

Law and Disorder in the Middle East

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The Participants

The Palestinian delegation entered the negotiations in good faith in order to negotiate an interim peace agreement with Israel that would create a Palestinian interim self-government for a transitional five-year period.

Immediately following the ceremonial opening at Madrid on 30 October 1991, I was instructed to draft several position papers on numerous issues that were expected to come up during the first round of negotiations scheduled to begin a month later in Washington, D.C. But when we got to our headquarters at the Grand Hotel in Washington, nothing happened. At the U.S. State Department headquarters, which served as the venue for all tracks of the Middle East peace negotiations, the Israeli team offered no reasonable good-faith proposals for dealing with the Palestinians.

At that time the Israeli government was headed by the Likud party under Prime Minister Yitzhak Shamir. Later on, Shamir admitted that his strategy at the peace negotiations was to drag them out for the next decade. Having been personally subjected to this process, I can assure you that Prime Minister Shamir accomplished his objective for as long as he was in power.

Most distressing of all, however, was that the United States State Department went along with Shamir's strategy. It soon became obvious that U.S. officials had no intention whatsoever to pressure Israel to negotiate in good faith. To the contrary, they usually sided with the Israeli delegation against the Palestinian delegation in support of Shamir's stall-strategy. Furthermore -- having done some work at the request of the Syrian delegation to the peace negotiations -- I can certify that the same stall-strategy was operative during the

first round of the Israeli-Syrian negotiations in Washington.

When the Likud party lost the elections in June of 1992, the Labor party came to power under Prime Minister Yitzhak Rabin. One of the first changes Rabin made in the negotiations was to fire the Israeli-Syrian team and bring in new and dynamic leadership under Professor Itamar Rabinowitz, generally considered to be Israel's top expert on Syria. With the new Syrian team in place, substantial progress was made during the course of the Israeli-Syrian track to such an extent that, if Labor had won the next round of Israeli elections, there would have been an Israeli-Syrian peace agreement along the lines of the Israeli-Egyptian peace treaty. This still could happen now if Israel ever becomes willing to implement U.N. Security Council Resolution 242 (1967), which Israel is obligated to do in any event.

By comparison, Prime Minister Rabin kept the Likud team for negotiating with the Palestinian delegation. This was a most inauspicious sign. Soon thereafter, in the late summer of 1992, the Israeli team tendered a proposal to the Palestinian delegation for an interim peace agreement that included a draft Palestinian interim self-government.

Israel's Bantustan Proposal

Because of its importance, the head of the Palestinian delegation, Dr. Abdel Shafi, asked me to fly to Washington to analyze the Israeli proposal *in situ* for the Palestinian delegation. Part of my responsibilities was to review all preceding peace proposals put forward by Israel with respect to the Palestinians, going back to the original Camp David Accords, including the "Linowitz negotiations" that took place thereafter under the Carter Administration.

Upon my arrival at the Ritz-Carlton Hotel in Pentagon City, where the Palestinian delegation was headquartered, I was ushered into a suite where the delegation leaders had assembled. There I was instructed by one of its accredited negotiators to tell them what was the closest historical analogue to what they were being offered.

I returned to my hotel room and spent an entire day analyzing the Israeli proposal. When I finished, I returned to the same suite and reported to the delegation: "A bantustan. They are offering you a bantustan. As you know, the Israelis have very close relations with the Afrikaner Apartheid regime in South Africa. It appears that they have studied the bantustan system quite closely. So it is a bantustan that they are offering you."

I proceeded to go through the entire Israeli proposal in detail to substantiate my conclusion. I pointed out that this proposal basically carried out Prime Minister Menachim Begin's disingenuous misinterpretation of the Camp David Accords -- rejected by U.S. President Jimmy Carter -- that all they called for was autonomy for the Palestinian people and not for the Palestinian land as well.

Worse yet, Israel's proposed Palestinian interim self-government would be legally set up to function as the civilian arm of the Israeli military occupation forces!

Not surprisingly, after consultations among themselves, and under the chairmanship of Dr. Abdel Shafi, the members of the Palestinian delegation rejected Israel's bantustan proposal.

The Palestinian Anti-Bantustan Proposal

Shortly thereafter, Dr. Abdel Shafi requested that I return to Washington to consult with the entire Palestinian delegation for a second time. I had a series of sequential meetings with the different members of the delegation in order to understand their basic concerns about negotiating an interim peace agreement with Israel. I was then invited into Dr. Abdel Shafi's private suite. It was just the two of us.

Dr. Abdel Shafi quite solemnly instructed me: "Professor Boyle, we have decided to ask you to draft this interim peace agreement for us. Do whatever you want! But do not sell out our right to our state!" The emphasis was that of Dr. Abdel Shafi. "Do not worry," I assured him. "As you know, I was the one who first called for the creation of the Palestinian state back at United Nations Headquarters in June of 1987, and then served as the legal adviser to the P.L.O. on its creation. I will do nothing to harm it!"

I then went back to my hotel room to work on the Palestinian approach to negotiating an interim peace agreement with Israel that was designed to get the Palestinians eventually from where they were then to a free, viable, democratic, independent nation-state on the West Bank and Gaza Strip with their capital in Jerusalem, and to do this by the required intermediate means of establishing a genuine Palestinian interim self-government, which was not a bantustan. I spent the entire day sketching out what I shall call here my "anti-bantustan" proposal for the Palestinian delegation to consider.

I met with Dr. Abdel Shafi to brief him on it. Then, at his instruction, the entire Palestinian delegation assembled to hear me. During the course of this briefing, an extremely high-level and powerful P.L.O. official began to yell at me at the top of his lungs: "Professor Boyle, what good has the Fourth Geneva Convention ever done for my people!" I replied: "Without the Fourth Geneva Convention the Israelis would have stolen all your land and expelled most of your people years ago." From my other sources I already knew that the P.L.O. had been putting enormous pressure upon Dr. Abdel Shafi and the rest of the Palestinian delegation to accept Israel's bantustan proposal right then and there in Washington. This Dr. Abdel Shafi adamantly refused to do!

After this meeting, I commented to a very prominent and now powerful Palestinian lawyer from Gaza, who had heard my briefing: "My instructions from Dr. Abdel Shafi were to figure out how to square the circle. I believe I have accomplished this objective." He replied laconically: "Yes, you have."

I next met with Dr. Abdel Shafi to report to him about the vociferous opposition by the top P.L.O. official to my anti-bantustan proposal. He instructed me to write up my proposal as a Memorandum for consideration and formal approval by the Palestinian delegation in Washington as well as by the P.L.O. leadership in Tunis. Having rejected the Israeli bantustan proposal, Dr. Abdel Shafi had to come up with an anti-bantustan proposal both to negotiate in good faith with the Israelis, and to convince the P.L.O. leadership in Tunis that a viable interim peace agreement did exist that would not sell out the right of the Palestinian people to an independent nation-state of their own.

My Memorandum, entitled "The Interim Agreement and International Law," was completed

on 1 December 1992. I sent it off by couriers to Dr. Abdel Shafi and the Palestinian delegation in Washington, and to the political leaders of the Palestinian people in Tunis and elsewhere in their diaspora.

The Memorandum was approved by both the Palestinian delegation in Washington and by the political leadership in Tunis. The Memorandum has been published in Vol. 22 of *Arab Studies Quarterly*, Number 3, pp. 1-45, Summer 2000. Readers should be aware that the Israeli bantustan model I critiqued therein would later become the Oslo Agreement of 13 September 1993, as I explain below. [An excerpt from this Memorandum is reprinted below.]

Shortly after submitting my Memorandum to Tunis, I received a fax from an extremely powerful and prominent P.L.O. lawyer living in the Palestinian diaspora, who personally thanked me for "showing the way forward to our people." After what we had been through together in the past, my friend's commendation meant a great deal to me. But five years later he would quit his high-level positions in both the P.L.O. and the provisional government of the state of Palestine because of his disgust over the subsequent course of the so-called Oslo Process.

Norway

While all this was going on, and unbeknownst to Dr. Abdel Shafi and myself, the Israeli government opened up a secret channel of communications in Norway with P.L.O. emissaries who reported personally and in private to President Yasir Arafat. Eventually, during the course of these negotiations, the Israeli team re-tendered its original bantustan proposal that had already been rejected by the Palestinian delegation in Washington. It was this proposal that became known as the Oslo Agreement, and which was signed on the White House Lawn on 13 September 1993.

Dr. Abdel Shafi and I knew full well that we were engaged in a most desperate struggle against the Israelis -- working hand-in-hand with the Americans -- to prevent the Palestinian leadership in Tunis from accepting Israel's bantustan proposal. Of course we lost.

In the summer of 1993, the wire services reported that a secret agreement between Israel and P.L.O. emissaries had been reached in Norway. Soon thereafter, Dr. Abdel Shafi phoned me from Washington and asked if I could analyze the Norwegian document for him immediately. He faxed it to my office.

After a detailed study, I called him back with my report: "This is the exact same document we have already rejected in Washington!"

Dr. Abdel Shafi responded in his customarily low-key manner: "Yes, that was my impression too." Then he added: "I will call Abu Amar and demand that he get a written opinion from you on this document before he signs it! Can you give me that opinion right away?" Once again, the emphases were that of Dr. Abdel Shafi.

"Yes, of course, you can count on me," I replied.

"I will call Abu Amar immediately," said a determined Dr. Abdel Shafi.

Abu Amar is the *nom-de-guerre* of Yasir Arafat. The two men go all the way back to the founding of the P.L.O. So that must have been one tumultuous conversation.

But President Arafat had already made up his mind to sign the bantustan proposal, now emanating from Norway instead of Washington. Dr. Abdel Shafi, the head of the Palestinian delegation in Washington, could do nothing to change his mind.

When the proposal was signed on the White House Lawn on 13 September 1993, Dr. Abdel Shafi did not attend. He knew Oslo was a bantustan and he wanted nothing to do with it.

As for me, on that day I had to be in the International Court of Justice in The Hague in order to accept the second World Court Order I would win for the Republic of Bosnia and Herzegovina against the rump Yugoslavia to cease and desist from committing all acts of genocide against the Bosnian people. So I had to watch the ceremony on television in my Amsterdam hotel room. "This will never work," I reflected with a heavy heart, "but perhaps President Arafat knows something that I do not."

Still, the question remains: Why would President Arafat accept and sign an Israeli proposal that he knew would constitute a bantustan for the Palestinian people? I really do not know the answer to that question. President Arafat did not discuss this matter with me. He did discuss it with Dr. Abdel Shafi. But I was not privy to that conversation, and I have never asked Dr. Abdel Shafi about it.

In fairness to President Arafat, I believe he felt that he must take what little was offered, even if he knew it was nothing more than a bantustan. Perhaps he thought that Palestinians would live in peace with Israel throughout the trial period of five years, under their bantustan model, at the end of which he would negotiate a legitimate, free, viable, and independent Palestinian state on the West Bank and Gaza Strip, with its capital in Jerusalem.

Also, in fairness to President Arafat, the Oslo Agreement made it quite clear that all issues would be open for negotiations in the so-called final status negotiations. And this included Jerusalem, despite the massive Israeli rhetoric and propaganda that Jerusalem was "their," "eternal," "undivided," "capital." You do not agree in writing to negotiate over "your," "eternal," "undivided," "capital," if it is really yours.

Finally, in fairness to President Arafat, there was already on the books a resolution that had been adopted by the Palestine National Council that authorized the P.L.O. to take control of any portion of occupied Palestine that was offered to them by Israel. This is precisely what President Arafat and the Tunisian P.L.O. leaders did.

For the record, though, it should be noted that the Palestinian delegation to the Middle East peace negotiations -- all of whom lived in occupied Palestine, not in Tunis -- had explicitly rejected this Israeli bantustan proposal during the course of the formal negotiations in Washington. For that reason, in addition to Dr. Abdel Shafi, other accredited Palestinian negotiators refused to attend the signing ceremony on the White House Lawn, including my friend who had personally instructed me to analyze the Israeli bantustan proposal for the

delegation. Like Dr. Abdel Shafi, they knew full well that Oslo was a bantustan, and they wanted nothing to do with it.

President Arafat had assumed a modicum of good faith on the part of Israel and the United States. My 1 December Memorandum did not. As it happened, Israel and the United States proceeded to stall and delay the implementation of the bantustan model throughout the entire five-year course of the Oslo process, and even after its expiration. Never was a realistic hope provided that at the end of the road the Palestinians would have their free, viable, genuinely independent state on the West Bank and Gaza, with its capital in Jerusalem.

Hence, I will not waste time analyzing the numerous post-Oslo agreements between Israel and the P.L.O. that were "brokered " by the United States. For they all constitute nothing more than implementation and refinements of Israel's original bantustan proposal that the Palestinian delegation had rejected in Washington. I am a Professor of International Law, not of Bantustan Law. From the perspective of public international law, however, numerous provisions of all these agreements were void *ab initio* under articles 7, 8, and 47 of the Fourth Geneva Convention of 1949, *inter alia*.

Camp David II, the Al Aqsa Intifada, and U.N. Security Council Resolution 1322

This brings the story up to the summer of 2000, to the so-called Camp David II negotiations. This proposed conclusion to the final status negotiations was not the idea of the Palestinian leadership. Rather, it was the brainchild of Israeli prime minister General Ehud Barak, with the full support of President Clinton, who fully intended to pressure President Arafat into permanently accepting the Oslo bantustan arrangement. To his everlasting credit, President Arafat refused to accept Oslo as his people's "final solution." But it was a near-death experience.

True to his pro-Israeli stance, President Clinton publicly blamed President Arafat and the Palestinian leadership for their alleged intransigence. He also threatened to illegally move the United States Embassy from Tel Aviv to Jerusalem unless President Arafat succumbed to permanently accepting Israel's bantustan model. This President Arafat still refused to do.

When it became clear to the Israeli government that it could not impose Oslo on the Palestinians by means of negotiations and U.S. bullying, Prime Minister Barak and Likud leader General Ariel Sharon reverted to inflicting raw, brutal, military force on the Palestinians in order to get their way. Hence the Israeli origins of what has come to be known as the Al Aqsa Intifada.

General Ariel Sharon -- the architect of the Israeli invasion of Lebanon that exterminated an estimated 20,000 Arabs, the man personally responsible for the massacre of about 2,000 Palestinian and Lebanese civilians at the refugee camps in Sabra and Shatilla, a man cashiered by his own government -- on 28 September 2000 appeared at Al-Haram al-Sharif in Jerusalem, the third holiest site in Islam. Here stand the Al Aqsa Mosque and the magnificent Dome of the Rock, where Mohammed (May Peace Be Upon Him) ascended into Heaven. Sharon, with Barak's full approval, arrived surrounded by about 1,000 armed Israeli

forces. The two former generals knew exactly what the Palestinian reaction would be to this deliberate desecration of, and provocation at, their sacred shrine. And if there had been any lingering doubt about the matter, Israeli armed forces returned the next day to the site and shot dead several unarmed Palestinians, thus setting off what has come to be known as the Al Aqsa Intifada.

On 7 October 2000, the United Nations Security Council adopted Resolution 1322, which is critical for this analysis. The vote was 14 to 0, with the United States abstaining. The U.S. could have vetoed this Resolution, but did not. So the Resolution became a matter of binding international law. I will not go through the entire Resolution here, but I do want to comment on its most important provisions.

In paragraph 1, the Security Council "Deplores the provocation carried out at Al-Haram al-Sharif in Jerusalem on 28 September 2000 and the subsequent violence there." Notice, the Security Council, by a vote of 14 to 0, made it crystal clear that it was Sharon's desecration of the Al-Haram al-Sharif that is responsible for the start of the current round of warfare and bloodshed perpetrated by Israel against the Palestinian people living in occupied Palestine. Even the United States did not vote against that determination, deliberately letting it pass into binding international law.

In paragraph 3 of Resolution 1322, the Security Council, again 14 to 0, "Calls upon Israel, the occupying Power." "Occupying Power" has a definite meaning in public international law. Israel only "occupies" the West Bank, the Gaza Strip, and the entire city of Jerusalem. It is what international lawyers call a "belligerent occupant." As such, Israel has no sovereignty over the West Bank, or the Gaza Strip, or the entire city of Jerusalem. Hence, what is being waged there is a war by the belligerent occupant, Israel, against a people living on their own land, the Palestinians. Under international law and practice, a people living on their own land is the essence of sovereignty. This has been the case for the West Bank and Gaza Strip and East Jerusalem since the war of 1967.

As for West Jerusalem, the world has never recognized Israel's annexation of it as valid either. That is why the U.S. Embassy and the embassies of almost every country in the world that has diplomatic relations with Israel -- except for the few banana republics that have been bought and paid for -- have their embassies in Tel Aviv and not Jerusalem. That is also why President Clinton's threat to move the U.S. Embassy to Jerusalem was clearly illegal.

Belligerent occupation is governed by the Hague Regulations of 1907, as well as by the Fourth Geneva Convention of 1949, and the customary laws of belligerent occupation. Security Council Resolution 1322, paragraph 3: "Calls upon Israel, the occupying Power, to abide scrupulously by its legal obligations and its responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in a Time of War of 12 August 1949;" Again, the Security Council vote was 14 to 0, making it obligatory under international law.

The Fourth Geneva Convention applies to the West Bank, to the Gaza Strip, and to the entire city of Jerusalem. The Palestinian people living in occupied Palestine are "protected persons" within the meaning of the Fourth Geneva Convention. All of their rights are sacred under international law.

The fact is, there are 149 substantive articles of the Fourth Geneva Convention that protect the rights of almost every one of these Palestinians living in occupied Palestine. The Israeli government is currently violating, and has been since 1967, almost each and every one of these sacred rights of the Palestinians.

Nor should we forget that violations of the Fourth Geneva Convention are war crimes. This is not a symmetrical situation. As matters of fact and of law, the gross and repeated violations of Palestinian human rights by the Israeli army and by Israeli settlers living illegally in occupied Palestine constitute war crimes. Put another way, the Palestinian people are defending themselves and their land and their homes against Israeli war crimes and Israeli war criminals, both military and civilian.

On 5 December 2001, 114 states, all parties to the Fourth Geneva Convention -- including Britain and the rest of the European Union -- issued a declaration urging Israel to abide by international laws enshrined in the 1949 accord seeking to protect civilians in wartime or under occupation. [+ ++] Israel, the United States and Australia, also parties to the Convention, boycotted the session. The declaration expressed deep concern about a "deterioration of the humanitarian situation" in Palestinian areas, condemned Israeli settlements there as illegal and urged Israel to refrain from "grave breaches" of the Fourth Geneva Convention, "such as wilful killing, torture, unlawful deportation, wilful depriving of the rights of fair and regular trial, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly."

Israel's War Crimes Against Palestinians

On 19 October 2000, a Special Session of the U.N. Commission on Human Rights adopted a Resolution set forth in U.N. Document E/CN.4/S-5/L.2/Rev. 1 , "Condemning the provocative visit to Al-Haram al-Sharif on 28 September 2000 by Ariel Sharon, the Likud party leader, which triggered the tragic events that followed in occupied East Jerusalem and the other occupied Palestinian territories, resulting in a high number of deaths and injuries among Palestinian civilians."

The U.N. Human Rights Commission went on to say that it was "[g]ravelly concerned" about several different types of atrocities inflicted by Israel upon the Palestinian people, which it denominated "war crimes, flagrant violations of international humanitarian law and crimes against humanity."

In operative paragraph 1 of its 19 October 2000 Resolution , the U.N. Human Rights Commission then "Strongly condemns the disproportionate and indiscriminate use of force in violation of international humanitarian law by the Israeli occupying Power against innocent and unarmed Palestinian civilians, . . . including many children, in the occupied territories, which constitutes a war crime and a crime against humanity."

And in paragraph 5, the Commission "Also affirms that the deliberate and systematic killing of civilians and children by the Israeli occupying authorities constitutes a flagrant and grave violation of the right to life and also constitutes a crime against humanity."

We all have a general idea of what a war crime is, so I will not elaborate upon the term. There are, however, different degrees of heinousness for war crimes. In particular are the more serious war crimes denominated "grave breaches" of the Fourth Geneva Convention. Since the start of the Al Aqsa Intifada, the world has seen those heinous war crimes inflicted every day by Israel against the Palestinians in occupied Palestine: e.g., willful killing of Palestinian civilians by the Israeli army and by Israel's illegal paramilitary settlers. These Israeli "grave breaches" of the Fourth Geneva Convention mandate universal prosecution for their perpetrators, whether military or civilian, as well as universal prosecution for their commanders, whether military or civilian, including and especially Israel's political leaders.

But it is Israel's "crime against humanity" against the Palestinian people, as determined by the U.N. Human Rights Commission itself, that I want to focus on here.

What is a "crime against humanity"? This concept goes back to the Nuremberg Charter of 1945 for the trial of the major Nazi war criminals in Europe. And in the Nuremberg Charter of 1945, drafted by the United States government, a new type of international crime was created specifically intended to deal with the Nazi persecution of the Jewish people.

The paradigmatic example of a "crime against humanity" is what Hitler and the Nazis did to the Jewish people. This is where the concept of crime against humanity came from. And this is what the U.N. Human Rights Commission determined that Israel is currently doing to the Palestinian people: crimes against humanity. Legally speaking, it is just like what Hitler and the Nazis did to the Jews.

Moreover, a crime against humanity is the direct historical and legal precursor to the international crime of genocide as defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The theory here was that what Hitler and the Nazis did to the Jewish people required a special international treaty that would codify and universalize the Nuremberg concept of "crime against humanity." And that treaty ultimately became the 1948 Genocide Convention.

It should be noted that the U.N. Human Rights Commission did not go so far as to condemn Israel for committing genocide against the Palestinian people. It condemned Israel for committing crimes against humanity, which are the direct precursor to genocide. And I submit that if something is not done quite soon by the American people and the international community to stop Israeli war crimes and crimes against humanity against the Palestinian people, it could very well degenerate into genocide, if Israel is not there already. In this regard, Israeli Prime Minister Ariel Sharon is what international lawyers call a *genocidaire*, one who has already committed genocide in the past. Sharon is ready, willing, and able to inflict genocide yet again upon the Palestinians, unless we stop him!

Peace Is Possible, If . . .

The goal of obtaining peace with justice for all peoples in the Middle East can only be achieved on the basis of a two-state solution for the Palestinian people and the Jewish people, the right of return for Palestinian refugees, and an equitable solution to the question of Jerusalem:

The Two-State Solution: On November 15, 1988, the independent state of Palestine was proclaimed by the Palestine National Council (P.N.C.), meeting in Algiers, by a vote of 253 to 46. On the same day it was also proclaimed in front of Al-Aqsa Mosque in Jerusalem, the capital of the new state, after the close of prayers. Notice the monumental importance of Al Aqsa Mosque to the Palestinian people. A remarkable opportunity for peace was created by the Palestinian Declaration of Independence because therein the P.N.C. officially endorsed this two-state solution in order to resolve the basic conflict.

This Declaration of Independence explicitly accepted the U.N. General Assembly's Partition Resolution 181 (II) of 1947, which called for the creation of a Jewish state and an Arab state in the former Mandate for Palestine, together with an international trusteeship for the city of Jerusalem. The significance of the P.N.C.'s acceptance of partition cannot be overemphasized. Prior thereto, from the perspective of the Palestinian people, the Partition Resolution had been deemed to be a criminal act that was perpetrated upon them by the United Nations. Today, the acceptance of the Partition Resolution in their actual Declaration of Independence signals a genuine desire by the Palestinian people to transcend the past century of bitter history with the Jewish people living in their midst in order to reach an historic accommodation with Israel on the basis of a two-state solution. The Declaration of Independence is the foundational document for the State of Palestine. It is determinative, definitive, and irreversible.

In this regard, it should be emphasized that Israel officially accepted the U.N. Partition Resolution in its own Declaration of Independence and as a condition for its admission to membership in the United Nations Organization. The 1947 U.N. Partition Plan called for the Palestinian people to have 44% of historic Palestine for their state, a much larger share than the 20% contemplated by U.N. Security Council Resolutions 242 of 1967 and 338 of 1973. Today the Palestinian people would be prepared to accept the 1967 boundaries for the state of Palestine, which would consist essentially of the West Bank, Gaza Strip and East Jerusalem. The P.N.C.'s solemn acceptance of Resolutions 242 and 338 represented a significant concession by the Palestinian people for the benefit of the Israeli people.

The Refugee Question: As another express condition for its admission to the United Nations Organization, the government of Israel officially endorsed and agreed to carry out U.N. General Assembly Resolution 194 (III) of 1948, which determined that Palestinian refugees have a right to return to their homes, or that compensation should be paid to those who choose not to return. Furthermore, that same article 13 (2) of the 1948 Universal Declaration of Human Rights which Soviet Jews relied upon to justify their emigration from the former Soviet Union provides that Everyone has the right . . . to return to his country."

That absolute right of return clearly applies to Palestinian refugees living in their diaspora who want to return to their homes in Israel and Palestine. The state of Israel owes a prior legal obligation to resettle Palestinian refugees who want to return home before it undertakes the massive settlement of Jews and others from around the world.

The Legal Status of Jerusalem: Reportedly, it was the question of Jerusalem that led to the breakdown of the Camp David II negotiations, though the negotiating situation was far more complicated than that. A brief review of the historical record can shed light upon Jerusalem's legal status, and point the way towards an ultimate solution for this city, so revered by three

monotheistic faiths.

On 25 September 1971, then-Ambassador George H.W. Bush, speaking as U.S. Representative to the United Nations, delivered a formal "Statement on Jerusalem" before the U.N. Security Council explaining the official position of the U.S. government with respect to the city of Jerusalem. Therein, Ambassador Bush specifically endorsed and repeated a 1969 statement made before the Security Council by his predecessor, Charles Yost, criticizing Israeli occupation policies in East Jerusalem in the following terms:

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

Ambassador Bush then reaffirmed Yost's prior statement that the United States government considers East Jerusalem to be "occupied territory and thereby subject to the provisions of international law governing the rights and obligations of an occupying power."

Succinctly put, these latter obligations can be found in the Fourth Geneva Convention of 1949, which expanded upon and improved -- but did not displace -- the 1907 Hague Regulations on Land Warfare. The United States government is a party to both the Fourth Geneva Convention and the Hague Regulations. Israel is bound by the terms of both treaties as well.

Ambassador Bush concluded his 1971 "Statement" as follows:

We regret Israel's failure to acknowledge its obligations under the Fourth Geneva Convention as well as its actions which are contrary to the letter and spirit of this Convention. We are distressed that the actions of Israel in the occupied portion of Jerusalem give rise to understandable concern that the eventual disposition of the occupied section of Jerusalem may be prejudiced.

The Report of the Secretary General on the Work of the Organization, 1970-71, reflects the concern of many Governments over changes in the face of this city. We have on a number of occasions discussed this matter with the Government of Israel, stressing the need to take more fully into account the sensitivities and concerns of others. Unfortunately, the response of the Government of Israel has been disappointing.

All of us understand that Jerusalem has a very special place in the Judaic tradition, one which has great meaning for Jews throughout the world. At the same time Jerusalem holds a special place in the hearts of many millions of Christian and Moslems through the world. In this regard, I want to state clearly that we believe Israel's respect for the Holy Places has indeed been exemplary. But an Israeli occupation policy made up of unilaterally determined practices cannot help promote a just and lasting peace any more than that cause was served by the status quo in Jerusalem prior to June 1967 which, I want to make clear, we did not like and we do not advocate re-establishing.

Ambassador Bush's 1971 "Statement" has always represented the United States government's official position on the numerous illegalities surrounding Israel's occupation and illegal annexation of East Jerusalem since 1967.

For similar reasons, the United States government has never recognized Israel's annexation of West Jerusalem as valid or lawful either. That is why the U.S. Embassy to Israel still remains in Tel Aviv, not Jerusalem.

Both Bush's 1971 "Statement" and similar comments he later made as President in 1990 are fully consistent with and indeed required by Article 1 of the Fourth Geneva Convention, which requires the United States government not only to respect but also to ensure respect for the terms of this Convention by other parties such as Israel "in all circumstances." As treaties, both the Fourth Geneva Convention and the Hague Regulations are deemed to be the "supreme Law of the Land" by Article VI of the United States Constitution. Contrary to the public suggestions made in the United States by the Israel lobby and its supporters, the United States government must support the vigorous application of the international laws of belligerent occupation to produce the termination of all illegal Israeli practices in Jerusalem as well as in the West Bank and Gaza Strip, together with the Golan Heights, including and especially Israeli settlers and settlements.

The 1947 United Nations Partition Plan for the Mandate of Palestine called for the creation of an international trusteeship for the city of Jerusalem, that would be administered as a *corpus separatum* apart from both the Jewish state and the Arab state contemplated therein. Today, however, it would not be necessary to go so far as to establish a separate United Nations trusteeship for the city of Jerusalem alone under Chapter XII of the U.N. Charter. Rather, all that would need to be done is for the Israeli army to withdraw from Jerusalem and a United Nations peacekeeping force to be substituted in its place. This U.N. force would maintain security within the city while the provision of basic services to all the inhabitants could be enhanced, especially for the Palestinians.

The simple substitution of a U.N. peacekeeping force for the Israeli army would have the virtue of allowing both Israel and Palestine to continue making whatever claims to sovereignty they want with respect to the city of Jerusalem. Thus, Israel could continue to maintain that Jerusalem is the sovereign territory and united capital of Israel, the Israeli Knesset could remain where it is as a capital district, and the Israeli flag could be flown anywhere throughout the city of Jerusalem.

Likewise, the state of Palestine could maintain that Jerusalem is its sovereign territory and capital. Palestine would be entitled to construct a parliament building and capital district within East Jerusalem. The Palestinian flag could be flown anywhere within the territorial confines of the city.

Both Israel and Palestine would be entitled to maintain ceremonial honor guards, perhaps with revolvers, at their respective capital districts. But no armed troops from either Israel or Palestine would be permitted within Jerusalem.

The residents of Jerusalem would be citizens of either Israel, or Palestine, or both, depending upon the respective nationality laws of the two states involved. Residents of Jerusalem would be issued a United Nations identity card to that effect, which would give them and only them the right to reside within the city of Jerusalem. Nevertheless, all citizens of the state of Palestine would be entitled to enter Jerusalem through U.N. checkpoints at the eastern limits of the city. Likewise, all citizens of the state of Israel would be entitled to enter Jerusalem at U.N. checkpoints located at the western limits of the city. Mutual rights of access for their respective citizens to the two states through Jerusalem would be subject to whatever arrangements could be negotiated between the government of Israel and the government of Palestine as part of an overall peace settlement.

In addition, both Israel and Palestine would have to provide assurances to the United Nations Security Council that religious pilgrims (Moslems, Christians, and Jews) would be allowed access through their respective territories in order to visit and worship at the holy sites in the city of Jerusalem. Some type of U.N. transit visa issued by the U.N. peacekeeping force should be deemed to be sufficient for this purpose by both governments. Of course this right of transit could not be exercised in a manner deleterious to the security interests of the two states.

Thus, Jerusalem would become a free, open, and undivided city for pilgrimage and worship by people of the three monotheistic faiths from around the world. Neither Israel nor Palestine would have to surrender whatever rights, claims, or titles they might assert to the City. Security would be maintained by the United Nations peacekeeping force. And the city of Jerusalem would remain subject to this U.N. regime for the indefinite future.

If a comprehensive Middle East peace settlement were to be negotiated along these lines, then it would be perfectly appropriate under international law for the United States to move its Embassy in Israel from Tel Aviv to Jerusalem. The U.S. Embassy could be simultaneously accredited to the state of Palestine as well as to the state of Israel. The same could be done by all other states in the international community. The presence of these embassies in Jerusalem under such circumstances would permit both Israel and Palestine to claim that the entire international community has now recognized Jerusalem as its capital.

There are many other historical precedents that could be drawn upon to produce a mutually acceptable arrangement for Jerusalem: e.g., the Free City of Danzig, the Vatican City State, the District of Columbia, etc. So determining the final status of Jerusalem is not and never has been an insuperable obstacle to obtaining a comprehensive Middle East peace settlement. If the will for peace is there on the part of the Israeli government, then creative lawyers on each side can devise an artful arrangement for the city of Jerusalem that would allow both peoples to claim victory while achieving peace.

Prologue: New Direction for the Palestinians

Just before the September 13, 1993 Oslo Agreement signing on the White House Lawn, I commented to a high-level official of the P.L.O., "This document is like a straight-jacket. It will be very difficult to negotiate your way out of it!" This official readily agreed: "Yes, you are right. It will depend upon our negotiating skill."

I have great respect for Palestinian negotiators. They have done the very best they can negotiating in good faith with an Israeli government that has been invariably backed up by the United States. But there has never been any good faith on the part of the Israeli government either before, during, or after Oslo. The same is true for the United States.

Even if Oslo and Camp David II had succeeded, they would have resulted in the permanent imposition of a bantustan upon the Palestinian people. But Oslo has run its course. Therefore, it is my purpose here to sketch out a new direction for the Palestinian people and their supporters around the world to consider as an alternative to the Oslo process.

- **First:** We must immediately move for the *de facto* suspension of Israel throughout the entirety of the United Nations system, including the General Assembly and all U.N. subsidiary organs and bodies. We must do to Israel what the U.N. General Assembly has done to the genocidal rump Yugoslavia and to the criminal apartheid regime in South Africa. Here the legal basis for the *de facto* suspension of Israel at the U.N. is quite simple:

As a condition for its admission to the United Nations Organization, Israel formally agreed, *inter alia*, to accept General Assembly Resolution 181 (II) (1947) (on partition and Jerusalem trusteeship) and General Assembly Resolution 194 (III) (1948) (Palestinian right of return). Nevertheless, Israel has violated its conditions for admission to U.N. membership and thus must be suspended on a *de facto* basis from any participation throughout the entire United Nations system.

- **Second:** Any further negotiations with Israel must be conducted on the basis of Resolution 181 (II) and the borders it specifies; Resolution 194 (III); subsequent General Assembly resolutions and Security Council resolutions; the Third and Fourth Geneva Conventions of 1949; the 1907 Hague Regulations; and other relevant principles of public international law.
- **Third:** We must abandon the fiction and the fraud that the United States government is an "honest broker" in the Middle East. The United States government has never been an "honest broker" since from well before the very outset of the Middle East peace negotiations in 1991. Rather, the United States has invariably sided with Israel against the Palestinians, as well as against the other Arab States. We need to establish some type of international framework to sponsor these negotiations where the Palestinian negotiators will not be subjected to the continual bullying, bribery, and outright deceptions perpetrated by the United States working in conjunction with Israel.
- **Fourth:** We must move to have the U.N. General Assembly adopt comprehensive economic, diplomatic, and travel sanctions against Israel according to the terms of the Uniting for Peace Resolution (1950). Pursuant thereto, the General Assembly's Emergency Special Session on Palestine is now in recess just waiting to be recalled.
- **Fifth:** The Provisional Government of the state of Palestine must sue Israel before the International Court of Justice in The Hague for inflicting acts of genocide against the Palestinian people in violation of the 1948 Genocide Convention.
- **Sixth:** We must pressure the Member States of the U.N. General Assembly to found an International Criminal Tribunal for Palestine (ICTP) in order to prosecute Israeli war criminals, both military and civilian, including and especially Israeli political leaders. The U.N. General Assembly can set up this ICTP by a majority vote pursuant to its powers to establish "subsidiary organs" under U.N. Charter article 22. This International Criminal Tribunal for Palestine should be organized by the U.N. General Assembly along the same lines as the International Criminal Tribunal for the Former Yugoslavia (ICTY) that has already been established by the U.N. Security Council.

- **Seventh:** Concerned citizens and governments all over the world must organize a comprehensive campaign of economic disinvestment and divestment from Israel along the same lines of what they did to the former criminal apartheid regime in South Africa. This original worldwide disinvestment/divestment campaign played a critical role in dismantling the criminal apartheid regime in South Africa. For much the same reasons, a worldwide disinvestment/divestment campaign against Israel will play a critical role in dismantling its criminal apartheid regime against the Palestinian people living in occupied Palestine as well as in Israel itself.

During the course of a public lecture at Illinois State University in Bloomington-Normal on 30 November 2000, I issued a call for the establishment of a nationwide campaign of divestment/disinvestment against Israel, which was later put on the internet. In response thereto, Students for Justice in Palestine at the University of California at Berkeley launched a divestment campaign against Israel there. Right now the city of Ann Arbor Michigan is also considering divesting from Israel. And just recently the Palestinian Students at the University of Illinois at Urbana-Champaign (whom I am privileged to advise) launched an Israeli divestment campaign here. This movement is taking off.

[See The Divest from Israel Campaign: Join People of Conscience - DIVEST NOW! (at www.divest-from-israel-campaign.org) including its listing of 23 (as of 6/14/03) active divestment/disinvestment university/college campaign websites. --ratitor]

These seven steps taken in conjunction with each other should provide the Palestinian people with enough political and economic leverage needed to negotiate a just and comprehensive peace settlement with Israel.

By contrast, if the Oslo process is continued, it will inevitably result in the permanent imposition of a bantustan upon the Palestinian people living in occupied Palestine, as well as the final dispossession and disenfranchisement of all Palestinian people living in their diaspora.

Consequently, I call upon all Palestinian People living everywhere, as well as their supporters around the world, to consider and support this "New Direction."

Free Palestine!

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Related Links:

- Mandate entrusted to the Secretary-General on the question of the violation of human rights in the occupied Arab territories, including Palestine.
- Mandate entrusted to the Secretary-General on the situation of human rights in southern Lebanon and western Bekaa.
- Mandate entrusted to the Secretary-General on the situation in occupied Palestine.
- Mandate entrusted to the Secretary-General on human rights in the occupied Syrian Golan.
- Special Committee to Investigate Israeli Practices affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.
- Special Rapporteur of the Commission on Human Rights on the situation of human rights in the occupied Palestinian territories.

- UN Information System on the Question of Palestine (UNISPAL).
Access to U.N. Resolutions on the Question of Palestine
(Security Council, General Assembly, Resolutions of some other UN Bodies)
- Current and recent UN documents on the conflict and access to the latest Security Council resolutions.
- Resolution 2002/1 "Situation of human rights in the occupied Palestinian territory". UN Commission on Human Rights.

- Hague Conventions of 1907:
 - Hague I - Pacific Settlement of International Disputes, 18 Oct 1907
 - Hague II - Limitation of Employment of Force for Recovery of Contract Debts, 18 Oct 1907
 - Hague III - Opening of Hostilities, 18 Oct 1907
 - Hague IV - Laws and Customs of War on Land, 18 Oct 1907
 - Hague V - Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 Oct 1907
 - Hague VI - Status of Enemy Merchant Ships at the Outbreak of Hostilities, 18 Oct 1907
 - Hague VII - Conversion of Merchant Ships into War Ships, 18 Oct 1907
 - Hague VIII - Laying of Automatic Submarine Contact Mines, 18 Oct 1907
 - Hague IX - Bombardment by Naval Forces in Time of War, 18 Oct 1907
 - Hague X - Adaptation to Maritime War of the Principles of the Geneva Convention, 18 Oct 1907
 - Hague XI - Restrictions With Regard to the Exercise of the Right of Capture in Naval War, 18 Oct 1907
 - Hague XIII - Rights and Duties of Neutral Powers in Naval War, 18 Oct 1907

- Charter of the United Nations, 26 June 1945
- Nuremberg Charter of the International Military Tribunal, 8 August 1945
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948
- Third Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949
- Fourth Geneva Convention Relative to the Protection of Civilian Persons in a Time of War, 12 August 1949

See Also:

- The Al Aqsa Intifada and International Law, by Francis A. Boyle, 30 November 2000
- Palestine, Palestinians and International Law, by Francis Boyle, 31 March 2002