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Beyond the Armed Struggle

*The Relationship of International Law and
International Organizations to the
Palestinian Cause*

Jean Allain

Comments by

Joni A'asi
Samer Fares



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Beyond the Armed Struggle

*The Relationship of International Law and
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Palestinian Cause*

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The very essence of developing a strategic paper is that it should have policy implications. It should seek to achieve a specific end and demonstrate how those ends might be achieved. Like George Kennan's Mr. 'X' article in the 1947 edition of *Foreign Policy*, the value of such a strategic paper must be found in an analysis of the past which seeks to highlight trends which are likely to persist; while – in the Palestinian context – seeking to redirect those historical patterns in a manner which stops the continuing withering of Palestine and seeks to reverse that trend, thus creating a viable Palestinian state – secure from attack. To this end, this strategic paper considers the historical evolution of the Palestinian struggle in an era of decolonization and the establishment of a *right* of self-determination wherein the right to use armed force gained legitimacy. However, the paper goes on to consider how the events of 11 September 2001 have reversed this gain, resulting in *any* use of force by non-state actors quickly moving towards being labelled 'terroristic' no matter its previous antecedence in international law. Against this backdrop of the end of self-determination by armed means, this paper asks whether Palestinians should seek to exploit avenues of civil disobedience as a new avenue of struggle against Israel's continued encroachments.

The strategic paper uses international law as its starting point: the normative framework of international relations, and international organizations, manifest in the United Nations, to emphasize those avenues which appear best exploited in seeking to gain the objective sought. Inevitably, when considering the geopolitical and international elements of an issue, it must be made clear that the foreign strategy which emerges must be one which is meant to achieve a specific objective, but in the international arena. As a result, for such a foreign policy *qua* strategy to be developed, there must be a consensus which emerges as to the overall objective in Palestine and the manner in which that objective is best realised through international action. Thus, the paper sets out a vision, but does not seek to impose it. It asks many questions; questions which

need answering by Palestinians living under occupation, living in Israel, and living in the Diaspora. Only through the building of consensus can any strategy be expected to bare fruit.

In order to start considering the issue of the Palestinian struggle in rather frank terms, it must be recognized that the overall objective of a viable Palestinian state is limited by a legacy of an ever-diminishing land and resource base. Additionally, it is plain that the international community of states has been unwilling to act to reverse the accumulation of daily Israeli encroachment in Palestine, despite strong language to the contrary; and Palestinians have been abandoned by Arab states which, having felt the sting of a number of defeats, have come to peace with the inevitability of the State of Israel as a major military power in their midst. The isolation of Palestine and more specifically the Palestinian struggle, since the attacks of 11 September 2001, requires an evaluation of the past struggle and a realistic means of securing Palestinian Statehood on as much of historical Palestine as possible. Finally, it should be made clear that international law and the United Nations should be considered as instrumental in this struggle. They do not, in and of themselves, provide a solution to Palestinian self-determination: what they do provide is a normative framework and fora within which such a solution can emerge. Ultimately, however, Palestinians must create the conditions both at home and abroad which allows these instruments to be used to their advantage.

I. The Palestinian Struggle

The Palestinian struggle remains led by an ethos of liberation in an era where the legal right of self-determination is quickly receding from the international horizon. Born as a result of the immigration of European Jewry seeking haven in the shadow of Mount Zion in the late 1800s, the Palestinian struggle became a reality when the 'benevolence' of the Ottoman occupation was replaced by Allenby's British forces in 1917, and the move to

establish a post-First World War mandate in line with the Balfour Declaration. With the displacement of local elite, and a policy meant to create a Jewish homeland, Palestinians took on the type of guerrilla warfare which was already evident in neighbouring Egypt. While the inter-war years were marred by massacres and inter-ethnic strife between Palestinians and the ever growing Jewish immigrant population, the momentum towards open conflict was tempered by a willingness of Zionist to cooperate with the British in their war effort against German Nazism. The British – having been caught between Palestinians who believed too much was being given by the occupier to the recently arrived, and Zionists who demanded much more towards the Judaisation of Biblical Zion – sought, in the aftermath of the Second World War, to rid themselves of a situation in which both Palestinians and Zionist were targeting the 60,000 strong British military contingency which ached to be demobilized.

During the period between 1945 and 1948, it became clear that two partition plans were hatched one by the United Nations, which was doomed to failure, and a second, which Avi Shlaim describes, of the tacitly accepted perpetration of infanticide upon the newborn Palestinian State by the British, Israelis, and Jordanians, which was ultimately successful. With declarations of statehood by both Israelis and Palestinians in 1948, only the Israeli declaration is remembered, as the newly formed State of Israel was able to consolidate its control over large swaths of territory which, accompanied by the recognition of both Cold War Super Powers, meant that it had effectively imposed itself on the map of the Middle East. Since the original gains in 1948 and starting with those of the Negev and Galilee in 1949, the Israeli policy has been to establish by all means possible a viable (Jewish) State between the Mediterranean and the Jordan River. Thus, since its gains during its War of Independence, the State of Israel has undertaken a project which has been successful in continuously making facts on the ground, by taking land, and consolidating its hold on territory by various means (military might, confiscation and nationalisation, settlements, road networks, building of its

security barrier, etc.). The project of a Greater Israel, for its part, has been shelved as a result of the 1972 War and Israel's willingness to return the Sinai to Egypt in exchange for a peace treaty and the recognition of its southern border. Likewise, Operation Litani and the subsequent Israeli invasions of Lebanon failed to meet the attempt to push the Israeli border north to the Litani River; while Hezbollah managed, for all intents and purposes, to have the Israelis retreat to its northern Mandate border, where the United Nations maintains a monitoring presence.

Thus, the map of the Middle East appears set for the foreseeable future, as recognition of international borders established after the First World War and confirmed through membership of the various Middle Eastern states in the United Nations, and which seems to be accepted by all significant players. The notable exception, of course, is the territorial boundaries within former Mandate Palestine, which remain fluid. While there are clear grievances by Palestinians over the acquisition of territory by Israel since 1948, it appears plain that Israel has established, if not *de jure*, at least *de facto*, territorial control and a claim to sovereignty over lands taken beyond the Partition Plan and seized in 1948-1949 (which is tacitly recognized in UN Security Council Resolution 141), and territory occupied by Israel in the 1967 War. In other words, while the Israelis have seized the land illegally, their ability to exclusively control it means, by default, they can retain it. And that the longer the retention of land persists the more difficult it is to sustain the argument that the land should be yielded to its rightful owner, in light of its integration into the Israeli polity and an unwillingness to compel Israel to yield. Where there remains some possibility to roll back Israeli gains is to be found, not in a return to Mandate Palestine, nor even to the Armistice Line and the pre-1967 borders (though there may be accommodation here), but in attempts to end the squeeze of the last decade and a half which started with the Oslo Accords and continues with the building of the Wall within the West Bank.

While Palestinians have pointed to international law as a means

of demonstrating their grievances, they have, until very recently, failed to harness its potential. Thus, if we consider the value which international law has played in seeking to secure a viable state for Palestinians, we must conclude that it has, in very abject ways, failed. Likewise, the United Nations, although it has been a storehouse of resolutions, reports and pronouncement; has failed, at any time, to stop Israeli encroachment, let alone turn the tide. If Palestinians wish to reverse this tide of continued Israeli encroachment, they must seek to harness the potential of both international law and the United Nations to their advantage. And there is advantage in both international law and the United Nations, but these are to be found in the *idea of justice and righteousness of the cause* and the predisposition of the large majority of states in the international community to look upon the plight of Palestinians in a favourable light.

To act upon these apparently ephemeral elements one must understand that beyond raw power politics and 'realist' school of international relations (primarily because the realist/liberal dichotomy was largely discredited as a result of its theorists' failure to foresee the implosion of the Soviet Union), a more nuanced attempt to understand the manner in which international relations functions has emerged. In the post-Cold War era, a number of theoretical underpinnings have vied for acceptance in foreign policy circles, including a willingness to consider social 'constructivism' wherein not only is the amount of military hardware important, but also that ideas *matter*; that, because our lives are a social construct, those ideas which we believe in and hold dear affect international relations. It is within this realm (what the United States might call 'winning the hearts and minds') that a well thought-out and executed foreign strategy could seek to redress the balance and secure a viable Palestinian state. Let us first turn to consider the manner in which international law has been intertwined with the Palestinian issue so as to come to an understanding of its possible strengths and weaknesses before going on to consider a possible new approach to benefiting from the United Nations.

II. Self-Determination

As I have made plain in my *International Law in the Middle East: Closer to Power than Justice* (2004), the creation of the State of Israel was not illegal. Almost from its inception, it did not lack the attributes of a state nor the legitimacy which comes from its acceptance as a state under international law. Where there was a clear disregard for the dictates of international law was during the run up to the creation of the State of Israel; that is, during the post-First World War settlement and the British Mandate for Palestine. The willingness of the victors of the First World War to incorporate the Balfour Declaration in the Mandate for Palestine violated the principles upon which the Covenant of the League of Nations was established – that is, the principle that the local population have a say in the manner in which they would be governed; in other words, self-determination. Article 22 reads:

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.

However, Balfour himself recognized that this was not to be, when he wrote to his Foreign Secretary, George Curzon:

The contradiction between the letters of the Covenant and the policy of the Allies is even more flagrant in the case of the 'independent nation' of Palestine than in that of the 'independent nation' of Syria. For in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country, though the American [King-Crane] Commission has been going through the form of asking what they are.

The Four Great Powers are committed to Zionism, and Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder import than the desire and prejudices of 700,000 Arabs who now inhabit that ancient land.

In my opinion that is right. What I have never been able to understand is how it can be harmonized with [...], the Covenant, or the instruction to the [King-Crane] Commission of Enquiry.

I do not think that Zionism will hurt the Arabs, but they will never say they want it. Whatever the future of Palestine, it is not now an 'independent nation', nor is it yet on the way to become one. Whatever deference should be paid to the views of those living there, the Powers in their selection of a mandatory do not propose, as I understand the matter, to consult them. In short, so far as Palestine is concerned, the Powers have made no statement of fact, which is not admittedly wrong, and no declaration of policy which, at least in the letter, they have not always intended to violate.

Now let us be plain and consider the nuances of the language found in international law. The basis of the settlement of the First World War, found in Wilson's Fourteen Points Speech, in the Peace of Paris and Lausanne, and in the Covenant of the League of Nations, was that of the *concept* of self-determination. Not the *right* of self-determination, but the *concept*. Thus, it was not something which colonized states could demand, but instead the political basis upon which Western States sought to settle the peace. In general terms, the concept was followed early on, in Paris in 1919, for Eastern European states, but had degenerated by the time Powers considered the former Ottoman possessions at San Remo in 1920. Here it had, in the words of US President Wilson, descended into a "whole disgusting scramble" whereby the "decisions accorded neither with the wishes of the inhabitants nor with the unqualified end-of-war undertakings about freedom of choice".

By the time the Allied Powers – calling themselves the coalition of ‘United Nations’ – sat down to settle the peace after the Second World War at Dumbarton Oaks and San Francisco, they sought to include as part of their new international order, the *principle* of self-determination as one of the newly established United Nations Organization’s purposes. Article 1(2) of the United Nations Charter reads in part that its purposes include “[to] develop friendly relations among nations based on respect for *the principle of equal rights and self-determination of peoples*, and to take other appropriate measures to strengthen universal peace”. Still, here we are not speaking of a *right* of self-determination, but the ‘principle’ of equal rights and self-determination of peoples. This principle, which was moved by the Allied Powers as a means of defeating fascism, was taken to heart by the colonial forces when they were decommissioned and returned home. The principle of self-determination, having found its way into the overall framework of the governing system of international relations (the UN System), became what has been termed the “intellectual engine of decolonization”, and would move from being inspirations to being established as a right in international law. The first manifestation of self-determination as *right* in international law was thus expressed in the 1960:

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This annunciation of a *right* of self-determination was made by the UN General Assembly in its contentious Declaration on the Granting of Independence to Colonial Countries and Peoples. The Declaration was contentious as it clearly reflected a split between the European and North American states, and the emerging decolonized states, which had come to form a numerical majority in the United Nations and thus were able to control the agenda of the General Assembly: the United Nations’ so-called ‘democratic’ body. As more colonial territories gained their independence, two trends emerged. The first was the strengthening of the right

of self-determination *as a right*, and the second, the narrowing of its focus. Newly independent states came to realize, as their colonial masters before them had, that the notion of self-determination was a powerful idea, one which could not only grant them independence, but could dismantle their state. This understanding is best reflected in the establishment of the 1963 Organization of African Unity which pledged its determination to “safeguard and consolidate the hard-won independence” of its members, while making plain, as one of its founding principles, that it demanded respect “for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence”. Functioning on the basis of the legal principle of *uti possidetis juris*, African states, like those of South America during the Bolivarian independence movements of the 1820s, sought to decolonise on the basis of the established, colonial, borders.

As the International Court of Justice stated in the 1986 *Frontier Dispute* case between Burkina Faso and Mali, the notion of *uti possidetis* (which literally translates as meaning the state of your possessions or ‘as you possess’) had an “obvious purpose [...] to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering [re: colonial] power”. How did this notion of *uti possidetis juris* then conform to a newly established right of self-determination? The Court squared the circle in the following manner:

At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African

States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.

By taking into account in interpreting the *principle* of self-determination, the Court was noting that states were willing to consider the right of self-determination in light of the decolonization process, but not as it might apply to, say: ethnic groups within a state.

The parameters of the right of self-determination were expressed in their fullest form internationally, in the after-shocks of the decolonization process when consensus could be gained between long established states and the newly independent states (whose leadership had accepted and internalised the Westphalian, Statists system). In the 1970 Declaration on Friendly Relations, consensus emerged regarding the parameters of the right of self-determination. The Declaration passed unanimously by the UN General Assembly found that the right of self-determination would be violated wherein there was “subjection of peoples to *alien subjugation, domination and exploitation*”. What this meant, in actual fact, was that there was a recognition that a right of self-determination applied in very limited circumstances: only with respect to *colonial regimes, to foreign occupation, and to racist regimes* of the Southern African variety. Making plain that the right of self-determination did not allow for the disintegration of states, the 1970 Declaration developed what might be termed as its ‘territorial integrity’ clause:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Ultimately, the *right* of self-determination was divorced from the *idea* of self-determination and made applicable in the most narrow of circumstances. As Professor Antonio Cassese has pointed out in his seminal 1995 work, *Self-Determination of Peoples: A Legal Appraisal*, the United Nations General Assembly, and hence states themselves, have remained “silent in response to claims asserting the right of self-determination”, be they “on behalf of *ethnic groups*, such as the Kurds, Armenians, and Basques; *indigenous populations*, such as the native peoples of Latin America, North America, Australia, and New Zealand, *linguistic minorities*, such as the Québécois, and *religious groups* such as the Catholics in Northern Ireland”.

Turning to the Palestinian context, the right of self-determination does clearly exist and has been confirmed by the International Court of Justice in its 2004 Advisory Opinion. *It is here that a strategy must harness the power of the idea of justice and the obligations which flow from international law, if Palestinians wish to be successful in stalling and rolling back Israeli encroachment.* In that Opinion, not only did the Court find that the Palestinian right of self-determination existed, but it mandates to all states their obligation to assist in its realization.

The Advisory Opinion delivered by the International Court of Justice on 9 July 2004 regarding the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* is the most significant pronouncement – bar none – of the legal framework which exists regarding Palestine. The significance of the determination of the International Court is to be found in the fact that it provides an authoritative pronouncement of the law, sustains the fundamental outlines of the Palestinian reading of what the law is, and goes beyond considering solely the issue of the construction of the Wall by dealing with fundamental issues regarding the continued Israeli occupation of Palestinian territories, including violations of human rights, humanitarian law and settlements, but also the right of self-determination. The International Court noted that it considered the right of self-determination as one of a number of “legitimate rights”

which were noted in the Oslo Accords, and which Palestinians possessed. While stating that the Wall “severely impedes the exercise by the Palestinian people of its right to self-determination” where it encroached beyond the Green Line, the Court determine that this was “a breach of Israel’s obligation to respect that right”. It further stated that “Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination”.

The International Court of Justice, however, went further; it noted that “the obligations violated by Israel include certain obligations *erga omnes*”. That is to say that the violations not only include obligations by Israel, but also obligations of each and every state towards the other (*erga omnes* literal translation being “towards all”). The Court, citing a previous decision, noted that obligations such as those regarding self-determination were, “by their very nature ‘the concern of all states’ and, [in] view of the importance of the rights involved, all states can be held to have a legal interest in their protection”. The International Court thus determined that the “obligations *erga omnes* violated by Israel are [*inter alia*] the obligation to respect the right of the Palestinian people to self-determination”, where in the context of the Advisory Opinion, it relates to the encroachment of the Wall into to the West Bank. The Court concluded by saying:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

Thus emerges three elements required by other states. While these requirements are specific to the construction of the Wall which were the narrow considerations of the International Court, it may be said that they exist not only specifically with respect to the Wall, but more generally in the following form: 1) non-recognition of illegal Israeli activities; 2) non-support or assistance in maintaining illegal activities; and, 3) the removal of impediments to the exercise of the right of self-determination. It is here, where a strategy must emerge, working within the confines of what the International Court of Justice has identified as *obligations which States must undertake*. What the International Court has identified, however, is nuanced. It is saying that the removal of obstacles to the right of self-determination must transpire in such a way as to respect the United Nations and international law. Thus begs the questions: what are the parameters of legal assistance to people struggling for a right of self-determination within the established, UN System?

III. The End of Self-Determination

In the wake of the events of 11 September 2001, the international system is at a watershed where it relates to the right of self-determination. In light of this, it appears in no uncertain terms that the fate of the right of self-determination lies in the hands of Palestinians and the manner in which they undertake their struggle against the foreign occupation by Israel. The parameters of the right of self-determination have narrowed since the 1970 Declaration on Friendly Relations, because of the end of the decolonization process (though some may consider that a Jewish presence on Mandate Palestine is a colonial venture and thus can be struggled against as a whole), and the demise of apartheid regimes of Southern Africa. What is thus left is a right of self-determination as against foreign occupation. In the Palestinian context, this means within the occupied territories of the West Bank and Gaza Strip. Yet, since 11 September 2001, there has

been a growing unwillingness by states to allow non-state actors to use force *in any context*. In an attempt by states to re-establish their monopoly on the use of force, they appear to be willing to forgo the right of self-determination if it is carried out by force (and yet we know that the right of self-determination has traditionally been a declaratory right – one won at the end of a barrel of a gun then recognised).

The ability to label a freedom fighter a terrorist, in a post-September 11 world, requires Palestinians to channel their struggle within the parameters of accepted law, so as to ensure not only the legitimacy of their struggle, but to also make sure that the very law itself does not disappear. Strategically, Palestinians must also ensure that internationally, the right of self-determination remains a part of the corpus of international law, and that the distinction between a freedom fighter and a terrorist is made plain and continuously reinforced. Making that distinction was controversial in international law during the decolonization process, but now may well be near-impossible to make – in a post-9/11 world – where colonization and apartheid no longer exists and occupation has become a live option for the sole remaining Super Power. The 1970 Declaration on Friendly Relations noted that states were not to use “any forcible action which deprives peoples [...] of their right to self-determination” and as such, those struggling for their right were “entitled to seek and to receive support in accordance with the purposes and principles of the Charter”. Whether this meant military support was glossed over as no consensus existed on the matter. The ambiguity which was brought on by an inability of states to agree as to whether force was allowed in pursuit of a right of self-determination was furthered by the 1973 Definition of Aggression which noted that it could not prejudice “the right of these peoples [seeking self-determination] to struggle to that end and to seek and receive support”. As Christine Gray notes in *International Law and the Use of Force?* a number of UN General Assembly resolutions which did appear at the height of the decolonization

era affirmed the right to 'armed struggle', yet these did not gain support of colonial powers or Western states, and were, by the early 1990s, replaced by less clear-cut wording in support of the use of force by liberation movements.

Against this backdrop, the issue of Palestinian right to struggle for self-determination must be considered. While shortly it will be demonstrated that Palestinians do indeed have a right to struggle and to use force, the previous paragraph sought to demonstrate that this issue is by no means settled internationally, and thus, it becomes vital that Palestinians seek to gain support for its recognition internationally. By seeking to gain support for the right to struggle against Israeli occupation; if Palestinians wish to benefit from the dictates of international law, they must be willing to – and be seen to – respect its dictates. What this means is that the right to struggle against occupation does not give freedom fighters unlimited means by which to seek to end the occupation. Here is where the distinction between freedom fighter and terrorist comes in to play: which must be emphasized by Palestinians to Palestinians and be part of an overall strategy which educates world opinion as to the distinctions. Short of this, any violence utilized by Palestinians will be de-legitimized as being a 'terrorist act'.

What is the distinction? It stems first from the Palestinian right to fight an occupation, which remains an act of aggression and thus allows for a right of self-defence in line with Article 51 of the United Nations Charter and the aforementioned 1973 Definition of Aggression. Thus, as opposed to saying the use of force to struggle for the right of self-determination in the colonial context, which may be circumspect; the use of force may be subsumed into legitimate self-defense and therefore is legal. Thus, a legal right exists to fight occupation; within those parameters, a distinction must be made between legal and legitimate warfare (carried out by freedom fighters) and illegitimate and illegal warfare (which can be labeled 'terrorism'). Within the Palestinian

context legitimate freedom fighting would mean targeting only the Israeli Defense Forces (IDF) in the occupied territories – though arguably the targeting of command and control within Israel proper would also be legitimate. To put it in negative terms, ‘terrorist’ acts would be those which target civilians in Israel or in the occupied territories (including settlers).

The issue of settlers has been contentious, as I have heard it said in Palestine that ‘settlers are part of the IDF’, ‘settlers are armed’, ‘settlers act just like the army’, etc. While it is clear that the Israeli settlements are illegal (see the International Court of Justice’s Advisory Opinion on the subject), the violation of international law does not fall to the individual, but incurs the responsibility on the States of Israel. The settlers are not acting illegally, the State of Israel is. The requirement of a legal struggle, and thus the ability to endow it with international legitimacy is to be found in the manner in which Palestinians target Israelis. This is a question of the laws of war (or often termed international humanitarian law) and more specifically ‘Geneva law’ which, although it deals primarily with situations when individuals fall into the hands of the enemy – such as in times of occupation, or as POWs – also makes the distinction between combatants (legitimate targets) and non-combatants (illegitimate targets).

Under the 1949 Geneva Conventions, only those members of armed forces, as well as “organized resistance movements” can benefit from the Conventions if they meet the following conditions: 1) there is a chain of command; 2) they wear distinctive signs – making them distinct from non-combatants; 3) they carry their arms openly; and 4) they conduct their activities in accordance with the laws of war. If they meet these requirements, then they are to be considered combatants, benefiting from the protection of the Geneva Conventions, but also they are legitimate targets – of legitimate warfare. Under the Geneva Convention protection is afforded to combatants when they are wounded, shipwrecked, or POWs, but also protection is afforded to civilians – primarily civilians under the control of

the enemy. Here the distinctions between legitimate targets are to be found not in the Geneva Conventions, but in the 'other' stream of the laws of war: 'Hague law'.

As far back as 1868, this facet of the laws of war set out the principle that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy". Placed in negative terms in the 1907 Hague Convention, it notes that there are limits to legitimate and legal warfare: "the right of belligerents to adopt means of injuring the enemy is not unlimited". Article 48 of the 1977 the first Additional Protocol to the Geneva Conventions, which reflect customary international law, goes further in outlining the limits of targeting in warfare:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Thus, a distinction is to be made between combatants (who meet the four conditions noted above) and civilians (who are not to be targeted), and legitimate warfare carried out as against military objectives, and not against civilians, so as to function within the legal parameters of the laws of war. Thus, for their part, Israeli settlers, if they are not carrying out military operations, if they are carrying on with their day-to-day activities as civilians, are not legitimate targets.

This distinction, it should be emphasised, cuts both ways, and should be emphasised in seeking to develop international support for the Palestinian cause. That is to say, emphasis should be placed on the Palestinian struggle to target the IDF only; as well as emphasizing when Israelis are targeting civilians; they are violating the laws of war (and opening themselves up to charges of terrorism). And yet, here is a tactical issue for Palestinians to

consider: Does it make sense for Palestinians to speak about 'terrorism' as against Israeli actions in a post-911 world, or can the distinction be made so clear that Israel actions which take place against civilians could be accepted as terrorist acts by people outside the region? Regardless of this tactical decision, a campaign should be carried out to emphasise the distinction, to educate to that distinction, and to ensure that the media (primarily the western media), that states, and, ultimately, the international general public, are aware of and make such distinctions.

As I have argued, we are approaching an end to the epoch of the right of self-determination. The ability to make the distinction in law (and the legitimacy which this entails) between a freedom fighter and a terrorist is quickly receding. While the Hezbollah approach, of targeting the IDF in Southern Lebanon was successful, this was in part because it sought to make this distinction, but ultimately, its success was to be found in the low morale of the IDF which was – in a cost-benefit analysis – not worth losing their lives over the land they did not consider their own. This cannot be said to be true in the Palestinian context, where the Israelis, by and large, believe Palestine to be biblically ordained to them and thus they are willing to fight on to appropriate it both overtly and covertly. Having outlined a means to legitimate armed struggle, what will be considered later is a strategy to move beyond the ineffectual armed struggle and whose very legitimacy may well have dwindling legitimacy. However, before this is considered, this paper turns to the United Nations to consider its role to date vis-?-vis the Palestinian struggle, and the manner in which it may be exploited in benefit of the establishment of a viable Palestinian State.

IV. United Nations and the Palestinian Struggle

In discussing whether the International Court of Justice should provide the Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory, the Court noted that the issue was

not a bilateral matter between Israel and Palestine, but was of direct concern to the United Nations. The International Court stated that the “responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine”. A Separate Opinion by the Egyptian national, Judge Nabil Elaraby, elaborated, saying: “[w]hat I consider relevant to emphasize is that this special responsibility was discharged for five decades without proper regard for the rule of law”. Judge Elaraby went on to say:

The question of Palestine has dominated the work of the United Nations since its inception [...]. Decisions with far-reaching consequences were taken on the basis of political expediency, without due regard for the legal requirements. Even when decisions were adopted, the will to follow through to implementation soon evaporated. Competent United Nations organs, including the General Assembly and the Security Council, have adopted streams of resolutions that remain wholly or partially unfulfilled.

This appears to be a fair and accurate assessment of the role of the United Nations, as a body which has been willing to enunciate itself on the law, but failed to act where Palestine is concerned. The sum of its parts – the international community of the current 191 States –, the United Nations has never been able to generate the support needed to act rigorously in Palestine under the umbrella of Chapter VII, or through a united front in the General Assembly. This was made evident not only with respect to the Partition Plan, but the involvement of the United Nations in the wake of the creation of the State of Israel. The role of the United Nations is seeking to deal with its own failed Partition Plan, and the realities on the ground as a result of the 1948 War were personified in the assassination of the UN Mediator for Palestine, Count Bernadotte, by the Stern Gang. The unwillingness or inability of the international community at the time (note that we are speaking of the original 53 Members of the UN, in a pre-decolonization era)

to forcefully intervene to try to settle the peace meant that the evolution of the dynamic of the Israeli/Palestinian conflict were that of the Israelis making facts on the ground and the international community speaking up, but unwilling to act in any forceful manner to reverse the 'new realities' on the ground.

Where there have been forceful attempts to challenge Israeli policies in Palestine, these have come not at the international level of the United Nations but by ad hoc coalitions of surrounding Arab states, such as those of 1948 and 1973 wars. However, these wars, as well as the military actions against Egypt in 1956, against Egypt, Jordan and Syria in 1967, and against Lebanon in 1982, demonstrated the Israeli military superiority of its fighting forces. Thus, on the one hand, Arab states have realised (as often regime changes came with defeat) to challenge Israel militarily is not an option; and, on the other hand, the international community is unwilling for political, but also for military reasons, to challenge the Israelis by forcing them to comply with UN decisions qua dictates. As a result, Israel has come to understand early on that it may achieve what it can, as the international community is powerless to stop it. Or to use the Thucydidesian dictum: "the strong do what they have the power to do and the weak accept what they have to accept". In actual terms this has meant the continuing dwindling of Palestine at the expense of a *de facto* expansion of the Israeli State, over more and more occupied territory.

To put it in rather crude terms, the Israel modus operandi has been to use time as a factor and to move three steps forward and retreat one step back in the face of international pressure building against it. Israeli policy has always followed the strategic objective of control over the totality the West Bank of Mandate Palestine. Israeli policy has functioned on the premise that *ultimately* nobody will actually stop them in seeking to reach this object. As a result, a gain of territory, no matter how small, the destruction of a house or the livelihood of a Palestinian, no matter how petty; benefits the Israeli objective as, over time, it adds to substantial gains.

Where political pressure is placed on the State of Israel from the international community, a tactical retreat may take place, but this will inevitably be only partial and only temporary in nature. Thus, when pressure is placed to stop building new settlements, agreement was made to limit the amount of new settlements (not stop them); while territorial expansion was allowed to persist by expanding already established settlements. Or, when pressure is placed on Israel regarding the detention of Palestinians, the release of, say, ten percent is sold (and bought) as a magnanimous move.

With this in mind, it is no wonder that the successor to Bernadotte failed to achieve a settlement in Palestine, primarily because Israel was unwilling to settle but was willing to wait out the negotiations so as to be left with no settlement on the ground, thus opening the way for its territorial expansion. In 1948, and in the wake of the death of the Mediator, the United Nations Conciliation Commission for Palestine was established, which was meant to assist the parties "to achieve a final settlement of all questions outstanding between them". Yet, at the 1951 Paris Conference, the Commission's swan song had been sung. Here it should be noted, that while Israelis were unwilling to consider the return of refugees, Arab states were unwilling to contemplate reaching a final settlement, and thus legitimizing the existence of the newly created state in their midst. The resulting Arab intransigence meant gained time for Israel and, with time, territory and control over more and more of biblical Israel. For its part, the Commission lives on to this day, rendered ineffective, its work falling into abeyance more than forty years ago.

The failure of the Conciliation Commission and the emergence of decolonization process meant that the focal point for Palestine was subsumed within the *zeitgeist* of liberation struggles. With the UN General Assembly acting as a forum in which the growing majority of newly independent states could express and develop international law, the Palestinians gained legitimacy in their struggle through the recognition of right of self-determination, but lost an individual identity to the collective. Thus, will rubbing

shoulders with revolutionaries, freedom fighters, and leaders of newly independent states, Palestinians watched from the sidelines as more and more territories were liberated and freedom fighters became statesmen. As these freedom fighters-turned-statesmen of the 1960s and 1970s were replaced by a second generation of leaders, the allegiance to the cause of Palestinians weakened. For its part, the Palestinian people, having lost its elite in the first wave of migration after the announcement of the 1947 UN Partition Plan, having fallen under the control of the State of Israel and the benevolent occupation of Egypt and Jordan after 1949, did not find any leadership to coalesce around until the run up to the 1967 War, when a Palestinian liberation movement lead by Yasser Arafat emerged. In the aftermath of the Arab defeat in 1967, Fatah undertook a guerrilla campaign against Israel, while the Popular Front for the Liberation of Palestine was involved in a number of hijackings, of which nearly three dozen were carried out in the decade after the 1967 war.

Forced out of Jordan during 'Black September' of 1970, the PLO found a new haven in Lebanon, but as a result of the Lebanese civil war and the Israeli invasion of 1982, it was once again forced to leave, this time to Tunisia. Yasser Arafat, having been weakened by his support of the Iraqi invasion of Kuwait in 1991, and seen by Israel as a means to putting an end to the grassroots *Intifada* which had broken out in the Occupied Territories, signed on to the Oslo Accords thus taking over control of limited areas of the West Bank and the Gaza Strip; and, by default, allowing the Israelis to retreat and consolidate further territory. Throughout the Arafat era, the centrality of the PLO and its essence as a liberation movement was – again by default – the essence of Palestinians. This, coupled with the success of Hezbollah in liberating Lebanon, provided further justification for approaching the Palestinian struggle as an armed struggle. Yet, in reverse proportion to the emergence of newly independent states and as a result of the implosion of the Soviet Union, the means utilized in the Palestinian struggle have come to be questioned. More and more states found it difficult to support assassination attempts

on their territories and the hijacking of their national carriers, while it became evident that the United States was moving towards unquestioning support of Israel in the UN Security Council and elsewhere.

While support persisted within the United Nations for Palestine with many General Assembly resolutions still passing with but two negative votes (Israel and the United States), the number of abstentions started to rise. Further, with the annual passing of resolutions regarding Palestine, it became evident that such actions were more a formality than expressions of solidarity with Palestinians. Where the issue has become more acute is within the UN Security Council where, as a result of the demise of the USSR, the United States has been able, since 1989, to set the international agenda. That agenda has been fundamentally altered by the events of 11 September 2001, as the United States has sought to retool the international system in its image as a 'War against Terror'. While the United States and the United Kingdom were challenged as going beyond the competence of the UN Security Council in seeking, in 1992, to have Libya handover two 'terror' suspected thought to have been involved in the Lockerbie incident, a decade later, not only was 'terrorism', as a threat to international peace and security, deemed to be within the Council's remit, but it was considered "one of the most serious threats to international peace and security in the twenty-first century". Within this post-9/11 reality, the era of the parameters of 'terrorism' has starting to come into focus.

While States have grappled with the nebulous nature of the term 'terrorism', they have agreed that it includes three elements: the use of violence for political ends, and the targeting of civilians (or at least non-combatants). A reflection of these elements is to be found in the 1999 International Convention for the Suppression of the Financing of Terrorism which reads:

Any [...] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed

conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing an act.

Where states have disagreed, Antonio Cassese rightly points out, is with the exceptions to such a general definition. The two specific exceptions which have limited the possibility of gaining consensus on a definition of terrorism internationally has been whether the term can be used in conjunction with the acts of freedom fighters or states. We have already considered the issue of freedom fighters so as to demonstrate that by targeting combatants within the context of a foreign occupation ? la Israel, one could avoid the label of terrorism; the issue of whether a state could be labelled as undertaking a terrorist act or supporting such a terrorist act, does raise fundamental issues. While states have yet to come to grips with this issue, there is clear movement towards excluding states (and freedom fighters) from consideration in the emerging UN Draft of Comprehensive Convention on International Terrorism.

As a result, more pressure will be placed on the Palestinian struggle, as it will be carried out by non-State actors: those specific people which the tightening net of 'terrorism' is starting to encircle. Whether Palestinians can find a legal hole in that net for their resistance to occupation remains to be seen. As the re-tooling of the international system continues towards states taking on non-state actors in a 'War on Terror', consideration must be given to the usefulness of the United Nations to the Palestinian cause. While the principles and legal norms which have emerged today from the United Nations are laudable, it is probably true that Palestinians will not get much more mileage out of the United Nations in the department of law-creating norms. It is entirely possible, however, that the United Nations will be regressive in this domain where the Palestinians are concerned – the most obvious being the right of self-determination which has already been considered (but

regression may also transpire with respect to, for instance, the issue of refugees, Jerusalem, settlements, etc).

While there may be a right of self-determination in the Palestinian context, that right as an armed struggle in becoming politically harder and harder to sustain, in an emerging state order which is quickly de-legitimizing any recourse to force undertaken by non-state actors. In the era of the 'War on Terror,' the United States is tacitly (if not overtly) demanding an end of all non-state violence including that by Palestinians. Thus tactically, Palestinians must consider whether the armed struggle remains a viable tactic in reaching the strategic goal of a viable Palestinian State. Instead, Palestinians may wish to take stock of their armed struggle, consider the effectiveness over its entire history, and consider whether it has been successful. Though, by any objective standard, it would be very difficult to point to the Palestinian struggle as being successful in terms of land retained, of rights curtailed, of people expelled, of resources taken, of dropping life standards, and of daily humiliations. While the death of Israelis, either from the IDF or civilians, has brought euphoric joy and ephemeral empowerment, it has inevitably been followed by the most brutal of reprisals by the Israeli military might.

V. Beyond the Armed Struggle

What follows from the above analysis is that the armed struggle seems to have become a liability rather than an asset as a tactic for Palestinian emancipation and self-determination. What should be considered in its stead, is a means of taking advantage of the ground work which the United Nations has undertaken during the last 50 years, culminating in the Advisory Opinion of the International Court of Justices, which requires all states to 1) not recognize, 2) not support the Israeli occupation and denial of self-determination, and 3) remove the impediments towards Palestinian self-determination. It would seem that

what would be required is a two-pronged approach necessitating a retooling of the struggle within historical Palestine and a re-emphasis beyond the Middle East. This strategy would take into account the requirement to strictly respect the dictates of international law from which Palestinians would wish to benefit and use as their international leverage, while harnessing the Diaspora and friends to its advantage. Consideration now turns to the type of strategy which should be considered within historical Palestine as a means of rolling back the Israel gains. This will be followed by a consideration of a foreign strategy which will build on the actions at home and seek to mobilize the Diaspora to gain international support for actions beneficial to Palestine.

i. At Home

The actions of Palestinians (both in the Occupied Territories and in Israel) need to be coordinated ideologically in an overall strategy which aims at making their cause 'appear' to be righteous. As has already been indicated, it is clear that their cause is both legal and legitimate; what is required is the need to maintain the 'high ground' by demonstrating that the cause is a noble one. True martyrdom, therefore, should come not as a result of a suicide bombing but by laying down one's life in defence of one's cause, while maintaining one's dignity. In other words, what is being proposed is the development of a non-violent, civil disobedience, campaign which aims at revealing the brutality of the Israeli Occupation for what it is, but also works well within the parameters of established and emerging international norms. One might say that Palestinians have resisted for the last 50 years and their resistance has not been successful. This is true, but it has not been coordinated and developed as part of an overall strategy of dissent which involves mass movements – which can be labelled as non-violent – both within Palestine *and* abroad, or made use of new technologies in disseminating the Palestinian message.

Too much emphasis has been placed in Palestine on the Hezbollah model and not enough on the model of the first *Intifada*. It may be worthwhile to revisit the work of Mubarak Awad, but also Gandhi and King, to see to what extent their work can be utilized and built upon to attempt to develop an overall strategy which would allow for visible civil disobedience both within the Occupied Territories and within Israel proper. It can be said that, with respect to the Palestinian struggle, nothing has been as successful as the first *Intifada* in forcing the Israelis to settlement talks. Though possible gains were lost at the negotiating table, the Israeli establishment was visibly shaken. Palestinians, having made the Occupied Territories uncontrollable, forced Israel to seek to shift the burden to Yasser Arafat, who agreed to have the Territories controlled by his men – by what the Oslo Accords called a “strong police force”. In contrast, the *al-Aqsa Intifada* has brought no gains, and much suffering. Furthermore, Palestinians have lost the moral high ground, in a post-September 11 world, to, of all people, Ariel Sharon.

Internally, moving towards a strategy of civil disobedience would empower a broad spectrum of Palestinians, providing them with the pride of cause and the willingness to undertake hardships in their daily lives with dignity *and be shown internationally as doing so*. In so doing, they would not only establish a community spirit but would gain general public support internationally, where others may be mobilized. Revisiting Awad’s proposals regarding non-cooperation with the occupation forces – military, civilian, and administrative – seem worthwhile if undertaken on a large scale in a coordinated and well advertised manner. This civil disobedience is meant to achieve two ends: 1) demonstrate the community’s allegiance to the cause, and 2) revealing the brutality of the Israeli system of occupation and the means it uses to ensure its perpetuation.

In essence, such a campaign should be understood as being in line with the ‘total war’ doctrine of the Second World War, where

all resources are channelled to the 'war' effort. This pacific war thus needs to infuse itself into the overall fabric of Palestinian society, wherein all participate whether physically confronting the occupation, participating in general strikes, or by any of a hundred different ways of demonstrating unwillingness to cooperate with one's oppressors in their military occupation, are seen as identifying with an overall objective. Furthermore, if one wishes to carry the war metaphor further, it should be understood that, within Palestine, what should be waged is a war of attrition, where Palestinians tax the resources of the Israelis, requiring that every contact take as long as possible, and that non-cooperation be the touchstone of every encounter.

Such disobedience should not only be large scale, but needs to be primarily symbolic in nature. Thus, for instance, opportunities were lost in December 2002 and 2003 when Israeli authorities denied Yasser Arafat the possibility to travel to Bethlehem to attend a Christian mass at the Church of the Nativity. Had the Palestinian leader said that he would disobey, and had sought to walk to Bethlehem, circumventing the check-points, the parallels between this and Ghandi's 'salt march' in India would not have been lost internationally – especially when the Western World was on vacation and sitting ideally at home in front of their television screens. Further activities might include burning of pass-cards, mass marches during curfew hours, wearing of yellow stars, creating doors and windows in the Wall, mass sit-downs in front of settlements, etc, etc. The point here is that what would be required is that protests take place not for protest's sake, but with a specific objective in mind, be well coordinated and demonstrate a commitment to non-violence. Such a strategy, in essence, would require more courage than the armed struggle, because it would meet the sophisticatedly armed IDF not with light arms (which, of course, have proven useless), but with empty arms. Viewed from abroad, the latter is acceptable, the former appalling.

It should be clear that civil disobedience does not mean passivity. By building an understanding of civil disobedience as an overall

strategic tool, it would become apparent that far from being passive, it is an active, empowering, means to an end. The manner in which these means can be developed requires first, education, then dedication, planning, coordination, and action. The first step towards a move away from an armed struggle and a move towards a pacifist, civil disobedience, tactics is education. What lessons have been learnt during the years of occupation – how have the various sectors of Palestinian and Israeli population acted and reacted to events? Are there in-roads that can be made; if so where and how? What is the history of civil disobedience campaigns? Why were some successful, why did others fail? What tactics were used, and what were their benefits, their drawbacks? How did such campaigns start, how were they organized, how were they managed? What worked, what did not work, what can work in Palestine, and what can not?

Questions should be asked about the education in Palestine and manner in which this education can be used strategically. What education is a Palestinian receiving and who can this education assist in the reversal of fortunes? In part, an education in Palestine should also be targeted towards providing every individual with the tools needed to understand and develop tactics to fight the Israeli encroachment. Further, each and every Palestinian should be seen as a spokesman for the Palestinian cause, being able to address the media and visitors as to what is transpiring and what is ultimately sought. Emphasis should be made on identifying those with strong intellectual and linguistic skills, to seek to have as many travel internationally to speak about Palestine. Likewise, education tours of Palestine should be promoted for decision-makers (shaming all who visit Israel, to also visit Palestine), as well as younger visitors.

Beyond education, dedication, in a true sense, is already apparent in those struggling in Palestine. However, more is required; more dedication in the sense of requiring people to think with action and be able to ask if that is helping or hurting the cause and how this action can be taken so as to assist the overall objective. Such

dedication will inevitably require suffering, and yet, suffering remains a part of the daily lives of most Palestinians, but the question is: does this suffering have an objective? Hence, an attempt should be made to curtail the indeterminate nature of suffering, or at least be able to place such suffering into context thus: this is happening to you, but you have willingly taken on this burden and your dedication to the cause means that your suffering is part of an overall attempt to reveal the brutality of the occupation and to shame your oppressor both in his eyes and those of the world. In this fashion, any type of daily humiliation is not in vain, but instead can be empowering.

By first asking these (and other) questions and socializing people to the possibilities and benefits of civil disobedience campaigns then, and only then, one can expect to move Palestinians away from random violence towards a concerted effort at challenging the Israeli occupation. Just as important as understanding the notion of civil disobedience and the manner in which it might function for Palestinians is to know the manner in which the Israeli occupation functions – who does what, why and how; only by understanding the means Israel uses, can a true challenge – on many levels – transpire. This is obviously very important as the Israeli position is not static. For instance, to what extent has the building of the Wall hindered the possibility for interaction between Palestinians and Israelis? Does the Wall allow for a viable civil disobedience campaign or can it be the symbol to be used to coalesce around such a campaign? Once a strategy of civil disobedience is undertaken, Palestinians will have to be vigilant as to the reactions of the Israelis so as to counter them. It should be remembered that in such situations, the advantage is always with those undertaking civil disobedience because it becomes part of their lives, as opposed to the oppressors', who are doing their job ... thus the commitment is to be found in favour of the challenger.

As important as it is to understand the Israelis, is to understand the manner in which aid agencies assist – or fail to assist – in the struggle. Questions need to be asked about the manner in which

agencies such as UNWRA and ICRC have assisted Palestinians or in fact legitimized the occupation. Clearly, for instance, UNWRA has provided material assistance, in education, in social welfare and health, but in so doing, has it not left Palestinians dependent and mitigated the suffering of the occupation? If so, how can this be addressed and challenged? What of the protection function which is afforded to all refugees except those being assisted by UNWRA? And how has the vital role of ICRC in Palestine shifted over the years so that it rarely protests day-to-day violations of the Third Geneva Convention by Israel? How has this so-called 'mission creep' taken place and how do Palestinians ensure that aid agencies undertaken their jobs in the occupied territories in such a manner as would serve their interest? Such questions about the role of international agencies needs to be considered – like all other issues related to a shift in emphasis of the Palestinian struggle. Fundamental issues need to be addressed, discussed and a consensus needs to emerge. For instance, if Palestinians decide that UNWRA must go, what are the alternatives? Will these alternatives ensure the subsistence of those Palestinians currently benefiting from UNWRA? Beyond that, what might replace UNWRA: a new agency, with a new mandate? What would Palestinians want of such an agency? Here it becomes clear that Palestinians need not be passive in receiving assistance, instead they may receive it on their own terms.

Thus, while each and every Palestinian needs to be inculcated with the virtues of a disobedience campaign, being given the educational tools and instilling in them the dedication to persevere in dignity, what is just as important is the need to plan and to coordinate activities so that resistance is found not only at the micro-level, but also at the macro-level. While Palestinians should resist at the local level, they have to be reminded that the struggle is a national one and one which needs to manifest itself nationally and throughout Palestine. Thus general strikes, specific manifestations, coordinated actions across the West Bank and with Gaza are essential. Walks and marches which require Israeli responses are essential to ensure making it plain internationally

that the occupation remains, in international law, an act of aggression, and is shown to be such. In other words, require the Israelis to use force against peaceful marchers, against demonstrators and against women and children. Such would be the ultimate cost; but would such cost be any different than what is transpiring at the moment? I believe that such cost would be different as these deaths could not be discounted internationally and could not go unanswered by politicians in states which support Israel, or are ambivalent in their attitudes.

One need not go into further detail regarding the movement from education to action – that is through dedication, planning, coordination. These are issues and elements which will need to be decided upon by Palestinians. Such a new phase of the struggle, it should be understood, will not be without pain and suffering. Large numbers of people will be imprisoned, beaten, and killed. The violations of human rights and humanitarian law which the International Court of Justice points to, will become more acute. In essence, such a strategy would require that the population as a whole become active, and embark on a daily struggle against the occupation – but with utilizing the specific strategic tools of resistance. Thus, every action would be weighed against the aims it seeks to achieve: does this resistance assist in a civil disobedience campaign? If not, how might such resistance assist? Is there a point which needs to be made and can this point be made symbolically – can it be mediatized? It is this type of thinking which will need to take place on a micro level, so as to channel the struggle in such a manner as to demonstrate the brutality of the Israeli occupation.

It is one thing to declare and to carry out a strategy of civil disobedience and another to ensure that non-violent resistance which challenges the Israeli occupation is witnessed by the international community. This is where new technologies can greatly assist the Palestinian cause. The use of hand-held video cameras should be used en masse; they should ensure that all Israeli aggressions and Palestinian acts of resistance, whether it is house demolitions or demonstrations, are challenged and filmed then

distributed over the internet and to media outlets. Time and again, it has been shown that individuals in the West will support the Palestinian cause if they are aware of what is transpiring. By insuring that the message leaves Palestine, those living at home, carrying on the struggle, will be doing their part.

One final thought can be given here to the manner in which the home front can be used to advantage in the Palestinian struggle for a viable State. The one major resource which Palestine holds and has been central to its historical antecedence is of course the Holy Places. This element has not played a prominent role in the Palestinian struggle. It must be emphasised that the Holy Places have suffered as a result of the Israeli Occupation, and their treatment should be emphasised with religious groups which visit. That is, groups on religious pilgrimages should be made aware of what is transpiring; desecration of non-Jewish sites, attacks on churches and archaeological digs, which travel through Christian era materials, destroying them in order to reach Judaic times should be propagated to assist in moving international public opinion, by getting such information more readily into the public domain.

ii. Abroad

The battle for Palestine is not taking place in the Middle East. Israel is too small a state to ensure on its own its policies regarding Palestine. Without receiving the financial and diplomatic assistance from the United States of America, Israel would lose its swagger and be forced to heed the call to respect its international obligations. There is much fertile ground in the United States and elsewhere which would allow for the United States to loosen itself from the grip of the Israeli lobby. It should be recalled that the United States has many interest groups vying for position. On the Middle East, the Israeli lobby has a near monopoly – simply because no other group focuses as much. Yet, the events of 11 September 2001 have made many questions the controlling focal point of its foreign policy in the region, which has brought on the attacks of 11 September and the fiasco of Iraq. This window of

opportunity requires a consolidated approach which provides a counter-balance to the Israeli lobby. Likewise, Israel is vulnerable to pressure because it is the home of the Holy Places, something which in the wake of 11 September and the resurgence of the Christian religion, should not be discounted.

While the need to focus on the United States of America is important, it is just as important to focus on other key states to ensure pressure is brought to bear on them to change their policy and take up their international obligations. How is this to be done? This pressure can be built from below, and used to pressure legislators to voice their dissent to policies which violated their international obligations. When it is made clear to parliamentarians that what is being demanded is respect for international obligations, it becomes difficult for them, and ultimately for governments, to defend themselves. This type of grassroots pressure requires a commitment of the Diaspora which has been all but invisible in the struggle. There is a need for Palestinians living abroad, for Arabs who wish to associate themselves to the cause, to be the vanguard of a movement which seeks to make known the plight of Palestinians to people in their neighbourhoods. Such a community-based solidarity system of advocates could speak at universities, churches, and social clubs and show the most recent footage of what is transpiring in Palestine. It could create websites, generate e-mail lists, and organize letter writing campaigns. In short, it could make use of the democratic tools available in the West to promote its agenda.

It needs to be emphasised that the Palestinian Diaspora is as relevant – or even maybe more so – as the home front in attempting to deal with the Israeli occupation, as they are to be found in countries which can truly influence the outcome of a move towards a viable Palestinian State. The Diaspora Palestinians, who in notable instances have prospered in their adopted countries, should be mobilized to become activists, by sponsoring awareness campaigns and hosting information functions. They must be the link to the outside worlds. More than anything what is required is to get the

message out and to get other people – non-Palestinians; non-Arabs – to adopt Palestine as their cause much as the Anti-Apartheid campaign transcended its African roots and became a mass-movement. People of good spirit are game to assist, while others are interested in knowing what is transpiring in Palestine and are eager to learn. It is these people which must be mobilized, as they too can mobilize others. Much can – and needs to be learned – from solidarity campaigns which have transpired in the past. The pressure to divest from South Africa during the 1980s and the use of boycotts has been successful in the past. The specific targeting of firms visibly involved in the Occupation would make exceptional targets for such boycotts. For instance, recently the company which built the tractors which demolish houses has been picketed and embarrassed publicly as a means of naming and shaming them and seeking to have them desist from their participation. This has been followed by legal action against the company. Yet, as important as it may be for the targeting of specific companies, these various businesses do not have a legal obligation to desist from assisting the Israelis with their occupation regime – or do they?

As has been noted earlier, each state has an obligation – towards each and every other state – to 1) not recognize the occupation, 2) not support the occupation or the denial of self-determination, and 3) to remove the impediments towards Palestinian self-determination. What flows from these requirements is an obligation upon states to ensure that not only they respect the three imperatives laid down by the International Court, but that their domestic companies also respect these imperatives. In essence, states are under an obligation to ensure that they are not collaborating with the Israel occupation. In each country, solidarity campaigns should be initiated by ensuring that no economic activity takes place with Israel which violates these three imperatives. Let us consider these three in turn. The first obligation placed on all states is not to recognize the occupation. From this obligation flows the requirement of states not to function or have a presence in areas occupied by Israel including East Jerusalem. It requires non recognition of the occupation in

international *fora* such as the United Nations, and the denial of any benefits which might be incurred from the Israeli occupation.

The second obligation requires that states not support the occupation or deny Palestinian self-determination. From this flows the requirement not to support Israel in any way which might support the occupation or impede Palestinian self-determination. Thus, pressure should be placed on states to have Israel certify that its imports are not being used in anyway to support the occupation or deny Palestinian self-determination. This can be a means of placing an economic burden on Israel by making it awkward to conduct business. By ensuring that there are added costs associated with doing business with Israel, and creating an aura of a 'pariah' state, increased pressure could be place on Israel to confirm to its international obligations. The identifying of Israel as a 'pariah' state requires a sustained propaganda campaign which exposes it for what it is: a state which has flouted its international obligations, is in violation of numerous UN Security Council Resolutions, and has been found in violation of human rights obligations, humanitarian law obligations, and the rights of Palestinian self-determination.

It has already been noted that the United Nations no longer has value in the sphere of norm creating: all the legal arguments, resolutions, instruments, and judgments are in place; what is required is their implementation. Thus, resources should be allocated to turn the political tide. This must work hand-in-glove with a mass movement to explain what is to be achieved and to seek and gain political support for such actions. What is the strategy and tactics to be used to seek to achieve respect of international norms by Israel? Again, these are questions which Palestinians will have to address, but it seems that resources should be targeted towards establishing alliances, which can move the United Nations and other inter-governmental organizations (e.g., the European Union, the African Union) to isolate Israel and to bring pressure upon it to respect its obligations. But that pressure can only be effective if it is carried on the back of a campaign that is seen as righteous, is non-violent, and carries with it a vocal public opinion in various states.

VI. Conclusion

The realities of shifting international norms in a post-September 11 world must be acknowledged and taken into consideration in seeking to maximize a positive outcome to the Palestinian struggle. It may be said that international law and the United Nations have fulfilled an instrumental objective in that struggle to establish norms and obligations incumbent upon Israel, the international community, but also on Palestinians. If Palestinians wish to take advantage of these normative standards, they must understand them, accept them, and utilize them to their advantage. What this paper has sought to demonstrate is that the *zeitgeist* of armed liberation struggles is over, both *de facto*, and in moving towards a *de jure fait accompli* as well. While the right of self-determination remains in existence, and the right to act in self-defence remains true in the Palestinian context, its feasibility as a means of gaining a viable Palestinian state seems to be diminishing. Taking this into consideration, the paper puts forward a re-tooling of the struggle, one of total pacific war where the instruments of battle mandate complete commitment from those at home and abroad to civil disobedience and to challenging the Israel occupation from higher ground.

In many ways, this paper raises many more questions than it answers, in part because only Palestinians, amongst themselves, can answer these questions. What international law cannot do and what the United Nations has not been willing to do is to act on these international standards to require Israel to roll back its continues encroachment on Palestinian territory. Thus, it is for Palestinians to change that reality and force others to act by following their lead. Creating a new way of thinking, however, mandates that much groundwork be prepared. The strategy laid out in this paper requires a fundamental shift in thinking and acting, but through education, dedication, planning, coordination, and action, an overall strategy can emerge which can seek to achieve gains which have been elusive thus far

under the mantle of an armed struggle. The value of this paper will be found in its laying out of an historical narrative and providing an analysis of the established and evolving international norms which touch on the Palestinian struggle. If that analysis is correct, then it appears that the armed struggle is doomed to failure. The alternative which is being proposed is one which is empowering and can lead to results. But that requires a total commitment and the type of communal instinct which was so readily apparent during the first *Intifada*.

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Comments

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I agree with Dr. Jean Allain that Palestinians should rethink their actions in the struggle for independence and freedom, but not from within the same framework of analysis. In this struggle, it is imperative for the Palestinians to rely on international law and international organizations, particularly after 38 years of dehumanization by a brutal and merciless occupation. In its 19 October 2000 resolution, the UN Human Rights Commission declared that it was “gravely concerned” about Israeli atrocities against Palestinians, which it labeled as “war crimes, flagrant violations of International Humanitarian Law and crimes against humanity” (U.N. Document E/CN.4/S-5/L.2/Rev. 1).

In his strategy paper, Dr. Jean Allain states that “...*Al Aqsa Intifada has brought no gains, and much suffering*” (p.16), and reproaches Palestinians for their military resistance, which he considers the main reason for their isolation. Here, I think that Dr. Jean Allain should have taken a more objective view in dealing with al-Aqsa Intifada and its consequences. Al-Aqsa Intifada represents both civil and military resistance to the occupation. Focusing only on the military actions of the Palestinians is forgetting, or ignoring, the brutality of the occupier. If, in the Intifada of 1987, the Israeli Army had taken some response measures that fell within the principle of proportional force, in the second Intifada, it undoubtedly used excessive and lethal force. In my view, and in terms of the consequences of the second Intifada, Palestinians should ask themselves what gains the Oslo period has brought them in comparison with gains brought by al- Aqsa Intifada.

Dr. Allain says:

“Yet, since September 11, 2001, there has been a growing unwillingness by states to allow non-states actors to use force in any context. In an attempt by states to reestablish

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their monopoly on the use of force, they appear to be willing to forgo the right of self-determination if it is carried out by force (and yet, we know that the right of self-determination has traditionally been a declaratory right - one won at the end of a barrel of a gun, then recognised)" (Allain p.8)

The author clarifies which states on the next page, when he quotes Christine Gray, who pointed out that the colonial powers, or Western states, had taken an assertive position in the 1990's concerning the UN resolution on "armed struggle", wherein they reject the use of force by national liberation movements. However, the fact remains that those who seek the right to self-determination must struggle to obtain international recognition. Therefore, since struggling for the right of self-determination must have *effectivity* in order to be recognized, and that *effectivity* is no longer acceptable, subsequently, we must expect it to cease to exist.

Dr. Allain also says, "*The Palestinian struggle remains led by an ethos of liberation in an era where the legal right of self-determination is quickly receding from the international horizon*". On the other hand, the international legalist Richard Falk states, "Israel's failure to abide by international law, as a belligerent occupier, amounted to a fundamental denial of the right of self-determination, and more generally for the framework of belligerent occupation –giving rise to a Palestinian right of resistance"¹. That was written in 2000 and, regardless of the consequences of the spectacular events of September 11 2001 – since I believe the change began much earlier, during Roland Reagan's presidency when he decided to challenge the UN System and its Third World ideology – in my view, remains valid for the Palestinian struggle even after September 11, 2001.

¹ Richard Falk, 'Beyond Oslo: The New Uprising. International Law and the al-Aqsa Intifada', Middle East Report 217, winter 2000 (Middle East Report 217.htm)

If the Palestinians opt for civil resistance as Allain recommends, it would be to buttress the Palestinian right to rise against their occupier and to “humanize” the Palestinian struggle, not to lend credibility to the Western discourse on terrorism or to de-legitimize in any way the right of the Palestinian people to resist. It must be emphasized here that international law recognizes the right of resistance and armed struggle as a last resort to resist occupation (Additional Protocol I, 1977 to the Geneva Convention of 1949, art.1 para.4). Although it is true that at the time of signing the Additional Protocol there was an international consensus on defining resistance by its objective (political objective), and true that in the last few years there developed a tendency to define resistance by its means, but there still is no consensus on the definition of “terrorism”.

In my commentary, I will address two issues discussed in Dr. Jean Allain’s paper: the reinterpretation of self determination and the Palestinian struggle, and methods for protecting the right of self –determination.

I. Reinterpreting Self-Determination and the Palestinian Struggle:

After 1945, and during the progressive development of international law from what it ought to be (*lex ferenda*) to what is (*lex lata*) was translated in the matter of self-determination from a concept to a right. This right had been validated by the consensus of states, expressed by UN General Assembly Resolution 1514 (1960) and 2625 (1970) and by *opinio juris* offered by the International Court of Justice, the Namibia case (1971) and the Western Sahara case (1975).

The UN System has taken a number of resolutions concerning Palestinian self-determination:

- ◆ UN General Assembly Resolution 181 Concerning the Future Government of Palestine (1947) establishes the

parity of the two peoples with respect to their respective rights to establish states on the former mandated territory of Palestine.

- ◆ UN General Assembly resolution 3236 (1974) asserts the collective rights of Palestinian people. It granted Palestinians the right to national independence, sovereignty and the right to return.
- ◆ UN General Assembly resolution 3375 (1975) recognized the right of the PLO to represent the Palestinian people in its aspiration for self-determination, in accordance to resolution 3236.
- ◆ UN General Assembly Resolution 34\70 (1979) asserts the need for any solution to the conflict to be in accordance with the right of self-determination, regardless of what the parties might negotiate.
- ◆ UN General Assembly resolution 43\177 (1988) acknowledges the 1988 Palestinian declaration of a Palestinian State as consistent with UN General Assembly resolution 181.
- ◆ UN General Assembly resolution 52\114 (1997) recalls the right of self-determination for the Palestinian people.
- ◆ UN General Assembly resolution 52\207 (1997) asserts the sovereignty of the Palestinian people on the natural resources of the Palestinian Territories.

i. External Self-determination

The concept of self-determination has intellectual origins that go back to the Enlightenment era and to the philosophy of Jean-Jacques Rousseau. In the international arena, the use of that concept had been linked with the problems of minorities in the context of the collapse of Empires after World War I (Ottoman, Russian and Habsburg empires). Martti

Koskenniemi draws our attention to the opinion taken by the International Commission of Jurists in 1920 on the Åland Islands. It introduces a distinction between a normal situation and abnormal situation, “For Commission of Jurists, national self-determination was a fall-back position: something that was normally dormant and enclosed within sovereignty. During periods of political transformation, however, when the existence of States becomes uncertain, self-determination becomes applicable to reconstitute the political normality of statehood”. And the opinion holds another more revolutionary sense, when national self-determination challenges the formal structures of statehood, “[...] true self-determination is not expressed in the normal functioning of existing participating process and in the duty of other states not to interfere but in the existence and the free cultivation of an authentic communal feeling, a togetherness, a sense of being “us” among relevant groups.”²

In the decolonization period of the 1950's and 1960's, the interpretation of the right for self-determination remained within the “normal” situation. Its application did not threaten the territorial integrity of states. The new independent states were created from the administrative units of the colonial empires. The *uti possidetis* principle means “you take what exists”; in other words, “the administrative borders became international borders”. External self-determination is strengthened by *uti possidetis* principle, but this does not constitute a general principle of international law. In its 1992 decision on the Salvador\Honduras case, the International Court of Justice was suspicious of the “lending security virtues” of *uti possidetis* principle and thus decided the

² Martti Koskenniemi, ‘National self-determination today: problems of legal theory and practice’, *International and Comparative Law Quarterly*, vol.43 April 1994 pp.241-269 pp.246.

frontiers between the two states in a way “equivalent to taking certain pre-cut pieces of a puzzle and placing them where the expanse and location of the frontier obtained depended on the size and form of the piece to be inserted”³. That confirms that *uti possidetis* is not accepted as a general principle of international law and self determination right can be interpreted in terms other than those which respect territorial sovereignty.

Furthermore, in the context of the occupation of Palestine, colonization has not ended since that is also defined as “alien subjugation”, “domination, and exploitation”. For Martti Koskenniemi colonization “is not limited to a Third World context [...]” It can be extended to “any situation where an ethnic group becomes the object of human rights abuses or at least a denial of equal rights”⁴.

ii. Internal Self-determination

In the 1990’s, self-determination was re-interpreted in a manner to restore its first meaning from the Enlightenment era: self-determination = democracy. Self-determination is the right of every group, whether ethnic, linguistic, religious or other, to participate in the decision-making process that concerns its economic and social future. That definition of self-determination was then linked with problems of minorities as in East Timor in Indonesia, Quebec in Canada, and the Kurdish region in Iraq. There, elections were the principal means by which groups decided to remain with the mother state or to secede.

³ “à la manière d’un puzzle à partir de certaines pièces prédécoupées, de sorte que l’étendue et l’emplacement de la frontière obtenue dépendent de la taille et de la forme de la pièce à insérer” Patrick Daillier et Alain Pellet, *Droit International Public* 6e édition LGDJ Paris 1999, pp.466.

⁴ Martti Koskenniemi, *ibid*, pp.247\48.

The Palestinian case is in essence a decolonization process: an indigenous people struggles against a settler-colonial state. But there is another part of the reality that was described by UN special rapporteur of Human Rights in the Palestinian Territories, John Dugard, who wrote in a report to the UN General Assembly in August 2004 that Israel has created “an apartheid regime”. That reality, or the facts on the ground imposed by the occupier – the continuous expansion in and of the settlements in Palestinian territories, which involves the ongoing seizure of land, unremitting destruction of property and daily killings of Palestinians, including children – inevitably leads to a reassessment of the possibility of establishing a viable Palestinian state in the territories of 1967.

Baruch Kimmerling, the Israeli sociologist, sees the construction of the wall as a step towards “politicide” for Israel and represents a new step in Israeli policy to force Palestinian into submission. However, in Israel today, it is difficult to find an influential politician who accepts the complete withdrawal from the Palestinian Territories of 1967 and accepts the evacuation of the settlements. In general, when Israeli politicians speak about a Palestinian state, they have in mind a pseudo-state controlled by Israel in its external relations, which means we should expect the end result to be a new kind of colonialism. In an interview with the *Haaretz* newspaper on October 8, 2004, Dov Weisglass, the Prime Minister’s adviser, explained that “the significance of the disengagement plan is the freezing of the peace process. And when you freeze that process, you prevent the establishment of a Palestinian State”.

I think that, with such a brutal occupation, the only option the Palestinians have is internal self-determination; which might have been the adoption of the “one state solution”, unfortunately, there is no debate among Palestinians on an idea that was their slogan before 1988: one secular and democratic state. Therefore, the only alternative left for the Palestinians is to firmly latch onto Human Rights Law in their struggle.

II. Protecting the Right of Self-determination

I Agree with Dr. Allain when he further states that Palestinians should put forth large efforts to protect the right of self-determination. I think they should insist on two matters: self-determination in the foreign policy of United States, and self-determination as a general principle of international law.

i. Self-determination in American Foreign Policy

The Middle East was the center of the American policy of “preemptive war” and it will persist even with the return to the geo-strategic game. There are signs that American geo-strategic interest in this region re-emerged with what Jephraim P. Gundzik calls the “China-Iran-Russia axis” that challenges US interests in Central Asia⁵, and with the last document of the Pentagon setting a general strategy for the United States, essentially to face potential enemies like Russia and China and to dominate allies like Western Europe.

In the context of these new developments in international relations, the support of Israel is not the result of “Hazbara” (public relations) or the strong Zionist lobby having a major influence on American policy in the Middle East, but a consequence of the strategic importance of Israel and the vigorous interests of the United States in the Middle East. For Bernard Lewis, the Middle East was not a Vietnam, Cuba or Nicaragua in that the American domination of the region did not require military intervention before 1991. He wrote that “it seems likely that this record of relative success may owe much, first, to the steadfastness of the northern tier and, second, to the presence of a powerful self-reliant and stable democratic

⁵ Jephraim P.Gundzik, ‘The US and that ‘other’ axis’, Asia Times online. www.atimes.com , June 09.2005

power in the region”⁶. I agree with Bernard Lewis, and perhaps even venture the presumption that if there were no Zionist Lobby influencing American policy in the Middle East, it would certainly be invented or created to serve the strategic purposes of the United States.

Since September 11, the United States has adopted a clear policy that gives priority to national sovereignty over multilateralism and international law. The principle of self-determination exists as a principal idea in American foreign policy, but it conflicts with another primary idea, i.e., national sovereignty. For Harlan Grant Cohen, “this is not contradictory. The United States can advocate human rights for the world and state sovereignty for itself because its foundational ideology (liberal constitutionalism) presupposes that it is the only truly legitimate state”. “In its self-perception, it is not a state like those of the old world; [...], it is truly a government by consent. The United States’ unique legitimacy thus serves as an important element of self-identification. The rest of the world is defined by its very illegitimacy”⁷.

This is where the Palestinians should be resolute in exploiting the presence of the self-determination principle in American ideology and history, and fight the Israeli position, which was based on the second idea, namely, “*the threat presented by a corrupt and anti-democratic Palestinian Authority to the ‘only democracy in the region’*”. However, in order to succeed, they will need to implement a battery of radical changes at home, in Palestinian institutions and in their decision-making process.

⁶ Bernard Lewis, ‘Rethinking the Middle East’, *Foreign Affairs* 71 (4, 1992), pp.103-119, p.110

⁷ Harlan Grant Cohen, ‘The American Challenge to International Law. A tentative framework for debate’, *The Yale Journal of International Law*; vol.28 2003, pp.551-578, pp.562

ii. Violations of International Law and the Likelihood of ending Customary Human Rights.

Self-determination has been developed as a customary rule. When it is stabilized by practice and *opinio juris*, custom is binding to all states. But the process of formulating customary law can also be an annulment process with constant violations in the practice of customary law, which can confirm refusal to its mandatory force (*opinio juris*).

Palestinians should insist on defining self-determination “as a general principle of law, which may be maintained even when it is violated by states”. Here, the efforts of Anthea Roberts⁸ to rethink the formation of customary international human rights are very appropriate, wherein she stresses the need to minimize the requirement of state practices in the formation of normative customs, and to look at the practices of all arms of government, not only the executive branch. For instance, in Israel, only a few Israeli academics are calling for an academic boycott of certain Israeli universities because of their complicity with the Israeli system of apartheid – the most prominent of those are Ilan Pappé and Tanya Reinhart; but this is the type of reaction to state practices that Palestinians should examine and encourage, and which might eventually aid in the formation of new normative customs.

In addition, the last decision of the High Court of Justice that determined with its 11-judge panel that “Judea and Samaria (West Bank) and the Gaza area are lands seized during warfare, and are not part of Israel”⁹ may have been historic in some ways; however, it does not compel Israel to rectify the situation in the Occupied Territories. As Eyal Benvenisti said, “With the court’s disregard

⁸ Anthea Roberts, ‘Righting Wrongs or Wronging Rights? The United States and Human Rights Post- September 11’, *European Journal of International Law*, vol.15, N0.4 2004, pp.721-749.

⁹ Yoav Yoav, ‘Influx of Compensation Requests Expected in Light of Court Ruling’ *Haaretz.com* June 09 2005.

of treaty-based laws, its strict definition of customary law, and its broad interpretation of the occupant's powers under those customary rules which were found to exist, the ultimate outcome of the jurisprudence of the Court was a refusal to deal with the territories as a truly international matter. Surely, the Court never treated these areas as part of Israel. Yet by practically stultifying the effectiveness of international law on the one hand, and on the other by its readiness to review occupant's measures under the principles of Israeli Administrative Law, the Court has come to treat the administration's action in the territories in much the same way as it treats governmental action within Israel."¹⁰

It is also important to see what the reaction of other states is to the Americano-Israeli discourse on terrorism. The examination of that reaction should take account of the popular reaction and the social forces in these states. According to Rosalyn Higgins¹¹, international law is no longer a certain number of rules binding states in their mutual relations; it is a decision-making process in which many actors intervene: social forces, states and international organizations, individuals and NGO's. Philippe Moreau Defarges¹² also asserts the significant role of NGO's and civil society in the creation of international law by emphasizing the tension between two legitimacies: the legitimacy of the Sovereign State, and the legitimacy of International Society in the international arena. For instance, in human rights, environment, etc., international civil society actors are very active in determining the content of what is to become international rules in these domains after the consent of states.

¹⁰ Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: an Analysis of Attitudes of National Courts', *European Journal of International Law*. <http://ejil.org/journal/vol4/N02/art2-01.htm>, p.5

¹¹ Rosalyn Higgins, "Problems and Process; International Law and How We Use It", 1994, Oxford, Clarendon Press.

¹² Philippe Moreau Defarges, 'Droit et mondialisation', *Ramses* 2000, pp.215-227

Hence, Palestinians should consider creating a common basis between their struggle and that of social forces within other states. The academic boycott, for instance, is a helpful strategy against the Israeli occupation because it underscores the crucial comparison between Israel and South Africa. The boycott is not against ethnic identity or academic liberty but against the complicity of Israeli institutions in the State's system of apartheid.

However, in order to be consistent, the Palestinians should seriously consider incorporating Human Rights Law in their constitution and institutions.

Finally, I must offer a cautionary note to Dr. Jean Allain with regards to the discourse he uses in presenting his ideas. Although I am sure it was not intentional, his ideas contribute to the revisionist trend in the epistemological domain of the history of colonialism; a trend that is often found in the debate about the "positive effects" of British colonialism on the democratization process of Third World countries. It is also used by those insisting on the ethno-nationalism of Eastern Europe and the ex-Soviet Union in order to invalidate the ideology of Third World Nationalism; and now, in exploiting September 11 and the discourse on terrorism in order to announce the end of self-determination.

Samer Fares*

With regard to the strategic paper written by Dr. Jean Allain, I enjoyed reading a comprehensive methodology in the most effective approaches to utilize international law and international organizations in the best interest of the Palestinian people and their legitimate cause. The paper briefly discusses the history of Palestine, from an international law perspective, beginning with the Balfour Declaration in 1917 until the International Court of Justice's Advisory Opinion in 2004 on the legal consequences of the construction of the Wall in the occupied West Bank. Furthermore, it describes the progression of international law regarding the right of self-determination and its implications as relates to the Palestinian struggle for independence. Then it analyzes the right of self determination in light of September 11 and its impact on the Palestinian question. Finally, and in light of the above, it lays down the best local and international non-violent strategies to revive the Palestinian struggle in the newly created post-September 11 world.

I think the author has managed to highlight the successes and failures of the PLO in pursuing the path of armed struggle, and, most importantly, he has emphasized the impact of the new realities in international law on the ongoing Palestinian journey to independence. I think that the author was right when he proposed that Palestinians, taking into consideration the United States' recent policies, which, as claimed, have come as a result of September 11, must reconsider their resistance tactics against Israel, especially those that target civilians. As such, the author believes that the Palestinian Authority must now define a very clear strategic line for dealing with the new realities and exploiting international law in its favor. I agree with the author that a loud and clear denouncement of violence against Israeli civilians is a priority. I also think that promoting peaceful resistance locally and

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internationally is consistent with the fact that the occupation is no longer acceptable in the new international norms and values.

Despite all the above and in order to strengthen the paper, I think the following points must be considered:

1. It is important to revise the introduction to the paper to express its entire content. The introduction describes the objective but not the path to achieving it.
2. Since the author has tackled the Palestinian struggle and their right of self determination from a historical perspective, it is better to reflect that approach in the content of his paper. Thus, I suggest that the author moves paragraphs 15-18, which talk about the Palestinian right of self- determination in the Advisory Opinion of the ICJ, to come after section III on the "End of Self-Determination". The latter is dealing with post September 11, 2001 while the former is dealing with the period of 2004.
3. Paragraphs 23-25 argue that Israeli settlers are non-combatants because they do not fit the definition of "combatants" in the 1949 Geneva Convention and hence must not be targeted by the Palestinian resistance. Settlers are not civilians, and in addition to the well-known fact that the Israeli settlements are not just illegal but also a war crime, the settlers act as well-organized gangs protected by the IDF. Their behavior on the ground cannot be described as day-to-day civilian activities. Their behavior is parallel to those of X-ray camp in Cuba (a definition created by the USA) and therefore, they are a legitimate target.

Furthermore, I think the Paper will have much better value if it considers the following points:

1. It is important to evaluate the Balfour Declaration in the context of international law because, even though the Israeli Declaration of Independence was not illegal as a

result of the UN Partition Plan, the Balfour Declaration and its implementation by the British Mandate clearly violated international law.

2. Section V of the paper, "Beyond the Armed Struggle", describes Palestinian peaceful resistance tactics. This section only tackles methods of popular resistance in the Palestinian Occupied Territories and abroad, but does not refer to the official resistance; here I mean the role of the Palestinian National Authority internally and internationally, especially in what must be done as a result of the Advisory Opinion. I assume that the PA can, and must, exploit this role in strengthening the Palestinian cause in the UN and the international arena as a whole. Thus, I would have liked to see the author's ideas on what strategy and measures the PA must adopt.
3. Finally, I could not find any reference to the impact of the Oslo Agreements and the creation of the PA on the Palestinian right of self-determination. It would be important for the author to discuss that matter, especially if we take into consideration the Israeli disengagement plan and the new realities which might emerge in Gaza. Will such a plan alter (help or obstruct) the right of self-determination for Palestinians in the West Bank?

