not known for sure if the figure of 80% is calculated on the basis of the number of settlers in the occupied territories or in the West Bank alone, and whether it includes or excludes settlers in the annexed part of Jerusalem.



Map 5. Proposed Settlement Blocks in the Barak Proposal at Eilat, May, 2000. The white area would remain under Israeli control. (Source : *Yediot Aharonot, May 19, 2000)*.

In response to the mounting tensions and the beginning of the second *intifada* in September 2000, President Clinton made further proposals, in December 2000, that included a withdrawal of Israel from 94 to 96 % of the West Bank, but that kept the provision that 80 % of the settlers would stay in the West Bank in consolidated settlement areas.[28]

The Fourth Geneva convention protects civilian populations during a conflict (*jus in bellum*). However, an important principle of jurisprudence has been mentioned by Professor Marco Sassoli on this issue: *Nemo auditor propiam turpitudinem allegans* (no one can claim an advantage

[28] A day-by-day account of the negotiations at Camp David and later at Taba can be found in Charles Enderlin, *Le Rêve Brisé*, Fayard, 2002. This source also explains the processes that led to the failure of these talks. Several other accounts have been published by participants in these talks, but our purpose here is not to write a history of the talks : it is rather to highlight the legal issues raised by the proposals.

resulting from an illegal action). In other words, actions of one party that were illegal during an occupation cannot be used as binding constraints on the other party in an eventual peace settlement. Thus, the presence of the Jewish immigrant settler population in the occupied territories cannot be given the same status as the local Palestinian population that had been living in the West Bank and Gaza here before the occupation.

The Israeli government challenges this position. Its official position is:

> The provisions of the Geneva Convention regarding forced population transfer to occupied sovereign territory cannot be viewed as prohibiting the voluntary return of individuals to the towns and villages from which they, or their ancestors, had been ousted. [29]

Thus, the Israeli government claims that referring to far ancestors having lived at some point in time in a given territory grants the individuals, if they are Jewish, a right of return, even if they cannot trace the individual genealogical line that connects them to the land. If individuals convert to Judaism, they also have the right to 'return' to the land. The Israeli government considers that these rights extend to the territories occupied in 1967. However, according to the Israeli official position, a non-Jew who lived himself or herself in Palestine before being forcibly expelled cannot claim a right of return to his place of residence, even if he or she owns the dwelling where he or she lived (see the section on refugees). Here, the criterion applied by Israel to determine who has the right to return is a purely religious criterion. International law and in particular humanitarian and human rights law does not grant individuals more or less rights according to their religion. The Israeli arguments are therefore discriminatory and they cannot hold if the criteria for consideration are coherent with principles of human rights and non-discrimination.

Moreover, this is not a situation where an individual returns to a country where he/she or his immediate ancestors were born. This is a situation where a political project aims to take over a territory for the benefit of settlers and at the expense of the indigenous population.

The Israeli view is not shared by any country, not even by the US, which considers the settlements to be both "illegal and an obstacle to peace." In an article published in the Washington Post in November 2000,[30] former US President Jimmy Carter wrote:

> It was clear that Israeli settlements in the occupied territories were a direct violation of this agreement [SCR 242] and were, according to the long-stated American position, both "illegal and an obstacle to peace." […] It seems almost inevitable that the United States will initiate new peace efforts, but it is unlikely that real progress can be made on any of these issues as long as Israel insists on its settlement policy, illegal under international laws that are supported by the United States and all other nations.

As we have shown above, the best offers ever made to the Palestinians by Israeli officials, the Taba offers of December 2000 included an increase, not a decrease, of the number of settlers present at

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[29] From : Israeli Settlements and International Law, found on the official site of the Israeli Ministry of Foreign Affairs (http://www.mfa.gov.il/mfa/go.asp?MFAH0jyz0)

[30] Jimmy Carter, "For Israel, Land or Peace," *The Washington Post*, Sunday, November 26, 2000.

the beginning of the Oslo negotiations. These offers were thus aimed at making legal, with the consent of the victims, a situation that is presently illegal. The Clinton counterproposal (the American bridging proposal) incorporated the Israeli demand on settlers as is.

3. Conclusion

A rights-based approach to the conflict should uphold respect for international law and in particular for the Fourth Geneva Convention, protecting the rights of the civilian population under belligerent occupation. A peace agreement thus should not legalize a situation deliberately created, in violation of international law, by the occupying power (Israel) in the hopes of obtaining the advantage in future negotiations by creating an insurmountable *de facto* situation.

D. JERUSALEM

1. Background

In the GA Resolution 181 that gave international legitimacy to the creation of the State of Israel in Palestine, Jerusalem was given a special status. This status was never put into effect.
A part of Jerusalem was conquered and occupied in 1948. This has become West Jerusalem. East Jerusalem was not occupied until 1967 and it remained predominantly inhabited by Palestinian Arabs. It includes the Old City of Jerusalem, which is comprised of high walls and accessed through several gates, and Arab neighbourhoods outside the walls of the Old City. It is this Old City that contains most (but not all) of the Holy Sites.

When the 1967 war broke, Israel occupied East Jerusalem (6.5 sq. km.), enlarged its boundaries by adding 71 sq. km. taken from the West Bank, and then formally annexed the enlarged city. So, when Jerusalem is mentioned in political analyses today, it does not refer to the municipal boundaries of pre-1967 Jerusalem (East and West), but it also includes an area which is located predominantly in the West Bank, which is occupied territory, and which Israel does not count in its West Bank statistics.

Israel declared the unified Jerusalem to be its Eternal Capital, but most Western countries did not recognize this and maintained their Embassies in Tel Aviv. Even the US does not formally recognize the annexation of Jerusalem. A vigorous policy of 'judaisation' of Jerusalem has been put in place by successive Israeli governments in order to change both the demographic composition of the city and its physical landscape. A campaign of withdrawal of residency permits of Palestinians living in Jerusalem was put in place; their spouses were not allowed to live in Jerusalem if they were not living in it at the time of occupation, and permits to construct houses were systematically denied to non-Jewish owners, and the houses bulldozed to the ground after their completion if they had been built without the proper permit.[31]

[31] Although not reported in the mainstream media, these practices have been thoroughly documented by the Israeli Committee against House Demolitions (ICAHD) and by B'Tselem, two Israeli human rights organizations.

Since the signing of the Declaration of Principles in 1993, Israel has sped up its in-depth transformation of the Arab sector of East Jerusalem, razing Arab houses to make way for highways and by-pass roads to connect the West Bank settlements to West Jerusalem, and to make the settlements more attractive for the settlers. A number of settlers in the occupied outskirts of the city are not there for ideological reasons but for economic reasons and polls indicate these settlers are quite willing to leave this area and move within the Green Line as part of a peace settlement.

Finally, it must be said that East Jerusalem was the economic heart of the West Bank. By restricting access to East Jerusalem for the Palestinians living in the rest of the West Bank, Israel has seriously harmed the Palestinian economy.

MAP 6. Jerusalem within its pre-1967 boundaries in comparison to the expanded boundaries which include 71 sq. km. annexed from the West Bank in contravention of international law.
(Source : PASSIA, www.passia.org)

All these policies were put in place before the violence erupted in the fall of 2000, and cannot be explained as a response to violence, but as a policy of creating facts in order to pre-determine the final outcome of a peace settlement.

The international community has always considered that the annexation of Jerusalem was illegal, because it had been conquered by war. In a formal statement made in 1971 by the then-Ambassador of the US to the UN, George Bush Sr., the US reaffirmed its position that the US government considers East Jerusalem to be "occupied territory and thereby subject to the provisions of international law governing the rights and obligations of an occupying power." [32] George Bush went on to say:

> The expropriation or confiscation of land, the construction of housing on such land, the demolition or confiscation of buildings, including those having historic or religious significance, and the application of Israeli law to occupied portions of the city are detrimental to our common interests in the city.

Ambassador Bush concluded his 1971 Statement as follows:

> We regret Israel's failure to acknowledge its obligations under the Fourth Geneva Convention as well as its actions which are contrary to the letter and spirit of this Convention. We are distressed that the actions of Israel in the occupied portion of Jerusalem give rise to understandable concern that the eventual disposition of the occupied section of Jerusalem may be prejudiced. The Report of the Secretary General on the Work of the Organization, 1970-71, reflects the concern of many governments over changes in the face of this city. We have on a number of occasions discussed this matter with the Government of Israel, stressing the need to take more fully into account the sensitivities and concerns of others. Unfortunately, the response of the Government of Israel has been disappointing. […] an Israeli occupation policy made up of unilaterally determined practices cannot help promote a just and lasting peace any more than that cause was served by the status quo in Jerusalem prior to June 1967 which, I want to make clear, we did not like and we do not advocate re-establishing.

2. Legal Issues

The issues concerning Jerusalem are complex and intricate, and are complicated by the fact that GA Resolution 181 gives Jerusalem a special status, and determines the boundaries within which this status is to be recognized. However, since the boundaries of the two States proposed in that resolution are not on the agenda anymore, this makes the legal provisions concerning Jerusalem unworkable. As a result, no proposal stands on solid legal grounds.

The principles put forward by President Clinton, to the effect that Jewish neighbourhoods go to Israel and Arab neighbourhoods go to the Palestinians, are workable within the old boundaries of Jerusalem, but not in the West Bank area that has been annexed to Jerusalem illegally.

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[32] "Statement on Jerusalem" delivered before the UN Security Council by US Ambassador George H. W. Bush on September 25, 1971, explaining the official position of the US government with respect to the city of Jerusalem. Quoted in Francis Boyle (2002a).

3. Conclusion

A position based on international law should advocate, therefore, that the areas of the West Bank that have been annexed illegally should be returned to the Palestinians, and that the principles advanced at Taba should be applied in East Jerusalem. The Old City of Jerusalem should have a separate negotiated status guaranteeing freedom of access to their respective religious sites for adherents of each of the three religions.

E. PALESTINIAN REFUGEES

1. Background

Close to 800 000 Palestinians became refugees during the 1948 war. For years, Israel claimed they had left voluntarily, or at the instigation of calls made by Arab leaders. But a group of 'New Israeli Historians' belonging to various schools of thought (Zionists, non-zionists, and anti-zionists alike) have documented and established that a large portion of the Palestinian exodus was systematically planned and executed by the Israeli military leadership. The names of Benny Morris[33], Ilan Pappe[34], Simha Flapan[35], Avi Shlaïm[36], and others have now become known to an audience much larger than that of their specific academic circles[37].

These historians have established that the Palestinians were not simply expelled, but that these expulsions were accompanied by massacres to make sure that the population of a given village and of the surrounding villages would flee. It is worth quoting Israeli authors on this issue as the historical facts are not recognized in official Israeli discourse, and are treated as 'anti-semitic propaganda' when mentioned in North America. Yet they are grounded in solid archival research by serious and credible Israeli historians. We will thus support what we are saying by quoting this revealing passage from a reputable Israeli source, noting that Morris considers himself a Zionist. Writing in Ha'aretz on November 3, 2000 in a review of the latest book of Benny Morris, Gideon Levy writes :

> They lied when they told us that the Arabs of Lod and Ramle "asked to leave their cities" (the head of the history department of the Israel Defense Forces). They lied when they told us that the murderous Kibiya operation was carried out by "enraged residents" (David Ben-Gurion). They lied when they

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[33] Benny Morris, **The Birth of the Palestinian Refugee Problem, 1947-1949**, Cambridge, Cambridge University Press, 1987, and **Israel's Border Wars, 1949-1956: Arab Infiltration, Israeli Retaliation and the Countdown to the Suez War** (Clarendon Press, Oxford, 1993).

[34] Ilan Pappé, **The Making of the Arab-Israeli Conflict, 1947-1951**, London, I.B. Tauris, 1992.

[35] Simha Flapan, **The Birth of Israel, Myths and Realities**, London, Croom Helm, 1987.

[36] Avi Shlaïm, **Collusion Across the Jordan. King Abdullah, the Zionist Movement, and the Partition of Palestine**, Oxford, Clarendon Press, 1988.

[37] A detailed analysis of the issues raised by the new historians can be found in: Dominique Vidal, (with Joseph Algazy), **Le Péché originel d'Israël. L'expulsion des Palestiniens revisitée par les « nouveaux historiens » israéliens, Paris**, Les Éditions de l'Atelier, 2002.

> told us that all the "infiltrators" were bloodthirsty terrorists, that all the Arab States wanted to destroy us and that we were the only ones who simply wanted peace all the time.

After noting that the 'old historians' have engaged in a mud-slinging campaign against the new historians, Levy continues :

> Benny Morris certainly has a large stake in the new historical enterprise […].
> Morris' two earlier books, *Israel's Border Wars, 1949-1956: Arab Infiltration, Israeli Retaliation and the Countdown to the Suez War* (Clarendon Press, Oxford, 1993), and *The Birth of the Palestinian Refugee Problem, 1947-1948* (Cambridge Middle East Library, 1987), are foundations for an understanding of the roots of the Israeli-Arab conflict.
> If you want to understand the Palestinian uprising in the territories, go to these two books. If you want to understand why a settlement is impossible without a solution to the refugee problem, go to Morris. All the early-warning signs appear in his works. They show how our relationship with the Arabs began. Everything that followed, up until this very day, is anchored in their - and particularly our - original sins, which Morris and his colleagues have exposed. […]
> [Morris] believed Major General (res.) Moshe Carmel and other sources, who told him that no deportation orders were issued during the course of Operation Hiram, to be the dirtiest there was. And now, the IDF archives have been opened and there we find a cable dated October 31, 1948, signed by Major General Carmel and addressed to all the division and district commanders under his command: "Do all you can to immediately and quickly purge the conquered territories of all hostile elements in accordance with the orders issued. The residents should be helped to leave the areas that have been conquered."[…]
> Apparently, Carmel's troops carried out massacres in no less than 10 (!)villages in the north of the country. They would gather the men of these villages in the square, choose a few of them, sometimes dozens, stand them up against a wall and shoot them. Because the IDF has kept the relevant document under wraps, we know nothing about these massacres. We can only hope that this nonsense, this outrageous practice of keeping things confidential, passes from the world and that 52 years on, we will eventually learn everything - where we went wrong and the evil things we did.

A number of laws were passed in Israel to make sure that the displaced persons would not be able to come back. Their belongings were confiscated and attributed to Jewish immigrants, and close to 400 villages were bulldozed to the ground.

The estimates of the number of Palestinian refugees in 1948-49 vary from 600,000 to close to 950,000 with Palestinian and US estimates being about 875,000 individuals. Most scholarly studies mention the figure of 700,000 to 800,000 refugees. The current UNRWA estimates for registered persons, were, as of June 2000, as follows:

West Bank	**Gaza Strip**	**Total Palestine**	**Jordan**	**Lebanon**	**Syria**	**Total (Agency-wide)**
583,009	824,622	1,407,631	1,570,192	376,472	383,199	3,737,494

(Source : UNRWA, http://www.un.org/unrwa/pr/pdf/figures.pdf)

Official Palestinian sources indicate that in addition to the refugees registered with UNRWA, there are between 1.3 and 1.5 million who are not registered.

UN Mediator Count Folke Bernadotte said of these refugees: "It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes, while Jewish immigrants flow into Palestine" (UN Doc Al 648, 1948). The Absentee Property Law was enacted by the Israeli authorities as early as 1948. It allowed Israel to seize the property of the refugees and transfer it to the state of Israel, its agencies, or Jewish individuals.

Writing in early 1948, as the UN General Assembly's recommendation to partition Palestine into two states against the wishes of the majority of the inhabitants of the country began to unravel, George Kenan, then director of Policy Planning at the State Department stated: "Any assistance the U.S. might give to the enforcement of partition [i.e., denial of the right to self-determination] would result in deep-seated antagonism for the US in many sections of the Moslem world over a period of many years…As a result of US sponsorship of UN action leading to the recommendation to partition Palestine, US prestige in the Moslem world has suffered a severe blow and US strategic interests in the Mediterranean and Near East have been seriously prejudiced." (Cited in Donald Neff, Fallen Pillars, US Policy towards Palestine and Israel Since 1945 [Italics added]) The study was seconded by the CIA and the Pentagon. By the spring of 1948, the US government attempted to back-pedal from the partition plan, but by then it was too late; military operations by Zionist/Israeli forces had resulted in the expulsion and dispossession of more than half of the Palestinian Arab population of Palestine, some 750,000 refugees.

Two UN agencies were accorded specific mandates to provide international protection and assistance to Palestinian refugees: The UN Conciliation Commission for Palestine (UNCCP), and the UN Relief and Works Agency for Palestine Refugees (UNRWA). Palestinian refugees could also resort to the Office of the UN High Commissioner for Refugees (UNHCR).

According to BADIL, a Palestinian NGO based in Bethlehem (West Bank), dealing specifically with the issue of refugees :

> UNCCP protection collapsed in the mid-1950s. Neither the UNHCR nor any other international agency, however, explicitly stepped in to completely fill the subsequent gap created by the cessation of comprehensive international protection for Palestinian refugees. UNHCR does not have an explicit mandate to provide protection for all Palestinian refugees. The collapse of UNCCP protection, limited intervention by the UNHCR, and lack of an explicit UNRWA protection mandate, has resulted in severe gaps in international protection for Palestinian refugees. No international agency is currently recognized by the international community as having an explicit mandate to systematically work for the realization of the basic human rights of all Palestinian refugees and search for and implement durable solutions consistent with international law as affirmed in UN GA Resolution 194(III).[38]

[38] UNHCR, Palestinian Refugees, and Durable Solutions , BADIL Brief number 7, (www.badil.org/Publications/Briefs/I&D_Briefs.htm)

The refugee population was accepted reluctantly in most surrounding Arab countries, which granted them various degrees of economic and social entitlements, but which, generally, did not grant them citizenship.

2. Legal Issues

The refugee issue is probably the hardest to resolve, not because international law is not clear on this issue (it is very clear), but because the current balance of power does not allow an imposition of a just solution, as it raises the issue of the nature of the Israeli State: is it the State of all its citizens, or a Jewish State? A solution that is in conformity with international law would question the 'religious/ethnic' character of the Israeli State and its fundamental distinction between Jewish citizens and non-Jewish citizens, who do not enjoy the same rights, neither *de jure* nor *de facto*. Such a distinction is at the foundation of the State in Israel, and in the foreseeable future, no Israeli government will agree to abandon this distinction and the differential set of rights accorded to each category of citizens. So, what is a reasonable compromise?

The right to return to their homeland is recognized to Palestinian refugees in GA Resolution 194, voted on December 11, 1948. Paragraph 11 of the Resolution states that:

> ...the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date... compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.

Resolution 194 was re-affirmed practically every year since with almost universal consensus -- the one constant exception being Israel.[39]

Moreover, Article 13 of the *Universal Declaration of Human Rights* states that: "everyone has the right to… return to his country." SC Resolution 242 also refers to the refugee issue and calls for "a just settlement of the refugee problem".

Similarly, in the following year, the United States recognized that unless principles of international law as affirmed in UN resolutions were applied to resolve the refugee issue it would be a source of instability in the region and further cause for antagonism towards the United States. A Policy Paper prepared by the State Department in March 1949 outlined US efforts to resolve the refugee problem. "With respect to the attitude of the Israeli government towards the question of repatriation, we have undertaken and are undertaking action on the diplomatic level in two respects: (1) with the underlying purpose of safeguarding Arab absentee property interests in Israel against application of the Israeli ordinance of December 12, 1948 authorizing sale of such property, we are urging Israel not to take unilateral action which would prejudice achievement of an agreed settlement on the return of refugees to their homes and return of property to refugee owners; (2) we

[39] The relevant official international documents on this issue are the following. They can all be accessed in full text on the world wide web : The Balfour Declaration, the Mandate for Palestine, the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the UN General Assembly Resolution 181 (Partition Plan), the United Nations General Assembly Resolution 273 (III), the General Assembly Resolution 194, the U.N. Security Council Resolution 242, U.N. Security Council Resolution 338, Security Council Resolution 465.

are urging Israel to implement the purposes of the December 11 resolution [i.e., right of return, restitution, and compensation], as a means of facilitating political settlement of the Palestine problem and preparing the way for a modus vivendi with the Arab states." (Cited in Neff, Fallen Pillars)

The Policy Paper concludes: "We should use our best efforts, through the Conciliation Commission and through diplomatic channels, to insure the implementation of the General Assembly resolution of December 11, 1948; We should endeavor to persuade Israel to accept the return of those refugees who so desire, in the interests of justice and as an evidence of its desire to establish amicable relations with the Arab world; We should furnish advice and guidance to the governments of the Arab states in the task of absorbing into their economic and social structures those refugees who do not wish to return to Israel." Faced with Israel's refusal to recognize the right of return and facilitate the repatriation of Palestinian refugees, as required under international law, however, the US redirected it efforts towards economic rehabilitation (i.e., resettlement) of refugees in exile.

Israel does not recognize the right of return of Palestinian refugees. An article by Professor Ruth Lapidoth, posted on the Web site of the Israeli MFA, states:

> A comparison of the various texts and a look at the discussions which took place before the adoption of these texts lead to the conclusion that the right of return is probably reserved for nationals of the State.[40]

It is interesting to compare this position with the one that states that, for the Jewish immigrants, the mere fact of having ancestors who lived in the area 2000 years ago is a sufficient condition to have the right of return, even if no direct affiliation can be traced back to a specific ancestor, and even if the individuals have converted to Judaism (and therefore do not have ancestors who lived on the land). According to this view, non-Jews do not enjoy the right of return even if they had themselves lived in the country.

Non-Israeli jurists tend to agree that the right of return of Palestinians expelled in 1948 is garanteed under international law. A study by Gail Boling explains that :

> (…) the individually-held right of return is anchored in four separate bodies of international law: the law of nationality, as applied upon state succession; humanitarian law; human rights law; and refugee law (a subset of human rights law which also incorporates humanitarian law). The right of return exists in these four bodies of law for all factual cases of involuntary displacement, and regardless of the circumstances of displacement. Accordingly, the right of return prohibits any type of deliberate governmental policy designed to block the voluntary return of persons to their homes of origin, including "peaceful" obstructions deliberately barring return after a temporary departure. For example, if individuals happened to travel outside their normal place of residence for a weekend picnic, the right of return guarantees that no governmental policy could be enacted to bar their voluntary return to their homes. The obligation under international law of the "state of origin" from which the involuntarily displaced person originated to receive back persons seeking to return to their homes of origin is absolute. However, because

[40] Ruth Lapidoth: Do Palestinian Refugees Have a Right to Return to Israel? (posted on the Web site of the Israeli MFA)

> international law has particularly strong prohibitions against "forcible expulsions" carried out by governments, a fourth major principle regarding the right of return can be noted here. Whenever the facts demonstrate that deliberate, forcible governmental expulsion has been practiced, a heightened obligation to implement the right of return exists.[41]

The vast majority of jurists agree with this position, and the reader is invited to consult the works of John Quigley, W.T. Mallison and S. Mallison, Susan Akram, Francis Boyle, Kathleen Lawand, among others. [42]

According to international jurist Kathleen Lawand,[43] the refugees who were forced to flee Palestine in 1948 should have been given the nationality of the successor State, Israel. Thus objections to their return on the basis of their nationality do not hold.

In a paper presented in Ottawa in 1999 [44], Professor John Quigley raises the issue of the terminology referring to Palestinians displaced by the 1948 war. He writes:

> In reviewing the legal literature, I find confusion caused by the fact that the question of the 1948 Palestinians is often addressed on the basis of the definition of refugee found in the UN convention on refugees. The Palestinians displaced in 1948 do not fit that definition, since they seek repatriation to their home areas rather than asylum abroad. Nonetheless, some writers try to fit the Palestinians into the convention definition, or they conclude that certain ones among them (e.g., persons who have committed acts of violence) may not qualify. Unfortunately, the UN documents employ "refugee" for the 1948 Palestinians. However, in my view, it facilitates proper legal analysis to refer to them as displaced persons, rather than as refugees.

He goes on to say:

> Non-possession of the nationality of the state to which repatriation of persons is sought, and in which repossession of property is sought, does not defeat the right of repatriation/ repossession. Ukraine repatriated the Tatars to Crimea, even though Crimea had been part of the Russian Federation at the time of the dispossession in 1944 and thus had held the nationality of the Russian Federation (Crimea was transferred to Ukraine in 1953). Ukraine repatriated, despite the fact that the Tatars had never held Ukraine nationality.

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[41] Gail Bowling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, BADIL Resource Center for Palestinian Residency and Refugee Rights, Bethlehem, Palestine, January 2001.

[42] John Quigley, "Displaced Palestinians and a Right of Return," Harvard International Law Journal, Vol. 39, No. 1 (Winter 1998) 171; John Quigley, "Mass Displacement and the Individual Right of Return," British Yearbook of International Law, Vol. 68 (1997) 65; W.T. Mallison and S. Mallison, "The Right to Return," 9 Journal of Palestine Studies 125 (1980); W.T. Mallison & S. Mallison, An International Law Analysis Of The Major United Nations Resolutions Concerning The Palestine Question, U.N. Doc. ST/SG/SER.F/4, U.N. Sales #E.79.I.19 (1979); W.T. Mallison & S. Mallison, The Palestine Problem In International Law And World Order 174-188 (1986); Kathleen Lawand, "The Right to Return of Palestinians in International Law," International Journal of Refugee Law, Vol. 8, No. 4 (October 1996) 532.

[43] Kathleen Lawand, "The Right to Return of Palestinians in International Law," *International Journal of Refugee Law*, Vol. 8 No. 4 (1996).

[44] Quigley, 1999 b.

According to Professor Sari Hanafi, Director of Shaml, a think-tank devoted to the study of the question of refugees, a compromise solution could be found. That compromise would include a formal recognition of the responsibility of Israel in the creation of the refugee problem (a responsibility solidly established by the New Israeli Historians), but an actualization of the right of return of small numbers of people every year, with generous compensation for those who choose not to return. He notes that most Palestinians displaced during the 1948 war will not want to go back to their country of origin. However, recognizing this as a right and recognizing the responsibility of the State of Israel in the creation of the problem will go a long way towards restoring the dignity of the displaced persons and will greatly contribute to healing the wound. However, the choice must be that of the individual refugees, as garanteed by international law.

3. Conclusion

A rights-based approach to the conflict should uphold recognition and respect for the right of the Palestinians displaced during the 1948 war on the basis of Resolution 194, and recognition of the responsibility of Israel in the creation of the refugee problem. However, this rights-based solution is not likely to be feasible without causing greater conflicts. A compromise solution can be achieved if we take into account that most refugees will likely choose not to return and would prefer compensation. Palestinians themselves must decide whether to exercise the right of return or to choose compensation.

V. Conclusions and Recommendations

Conclusions

The question of the *control* of the Palestinian territory (with or without direct military occupation) and the settlements are *structuring factors* in the peace and reconciliation process between Israel and the Palestinians, in the sense that whatever the agreement reached on these issues, it will have a permanent impact on the evolution of the conflict. They also put into play issues of fundamental human rights. Moreover, unlike the issue of Jerusalem, there is far wider consensus on the legality of the 'land for peace' solution, based on a withdrawal from virtually all the territories occupied in 1967.

The issues surrounding the status of Jerusalem can be divided into two parts. The areas of the West Bank that have been added to the municipal boundaries of Jerusalem and then annexed in 1967 clearly fall under the principle of the non-annexation of territory by war. The Old City, on the other hand, while being formally occupied territory, has been considered by the international community as deserving a special status, and both parties have come up with proposals to that effect which are not entirely incompatible. There, a political compromise is required. Resolution 181 did include suburban areas of East Jerusalem in its internationalisation proposal, but a return to Resolution 181 would be totally unacceptable to Israel.

The notion of the right of return must be affirmed as a fundamental principle in human rights. With the considerations raised above in mind, a compromise solution would be based on the recognition in principle of the responsibility of Israel in the creation of the refugee problem, coupled with a generous compensation plan and a timed rate of return for those who choose to return.

It should be clear that a peace settlement that does not include a withdrawal from all or almost all the territories occupied by Israel in 1967 would be violating both the letter of SC Resolution 242, and the norm that is behind it. Therefore, on the question of borders, a rights-based view of the solution to the conflict will have to support the claim for a full withdrawal from substantially all territory occupied by Israel in 1967.

Recommendations

A rights-based approach to the conflict must be predicated on the respect for international law, including international humanitarian law and in particular for the *Fourth 1949 Geneva Convention*.

This rights-based approach could include the recognition of the following principles:

- *- The right of Palestinians to have their own State, with all the internationally-recognized attributes of State sovereignty*. This right should be explicitly mentioned in any peace proposal as a matter of principle and should not be subject to any condition, in the same way that Palestinians were requested to unconditionally recognize the State of Israel, a request that the various national Palestinian bodies complied with.
- *- The principle of non-acquisition of territory by war*, which implies that Israel withdraw completely from all territories occupied in 1967, on the basis of *Security Council Resolution 242*. This implies the following:

  - that Israel withdraw from the settlements created in the Occupied Territories in violation of international humanitarian law, since such occupation continues against the will of the indigenous population, and is achieved through violent coercive and punitive means,

  - that a special status be negotiated for Jerusalem,

  - that minor adjustments may be negotiated, provided such adjustments deprive neither Palestinians nor Israelis of strategic parts of their recognized territory and provided such negotiations are conducted freely and not under duress.

- *- Tthe respect for the rights of the Palestinians displaced during the 1948 war on the basis of Security Council Resolution 194*, and the acknowledgement of the responsibility of Israel in the creation of the refugee problem.

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Appendix I: Canadian Policy on the Middle East Peace Peace Process (key issues)

(http://www.dfait-maeci.gc.ca/Peaceprocess/keyissue-en.asp **-** Updated 2003-04-01**)**

SECURITY OF ISRAEL

Canada supports the security, well-being and rights of Israel as a legitimate, independent state. This has been a fundamental aspect of the policy of successive Canadian governments since the foundation of the State of Israel in 1948.

SUPPORT FOR A COMPREHENSIVE PEACE SETTLEMENT

Canada firmly supports the Israel-PLO Declaration of Principles signed on September 13, 1993. These should lead to a comprehensive agreement based on **UN Security Council Resolutions 242** and **338**, including the right of all countries in the region to live within secure and recognized boundaries and the requirement for Israeli withdrawal from territories occupied in 1967. Canada also firmly supports the Israel-Egypt Peace Treaty of March 26 1979 and the Jordan-Israel Peace Treaty of October 26, 1994.

OCCUPIED TERRITORIES

Canada does not recognize permanent Israeli control over the territories occupied in 1967 (the Golan Heights, the West Bank, East Jerusalem and the Gaza Strip) and opposes all unilateral actions intended to predetermine the outcome of negotiations, including the establishment of settlements in the territories and unilateral moves to annex East Jerusalem and the

Golan Heights. Canada considers such actions to be contrary to international law and unproductive for the peace process.

RIGHTS OF PALESTINIANS

Canada recognizes that the legitimate rights of the Palestinians must be realized, including the right to self-determination to be exercised through peace negotiations.

THE PALESTINE LIBERATION ORGANIZATION

Canada recognizes the PLO as the principal representative of the Palestinian people.

PALESTINIAN STATE

Canada fully supports the right of the Palestinian people to self determination. We are fully supportive of the creation of a Palestinian state. But, Canada believes that while the right to a state is implicit in the Palestinian right to self-determination, the interests of the Palestinians, as well as of the peoples of the region as a whole, will be best served if that right is exercised through the negotiating process.

SUPPORT FOR FAIR MINDED PEACE INITIATIVES

Canada firmly supports the Madrid bilateral negotiations launched in October 1991 by the United States and the former Soviet Union. Canada has also supported the decision of the Palestine National Council to accept **Security Council Resolution 242** as a basis for peace negotiations, the mutual recognition by Israel and the PLO of September 9-10 1993 and the Israel-Palestinian Declaration of Principles of September 13, 1993. Canada firmly supports the efforts of Israel and the Palestinians to work towards peace through such recent instruments as the **Wye River Memorandum of October 23, 1998** and the Sharm el-Sheikh Memorandum of September 4, 1999.

Canada strongly backs the Israeli-Palestinian effort to arrive at a final status settlement. Canada welcomes the Report of the Sharm el-Sheikh Fact-Finding Committee, led by former U.S. Senator George Mitchell. The Report, which was officially released on May 21, explores events that led to the most recent cycle of violence in the Middle East and makes recommendations aimed at helping Israelis and Palestinians resolve the current impasse and return to the negotiating table.
http://198.103.104.118/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104216.HTM.

STATUS OF JERUSALEM

Canada believes that the status of Jerusalem can be resolved only as part of a general settlement of the Arab-Israeli dispute and opposes Israel's unilateral annexation of East Jerusalem.

TERRITORIAL INTEGRITY OF LEBANON

Canada supports Lebanon's independence, sovereignty and territorial integrity. In accordance with the UNSC Resolution 425 of 1978 and the Taif Accord of 1989, Canada supports the progressive extension of the Lebanese government's authority over all of its territory. We have welcomed Israel's withdrawal of its forces from southern Lebanon which we consider an important step towards lasting peace in the Middle East.

We look forward to agreement in due course between Syria and Lebanon on the withdrawal of Syrian forces which are in Lebanon at the request of the Lebanese Government. It is up to the Government of Lebanon to determine when domestic conditions are propitious for a Syrian withdrawal.

PROGRESS THROUGH DIPLOMATIC SUPPORT FOR PRACTICAL CONTRIBUTIONS

Canada is a strong advocate of moderation and of diplomatic support for those who take risks for peace. Canada has emphasized the importance of practical contributions such as participation in peacekeeping forces, support for human rights and the establishment of development assistance programs in the region.

UNITED NATIONS RESOLUTIONS

Canada opposes all attempts to prejudge the outcome of negotiations by one-sided resolutions in international fora. Successive Canadian governments have been concerned that the polemical nature of many resolutions diverts UN agencies from pursuing their mandates. Canada has strongly opposed any move to suspend or expel Israel from the United Nations or its specialized agencies. However, when UN resolutions, such as the applicability of the Fourth Geneva Convention to the Occupied Territories, have identified Israeli actions as unjust, Canada has supported them along with virtually all of its Western allies.