International Law and the Peace Process

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By RICHARD FALK*

My analysis of the role of international law in the Israel-Palestine peace process rests on several fundamental assumptions:

(1) Conventional approaches to resolving the Israel-Palestine conflict, based on bargaining and inter-governmental negotiations have failed for several decades, and offer no prospect of succeeding in the foreseeable future;

(2) International law provides the parties with a perspective on the merits of their claims in regard to disputed issues, and a crude map that identifies the contours of a fair solution. Fairness is in the eye of the beholder, and in such a partisan context as the Israel Palestine conflict, especially as perceived in the United States, the interpretation of fair is likely to receive contradictory spins. A way to reduce this spin factor is to make reference to what features of statehood are necessary for both Israel and Palestine to constitute viable and secure sovereign states, as well as to consider Palestinian entitlements under international law;

(3) Relying on international law is currently as unpromising as the previously tried approaches because of considerations of political feasibility; and

(4) If the United States Government were to promote a solution based on international law, it could show its commitment by taking various steps that exerted pressure on the government of Israel to implement international law in the Occupied Territories and in framing future peace negotiations, including conditioning arms assistance, prohibiting further foreign investment, and imposing an arms embargo.

In this article I seek to demonstrate that the acceptance of international law is the best way to achieve peace and security in Israel-Palestine, and why, despite the potential benefits for both sides, it is highly unlikely -

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given current prevailing attitudes toward 'peace' in both Tel Aviv and Washington - that international law will be used in this manner. Given such a political reality, I will still proceed to make the argument for using international law in this context, both to show why past efforts have failed and how future efforts could succeed if the necessary political will emerged. In this respect, the assessment is deliberately 'utopian' in the sense that it is highly unlikely it will be realized in practice. But, as I will argue, this sort of utopian perspective encourages a more active moral and political imagination in circumstances where conventional approaches seem blocked.

Further Framing Remarks

This analysis is premised on the assumption that a sustainable peace between Israel and Palestine requires the establishment of an independent state of Palestine enjoying sovereign rights equal to those of the state of Israel, or in the alternative, a single, bi-national state that treats the new peoples equally under the authority of a single government. The indispensable end point to my mind is attaining this sort of equality, but the two-state approach offers the most likely escape route from the current impasse. A sustainable peace at the present time is more likely to come about with the implementation of a two-state system than a shift of attention to the formation of a single state, which would amount to the recreation of the historic Palestine as it existed before 1948.1

The focus of this article is to explore the relevance of international law in getting from here to whichever 'there' of the two mentioned above is preferred, but is weighted toward an outcome that produces two independent sovereign states living side by side. This exploration also seeks to show that the prior exclusion of international law from the peace process, as has occurred in past efforts to work toward conflict resolution, inhibits identifying the specific conditions of success and precludes finding a solution to this tragic conflict. Such a failure is not an abstract matter, as the persistence and continuous worsening of the conflict is exacting a terrible toll of human suffering on both peoples, in particular the Palestinians. In this respect, the continuing exclusion of international law represents a fatal flaw to the extent that the establishment of a 'peace process' genuinely seeks to achieve peace rather than merely to register disparities in power and influence in an agreement that will not command respect on the Palestinian side, even if accepted at some moment due to

international pressures.\(^2\)

My work here, as in so much else related to this subject matter, draws inspiration from my friend, the late Edward Said. While his ‘absence’ now deprives us of a needed and irreplaceable voice, his ‘presence’ persists in our thoughts and sentiments remaining as powerful as ever for many of us concerned with this and related issues. In words that express my point of departure, in a preface published in 2003 for the 25th anniversary edition of *Orientalism,* Edward wrote:

Our role is to widen the field of discussion, not to set limits in accord with the prevailing authority... The paramount thing is that the struggle for equality in Palestine/Israel should be directed toward a humane goal, that is, coexistence, and not further suppression and denial.\(^3\)

From such a point of departure, the approach developed in this presentation is rights-based rather than power-driven. The approach is similar to a persuasive and congenial international law analysis published five years ago by John Quigley, in his excellent article entitled “The Role of Law in a Palestinian-Israeli Accommodation,” which was part of a symposium on “The Legal Foundations of Peace and Prosperity in the Middle East.”\(^4\) I will go beyond the legal analysis to examine the politics behind the exclusion of international law. The insistence on the inclusion of international law may appear as fanciful if we allow our legal imaginations to be bound by the constraints of present perceptions of political feasibility. I believe that to find any glimmer of hope for the future with respect to resolving the conflict, we must be willing to embrace what now appears implausible. If that political situation could somehow be changed, then the new format for rights-based negotiations would provide both Israel and Palestine with a promising framework for achieving a sustainable solution to the conflict.

II. The Essential Argument

In many circumstances, it would hardly be innovative to propose that an outstanding international conflict involving sustained political violence should take account of the respective rights of the parties in seeking to

\(^2\) For comprehensive treatment of international law from a Palestinian perspective see Francis A. Boyle, *Palestine, Palestinians, and International Law* (2003).


devise a solution that is fair and sustainable. After all, a major role of international law is to help parties caught in lethal conflicts to identify, admittedly without great precision, the outer limits of reasonable claims on both sides. In this larger sense, it is helpful to understand international law as the embodiment of reasonableness, and hence to treat gross departures from international law, unless vindicated by truly exceptional circumstances, as treading treacherously upon the terrain of unreasonableness.

It is a sign of the special character of the Israel-Palestine conflict, and the lengthy history of the failed efforts to find resolution, that it seems like such a provocative idea to argue that the neglect of international law guidelines is a fatal flaw of all previous attempts to achieve 'peace' between these two long-suffering peoples. We must ask, at the outset, why has this neglect been so ingrained, indeed to such an extent that during the Oslo years, it was viewed as disruptive of the 'peace process' to contend that Israel was violating Palestine's rights under international law? If objection was voiced to Israeli expansion of the settlements, to construction of bypass roads, and to steps taken to 'Israelize' the city of Jerusalem and its surroundings, the standard diplomatic response from Tel Aviv and Washington was to deflect any consideration of the alleged violations of rights, contending always that such matters would be resolved in the final status phase of the negotiations. These issues are different in kind from the Palestinian legal grievances under the occupation, which raise questions about the applicability of the Fourth Geneva Convention to day-to-day realities in the West Bank and Gaza. What makes the exclusion of international law from the peace process itself function so perversely is that it tends to strengthen the overall position of the party (Israel) that is pursuing occupation policies deliberately designed to alter the negotiated outcome via bargaining in its favor? This perversity was accentuated in 2000, at the end of the Camp David II and Taba negotiations when Yasir Arafat and the Palestinian side were blamed for the breakdown of the negotiations and the resumption of armed struggle and the Israelis were praised for their supposedly 'generous' proposals. The only conceivable way such perceptions can achieve even minimal plausibility is by viewing the 'peace' between the two sides through an Israeli-tinted geopolitical lens.

5. These proposals were never written down in an authoritative form, and their content is available only indirectly and tentatively. For a useful commentary see Robert Malley and Hussein Agha, Camp David: A Tragedy of Errors, New York Review of Books, Aug. 9, 2001, Vol. 48 (No.13).
What I mean by this comment is that ever since the occupation of the Palestinian Territories commenced in 1967, Israel has proceeded 'to create facts on the ground,' especially with respect to the settlements, the status of Jerusalem, access to and use of water, and the delimitation of borders. It was these facts, which were themselves gradually established in direct violation of the ground rules for an occupying power contained in the Fourth Geneva Convention, that Israel, with American support, managed to insert at every stage into the bargaining process. In effect, Israel was successful in establishing a geopolitically-driven understanding of 'reasonableness,' coupled with an argument as to feasibility, which was radically at odds with a legally-driven understanding. In effect, Palestinian demands were deemed 'unreasonable' if they objected to the facts on the ground in the West Bank (that is, principally, the settlements and their infrastructure of bypass roads, the denial of a Palestinian right of return, appropriation of ground water, and the Israelization of Jerusalem). The Palestinian position was also viewed as impractical to the extent that its demands were formulated by reference to Palestinian rights under international law rather than as presented as a negotiating response to an Israeli proposal. Among other consequences, associating 'peace' with such geopolitical expectations puts those favoring a balanced and fair outcome in the position of being identified as 'rejectionists,' or at best, 'unrealistic.' By his principled opposition to this geopolitical idiom, Edward Said often found himself categorized as such, and barred from so-called respectable discussion. On the other side, those who softened their geopolitical posture, such as Shimon Peres, were misleadingly portrayed as 'doves,' dedicated to 'peace,' and their views were welcomed as constructive efforts to bridge the gap and achieve peace.

What made this deformation of negotiations so widely accepted was the underlying gross imbalance in diplomatic skill and capacity between the two sides. The stronger Israeli side had an incentive and the ability both to establish facts that enlarged its claims, with respect to the future, and to exclude from consideration the invalidating relevance of international law. Israel has continuously pressed this advantage to the fullest extent over the entire period of the occupation, which enjoyed, with minor, rare, and temporary exceptions, unqualified American diplomatic

support. This support took the form of blocking, or at the very least, severely curtailing criticism of these Israeli practices that were so clearly violative of Palestinian legal rights. Additionally, the American support infringed upon the sense of fairness and legitimacy of a political process that sought reconciliation between the two equal peoples. The Palestinian side was further hampered by a lack of consistent technical competence about the details of negotiations, a weakness exploited by sophisticated Israeli negotiators backed by an array of experts. The otherwise puzzling Palestinian failure to demand the explicit inclusion of international law in the Oslo framework as pertaining to the process of negotiations from start to finish, and as governing Israeli administration of the occupied territories in the interim is evidence of this particular disparity in negotiating sophistication. As it was, this weakness resulted in reducing the Palestinian objections to Israeli gross violations of the Fourth Geneva Convention during the Oslo period to a barely audible whimper. The Palestinian leadership, unwisely in my opinion, generally accepted the admonition that raising legal objections, even in the face of such fundamental alterations in the status quo as those associated with the billions being invested by Israel during the 1990s in the settlements and network of roads, would clearly harm the prospects for progress toward any sustainable peace. These illegal practices by Israel undercut Tel Aviv's contention that to the extent that legitimate Palestinian grievances existed, they should be addressed only later when a final arrangement was being negotiated by the two parties. The Palestinians were trapped between allowing adverse facts on the ground to accumulate by way of the expansion of the settlements, land annexations, and the like and being charged with disruptive behavior with respect to the peace process by raising objections with respect to issues that were to be addressed and if possible resolved at the very end of negotiations, so-called 'final status' issues. This Oslo approach was defended by the alleged need to first establish security and an end to violence as Palestinians took over from the IDF in the occupied territory, and thereby build confidence on the Israeli side that it was safe to go ahead and deal with the most difficult adjustments for the sake of a durable peace. In effect, why confront the settlers until the gains for Israel were sufficient to justify what loomed as an exceedingly difficult struggle. There was a similar incentive on the Palestinian side relating to relinquishing, or at least downsizing, the claims of Palestinian refugees and exiles.

At worst, the scale of Israeli settlement construction and infrastructure development on the West Bank convinced Palestinian skeptics that the whole Oslo Process was a ruse to undermine growing Palestinian resistance to the occupation, as well as to make the emergence of a viable Palestinian
state impossible. This skepticism led to a resumption and intensification of sporadic Palestinian violence, directed especially against the settlers, as a way of demonstrating that Palestinian militants had not been co-opted into this geopolitical framing of a one-sided peace. Such a development, in turn, was seized upon by Israeli extremists, who formed the backbone of the Likud and never accepted the idea of a negotiated solution, even if heavily weighted in Israel’s favor.\(^7\) To these Israeli obstructionists it was the Palestinians who were using the peace process as a staging ground for further assaults on Israel’s very existence as a state.

In effect, Oslo was destined for failure because its central premise was based on the embedding of the geopolitical imbalance between the two sides in an arrangement for negotiations that was identified with ‘peace.’ In actuality, it fueled the distinct, yet deeply felt, paranoia of both the Palestinians and Israelis.

Beyond serving to create facts that would raise Israeli expectations and change the reference points for a reasonable compromise and a just outcome, Israeli settlement presents a further problem to the degree to which international law, as widely and persistently endorsed by the membership of the United Nations, supports the range of Palestinian claims pertaining to such issues as borders, refugees, Jerusalem, settlements, water, and self-determination. The Israeli effort to superimpose its security and its identity as a Jewish state on the peace process depends on denying to Palestine the implementation of its rights under international law. On some of these issues there may be room for a voluntary relinquishment of legal rights on the part of the Palestinians so as to obtain a political acceptance in Israel of proposals that will reassure a broad spectrum of viewpoints in Israel. But to make concessions viable on the Palestinian side, they must be made in a forthright manner in which Israel acknowledges by word and deed, and without qualification, the sovereign equality of any Palestinian entity vis-à-vis itself that is declared in the end of the process to be a ‘Palestinian State.’ Such an outcome would almost certainly also entail the unconditional abandonment on the Palestinian side of any future additional claims for the rectification of alleged past wrongs, especially those associated with past expulsions, particularly the refugees generated by the 1948 and 1967 wars.

So far, this spirit of reciprocity and mutuality has been absent from even the most widely endorsed peace proposals that enjoy support from peace activists on both sides. For instance, the ‘Geneva Accords’ that

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7. See Khalidi, supra note 5, at 137-150; see also Derek Gregory, The Colonial Present (2004), 76-143.
caused such a stir among peace groups here and elsewhere when released a few months ago, posits, at best, a Palestinian mini-state that is denied equal rights, most notably when it comes to the security arrangements permitted for the two states. The outline presented in the Geneva Accords for a recommended agreement does represent a definite and desirable softening of the geopolitical imbalance that has marred the official approaches, but it continues to sustain the illusion that a political bargain between two sides of unequal leverage can produce a fair and sustainable outcome. The position that I advocate is that such an outcome can come about only by a process that, at the very least, acknowledges Palestinian rights under international law, which means rejecting and removing Israeli "facts" that are illegal, and gives substantial expression to these rights as the necessary basis for defining a fair and just peace. As indicated earlier, there is room in a peace accord for taking into account deeply and widely felt Israeli anxieties around Israel's identity as a Jewish state and the related fear of a massive influx of Palestinian refugees. Allaying this fear would require some degree of self-limitation on the Palestinian side with respect to the implementation of their legal rights, perhaps facilitated by compensation awarded to non-returning Palestinians. In this sense, the insistence on the relevance of international law should not be confused with a rigid approach that relies on sterile legalism to resolve the conflict. Of course, admittedly, drawing the line between taking legal rights seriously and avoiding legalism depends on interpretative reasonableness on both sides of any negotiation. When talking with Palestinians who were extremely skeptical about the Oslo, Geneva, and roadmap frameworks, I was encouraged by the degree to which there was often a display of flexibility about the literal enactment of Palestinian rights on the subjects of refugees, borders, even some settlements, if the context of negotiations was shaped by an ethos of sovereign equality between the two peoples, but not otherwise.

We need to ask ourselves at this point why, given the relevance of international law in identifying the contours of a fair and sustainable peace, it has not been a more prominent negotiating tool for both sides. From a standard Israeli perspective, the answer is that international law opposes their demands on the crucial issues, and even if Palestinian rights are not fully implemented, their mere acknowledgement would still threaten, or be widely perceived on the Israeli side to threaten the very survival of Israel as a Jewish state, and at least would seem inimical to Israeli benefits.

associated with the \textit{status quo}. But given the multi-dimensional costs of the ongoing conflict and the apparent futility and burdens of achieving security by a combination of oppressive rule and state terrorism, it would seem that Israel can only hope to achieve security through a peace process that \textit{genuinely} satisfies the overwhelming majority of Palestinians, not an agreement that is force-fed to the Palestinian leadership of questionable credentials that is reflective of desperate circumstances. I would argue that this alternative approach, based on the rights of the parties, although never tested, is the most promising approach, even from an Israeli perspective. Of course, there would be some large bumps in the road arising from likely violent disruptive tactics by extremist opponents of such a real peace process on both sides. The difficulties of following through on the Good Friday Agreement to resolve conflict in Northern Ireland is illustrative, as is the assassination of Yitzhak Rabin for his role in promoting the Oslo framework, even though Oslo never required Israel to abandon the geopolitical track that gave it an asymmetric advantage.  

I fully acknowledge that a law-guided approach to Israel-Palestine relations is not politically viable for the foreseeable future, but only because the political and psychological conditions are absent. An overwhelming majority of Israelis would presently interpret such an about face by their government as an unacceptable expression of weakness and defeat. The shift of approach that I am advocating would require a dramatic breakdown of the present thinking about Israeli security that generated such deep pessimism so as to produce receptivity to new thinking. This could occur either as a result of the persistence of Palestinian-armed resistance, through a deepening of the Israeli economic crisis, or by some unexpected change of position by the United States. The emergence of a charismatic leader in Israel who is willing and able to produce this sort of reversal of attitudes would also probably be a necessary component. Such developments, however remote they now seem, are not altogether inconceivable. Consider the unlikelihood of a peaceful transformation of \textit{apartheid} South Africa as late as the mid-1980s or of the improbable internal and international dynamics set off by the unexpected

\footnotesize{9. There exists a certain affinity to the argument given prominence by Robert Kagan in his explanation of the cleavage between Europe and the United States with regard to the role of international law. Kagan contends, in essence, that Europe is disposed toward international law because it is weak militarily and the United States is dismissive because it is strong. ROBERT KAGAN, \textit{OF PARADISE AND POWER, AMERICA AND EUROPE IN THE NEW WORLD ORDER} (2003).

10. For sharp criticism along these lines see Edward Said, \textit{The End of the Peace Process: Oslo and After} (2000).}
leadership of Mikhail Gorbachev in the Soviet Union, which included the revolutionary calls for glasnost and perestroika.

On the Palestinian side, the reluctance to invoke international law is at first glance harder to explain. After all, in the encounter with Israel, international law is one of the few domains in which the Palestinians hold the better cards. Palestinian legal rights can be invoked both to clarify the parameters of a fair outcome and as a bargaining tool to neutralize the power disparity. International law in this context can be understood as a vast reservoir of latent Palestinian 'soft power,' as yet untested as a lever of influence. But why untested? Palestinian reluctance to insist on their rights under international law is most easily explained as a tacit acknowledgement of extreme and humiliating Palestinian weakness, accepting the reality that any kind of viable framework for negotiations would have to conform to even the unreasonable demands of Israel, as endorsed by the United States government. These demands would include an insistence that the negotiating process be based essentially on political bargaining in which the respective legal rights of the parties were not to be taken into account. Israel has displayed a clear-eyed awareness of the weakness of their peace diplomacy if it submits to the authority of international law. In this sense, the exclusion of international law represents a pre-negotiating Israeli victory that the Palestinians can oppose only if they are willing to pay a high public relations cost by being cast in the role of blocking forthcoming peace initiatives.

The Palestinian acceptance of this exclusion is comparable to their continuing acceptance of the mediating role of the United States in the face of extreme and consistent displays by Washington of pro-Israeli partisanship. This strong partisanship has been more or less a constant at least since 1967, and was epitomized in the months preceding the most recent American presidential elections by an extraordinary speech given by President Bush to the 2004 annual meeting of the avidly pro-Israeli lobbying group, AIPAC. John Kerry also gave gratuitously supportive statements of Sharon, and his military tactics, promising continuing unwavering support for Israel if elected. In other words, Palestinian weakness is so pronounced that these clearly distorting features of so-called peace negotiations are accepted without public objection by Palestinian leaders, including Yasir Arafat, despite his ill treatment at the hands of Israel during the Sharon period.

Because the framework is so grossly distorted and has been so unproductive, many Palestinians are themselves periodically suspicious about the motives of their official representatives, exerting their own pressures through back channels and by continuing militancy. Palestinians
of all people know these elementary truths: that international law and United Nations authority are on their side and that the United States is unconditionally committed to Israel and thus not qualified in any sense to serve as an 'honest broker.' This awareness helps to account for a Palestinian backlash often directed at their own leadership. It exerts strong pressures on Arafat and the Palestinian Authority to reassure its people and their more militant leaders that Palestinian demands have not been, despite appearances to the contrary, sacrificed. Unfortunately, such reassurances, when heard by Israelis, feed an impression of double-dealing by Arafat. While visiting the West Bank and Gaza three years ago as part of a fact-finding mission for the United Nations Human Rights Commission, I recall being told over and over again by moderate Palestinian civil society activists that the second intifada of 2000 was intended as much as a warning to Arafat not to betray fundamental Palestinian claims as it was a militant reaction to Sharon's visit to Haram al-Sharif (The Temple Mount) on September 28, 2000. What I am arguing is that the exclusion of international law, which appears to Palestinians to be tantamount to political surrender, puts the official Palestinian leadership in a double bind from which there is no clear way out: they must either reject prospects for a peaceful solution or participate in a process that ignores their most fundamental rights.

Having argued along these lines, is it now time to put aside this line of advocacy as 'utopian,' 'unrealistic,' and a glaring instance of 'the best being an enemy of the good.' The Palestinians, in particular, have always been advised by centrist voices in the United States to settle for what they could get, given the disparity of power between the two sides, as well as the de facto circumstances brought about by decades of Israeli occupation. For these reasons, it was implicit that if the Palestinians had any hope for diplomatic progress, they needed to abandon an insistence on an outcome based on law and justice. In truth, neither of the parties has ever shown any interest in a rights-based approach to conflict resolution. Nevertheless, I think it is essential in the present setting to take this rights-based approach seriously and to endorse it with avid sincerity. To begin with, I insist that my position is one in which it is opposing 'the good' to 'the bad' when it comes to the pursuit of peace, and that the inclusion of international law is an instance of 'the good' and not of 'the best.' By this I mean a solution that expects the Palestinians to settle for a non-viable mini-state is 'bad' in the sense that it will not lead to peace or justice, and providing the Palestinians with a state that is equal to that of the Israeli may be far from the 'best' (considering that it is based on ethnic criteria of political community, which is contrary to the Enlightenment conception of a
legitimate sovereign state as a secular entity without a specific ethnic or religious identity) but it might still be ‘good’ insofar as it ends the conflict and is a sustainable basis for co-existence of the two peoples. Furthermore, that which has in the past been hailed as realistic and feasible has not resulted in any sort of solution in historic Palestine for almost a hundred years. Put differently, only a solution which seems utopian and unrealistic at this point can set the political and moral imagination sufficiently free enough to envision a solution that might finally bring peace. True, for such thinking ‘outside the box’ to have any chance at success will still depend on a sea change in Israeli public opinion and leadership style. Yet we can affirm that, without this sea change, those outcomes that are touted as solutions are at best variations of an ‘imposed peace.’ Such a result is almost certainly unsustainable, and at worse, a pause in the conflict that will be ended by an escalated scale of violent encounter.

It might be argued in opposition to my line of thinking that I have exaggerated the clarity of international law, and the degree to which it favors Palestinian claims. I make reference to other contributions to the symposium to bolster this facet of the argument, showing that unlike many international disputes, here international law as widely understood throughout the world and as reasonably interpreted, does indeed lend strong support to the Palestinian position on every major contested issue. This should not be surprising since Israel has, since its inception, been able to convert its vulnerability to hostile regional and indigenous forces into a series of expansions at the expense of the Palestinians. And beyond this, the Israeli *raison d’être* of being a Jewish state entitled to disallow the return of Palestinian refugees challenges the widely legitimized view of the sovereign state as a secular entity that is not permitted to define itself in exclusivist ethnic and religious terms, and is obliged to treat all of its inhabitants in a non-discriminatory fashion. To give Jews throughout the world an unlimited right of return, including those that have resided outside of present day Israel for centuries, while at the same time disallowing Palestinians the same right of return, including to their own homes, illuminates the extreme degree to which the Palestinians have been victimized and their rights denied at least since 1948. Of course, the historical realities of the Holocaust, associated patterns of anti-Semitism, and the anti-Zionist hostility of Arab neighbors must also be taken into account in assessing the Zionist movement that brought Israel into being as an independent state. Also relevant is the behavior of the Israeli state that has, from its inception, fused genuine security concerns with its expansionist ambitions and schemes. Palestinian sensitivity to some Israeli concerns, as earlier suggested, might help fashion a valid peace process in a
spirit of genuine Palestinian accommodation and compromise, but only if a reciprocal process on the Israeli side yields legal rights to the Palestinians, including in particular affirming a Palestinian right of self-determination that included the option of a fully sovereign state.

III. Palestinian Claims and International Law

This portion of the paper summarizes the assessments under international law of the relative merits of the Palestinian claims as to their legal rights. It concludes that on the politically contested issues of borders, settlements, refugees, Jerusalem, and water that international law is generally supportive of Palestinian claims, while being mostly critical of Israeli efforts to establish facts in contravention of Palestinian legal rights. Since 1967, Israel, as occupying power in the West Bank and Gaza, has had an overriding legal responsibility to act as the guardian of the rights of Palestinians under their control. Their defiant refusal to discharge this responsibility, including a refusal to comply with numerous resolutions issued by the United Nations, including the call for an immediate withdrawal from territory occupied in 1967, validates Palestinian resistance, although not violence against civilians.1 What counts as a ‘civilian’ is itself contested, with the issue centering on how to interpret the status of Israeli settlers, especially those who are armed. Whether Palestinian exercise of such a right of resistance is prudent and wise under the circumstances of the conflict remains a contested matter, but from a legal perspective such a right exists provided that it respects the limits on political violence embedded in international humanitarian law.

Arguably, a principal motivation for this resistance is the refusal of Israel to act in accordance with international law or to show respect for the recommendations and decisions of the United Nations. This refusal has been allowed, to date, to control the approach to conflict resolution, which has conveyed to Palestinians, including those seeking some sort of reasonable compromise, that their only alternatives are political surrender of their fundamental rights or armed struggle. That is, the failure of the international community, including the United States, to protect the

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Palestinians from unlawful Israeli policies and practices gives rise to violent resistance and poisons the peace process itself. There are three interconnected issues here: international law and the occupation; international law in the course of the peace process; and international law and the shape of the final negotiated arrangement.

IV. Toward Peace

As I have argued, the geopolitically oriented approach to conflict resolution perpetuates the distortions associated with power disparities between the Israelis and Palestinians, and is incapable of generating outcomes that are acceptable to the Palestinian side over any length of time. This underlying assessment should not be put aside because there are also some differences of viewpoint on the Israeli side. One difference is over how strongly to insist on translating their geopolitical advantage into a permanent arrangement, with Israeli ‘doves’ favoring somewhat less one-sided solutions than the Israeli ‘hawks,’ many of whom see no benefit in making any departure from the de facto realities of Israeli domination of Palestinian territories.

A further element in understanding this tormented conflict configuration is the major foundational concession made by the Palestinians through their acceptance of the 1967 borders as the starting point for negotiations. As has been frequently pointed out, this Palestinian initiative concedes 78% of the original Palestine mandate to Israel, limiting the search for Palestinian self-determination to the remaining 22%.12 In this respect, even the full implementation of Palestinian rights under international law would involve an implicit deference to pre-1967 facts on the ground, that is, geopolitical realities.

Against this background it is possible to envision two different constructive ways to achieve a sustainable peace, both emphasizing legal rights but in reverse order. The first approach would start the process of negotiation from an agreed-upon endpoint of achieving a Palestinian state in the occupied territories that enjoyed full sovereign rights on an equal basis with Israel. With this endpoint in view, the peace process would work backward to determine what steps need to be taken to reach this outcome. It would seem that steps such as dismantling all armed

12. For instance, Saeb Erakat, the chief Palestinian negotiator with Israel in recent years, has been quoted as follows: “We recognized Israel in 78 percent of the territory of Palestine in exchange for our own state on 22 percent, but then Israel began negotiating over the 22 percent.” Michael Jensen, “Palestinians’ ‘Life in Precarious These Days,’” JORDAN TIMES, Sept. 18, 2003. See <http://www.palestinemonitor.org/Feature/cover.htm>.
settlements, internationalizing the city of Jerusalem, fixing the 1967 borders, establishing a joint regime for sharing water resources, and a mutual non-aggression pact would be taken according to a fixed timetable. International law would only be indirectly relevant to help identify what would need to happen to give Palestine a state that would then provide the basis for Palestinian self-determination on the basis of equal rights. International law would also be relevant in establishing a solution to the burning issue of Palestinian refugees, but as indicated, the solution, while reflective of legal rights, need not be rigidly legalistic in implementation.

The other alternative would be to shape the process and the outcome by reference to the respective legal rights and duties of the two sides. Such a law-guided framework for conflict resolution would apply to the character of Israeli occupation, requiring strict adherence to the Geneva framework on International Humanitarian Law during all phases of negotiation and implementation. International law would also shape the substantive contours of the Palestinian entity emerging from negotiations. Such an entity would have to be a state in the full sense of international law, and could not be subject to Israeli intrusive security arrangements such as insisting on Palestinian demilitarization or Israeli claims to control air space, sea corridors, and borders.

A third potential approach noted at the beginning, but outside the scope of this article, would seek implementation of Palestinian legal rights within the architecture of a one-state solution, including the process associated with moving from where we are to the desired endpoint.

In ending I would like to return briefly to the motif of hope as the necessary alternative to despair. I have been deeply impressed by the outlook on world affairs of Jacques Derrida, one of the wisest and most profound thinkers now walking the planet. My presentation can be heard as an affirmation of the following sentiment expressed by Derrida, thinking about the future in the light of the 9/11 attacks:

I would take the side of the camp that, in principle, by right of law, leaves a perspective open to perfectibility in the name of the 'political,' democracy, international law, international institutions....Even if this 'in the name of' is still merely an assertion and a purely verbal commitment. Even in its most cynical mode, such an assertion lets resonate within it an invincible promise.13

In the same spirit I have tried to give voice to what Derrida calls 'an

invincible promise’ as one way to sustain hope amid darkness.

In this search for the difficult and obscure road forward a few lines of poetry by Mahmoud Darwish from the poem “The Hoopoe” provide a form of subtle encouragement:

Our journey to oblivion has been endlessly prolonged.
The veil before us obscures every other veil. Maybe traveling half the road will lead us to a road of clouds. Perhaps, O hoopoe of mysteries, we are nothing but ghosts searching for ruins.

For what use is our thought if not for mankind?”

Epilogue

Since this article was drafted, some possibly momentous developments have altered the climate of opinion on Israel/Palestine relations. Yasir Arafat is dead. His elected successor, Mahmood Abbas as of early 2005, has met with Ariel Sharon, a ceasefire has been negotiated at Sharm Al Shaik, with Israeli promises of a complete disengagement from Gaza and substantial withdrawals of military forces from West Bank cities, as well as a general softening of the oppressive features of the occupation. Abbas has renounced the tactic of armed struggle, deployed Palestinian Authority Security Forces with orders to prevent violence against Israeli targets, and has removed from command those security officers who have opposed his approach. Abbas has also been attempting to persuade Hamas and militant factions to join in the observance of a ceasefire, and seek their goals within the political process. Additionally, George W. Bush has been reelected President, and has reaffirmed the support of the United States for the establishment of a sovereign Palestinian State.

Do these developments constitute a new beginning in the search for a genuine peace or is this more smoke and mirrors intended to hide an unyielding structure of American-backed Israeli domination? There have been other moments of hope in the mainstream, none more widely felt than at the start of the Oslo ‘peace process.” An then again in 2000, when Bill Clinton, in the last months of his presidency, pushed hard at Camp David and Taba to achieve a breakthrough toward peace. As of now, it still appears that Prime

14. MAHMOUD DARWISH, UNFORTUNATELY, IT WAS PARADISE 40, 48 (Munir Akash et al. eds. & trans., 2003).
Minister Sharon wants to keep most Israeli settlements, and to deny more than half of the West Bank to any Palestinian entity that might emerge from negotiations. If this is a correct reading of Sharon's maximal offer to the Palestinians, then the pause in the armed struggle does little more than to delegate the burdens of occupation to the Palestinians with a mandate to kill other Palestinians who wage an ongoing struggle on behalf of their right to self-determination. What is also discouraging, are indications that settlement building is continuing at a rapid rate, that land in the Jerusalem area continues to be taken from Palestinian owners, and that Israel is going ahead with the building of its security wall at great expense and in defiance of the advisory opinion of the International Court of Justice backed by fourteen or fifteen judges.

In other words, the rhetoric and the surface mood has changed for the better, and quite possibly the daily existence of the Palestinians living under occupation will improve at least temporarily. It is encouraging in this regard that Israel seems to have stopped house demolitions as retaliatory acts. At the same time, the underlying structure of occupation is being maintained intact, defiance of fundamental Palestinian rights persists, and the Israeli concept of 'peace' remains far too one-sided to be acceptable to most Palestinians and therefore unlikely to be sustainable even in the event that the current Palestinian leadership were to swallow some new offer. At this point, there remains in existence a deeply flawed 'peace process' and the basic argument of my assessment does not have to be modified in light of recent developments. What we are likely experiencing may turn out to be nothing more than the less-violent phase of a cycle that alternates every few years between and atmosphere of hopes raised and one of hopes dashed. We can only work to have this cycle broken by the realization that until Palestinian rights are respected there will be no prospect of peace, and at best, periodic ceasefires in an unresolved struggle.

As usual, the pessimists argue that what is happening is just a repetition of a dispiriting pretense, while the optimists are insisting that this is a new and promising beginning that deserves support from persons of good will. It seems best to withhold judgment, and hope

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that reason and a sense of justice on both sides will begin to prevail at last.