On Achieving Palestinian Statehood

Concepts, Ends and Means From The Perspective of International Law

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Chapter One

The Establishment of a State in International Law
What should sovereignty mean for Palestine?

Introduction

If we look to the international system and try to imagine the manner in which the State of Palestine were to become a full member of the community of nations, it can readily be seen that the path that was followed in the interim Oslo Accords was diametrically opposed to nearly anything that preceded it. In 2000 the Palestinian negotiating team requested that the permanent status agreement should be a "comprehensive instrument that spells out the details, modalities, and timetables of ending the Palestinian-Israeli conflict". This in contrast to Oslo, which had been "merely a document that declares general political principles".[1] It should become evident as we work through the legal parameters of Statehood, that what is needed in not more legal language, but less.

In essence the Oslo Accords, although meant to be a step towards a final settlement of the Arab/Israeli war in Palestine, would have lead down a path of servitude for Palestinians and may well have violated the right of self-determination. It appears clear that the Al-Aqsa Intifada was a visceral reaction to this realization, that while Oslo provided for a bit of breathing space, it was leading towards an institutionalization of a Bantu-like existence.

The purpose here is to consider the parameters of the terms "sovereignty" and the "State" in international law. On this basis, I shall sketch out what a Palestinian State

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[1] See "Palestinian Negotiation Team: Remarks and Questions Regarding the Clinton Plan (January 2, 2001)", in Walter Laqueur and Barry Rubin (eds.), *The Israel-Arab Reader*, 2001, pp. 567-573.

should look like; and to demonstrate the need for the arrogant mentality of sovereignty which should form part of any Palestinian State. This mentality is the primary tool of the statesman, who understands that, as the leader of a sovereign State, he answers to nobody.

1. What is Sovereignty in International Law?

The historical starting point with regard to the sovereignty of States is found in the settlement of Westphalia of 1648 which put an end to the Thirty Years' War in Europe.[2] A fundamental restructuring of the system of interaction amongst people was introduced whereby the Pope and the Holy Roman Emperor were permanently sidelined by the fostering of an 'international' system predicated on the sovereign equality of States. The former, as spiritual head of Western Europe, and the latter, as the 'king of kings', had laid claim to ultimate supremacy in case of religious or political disagreements among the monarchies and principalities (and had also fought each other for centuries over the question of political precedence in what was known as 'the Investiture controversy').

The most succinct description of the notion of sovereignty, I believe, - and here I am speaking of territorial sovereignty - is found in the classic pronouncement of Max Huber in the 1928 Island of

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[2] Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies (Treaty of Westphalia), Münster, 24 October 1648.

Palmas case.[3] In his Award delivered under the auspices of the Permanent Court of Arbitration, the famous Swiss jurist noted:

"Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principles of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations."[4]

Thus, sovereignty is equated to independence: independence in a State's actions within its own boundaries and independence outside those boundaries. Independence in the sense that States answer to nobody - that there is no higher authority than the State. Westphalia then replaced or secularized the system of governance by displacing the Catholic representative of God. But it also paved the road for a further advance, in which neither Kings and Queens were to be sovereign; instead sovereignty was to be manifest in the arrangement of people along territorial lines.

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[3] United Nations, *Reports of International Arbitral Awards*, Vol. II, 1948, pp. 827-871. This case revolved around a case settled in favor of the Netherlands in its dispute with the United States of America regarding their different claims of sovereignty over this island located in the Pacific Ocean between the Philippines and Indonesia.

[4] *Op.cit.*, p. 838.

Thus the international system as it exists today is manifest in just under 200 sovereign States, which - at least in theory - answer to nobody. I say in theory, because States do in fact answer to each other, but only as a result of consent. Thus any limitation of sovereignty is by consent of that State, and thus limitations if institutionalized are what is know as international law. In other words, the only limits which States have to their actions are those limits of international law to which they have agreed.

This is completely alien to the system of law which exists within a State as between people. As I arrived from Egypt, I did not consent to be bound by the laws of the State of Israel; nor as I crossed over to the West Bank, I did not consent to the Israeli laws of occupation. No, within a State, these are laws of compulsion. By virtue of being within a certain geographic space I am compelled to follow, as compulsory, the laws in force. As the State is a centralized entity which has a monopoly on the use of force, it can compel and coerce, through policing and through its legal and penal systems, individuals into following the law.

I can not pick and choose which laws I will be bound by and which I will opt out of - it is in the Western discourse manifest in Rousseau's Social Contract - that individuals give up part of their liberty and are restricted by laws in exchange for the protection afforded them by the State. This is diametrically opposed to the system of international relations - an anarchical system in the true sense of the word - one with no central authority with the

power to compel. The result is a decentralized framework which requires States, if they are going to be bound by law, to agree to such a limitation of their sovereignty.[5] This manifestation by States of their sovereignty allows for the conduct of international relations through the interaction of States based on fundamental rules as expressed in international law. It thus becomes possible to answer my first question: "What is sovereignty in law?" It is the ability of a State to dictate what undertakings it will adopt both inside its own territory, and what obligations, if any, it will take on vis-à-vis other States.

2. What is a State in International Law?

The yardstick against which the notion of the "State" is measured in international law finds voice in the 1933 Montevideo Convention on the Rights and Duties of States. Although a regional treaty, the Montevideo Convention sketches, in broad outlines, the customary parameters of what is understood to be a State in international relations. Its Article 1 reads:

"The State [in] international law should possess the following qualifications: a permanent population; a defined territory; government; and the capacity to enter into relations with other States."[6]

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[5] Such limitations are not however, to be seen as an abandonment of sovereignty but instead are to be considered "an attribute of State sovereignty." See the Wimbledon case, *Permanent Court of International Justice*, 1925, Series A, Number 1, p. 25.

[6] Montevideo Convention on Rights and Duties of States, *League of Nations Treaty Series*, Vol. 19, 1934, p. 165.

Of these four qualifications it shall be seen that two are objective and two subjective, and that they are nonetheless, in their essence, interconnected. The notion of a permanent population for instance disqualifies Antarctica from Statehood. Thus, although no lower or upper limit is set to the amount of population, objectively we must be able to say that, yes, in this particular area there is a permanent population. In the case of Palestine, it is clear that there is a permanent population.

As for the matter of a defined territory, it is often stated that Israel lacks the attributes of a State as it is unwilling to define its borders. This is simply a myth and is inaccurate from the perspective of international law on more than one level. First, under the treaties of peace between Jordan and Egypt with Israel, both these international borders have been established and demarcated in law.[7] Second, most international borders are not established in fact. Whereas they may have been agreed to on paper, perhaps 70% of State borders worldwide remain to be demarcated. What is needed in international law for a particular State to be called into existence is a defined territory in the sense of a hard core - the edges are not that relevant - by which it may demonstrate that it has effective control. In the case of Palestine, it is clear that there is a defined territory.[8]

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[7] See Article 3 of the Treaty of Peace Between The Hashemite Kingdom of Jordan An The State of Israel October 26, 1994; and Article 2 of Treaty of Peace between the Arab Republic of Egypt and the State of Israel, 26 March, 1979. Note that the establishment of the Egyptian-Israeli border was settled on the basis of the "Taba" Award by the Egyptian-Israel Arbitration Tribunal, 28 September 1988.

[8] The hard core being the West Bank and Gaza.

It is when we leave the objective elements of statehood and move on to the vagaries of the subjective elements that Palestinian Statehood breaks down. Let me flip the order of the last two qualifications and start with d) the notion of the capacity to enter into relations with States before considering c) the need for a government. This ability to enter into relations with States should be understood as the concept of "recognition." In international relations, before an entity can take up its seat in the international community it must be accepted into the club of States. The recognition by a particular pre-existing State of the new one is its willingness to accept a newly established State as being sovereign over a part of the globe.

While recognition may be a qualification attributed on legal grounds, it is clear that, in the words of Hersch Lauterpacht, "there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven."[9] Thus, States recognize other States more often than not for political reasons, and not on the basis of their having fulfilled the other qualifications of Statehood as noted in the Montevideo Convention. Thus for instance, Turkey's willingness unilaterally to recognize Northern Cyprus or apartheid South Africa's to recognize its Bantustans did not translate into these entitles becoming States from the perspective of international law. Although the Turkish Republic of Northern Cyprus or, previously, Zululand, had what amounted to a permanent population, a defined

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[9] Hersch Lauterpacht, *Recognition in International Law*, 1947, p. v.

territory, issues of "government," recognition from the international community was not forthcoming.

To emphasize the subjective nature of recognition, which "is given in a number of cases for purely political reasons"[10] let me simply point to the case of Israel in 1948. In that instance, issues of a definite territory and a permanent population were tenuous at best, and the notion of a "government" had not yet been established. However, within hours of the Proclamation of the establishment of the State of Israel on 14 May 1948, the United States of America recognized the Provisional Government as the de facto authority of the State of Israel, followed, two days later, by de jure recognition of the State of Israel by the Soviet Union, and thereafter recognition by a majority of member States of the United Nations.

Where Palestine is concerned, despite the 1 October 1948 Proclamation of Independence of Palestine by the Arab Higher Committee and the relatively recent 1988 Declaration of the Independence of the Palestinian State proclaimed by the Palestine National Council in Algiers,[11] statehood has not transpired. In the case of the 15 November 1988 Declaration, although 20 States recognized the Palestinian State within 24 hours, and more followed, the Palestinian State has not come into existence.

The Palestinian State has been recognized by a significant number of States. Yet, Palestinian statehood

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[10] Malcolm Shaw, *International Law*, 1997, p. 297.

[11] Declaration of the Independence of the Palestinian State, *German Yearbook of International Law*, Vol. 31, 1998, pp. 681-683.

remains elusive because it lacks one essential ingredient: effective control over its territory and people. In other words, it lacks one of those elements of government which are mentioned in the Montevideo Convention. In closing the circle on what is to be considered a State, international law requires that such an entity be able to assert its sovereignty by demonstrating that it can act independently of interlopers. Without the ability to maintain effective control no would-be State can expect to join the club of sovereign States. Let me then, once more, take the case of Israel: it is clear that had Israel not been able to repel the intervention of 1948, its status as a State would have receded, becoming little more than an historical footnote. However, Israel's ability to sustain its existence in the face of invading neighboring Arab States in 1948 and to consolidate its power through its effective control of areas in Palestine allowed it to seize the opportunity granted by the recognition of various States and to emerge as a viable State.

It now becomes possible to answer the present question: what is a State in international law? A State is an entity recognized by the community of States as having the independence to demonstrate its ability of effective control over a certain territory and people.

3. What Should Sovereignty Mean for Palestine?

The first two questions I have sought to answer so far are the two dynamics which will form the parameters of the eventuality of Palestinian sovereignty. We have witnessed since the start of the Al-Aqsa Intifada that

the Palestinian Authority has lacked effective control over Zones 'A', in which it is presumed to exercise full administrative and security functions. It has been shown on the ground that the breathing space provided by the Oslo Accords in the Occupied Territories can be reclaimed by Israel at anytime by virtue of the actions of IDF helicopter gunships and tanks. Thus, the emergence of a sovereign Palestine will require, not security for Israel but security from Israel - that is some type of assurance of Palestinian security.

What should a sovereignty mean for Palestine? Sovereignty does not mean that Palestine will not be bound by already established dictates of international law. Like the newly independent States of African and Asia which rid themselves of the yoke of colonialism of during the 1960s and 1970s, Palestine will be bound by the norms of customary international law - those elements which have been such a fabric of international relations that all are bound by its dictates. Thus, for instance, it will have to respect fundamental norms of human rights protection and humanitarian law. Likewise, established rules in such fields as diplomatic relations and the norms by which treaties are established will automatically become part of the restraints on statehood long established by the community of States.

Sovereignty will mean respecting what amounts to the obligations of the constitution of the international system: the Charter of the United Nations. Recourse to the peaceful settlement of disputes and the prohibitions

on the use of force will be central to the obligations of the State of Palestine. But also imbedded in the UN Charter is Article 51 which provides a State with the inherent right of the use force in self-defense. And beyond this, the Charter recognized the possibility of collective self-defense, of other States acting in concert with Palestine through an alliance to protect it from Israeli incursions. This is the true test of the establishment of a Palestinian State and something which should not be legislated away. Sovereignty need not entail security guarantees for Israel, but if it does, such considerations should be based on reciprocity. Such guarantees should flow both ways.

I say that such guarantees need not be provided, because beyond customary international law, which would be automatically binding on a sovereign Palestinian State, representatives of the Palestinian people may undertake, or abstain from undertaking, any further obligations. It would be within the Palestinian State's sovereign prerogative - an attribute of sovereignty - to undertake to abide by specific obligations under international law.

The establishment of a sovereign Palestinian State, as is true of the sovereignty of all other States, should not be conditional - it is axiomatic that it be total. That is, any Israeli-Palestinian agreement which failed to provide for a full measure of Palestinian self-determination would not only fail the test of having established a sovereign Palestinian State but would be automatically invalid. This is so because 1969 Vienna

Convention on the Law of Treaties considers any international treaty to be invalid which conflicts with a norm of jus cogens, such as that possessed by Palestinians of a right of self-determination.[12]

If Palestinian authorities enter into a peace agreement with Israel, it should be in accordance with the will of its people and in order to ensure the viability of a strong Palestinian State. The emergence of a sovereign Palestinian State would thus mean that it would be free to control its natural resources, free in conducting its foreign policy, and free of any foreign occupation or interference. Thus as opposed to the Interim Accords, what sovereignty for Palestine should mean vis-à-vis Israel, is a limited treaty which deals with a relationship between two States, reciprocal in nature, and one that in no way, either territorially or in terms of resources, reflects the years of Israeli occupation. Such an agreement should - because of the power imbalance - be guaranteed internationally and be subject to obligatory pacific dispute settlement.

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[12] Article 53, Vienna Convention on the Law of Treaties, 23 May 1969, reads:

"Treaties conflicting with a peremptory norm of general international law *(jus cogens)*:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

4. What of the Arrogant Mentality of Sovereignty?

I mentioned in my introduction the need to develop the arrogant mentality of sovereignty. By this I mean, that if one considers the role of Statesmen, it becomes obvious that sovereignty means answering to nobody - at least internationally. While there is a need for legitimacy **within** the State - the creation of the State **in international relations** provides legitimacy for the Statesmen ipso facto (by that fact alone). The conceptual equality of States means that no State need answer to another, no State is to be forced to do what it does not have an obligation to do under international law. Thus, the less the Palestinians put on paper - as international law is the only valid limitation in international relations - the more room will they have to maneuver. The balance must be struck, at least early on, between ensuring the survival of the Palestinian State, and not tying its hands indefinably to requirements which obstruct its evolution towards being a truly sovereign and independent member of the club of States. Thus the arrogance of sovereignty means that decisions about a future Palestinian State should be made by Palestinians and anything which does not fit that vision should be summarily and consistently rejected.

Chapter Two

‘Terrorism’ in International Law
One Man’s Terrorist is Not Another’s Freedom Fighter

Introduction

The so-called ‘War on Terrorism’ currently being waged actively by United States and supported with unprecedented near unanimity is a misnomer. The war currently underway - which clearly has major ramification regarding Palestinian statehood - is not against ‘terrorism’; instead I would suggest that it be considered as an attempt, by States, to reclaim their monopoly on the use of force. Not since the 1848 Revolutions in various European States have we witnessed such a fundamental challenge to the Westphalian system which has as its central tenet the ‘State’. And in much the same manner as States reacted in 1848, today, more than 150 years later we are seeing to what lengths States are willing to go to maintain their monopoly on the use of violence.

We are witnessing a rare consensus in international relations whereby such ideologically varying States as China, Iran, Libya, Russia, are all actively agreed on the need to “fight terrorism.” Why is this? Again, I would offer this assessment: because there is no interest on the part of States in allowing their territory to be used by armed opposition groups. Thus by labeling them ‘terrorist’, States can undertake an unrepentant war against their opponents.

Further, when we consider the current situation in Palestine and its worldwide repercussions, I believe that we are witnessing the concrete effects of the passing of the era in which self-determination enjoyed the active

support of a significant portion of the community of States. For this reason alone, there is a need for Palestinians to retool their struggle against Israeli occupation so that it is conducted in the occupied territories and exclusively against the IDF. In other words, the clear perception must be that the struggle transpires within the norms of international law, thus providing a breathing space for world public opinion.

1. Who is a 'Terrorist' in International Law?

'Terrorism' at its core is the use of violence against civilians for political ends. If we adopt this as our working definition, then it becomes clear that States like individuals can engage in 'terrorism'. From the innocent victim's perspective, whether the act is perpetrated by a lone bomber or by the pilot of an Apache attack helicopter matters little. Yet, as we live in a decentralized Statist system, where international law is established through the consent of States, it should come as little surprise that there has been an inability to set down on paper an agreed definition of terrorism - and by extension to define a person who perpetrates such deeds: a 'terrorist'.

This is inevitable, when States are prepared to fight 'terrorism', but unwilling to define away their right to visit such terror upon their enemies. As a result, no overarching established definition of 'terrorism' exists in international law. It is a term of art which is used, more often than not, for political ends, to define the actions of one's enemies.

Having said that, it is possible to discuss the contours of what has been agreed to in international law. Primarily, a certain level of consensus has emerged through the auspices of various regional inter-governmental organizations which have negotiated treaties related to the suppression of terrorism. Yet even here, where there exists a consensus to legislate regarding terrorism, there has been an inability to agree on what the term means. In a number of cases, the notion of terrorism has been considered to ensure that people committing specific acts are not granted refugee status. Thus, within the context of the Organization of American States, acts of "terrorism" such as "kidnapping, murder, and other assaults" against diplomats are to be considered a common crime and thus exclude the perpetrators from gaining refugee status.[13]

Likewise, for the Council of Europe and the South Asian Association for Regional Cooperation (SAARC[14]), the

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[13] The various regional treaties regarding terrorism include: the 1977 European Convention on the Suppression of Terrorism; the Organization of American States' 1971 Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance; the South Asian Association for Regional Cooperation's 1987 Regional Convention on Suppression of Terrorism; the League of Arab States' 1998 Arab Convention on the Suppression of Terrorism; the 1999 Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism; the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism; and the Organization of African Unity's 1999 Convention on the Prevention and Combating of Terrorism.

[14] SAARC consists of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sir Lanka.

suppression of terrorism is meant to ensure that certain crimes are not labeled “political” thus paving the way to make sure that those who commit such acts are excluded for the privilege of asylum. While SAARC does provide for a residual definition of terrorism,[15] both it and the Council of Europe rely primarily on offenses that appear in United Nations treaties of international criminal law. Both point to the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Montréal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation as they relate to highjacking.[16]

Since the early 1970s, the United Nations has developed a number of further conventions which establish crimes which may well, depending on the circumstances, constitute acts of ‘terrorism’. They include the 1979 UN International Convention against the Taking of Hostages; the 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

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[15] See Article 1(e), Regional Cooperation Regional Convention on Suppression of Terrorism, South Asian Association for Regional Cooperation, Katmandu, 4 November 1987, which describes terrorism as including: “murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking, and offenses relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious injury to persons or serious damage to property.”

[16] The Council of Europe, however, did not go further in mentioning other UN conventions related to international crimes, due to the fact that at the time of signing the 1977 European Convention on the Suppression of Terrorism, European States had en bloc only ratified these two instruments.

and the 1997 UN Convention for the Suppression of Terrorist Bombings.[17]

Thus, from the perspective of these regional arrangements, there has been an unwillingness to legislate what 'terrorism' is, instead they have left it to their legal systems and their judges to make a determination whether, in the

[17] The United Nations has posted the following as universal treaties which it considers as being related to terrorism (see untreaty.un.org/English/Terrorism.asp):

- Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963.
- Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970.
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973
- International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979
- Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980.
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving InternationCivil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988.
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991
- International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997
- International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

case at hand, an individual is guilty of a specific international crime, which would thus preclude the possibility for receiving asylum, and allow for extradition of the individual to face prosecution.

Where we do find, to my knowledge, the most elaborate definition of ‘terrorism’ in an international instrument is within the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism which states clearly:

“ ‘Terrorism’ means any act of violence or threat thereof notwithstanding its motives or intervention perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.”[18]

And here we run into the hazard which I mentioned earlier. Could not, for instance the quelling of the uprising in Hama, Syria in 1981-82, or the suppression of the Muslim Brotherhood in Egypt during the 1990s, by the standards of this definition, be considered terrorism? If I were to go further, would not simply the nature of State

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[18] Convention of the Organization of the Islamic Conference on Combating International Terrorism, Organization of the Islamic Conference, Ouagadougou, 1 July 1999.

apparatuses of many authoritarian States in the Middle East render them ipso facto 'terrorist' States?

2. The Response of the United Nations

Short of international law, there appears to be a near consensus within the UN General Assembly as to what terrorism constitutes. Bearing in mind that General Assembly Resolutions have limited legal worth - they are recommendations - States have agreed in the 1995 Declaration on Measures to Eliminate International Terrorism,[19] on the following proposition:

"Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them..."

More interesting, the General Assembly has resolved that terrorism includes State terrorism. However, those interested should be cautioned by the fact that the term 'terrorism' is modified by the adjective 'international'. Thus for the States represented at the UN General Assembly 'terrorism' is meant to be criminal acts fostered at home but perpetrated abroad. In other words, the Member States of the General Assembly do not consider

[19] See Annex to UN General Assembly Resolution 60, Measures to Eliminate International Terrorism, A/RES/49/60, 17 February 1995.

that a State can terrorize its own people. Consider the wording of the Declaration, wherein its preamble reads:

“Firmly determined to eliminate international terrorism in all its forms and manifestations;

Convinced also that the suppression of acts of international terrorism, including those in which States are or indirectly involved, is an essential element for the maintenance of international peace and security...”

The Declaration goes on to say in the body that:

> “States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting, or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts; [...]”

Yet, when we get closer to the center of power, moving from the UN General Assembly to the Security Council, we see that, while States may still be involved in terrorism, the notion of ‘terrorism’ is voided of all its content, and no definition is established.[20] In the same

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[20] UN Security Council Resolution 1189 stresses “that every Member State has the duty to refrain from organizing, instigating, assisting or participating is terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts”, S/RES/1189/1998, 13 August 1999. This provision is reaffirmed in the wake of the attacks of 11 September 2001 in the United States by Security Council Resolution 1373, S/RES/1373/2001, 28 September 2001.

manner as US Supreme Court Justice Brennan dealt with pornography,[21] so has the UN Security Council taken the same tack regarding 'terrorism': that is "they know it when they see it".

In 1999, the UN Security Council passed Resolution 1269[22] which expressed its deep concern in the face of the increase in acts of international terrorism, and, though making reference to the 1995 Declaration, it left wide open what it will consider to be 'terrorism'. Thus the Security Council doesn't explain what 'terrorism' is, it simply

unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security.

Within 24 hours of the attacks of 11 September 2001 in the United States, the Security Council condemned these acts, regarding them as a threat to international peace and security, and opening the gate to Chapter VII of the United Nations Charter which allows for the use of force in an attempt to re-establish peace and security. A month later, the Security Council went further, declaring that "acts of international terrorism constitute one of the most

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[21] See Miller v. California, Supreme Court of the United States, 413 U.S. 15, 1973.

[22] UN Security Council Resolution 1269, S/RES/1269/1999, 19 October 1999.

serious threats to international peace and security in the twenty-fist century" and labeling international terrorism as a "scourge" - that is to say, a pestilence or a plague.[23] The lack of a clear definition of what 'terrorism' is - and thus the manner by which, in law, one is to distinguish between a 'terrorist' and a 'freedom fighter' - means that we must look elsewhere in an attempt to disassociate the 'terrorist' from the 'freedom fighter'.

3. Who is a 'Freedom Fighter' in International Law?

Like 'terrorism', the notion of 'freedom fighting' is not defined in international law. However, there are quite specific situations in which individuals may take up arms - legally - in an attempt to gain control over territory. This possibility exists within the overarching basis of international relations: attempts by States to coexist. In no uncertain terms it may be said that the totality of the infrastructures of international relations exist because States have found the expense of the advancements in the art of war too costly. Up to the 19th Century, war was a 'gentlemen's sport', but the First World War made it clear that war could cost one, not only a State - but an empire. The Great War was responsible for the collapse of Czarist Russia, for the end of the Ottoman and Austro-Hungarian empires. If the price of war were to mean that you would end up with modern day Austria, then the price was too high.

[23] UN Security Council Resolution 1377, S/RES/1377/2001, 12 November 2001.

Thus developed the twin pillars of international relations during the 20th Century - the peaceful settlement of disputes and the restrictions on the use of force.[24] While the Permanent Court of International Justice and its successor, the International Court of Justice would come to be marginalized, limitations on the use of force would grow more restrictive. The first formalized structure to limit the use of force was established by the League of Nations, which sought, not to outlaw war but to delay it. Seeking to fight the last war, the League set up a system which provided a cooling off period of three months, the lack of which was then seen as a major reason for the precipitation into the First World War. Despite this limitation by the community of nations and the 1928 Briand-Kellogg Pact, which outlawed war as an instrument of national policy, neither of these attempts could stall the momentum towards the Second World War.

Seeking to rectify the failures of the past, the Charter of the United Nations was established in 1945 and sought, not only to remove from the purview of the State the ability to go to war but to outlaw any use of force.[25] Instead, the legitimate use of force was to be internationalized, to be handed over to the Untied Nations Security Council which was to act on behalf of the international community. While States did not disavow their "inherent right" of self-defense,[26] such use of force was to be contemplated only

[24] See Jean Allain, *A Century of International Adjudication: The Rule of Law and its Limits*, 2000.

[25] See Article 2(4), Charter of the Untied Nations.

[26] See Article 51, Id.

"until the Security Council has taken measure necessary to maintain international peace and security."[27] Beyond acting in self-defense, States forfeited any unilateral determination to the use of force. Where the use of force could be projected, it was to be undertaken in concert, under the collective security arrangements found in Chapter VII of the Charter. Within the dictates of Chapter VII, where the Security Council determined that, by virtue of Article 39, there existed a threat or a breach of the peace or an act of aggression, it is empowered to take measures including "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security".

These are, thus, the parameters in which States can use force legally in international relations. Within these limitations is there a place for 'freedom fighters'? The answer is yes, and it finds itself within the evolution of the concept of the 'right to self-determination' which was first pronounced by United States President Woodrow Wilson as the American basis for the settlement of the First World War. While the Wilsonian conception of 'self-determination' was at the heart of the new international order created at Paris in 1919 and was formalized, as a legal principle, within the Covenant of the League of Nations, it lacked a clear formulation; and, as a result, fell victim to the vagaries of political machinations. It was only in the aftermath of the Second World War that the concept would become firmly imbedded in international relations as the "intellectual

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[27] See Article 42, Id.

engine of decolonization." With the growing number of newly independent States came the call for the establishment of self-determination as a legal right.

Yet, that right was to be defined in the narrowest of terms to ensure that the statist system did not disintegrate; thus States

> "remain silent in response to claims asserting the right of self-determination [...] on behalf of ethnic groups, such as the Kurds, Armenians, and Basque; indigenous populations, such as the native peoples of Latin America, North America, Australia, and New Zealand; linguistic minorities, such as the Québecois; and religious groups such as the Catholics in Northern Ireland."[28]

While self-determination was lifted by the Charter of the United Nations from political rhetoric to a principle of international relations, it would finally gain true legal standing internationally through State practice as fundamental changes to the international system emerged in the 1960s and 1970s. The East-West chasm which developed in the guise of the Cold War allowed breathing space for former colonized States to agitated for independence using the notion of self-determination as found in Article 1(2) of the Charter as their guiding principle.[29]

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[28] Paul Szasz, "The Irresistible Force of Self-Determination Meets the Impregnable Fortress of Territorial Integrity: A Cautionary Fairy Tale about Clashes in Kosovo and Elsewhere", *Georgia Journal of International and Comparative Law*, Vol. 28, 1999, p. 3.

[29] Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal*, 1995, 103.

In 1960, the United Nations General Assembly passed Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, wherein it proclaimed that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[30] The affirmation of this Declaration in the General Assembly, coupled with the 1970 Declaration on Friendly Relations, amounted to an *opinio juris* which, backed with the practice of States, establishes a customary right of self-determination. The 1970 Declaration went a step further in noting that States have a duty not to deprive people who are subject to "colonialism" and "alien subjugation, domination and exploitation" of their right to self-determination.[31]

Thus emerged from the United Nations a legal right to self-determination, however, it was limited to very specific situations. The right of self-determination was to be conceived as that for all people to assert their right only in the three following situations: against colonial regimes, racist/apartheid regimes, or military occupying forces.[32]

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[30] Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations General Assembly Resolution 1514, 14 December 1960.

[31] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, United Nations General Assembly Resolution 2625, 24 October 1970.

[32] Note that running parallel to a group right of self-determination, the
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Along with this clearly determined right to self-determination, States have, for the most part, further recognized the right to struggle against colonial or racist regimes and foreign occupation. Thus, there was a slow assimilation of the fight for freedom, as against these three modes of alien occupation, with the notion of 'the inherent right of self-defense' as established in Article 51 of the UN Charter. In the conclusions of her 1990 study, International Law and the Use of Force by National Liberation Movements, Heather Wilson notes, however, that there is a fly in the ointment:

"The authority of national liberation movements to use force is not agreed upon as a matter of international law. Such authority is actively supported by the newly independent States and the Eastern Bloc States, but has never been accepted by an established government confronting a liberation movement, or by Western States.

....
1966 human rights Covenants related to civil and political rights, and economic, social and cultural rights have a common Article 1 which reads:

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

Practice in the UN, particularity the Declaration on Principles of International Law and the Declaration on Aggression, both adopted without a vote, does not resolve the fundamental differences of opinion over the status of national liberation movements and the extent of their authority as a matter of law. **However, the trend over the last four decades and since 1960 in particular has been toward the extension of the authority to use force to national liberation movements.”**[33]

4. On Applying Force in the Palestinian Liberation Struggle

As the right to use force in a struggle for self-determination is not clearly established in law, it is essential, from my perspective, that Palestinians retool their efforts to rid themselves of Israeli occupation so as to ensure that the era of self-determination does not pass them by. We may be in the midst of seeing the end of the era of self-determination as most situations which fit the quite limited definition established by the community of States - against colonial or racist regimes, or occupation - no longer exist. States may be inclined to decide amongst themselves to put an end to this right to the detriment of the Palestinian cause. As a result, it would appear to me that what is needed is to ensure that the Palestinian struggle clearly show itself to the international community of States and to international

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[33] Heather Wilson, *International Law and the Use of Force by National Liberation Movements*, 1990, p. 136. Emphasis added.

public opinion as a liberation movement, one that abides by the dictates of the laws of war - which means targeting IDF fighters in the Occupied Territories.

As an occupation has been assimilated to the notion of an act of aggression, a permanent state of war exists until the occupier has been ejected. As such the laws of war - the Geneva Conventions - hold in the territories. Like it or not, this means that while the transfer of Israeli population into the territories is illegal, this is an act which implicates the State of Israel, not the individuals concerned. Instead, the Israeli settlers are civilians, protected, like Palestinian civilians, by the fourth Geneva Convention. However, much in the same way that Hizbullah primarily targeted the IDF, ultimately forcing them to quit Southern Lebanon, the IDF in the Occupied Territories, including annexed East Jerusalem, are fare game.

From the analysis of the terms 'terrorism' and 'freedom fighting', what emerges is a clear distinction. Ultimately, international law is on the side of the Palestinians, it may be the only advantage they have in their isolation by the community of nations, both within the Arab world and further afield. There is in law a right to struggle against foreign occupation and to self-determination. The struggle appears to extend to the right to use force. However, the door of self-determination may be closed if Palestinians, as one of the few, if not the only remaining group to benefit from such a right, abuse it.

The need to distance the struggle from acts which could be construed as being of a 'terrorist' nature is, again, in

my opinion, essential. Such acts weaken both the nature of that struggle as one of ‘national liberation’ and fail in the arena of public opinion.

By targeting the IDF, one can clearly carry one’s head high in a struggle against a foreign occupation. The use of violence against civilians for political purposes, to me appears futile to the end being sought - a sovereign Palestinian State. I would go further by saying that it plays into the hands of the occupiers, who can thus label Palestinians ‘terrorists’ thus de-humanizing them; a process which allows for the most unspeakable human rights abuses to be perpetrated in the name of ‘security’, or ‘rooting out evil’, or ‘civilization’. It is clear that the playing field is not even - there is no need for the Palestinians to lower themselves to the level of the IDF.