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Israel, Palestine and International Law

In this paper, three facts will be examined: a) the existence of the State of Israel; b) the non-existence of a Palestinian State and c) the desire of all Palestinians to have their own State. These may seem commonplace, but there are certain questions which arise directly from them and for which it is necessary to provide answers, before carrying out the discussion of the principal subject: Which borders does international law recognise as those of the State of Israel? Did the declaration of independence of Algiers (1988) create a Palestinian state? What State do the Palestinians want? Do Palestinians have a right to self-determination? If so, what are the terms and conditions of such right? Who are their legitimate representatives? What is the legal status of the Palestinian Territories occupied in 1967 by Israel? Is International Humanitarian Law applicable to the Palestinian Occupied Territories? How Israeli domestic Law deals with international Law?

The borders of Israel according to International Law

The Israelis reproach the Palestinians for continuing to reproduce a historical Palestine on their maps which exclude the State of Israel. A reproach not without some truth – as, according to the recollections of a high Palestinian official, Israel has never defined what is theirs, so that we can say that the remainder is ours! Actually, Israel is the only State in the world whose borders are not defined (it should be noted that the existence of defined borders does not imply the existence of a State and *vice versa*). In addition, a number of commentators use the expression 'the occupied territories' to indicate those territories which were occupied by Israel in 1967 (The West Bank, Jerusalem East, The Gaza Strip, and other Arab territories), undoubtedly, because they are territories which were conquered *manu militari*, by the war.

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The only official borders of the State of Israel - according to International Law- are those which the Partition Plan declared (the Jewish State would have covered a surface slightly larger than that of the Arab state, on Palestinian territory, and Jerusalem as an international city) and not the `Green line', which merely indicates the line of cease-fire; in this case Israel would cover 77,5% of the territory of historical Palestine. The war could not in any case, create territorial rights and therefore it could not lead to a modification of borders, whatever the time lapse since the conflict.

Professor Anthony d'AMATO, a specialist in International Law, stated in the article 'The Legal Boundaries of Israel in International Law', that the mandate is a concept close to that of 'Trust', in the Anglo-Saxon system. He went on to quote Article 22 in which it stated that although Palestine was considered as one of those Mandates which was "provisionally" recognised as an independent nation, it would, nevertheless, require the "administrative advice and assistance" of a Mandatory Power on its road to statehood, and that this would be also in the interests of the inhabitants of Palestine. Great Britain was appointed for this purpose in the capacity of Mandatory Power – Trustee.[2]

On the dissolution of the League of Nations in 1946, its mandate responsibilities were transferred to the United Nations (UN), founded in the previous year. As in the case of a Trusteeship, the mandated territory remains intact following the replacement of the League of Nations and the subsequent withdrawal of the mandatory power (Great Britain). The administration ends only when the goals fixed by the mandate have been achieved, that is, when the people of Palestine are (considered) competent to govern themselves. Consequently, the withdrawal of Great Britain from Palestine meant only that the mandate on Palestine was, de facto, once more entrusted to the UN, or more precisely, to the UN General Assembly (UNGA), which had adopted the Partition Plan for Palestine, in its resolution No. 181, of 29 November 1947.

The Jewish State was proclaimed a month later. No Arab State has ever been established in Palestine (the omission of which concerned Arab countries are to some extent responsible). Therefore, the mandate never actually ended in Palestine, since its objectives were never realized. Salafeh HAJAWI pointed out in her comments on the Palestinian President's short speech in front of UNGA, in 1974, that this fact has been completely ignored and forgotten by the Palestinian Leadership. She also noticed that there was no request to create a Palestinian State, and that Mr. Arafat did not require the General Assembly to assume its responsibilities as a mandatory power[3].

After the Six Day War, Israel proceeded with the occupation of the remaining Palestinian territories, and it commenced to colonise them, in spite of this action being considered as illegal by the UN and the majority of countries. Some suggested that Israel was only defending

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[2] D'AMATO A., *The Legal Boundaries of Israel*, in: *Jurist official Web site*. Anthony d'Amato is the Leighton Professor of Law at Northwestern University School of Law.

[3] *Majallatu-d-dirâsâti-l-filistîniyyah* – Revue d'Etudes Palestiniennes, édition arabe – n° 53, Beyrouth, 2003.

herself; for them, the aggression of the Arab countries would have been the cause of the Six Day War and consequently, of the expansion of the State of Israel, but, as outlined by professor d'AMATO,

> "the undeniable fact that the Kellogg-Briand Peace Pact of 1928, as definitively glossed by the International Tribunal at Nuremberg in 1948, has abolished forever the idea of acquisition of territory by military conquest".[4]

The war itself is an illegal action; and if self-defence is legitimate, it cannot exceed self-defence as, by doing so, it then becomes a new military aggression, by definition. If self-defence had continued until this military aggression, the occupation of territories during a certain period (the conflict) by no means confers on the attacker the right to retain these territories, nor, *a fortiori,* to annex them. D'AMATO concludes his analysis in these terms:

> "The legal boundaries of Israel and Palestine remain today exactly as they were delimited in Resolution 181".[5]

However, it is also true that the PLO, the only legitimate representative of the Palestinian people, expressed its consent on several occasions in considering the West Bank (including Jerusalem) and Gaza, as the territories forming the objective of their territorial claims, that is, the future Palestinian State; a position that was officially adopted in 1988 by the Declaration of Algiers.

Is there any Palestinian State?

In an article published in the European Journal of International Law, Professor Francis BOYLE of the University of Illinois exposes his point of view on the Palestinian State following the declaration of independence made by the Palestinian National Council (PNC). He writes that four elements must operate together so that there is a State, and that these four elements are actually co-functional, with regard to the State of Palestine. These four elements are: territory, people, government, and capacity to establish relations with other States. The author remarked that one hundred and fourteen countries had recognised, at that time, this new State, and that UNGA, by its Resolution 177/43 of 15 December 1988, had recognised 'the State de Palestine' and had conferred upon it the status of Observer with a majority of one hundred and four votes against two hundred and forty abstentions.[6] This opinion was criticised by Professor James CROWFORD of the University of Sidney in his article in the same Journal: "The Creation of a Palestinian State: too much, too soon?". He concluded –rightly- that the argumentations presented by Boyle are weak and unconvincing.[7]

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[4] D'AMATO A., op. cit.

[5] D'AMATO A., op. cit.

[6] BOYLE F. A., *The Creation of the State of Palestine*, in: *EJIL* (1990), pp.301-306. BOYLE F. A., *Creating the State of Palestine*, in: *The Palestine Yearbook of International Law*, Vol. IV (1987/88), pp.15-43;

[7] MALBERG R. C. de, *Contribution à la Théorie Générale de l'Etat,* Tome II, 1922, p.484.

There are several definitions of the State, but the minimalist legal definition is the following:

> "A state has cumulatively -as constitutive elements- a people, territory, and sovereignty and they must be interrelated".[8]

The French jurist Carré de Malberg, wrote in his '*Contribution à la Théorie Générale de l'Etat*', since 1922:

> « Tout, ce que peut faire le juriste, c'est de constater que l'Etat se trouve formé a partir du moment où la collectivité nationale, fixée sur un certain territoire, possède, en fait, des organes exprimant sa volonté, établissant son ordre juridique, et imposant supérieurement sa puissance de commandement ».[9]

Accordingly, the existence of the PLO, the Palestinian people, and the territory (West Bank + Gaza Strip) are not enough individually. It is necessary that there is a direct inter-relationship between these three elements. This condition did not exist before the proclamation of independence, and the proclamation of independence did not make any significant changes in this established fact.[10] Besides, the recognition of other countries does not represent a component of Statehood. It is only an expression of the desire (or refusal) of the other countries to collaborate with the new State (in so far as that it exists); in fact, the majority of the countries recognised the new State of Palestine more as a legitimate aspiration than an existing reality. It is true that GA took note of the proclamation of the Palestinian State by the PNC and agreed to replace the designation 'PLO' to that of 'Palestine'. However, this change of name did not alter its legal status as observer, since the adherence to the UN system is reserved for States only.

In the Palestinian case, the nation therefore, exists prior to the State, independently of it, and can justify the creation of a State. The declaration of independence remains a reflection of the mental attitude of the people, their sufferings, their vision of a state which they want to create, and engagements in which they would like to take part, in order to become members of the international community.[11] At this point, the importance of such a declaration did not lead to the independence of the State of Palestine but was a contribution towards it.

Moreover, one needs to put the declaration in its context: it should be considered as a concrete gesture in support of the *Intifada* which, by that time, had celebrated its 11th month,[12] and as an epic symbol of affirmation that the Palestinian cause is reasonable and has an international legitimacy.[13]

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[8] This was the definition made by the German jurist Georg J. Jellinek (1851-1911). Cf. TÖPPERWIEN N., *Nation-State and Normative Diversity*, Bâle/ Genève/ Munich, 2001, pp.20-21.
[9] MALBERG R. C. de, *Contribution à la Théorie Générale de l'Etat,* Tome II, 1922, p.484.
[10] DAJANI B., *Stalled Between Seasons: The International Legal Status of Palestine during the Interim Period*, in: *Denver Journal of International Law and Policy*, Vol.26, No.1, 1997, p.60. Omar M. Dajani, at that time was Law Clerck to Judge Dorothy Nelson, United States Court of Appels for the Ninth Circuit. He is now teaching at the University of the Pacific, McGeorge School of Law.
[11] AL-QASEM A., *Declaration of State of Palestine: Backgrounds and Considerations*, in: *Palestine Yearbook of International Law*, IV, 1987/8, p.327. Dr Anis Al-Qasem, Chair, PNC Legal Committee.
[12] DAJANI B., op. cit. p.58.
[13] DAJANI B., op. cit. p.59.

Throughout the 20th century, the Palestinian people made considerable attempts to obtain national independence – confirmed by DAJANI- by seeking the international recognition of their right to freely determine their political status in the territories which they claim to be theirs.[14] Despite all the sacrifices, the Palestinians did not succeed in establishing their State. KHALIDI wrote:

> "The story of Palestinian identity would thus appear in sum to be one of both failure and success. It has been a failure in that in spite of all their sacrifices over so many generations, the Palestinian people have not so far achieved the self-determination and control over their own lives for which they have been striving for so long… This story has been a success in that a Palestinian identity has asserted itself and survived against all odds, and in spite of the many failures we have touched on".[15]

The reason behind this failure is the Israeli military occupation of the Palestinian territories which has lasted since 1967. Palestine is not yet a State but it remains the homeland of millions of Palestinians who continue to consider themselves as such and who, to quote Edward Said, always saw in their fight, from the very start, a battle for sovereignty of the territory.[16]

Which kind of State do Palestinians want?

If Palestinians are asked about their opinion on the State they wish to have, many answers are given together with all conceivable solutions (and even contradictions). By temperament, -to quote Salafeh HAJAWI- the Palestinians have not been able to decide in favour of any defined objective for their national fight. Some want a Palestinian State extending to all the territory of historical Palestine; some do not want a Palestinian State at all, but aspire to the establishment of an Arab or Islamic State; some would be satisfied with a Palestinian State within the framework of the 1967 borders, even if a few of those consider that this solution is only a strategic and transitory solution, whilst awaiting the recovery of all of historical Palestine; and others think that a State which would be completely dependent on the Jewish State, would be acceptable.

Nevertheless, there is one common issue: the desire to establish a State. This has always been of extreme importance to the Palestinian national movement; besides, the State has always represented for the movement -and continues to do so- the only means by which Palestinians are able to preserve their territory, and continue to exist as a [united] people. According to AL-QASEM, the Palestinian people have never abandoned the idea of having their own independent state, which has been their demand since the British mandate period.[17]

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[14] DAJANI B., op. cit. p.27.
[15] KHALIDI R., *Palestinian Identity, the Construction of Modern National Consciousness*, Columbia University Press, New York, 1997, pp.208-209. Rashid Khalidi Professor of History and Near Eastern Languages and Civilizations; Director of the Center for International Studies. D. Phil. Oxford University 1974.
[16] SAID E., *« Gaza-Jericho » American Peace {Arabic}*, 1994, p.66. I assume responsibility for the translation; the original text is in Arabic.
[17] AL-QASEM A., op. cit. p. 315.

This is what explains the changes in the position of the Palestinian leadership in relation to the State. Initially, it evoked a *democratic Palestinian State* (a government for all Palestine as in the Palestinian Charter). Following the war of October 1973, they started to speak about a *fighting national authority*, as the first strategic step towards a democratic State; and when the PNC proclaimed the independence of the State of Palestine in 1988, the State had become synonymous with 'The West Bank, Gaza Strip, and Jerusalem East as capital'.

Within the framework of the Oslo Agreement, the Palestinian leaders returned to the idea of an *autonomous (National) Authority*, like a transitional solution, even if the intentions of the two parties differed with regards to the contents of such transitional period and its objectives. This explains the current contradiction: on one side, the continuing Palestinian preparation for Statehood - within the framework of the 'two States solution', adopted by the Quartet in the 'Road Map', which was applauded by the UNSC and UNGA; while on the other, Israel continues to do everything it can in order to make it impossible to have a viable Palestinian State in the future.

The legitimate Palestinian representatives

The Declaration of Algiers is not the first declaration of independence. Some Palestinians brought together in Gaza have proclaimed independence and the establishment of a so-called government of 'All Palestine' (*hukumat umum falasteen*) since 1 October 1948. The above-mentioned declaration did not lead to the establishment of a Palestinian State because The Mandate for Palestine, following the *Nakba* (*Independence* for the Israelis) was divided *de facto* into three parts: the first, the territory of the new State of Israel; the second, hereinafter called the West Bank, unified with (or better, annexed to?) the Emirate of Transjordan, thus forming the Hashemite Kingdom of Jordan; and the third, the Gaza Strip, even though it was never officially annexed, was administered by Egypt.

The Declaration of Algiers is not even meant to be the last declaration of independence! The date of 4 May 1999 (five years after the Interim agreement) was fixed as the date for the Declaration of the Palestinian State. Yasser Arafat's decision to postpone this Declaration to an unspecified date was not only related to Israeli protests and her threats to stop the negotiations, but also because the interim agreements had not been implemented and no final arrangements had been agreed. Nevertheless, the deterioration of the situation in the Palestinian territories was accompanied by an increasing international conviction for the need to find a peaceful solution to the Israeli-Palestinian conflict; "two peoples, two States" is the magic formula presented by the international actors, later adopted as the Road Map.

The international community shares -almost unanimously- the conviction that a resolution of the Israeli-Palestinian conflict is necessary for stability in the region. The so-called peace process, started at the beginning of the '90s between the government of Israel and PLO, formalised through several agreements, in particular the Declaration of Principles, should not be considered as a peace agreement, but rather, as a declaration of peaceful intentions by the

legitimate representatives of the two entities. That means a recognition by one of the existence of the other and of its right to existence, and thus to security and to development.

The Oslo peace process failed and added confusion to the already complicated situation. One of the most important – but the least considered - effects of the Oslo Agreement is the stressing of the distinction between the Palestinians of the West Bank and Gaza Strip on the one hand, and the other Palestinians dispersed throughout the world and the Middle East, especially those who still live in the refugee camps. That is an inevitable consequence of the distinction between what is transitory and what is permanent.

On the other hand, there is a quasi-unanimous recognition of the Palestinian people (through the recognition of the PLO as a liberation movement) as subjects of international law in spite of the fact that a Palestinian State does not exist. This recognition is expressed in different ways, for example, the exchange of 'diplomatic' delegations or representatives and the stipulation of international agreements... However, the only legitimate body entitled to represent the Palestinian people remains the PLO and its institutions even if – admittedly - the Palestinian Authority (PA) is playing an increasing role in the international arena.

In fact, it can be noticed that the centre of Palestinian political gravity is slipping from the PLO to the PA. Simultaneously, a transition has occurred away from a cause concerned with liberation towards a quasi-State that administers the population of the Occupied Territories. The Palestinian cause, which once revolved around the rights of a people, the majority of whom are in Diaspora, to self-determination, has increasingly been reduced to the question of territory and/or autonomy.

Thanks to the agreements with Israel, first legitimated by the PLO mandate and then by popular elections of 1996, the PA was created and exists and functions as a quasi-State, even though it is deprived of real sovereign jurisdiction. This caused a certain overlapping between the institutions of the PA and those of the PLO. A confusion arose which meant an increased authoritarianism in the territories under Palestinian jurisdiction and a lack of transparency. This confusion was also reflected in the way the Basic Law for the PA was approved and the elaboration of the Palestinian constitutional drafts.

In fact, adopting a constitutional document in the Palestinian case was seen to be a complicated task. As for the international community, it has shown an exceptional interest with regard to these efforts; an interest that means financing these efforts or simply providing consultations with highly qualified constitutional specialists. The international community wanted to take an active part in the efforts of construction of a transparent and qualified administration in the Palestinian territories, which will respect the state of law, Humans Rights, accountability, democracy and good governance.

These principles are in harmony, above all, with the aspirations of the Palestinian people, who took part in the constitution making efforts of the Palestinian entity through numerous conferences organised by the public and, especially, through the work of different and many international and local non-governmental organisations (NGO), that are present in the Palestinian territories, either for the preparation of Basic Law for the PA or for the preparation of the Constitution for the Palestinian State.

The Right of the Palestinian people to self-determination

Self-determination is a relatively recent phenomenon with dubious historical origin (used in order to end European colonisation in Africa and Asia, or used by the Soviet Union to assert the right of the Western populations of capitalist states to self-determination, and therefore choose Communism!) This explains also the fact that this right is potentially easy to manipulate and suffers from a high degree of practical and normative confusion.[18] In fact, sometimes self-determination can refer towards the outside (related to the phenomenon of colonisation) and other times it refers to the inside (related to the phenomenon of democratisation). In this paper, self-determination of the Palestinian people refers to the first meaning, with the intention of liberation from foreign and hostile occupation.

Nevertheless, the right to self-determination as a general principle of international law is no longer seriously disputed; in fact, it can, without any hesitation, be confirmed that it is even recognised as *ius cogens*.[19] The problem starts when it is necessary to know *who* has the right to self-determination and *how*. In other words, the problem is of knowing who forms a people and which of them can assert the right to a State, and thus, to contradict another fundamental principle of international law, the principle of sovereignty of States which forms the fundamental pillar of the so-called 'international community'.

It is thus not a question of States accepting recognition to the right of self-determination for all those who pretend to form distinct people, but rather, this principle remains the legal basis on which the fight of the Palestinian people for their national independence is based.[20] In fact, in the definition of colonisation - made in the first paragraph of the declaration of the colonisation of 1960 - is very large and can easily include the two *sui generis* situations: Palestine and South Africa.[21] Moreover, it can be seen that there is an international recognition of the existence of the Palestinian people, and an admission of the fact that these people are entitled to inalienable rights. For this reason, States enter into relationships with those who represent these people, the PLO, who negotiate with Israel to join a final agreement and thus, put an end to the Israeli-Palestinian conflict.

The State of Palestine does not exist indeed; however, this fact does not diminish the right of the Palestinian people to self-determination, since the exercise of this right is not limited to those who make a part of a State, and it does not necessarily lead to the establishment of a State.

Thus, the principle of self-determination becomes a legal right the moment it is called upon, by a group recognised as constituting a people, and in relation to a territory which can be deemed a unit for self-determination; according to DAJANI the Palestinian people meet these two criteria.[22] The same author specifies Palestinians were, at the beginning, defined by

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[18] DREW C., *Self-Determination, Population Transfer and the Middle East Peace Accords,* in: BOWEN S. (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories, International Studies in Human Rights*, vol.52, 1997, p.120.
[19] DREW C., op. cit, p.120.
[20] DAJANI B., op. cit. p.29.
[21] DREW C., op. cit. p. 125.
[22] DAJANI B., op. cit. p.33.

what they were not (non-Jewish communities of Palestine); later, and following the *nakba*, the Palestinian question was particularly regarded as a question of refugees, in other words, as individuals who have rights and not a community. During the 1960s, multiple factors played an essential part in the recognition of Palestinians as a people, well distinguished from the others.[23]

Palestinian nationalism is among the strongest national movements in the Middle-East. It developed in close connection with Arab nationalism, either, in the beginning, in its extreme sense (finalised with the construction of an Arab State for all –or at least, the majority of Arabs), or, later, in its moderate and pragmatic sense, which was intended to coexist with the current Arab territorial States. However, these modern Arab States undergo the most serious and dangerous crisis for their stability and their very existence. However, it is precisely in this continual research of a proper Arab identity and a Palestinian one in particular, that the Palestinian people intend to take their first steps towards modernity.

Now, what makes the Palestinians one people? The simplest answer, even naïve, is the following: Palestinians have, above all, a common culture (language, history, habits, religion...); this answer is not satisfactory because these elements are common with other Arab populations. There are two other elements which may distinguish Palestinians from Jordanians, Egyptians, and so forth.

Firstly, the Palestinian consciousness of being a people - a consciousness which was without doubt influenced by Zionism; however, as stated by KHALIDI it is an error to suggest that the Palestinian identity emerged mainly as a response to Zionism. For him, the nationalism of the nation-state developed in other Arab countries (Lebanon, Syria, Egypt, Iraq, Jordan) independently of Zionism.[24]
Secondly, the recognition of the Palestinian people by the others; in fact, no people or nation-state (in contrast to individuals) lives alone. People interact because they are interdependent. For that matter, each nation by necessity contains an idea of inclusion, since A, B, C form a people, but it also contains an idea of exclusion because 'all the others' are not members of this group or community.

There are various categories of 'others': the others can be friends, enemies or simply indifferent to us. One and the other, thus, represent similarity and difference. The differences, in whatever form, should not be the reason for exclusion of peaceful coexistence. In fact, as confirmed by SHULTZ, the groups which define themselves in categories of different cultural identities do not necessarily have to end up in conflict.[25]

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[23] DAJANI B., op. cit. pp.33-45.
[24] KHALIDI R., op. cit. p.20.
[25] SCHULZ H. L., *Identity Conflicts and Their Resolution: the Oslo Agreement and Palestinian National Identities,* in: WIBERG H. & SCHERRER Ch. P. (Ed.), *Ethnicity and Intra-State Conflict, Types, Causes and Peace Strategies,* 1999, p. 231.

How can Palestinians carry out their right to self-determination?

If the Palestinians are a people, and if they are entitled to the right to self-determination until the establishment of an independent State, and if this right is not in fact satisfied because of an Israeli military occupation, how can the Palestinians carry out this right? The editor of 'Le Temps', a Swiss daily newspaper, wrote on 19 April 2004, following the assassination of Abdul-Aziz Al-Rantissi, that the Palestinians were never so transparent and their rights so ignored like today. In fact, the goal of such military operations – according to Azmi Bishara- is to break the *will of the Palestinians.*

This new -or is it old? - reality makes it incumbent on the Palestinians to choose, and expediently, between two options: either they forget their cause and believe that they simply do not exist; or they continue to believe in it and work towards their objectives; but how? The occupation - wrote Edward Said- is not ended voluntarily or unilaterally by the occupying forces; nor does it end through negotiations completely controlled by the most powerful party.[26]

Some Palestinians believe that force is the only solution. Some do not rule out force, but think it has to be a last resort. Still others reject violence on principle. The right of self-determination for nations under occupation means above all the right to resist. Force is permissible, but resistance comes in other forms as well. Nevertheless, the use of force should be within the framework of commitments to international humanitarian law. In other words, self-determination does not grant those living under occupation the right to violate humanitarian principles.[27] Accordingly, it is unacceptable that some groups of Palestinian resistance use the force against Israeli civilians (suicide attacks on buses, for example). It is clear that these acts are related to the Israeli military occupation which can explain them but never justify them.

Moreover, following the attacks of September 11, and the successive total war against terrorism, there is confusion at the international level, between two concepts which should well be distinguished: resistance and terrorism. In fact, there is a serious risk which falls on the Palestinians, that is the risk to be converted, in the eyes of the world, from a people who seek his independence to cruel gangsters and 'terrorists'. Now, the suicide attacks contribute to diffuse and worsen this confusion; consequently, we can confirm that such acts are also to consider as counter-productive with regards to legitimate aspirations of the people Palestinian and its national interests.

In an article published in March 2004 (On… Resistance), Dr. Eyad SARRAJ, a Palestinian humanitarian activist, wrote:

> The real victory over evil is not by killing; but rather, through the victory of moral values that we adopt and are set in all religions… Our duty should be to unmask the Israeli practices and its human rights violations and its determined attempt to destroy peace… but we have to be careful not to slide into their shoes.[28]

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[26] SAID E., op. cit. p.94.

[27] for complete analysis, pleas read KHALIL A., *Rules of Engagement*, in: *Alahram Weekly*, 13-19 May 2004, n.690.

[28] The article of Dr. *Eyad Sarraj* (On… resistance) was published in the Webpage www.amin.org following the assassination of *Dr. Al-Rantissi.*

On the other hand, among some Palestinians, there are those who consider that using force, in international and internal contexts, is an erroneous choice because of the significance of force. They prefer non-violent means, diplomatic and political.

- *The General Assembly and the Security Council*

Palestinians take part in the activities of GA (as an observer) which, on several occasions, condemned the Israeli military occupation. However, its resolutions are not legally binding. The SC, the only UN institution able to take measures against a State which threatens international peace and makes serious violations of human rights, is easily blocked because of its voting system which affords permanent members the possibility of blocking resolutions that they may consider as 'inappropriate', according to their national interests. That explains the existing double measures: rapid reaction of the SC following the occupation of Kuwait by Iraq, while Israel continues to occupy Palestinian territories since 1967.

- *International Court of Justice (ICJ)*

The ICJ has two competences: a) to make judicial decisions on disputes that are subject to interested States and, b) on request of GA, SC, and other institutions and specialised agencies of UN, to provide advisory opinions. The advisory opinions are, by definition, non-binding neither for the States nor for the UN institutions; historically however, the UN institutions had always treated the advisory opinions of the ICJ with great respect, similar to the higher international legal institution; but this is not enough to ensure the application of international law to the Palestinian case, and thus, recourse to the ICJ will not lead to satisfaction of the aspirations of the Palestinians.

- *International Criminal Court (ICC)*

The development of the International Humanitarian Law (IHL) led to the creation of the ICC which signalled perhaps, the beginning of a centralised system of international penal justice, intending to persecute those suspected of committing international crimes. However, its jurisdiction is limited by: a) the nature of the crimes: only international crimes stipulated in the statute of the ICC can be considered; b) the time factor: only crimes committed since 1 July 2002, the date when the Treaty of Rome was enforced can be considered, and especially, c) the recipients of such norms who are Member States.

Israel did not sign or ratify the Treaty of Rome; it is thus outside the jurisdiction of the ICC. The status of IPC envisages the possibility of citing, under the premise of justice, a state which is not a member: but only on the request of SC. Then again, the procedure can be blocked by the SC voting system. The ICC does not represent, therefore, an interesting option for the Palestinians. It is not at all clear how Israel can be obliged to withdraw from the occupied Palestinian territories and to stop putting obstacles in front of the realisation of the Palestinians' right to self-determination; however, it is clear that it would not be possible through the current international institutions. What are, therefore, the alternatives that can be proposed?

Palestinians should not underestimate the role of Israeli public opinion: its power to exert enormous pressure over the Israeli government; its power to encourage the application of

international humanitarian law; and its power to end occupation of Palestinian territories. An important role can also be played by the Israeli Supreme Court, which could change its passive position. It is of extreme importance for Palestinians and Arabs to focus on an organised international "information campaign," for example through mass media, conferences and workshops. These and other initiatives would unmask the true face of occupation and show the realities experienced by Palestinian civilians. This would rouse support from the populations of other States (in Europe for example) for legitimate Palestinian aspirations to end occupation, and would pressure their governments in to taking a different stance.

In this regard, some Palestinian practices, such as suicide attacks – although the result of, but not necessarily justified by - an occupation that has continued since 1967 –may actually harm Palestinian national interests and have negative effects on the realisation of Palestinians' legitimate ambitions, since they allow Israel to justify its inhumane actions towards Palestinian civilians and to the Israeli and international public.[29] For this reason, it is necessary to encourage contact between the two civil societies, the Palestinians and the Israelis, even during the conflict. At this point, the importance of the Geneva initiative, which was signed by the Palestinian *Abed Rabbou* and the Israeli *Youssi Belin*, as private individuals and not as representatives of their governments, caused the most contradictory reactions.

The legal Status of the Palestinian Territories

Notwithstanding Judge Dillard's assertion in the *Western Sahara Case*:

> "it is for the people to determine the destiny of the territory and not the territory the destiny of the people".[30]

The territory, however, has proved to be significant in determining whether and how a given people will exercise self-determination- as put forward by DAJANI.[31] Consequently, it is necessary to qualify those territories that constitute the core of Palestinians claims. What is, therefore, the status of the Territories conquered by Israel in 1967? The answer to this question is important because it determines in the short term, the applicability of International Humanitarian Law (IHL), and in the long term, it can decide the entitlement to sovereignty of these territories, since the right of the people to self-determination depends also on the status of the territories to which they lay claim. According to BASSIOUNI:

> "In the abstract, people determine their goals regardless of geographic limitations; however, realistically, [self-determination] is exercisable only when it can be actuated within a given territory susceptible of acquiring the characteristics of sovereignty.[32]

[29] This was the conclusion after a detailed analysis of this question in an article that we published in International Politics Journal, April 2004.
[30] DAJANI B., op. cit. p.31.
[31] DAJANI B., op. cit. p.31.
[32] DAJANI B., op. cit. p.45.

In other words, it is not enough that there is a Palestinian people who are entitled to self-determination, it is also necessary that the occupied territories form a viable unit for the exercise of that right. The intention of Israel was always to prove the opposite by placing obstacles in the way. This intention can explain the Israeli policy in relation to the settlements in the occupied territories, and more recently, to the policy of the Separation Wall.

For the Palestinians, the territories conquered by Israel in 1967, are occupied territories; the UN resolutions and the States official statements, had adopted this position. The only protagonist to refuse this concept is the State of Israel, which considers these as disputed territories! It is rather the status of these territories which is disputed and not the territories themselves, which are indeed occupied territories, following the Six Day War and recognised as such by the international community. In fact, a territory is considered occupied -according to The Hague Regulations Article 42 - when it is placed under the authority of a hostile army.[33]

On 22/11/1967, the UNSC adopted Resolution 242 which called for the withdrawal of Israel from 'occupied territories' without the definite article 'the'; Israel regards this omission as an adoption of its own version in relation to the status of the occupied territories following the Six Day War. There is no doubt that this omission was not completely innocent but it is also true that the destiny of a whole people cannot simply depend on one definitive article which has been omitted! In fact, it is necessary to read this Resolution in the light of all other UN Resolutions, including the SC Resolutions.

By way of example, the SC Resolution 338, adopted on 22 October 1973 calls upon parties to stop fighting, to respect the cease-fire and to apply Resolution 242. In these two resolutions, SC underlines the inadmissibility of the acquisition of territories by the war. In 1979, SC comes to a conclusion about the establishment of the settlement colonies in the occupied Palestinian territories. In Resolutions 446 and 452, it condemns Israeli policy and the practice of establishing settlements in the 'occupied Arab territories' and

> "*Calls once more upon* Israel, as the occupying Power, to abide scrupulously by the 1949 Fourth Geneva Convention, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories".

The GA dedicated most of its Resolutions to the question of Palestine. Suffice it to mention here, by way of example, Resolution 3236 of 22 November 1974, where the GA

> "*reaffirms* the inalienable rights of the Palestinian people in Palestine, including: (*a*) The right to self-determination without external interference; (*b*) The right to national independence and sovereignty";

[33] GASSER H.P., *The Geneva Conventions and the Autonomous Territories of the Middle East*, in: BOWEN S. (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, *International Studies in Human Rights*, vol.52, 1997, pp. 291-292.

The Applicability of International Humanitarian Law on the Palestinian occupied territories

This so called Geneva Law accompanied the Hague Law, or the 'Law of War', which refers to the declaration of St Petersburg in 1868 and the successive agreements and conventions that aimed at limiting the use of certain kinds of arms in international conflicts.[34] The term 'international humanitarian law' or simply 'humanitarian law' was first used in 1945 and found its origins in the Geneva and Hague laws. It was not until 1977, though, that this term was officially used in two protocols, which completed the four Geneva conventions of 1949. These new conventions extended the protection to civilians in 'internal wars'.

The major difference between the Geneva and Hague laws is that the first is interested mainly in the protection of civilians and those no longer able to fight, in any conflict, and is applied to both states and militant groups. The Hague Law, meanwhile, aims to limit the use of certain arms that have devastating and harmful effects on civilian populations.[35]

According to the ICRC, international humanitarian law is

> "the body of rules which, in wartime, protects people who are not or are no longer participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict. The four Geneva conventions of 1949 and their two additional protocols of 1977 are the principal instruments of humanitarian law".[36]

Now, the International Committee of the Red Cross (ICRC) confirmed on several occasions the applicability of the 4th Geneva Convention (GCIV) in the territories occupied by Israel in 1967. At the time of XXIV International Conference of the Red Cross (Manila 1981), a resolution was passed in which it reaffirms the applicability of 4th Geneva Convention to the occupied territories of the Middle East.

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[34] Since ancient times, there has been a desire to render war more 'humane'. In around 500 BC, Sun Zi of China wrote The Art of War, in which he recommends that victory over enemies be won in a moral fashion, without harming civilians and their property. This book can be considered an ancient version of what we today call international humanitarian law.[34] This desire had religious and philosophical origins. Most religions, especially Buddhism, Judaism, Christianity and Islam, impose limits on the use of violence during war against certain groups, such as civilians, and more particularly women, children and the elderly. Philosophers started to focus on human dignity and the gradual limitation of state power in peace time, the motivation being to lessen the suffering of the victims of armed conflicts and populations under occupying powers, to control the use of arms, and to limit the damage of war. The flourishing of modern international humanitarian law, though, started outside religion and philosophy. This law is based on the principle of 'neutrality' since the only thing that it considers is human suffering, independently of what an individual was doing before. An important text in this regard was written by Swiss businessman Henri Dunant, who was deeply moved by the devastating effects of the battle of Solferino (which left 40,000 killed and wounded) to start, in 1863, the Red Cross and the beginning of what is called the 'Geneva Law' in 1864. ALLEND D., RIALS S., *Dictionnaire de la Culture Juridique*, PUF, 2003, p.487.

[35] For more details, KHALIL A., *Is Israel Obliged to Implement International Law ?,* in: *The International Politics Journal,* Caire, April 2004.

[36] The official site of ICRC..

On different occasions, the ICRC confirmed that the conditions for the application of 4th Convention are fulfilled in the case of the territories occupied by Israel, including the West Bank, East Jerusalem, The Gaza Strip and Golan. This was also the case in the ICRC reports of 1988, 1989 and 1991 for example.

From 1997 to 2001, a multilateral process was set up, on the initiative of UNGA. The purpose was to convene a Conference to decide the measures to be taken in order to impose the GC IV in the occupied Palestinian territory and to ensure its respect. Following the Report of the Secretary-general of UN during meetings of experts, the process led, in December 5, 2001, with a Conference of member States to the GC IV which was held in Geneva. The ICRC participated actively in this process. In particular, the ICRC made a declaration which was annexed to that formulated by the High Contracting Parties at the end of the Conference, in accordance with various Resolutions adopted by the General Assembly and the Security Council of the United Nations, and by the International Conference of the Red Cross and the Red Crescent, reflecting the position of the international community:

> « le CICR a toujours affirmé l'applicabilité de jure de la IVe Convention de Genève aux territoires occupés depuis 1967 par l'Etat d'Israël, y compris Jérusalem Est. Cette Convention, qui a été ratifiée par Israël en 1951, reste pleinement applicable et pertinente dans le contexte de violence actuel. En sa qualité de Puissance occupante, Israël est également lié par d'autres règles de droit coutumier relatives à l'occupation, qui sont énoncées dans le Règlement annexé à la Convention de La Haye du 18 octobre 1907 concernant les lois et coutumes de la guerre sur terre ».[37]

How Israeli domestic law deals with international law?

According to Anis Kassim, Article 35 of Order No 3, issued by the Israeli military governor on 7 June 1967, states that

> "the Military Court… must apply the provisions of the Geneva conventions dated 12 August 1949 relative to the protection of civilians in time of war with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail".

According to Kassim, this article was deleted by virtue of Order No 144 of 22 October 1967, hence stripping the Palestinian population of the protection of the Geneva convention of 1949.[38]

Following the common law tradition, Israeli courts distinguish between customary international law, considered part of domestic law –binding without transformation by statute,

[37] The declaration can be consulted online http://www.aidh.org/Droit_Humanitaire/actu01-decla-finale.htm .

[38] KASSIM A., *Legal Systems and Developments in Palestine*, in: *Palestine Yearbook of International Law,* Vol. I, 1984, pp.29-32. Dr. Anis Kassim, Attorney, Member of the Bar of the Hashemite Kingdom of Jordan. Member of Palestine National Council.

unless in conflict with existing statute– and treaty-based law, which has no legal effect unless incorporated by statute. As such, the Hague regulations of 1907 are enforced by the Israeli Supreme Court with respect to governmental action in the occupied territories, whereas the fourth Geneva convention, of 1949, deemed a constitutive treaty, is not enforced by the court. At the same time, Israel's official position of refusal to apply *de jure* the Hague regulations in the "territories" of 1967 is explained by its assertion that the Israeli presence is not an occupation but an administration in absence of sovereignty.[39]

Still, the Israeli Supreme Court recognises the necessity to apply de facto the humanitarian provisions of the fourth Geneva convention.[40] The *de facto* application is different from *de jure* since there are no possibilities to persecute government violations of these acts judicially. In fact, the international community has through various resolutions and recommendations urged Israel to recognise the *de jure* applicability of international humanitarian law in the occupied Palestinian territories in line with UNGA resolution 58/97 of 17 December 2003.

According to Eyal Benvenisti, the Israeli Supreme Court's rationale can be found in the same principle as the separation of powers.[41]

> « The decision of the Supreme Court to invoke doctrine with respect to the status of the treaties, rather than with respect to the government's ratification power, is a political decision aimed at granting the government more leeway in the international arena… The Supreme Court was quite willing in the early days to embrace international norms by adopting a monist approach to international law. Later, though, security considerations came to the fore, altering the court's attitude ».[42]

We firmly believe that Israeli courts may impose the international humanitarian law, including the Geneva conventions and their protocols, without necessarily renouncing its dual approach towards international law, at least for two reasons:

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[39] Cf. DORNIER N., *Audience du 21 Novembre 1988 devant la Haute Cour de Justice de Jérusalem Relatif à la Fermeture de l'Association In'Aash El-Usra*, Palestine et Droit, No 3 (1989), pp.32-33.

[40] BENVENISTI E., *The International Law of Occupation*, pp. 110-111.

[41] Israel signed and ratified a number of International Human Rights instruments:

Human Rights Conventions	Signed	Ratified
The 1966 Covenant in Civil and Political Rights	19/12/1966	18/8/1991
The 1979 Covenant on Economic and Social Rights	19/12/1966	18/8/1991
The 1979 Convention on the Elimination of Discrimination Against Women	17/7/1980	23/7/1991
The 1984 Convention against Torture	22/10/1986	4/8/1991
The 1989 Convention on the Rights of the Child	3/7/1990	4/8/1991

BENVENISTI E., *The Attitude of the Supreme Court of Israel Towards the Implementation of the International Law of Human Rights*, pp. 207-221.

[42] BENVENISTI E., *ibid.*

First, while many treaties are binding only on states that take part, some treaties and conventions are the codification of customary international law (CIL), which is applicable to all states, including those not participating. In other words, the codification of CIL aims to enhance its application rather than to excuse those states not participating. Still, the problem is how to distinguish between regulations that are part of CIL and convention-based regulations. It is of great importance not to leave this task to unilateral decision-makers in each state but rather to experts on international law.

Second, a (relatively) new phenomenon is the codification of international law in multilateral treaties that helps to spread and to enhance certain international regulations to the point that they are considered binding by almost all states, for a period of time, independent of the treaty. In other words, the codification of international law may include customary international law and may create new laws. This is happening with the application of international humanitarian law on civilians during armed conflicts.

Any Justification for constructing a Wall/fence in the Palestinian territories?

Several authors wondered about the 'real reason' behind the wall that Israel is building in the West Bank; their question can be reformulated as follows:

- *Is it true that The Wall is necessary for the security of Israel?*

The insecurity of Israel and its citizens is related to a military occupation of another people; Israel will obtain security by ending the occupation. The Wall consolidates this occupation considerably and therefore, cannot guarantee the desired security.

- *Let us suppose that the wall is necessary for security, is it really indispensable to annex -de facto- Palestinian territories in the West Bank?*

If the wall is to be considered as the best solution in the worst scenario, why does it not follow the 'Green Line'? The actual boundary of the wall, in fact, encompasses the West Bank to include the settlements. This leads to the belief that the 'theory' behind the erection of the wall is not security, but to annex more Palestinian territories and remove more Palestinians from these territories.

- *Let us suppose that the wall in its current plan is necessary for the security of Israel; is this sufficient to justify the violation of the IHL?*

The ICRC expressed considerable doubts on this subject. In an official declaration, the humanitarian organisation condemned the suicide attacks and recognised the need for Israel to take measures to protect its population; however, these measures -in terms of the ICRC- must respect the IHL.[43] Besides, the IHL, either customary or conventional, is applicable in a situation which is, by definition, serious and critical; in case the States or the armed groups

[43] Published in the official site in the ICRC.

decide unilaterally to excuse themselves from applying them each time they think it is necessary, then the IHL would be useless.

In fact the GCIV envisaged only *one exception* from the general rule – *military necessity* (the application of the GCIV Regulations during international or civil war, or during a military occupation). This clause derogates from the general rule because it was intended to create a balance between the sense of justice and humanity from the one side, and the necessary adherence by States to the terms and conditions of the general rule, on the other.

In its Resolution ES-10/14 of 8 December 2003, the GA decided to submit a request to the ICJ for an advisory opinion on the legal consequences of construction by Israel of a wall in the occupied Palestinian territories. The ICJ has issued an advisory opinion on July 9, 2004 on the request of the GA regarding the 'legal Consequences of the construction of a wall in the Occupied Palestinian Territories. According to ICJ,

> "The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law".

Accordingly, it can be confirmed without hesitation, that it was not a question of justifying the Separation Wall in the name of the military necessity, nor was it a necessity *tout court.*

Conclusion: New (missed?) occasion for peace

Immediately after his election, *Mahmoud Abbas (Abu Mazen),* the new elected PA president, began to receive positive reactions from all over the world: besides the United States promise of 365 million dollars and the European Union's undertaking of financial and technical aids, the Israeli government approved the evacuation plan from five Palestinian cities and the liberation of hundreds of Palestinian prisoners. The implementation of those promises will depend mostly on the 'good behaviour' of Palestinians. Should the Palestinian resistance groups break the cease-fire, Israel will react. Israel, then, may postpone, suspend or cancel her programme to evacuate Palestinian cities, resume the physical elimination of the *'wanted'*, and break off the dialogue with the Palestinian Authority.

Nevertheless, far from denying the importance of democracy and its existence in Israel, one can notice easily that the particular system in Israel is the obstacle to signing and implementation of a peace treaty with the Palestinians, based on international legality and the end of the longest occupation of recent history. Beside its particularity of dealing international law, Israel had a particular electoral system and a particular decision making process in the cabinet that complicates the task of decision makers in Israel.

- *The Israeli electoral system:* All the country is considered as a unique electoral circumscription. The party that obtains at least 2 % of the ballots, according to the proportional representational system, obtains a seat in the Knesset, the Israeli parliament. Consequently, in order to ensure its survival, the party that obtains the majority is constrained to look for

coalition with smaller parties, mostly religious ones (24 governments out of 29!). This explains, for example, why successive governments, without distinction between left or right, have always constructed new settlements in the Palestinian territories, despite large opposition of public opinion.

- *The decision-making process in the Israeli Cabinet:* In the case of dissension within the cabinet, the prime minister, elected directly, submits his decisions to the cabinet's vote, which may also hold a different opinion, ignoring the commitments of prime minister to the international community. For example, after the Knesset's approval of the Gaza disengagement plan, the national government approved the first step on 21 February, thanks to the support of Labour ministers. The plan includes another four steps that require cabinet approval which is not guaranteed since the National government may disappear long before implementing the plan.

This situation needs to change, especially in a context of confusion inside Israel, considering the future of the Occupied Palestinian Territories (still called in Israel by their biblical names) as an internal-national issue. We firmly believe that the future of the Palestinians, shall not –or, at least, shall not only- be dependent of the will of the Israelis. The Israeli-Palestinian conflict is related to the Israeli military occupation of the Palestinian territories since 1967. No peaceful resolution of the conflict, therefore, is possible without giving to the Palestinian people the possibility of establishing their own State, on their own territory.

The Israeli Palestinian conflict is one of the most complicated conflicts in the world, because there is a mixture between religion, politics, economy and culture. Consequently, its resolution, does not depend solely on territory but also in reconciliation between the two peoples. The reconciliation means not only the discovery of a people and its own identity but also the discovery of the other, exactly as they are, or as they would like to be considered. Reconciliation hardly means disregarding history but, on the contrary, to think on this painful and bloody period and to consider the conflict within its historical dimension. Only by doing so, can the two peoples consider the existence of each other and accept each other as being entitled to inalienable rights. Peace here is not an alternative but the only solution for regional and world stability.

The Palestinians and the Israelis can discover their national identity only in relation (not necessarily in conflict) to the other because one is the mirror image of the other. This means that Palestinians cannot simply be unaware of the existence of the other's nationalism which has justified their sacrifices for almost a century, and vice versa. Peace negotiations is much more difficult than to begin a war; the reconciliation should be based on compromise, not on revenge.

Recent internal Palestinian developments show that Palestinians start understanding that the right to self-determination is not enough in itself, since the "right" depends mostly on the existing relations of force between States, and/or other international subjects and actors in an

international community that lacks a central executive power. Besides, they discovered that being a victim is no longer enough to obtain justice. A people, in the name of self-determination, cannot violate other binding international laws without risking the legitimate basis of its right to resist occupation.

Nevertheless, conscious that making peace is much more difficult and sophisticated than declaring war, Israelis and Palestinians need to be much more attentive in not repeating the errors of the recent past. This time, Palestinians must be much more sensitive to Israeli needs for security, and the Israelis to the necessary economic improvements in the Palestinian territories. But this is not enough. Israel must ensure the application of its programme without further delay, cease building settlements in the West Bank and cease confiscating Palestinian lands to construct the Separation Wall. Recently, an Israeli journalist wrote that the Palestinians and the Israelis seem to be like two exhausted boxers who are waiting for the end of the match, regardless of who has won or lost! It is hoped that this occasion will not be reduced to a mere disengagement between the two parties in order to regain their strength for the 'next round'!