

## Can the Declaration of Principles Bring About a 'Just and Lasting Peace'?

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The Declaration of Principles<sup>1</sup> signed between the Government of Israel and the Palestinian Liberation Organization<sup>2</sup> has two salient features. First, it aims at establishing permanent settlement based on Security Council Resolutions 242 and 338. Second, the DOP also provides for the establishment of interim arrangements through the creation of a Palestinian Interim Self-Government Authority.

It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.<sup>3</sup>

The seventeen articles of the DOP elaborate on the interim arrangements. These include the jurisdiction of the Palestinian Authorities for a duration of five years, the transfer of authority to it, the law it will enforce, its relations with Israel, Jordan, and Egypt, and the withdrawal of Israeli forces from certain areas and their redeployment to other areas. It is made abundantly clear that none of these arrangements are permanent. Permanent status negotiations, according to Article V(2) 'will commence as soon as possible, but not later than the beginning of the third year of the interim period...'. Subsection (3) of the same Article states that:

It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest.

Finally subsection (4) provides that:

The two parties agree that the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached for the interim period.

In the course of its 26-year occupation of the Palestinian territories, successive Israeli governments pursued a deliberate and declared policy of acquiring land for Jewish settlements

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1 Hereafter referred to as the DOP.

2 Hereafter referred to as the PLO.

3 Article I.

and carrying out changes in the laws and administration of areas under their control to facilitate the creation of these settlements. Their objective was to achieve *de facto* annexation to Israel,<sup>4</sup> a policy which continues to be pursued at the time of writing.<sup>5</sup> Although the policy of settling the areas occupied in 1967 began a few months after the occupation, the main legal and administrative changes intended to separate the settlements from the rest of the Palestinian population were carried out in earnest after Israel signed the Camp David agreement in 1978. This agreement constituted the framework that determined the course of subsequent legal developments. In the years that followed their signature, Israel had ample time to reconcile its obligations under the Camp David agreement – as it interpreted it – with an expansionist policy that led it to acquire the majority of the land in occupied territories. These arrangements have become the basis for the transitional five-year period which, according to the DOP, will begin upon Israeli withdrawal from the Gaza Strip and Jericho area (Article V(1)).

Although the DOP itself makes no reference to Camp David, the link between the two was stressed by Prime Minister Yitzhak Rabin in an address to the Knesset:

The plan to apply self-government to the Palestinians in Judea, Samaria and Gaza – the autonomy of the Camp David Accords – is an interim settlement for a period of five years.<sup>6</sup>

In this article I want to show, through reference to the DOP, how the main arrangements imposed unilaterally by Israel in the past 26 years relating to land, water and Israeli settlements have been left intact, and how the jurisdiction of the Palestinian Authority has been restricted to exclude Israeli settlements. In the second part of the article I will discuss the question of whether a legal case can be made for action based on the declaration, and in pursuance of its stated objectives, to reverse these arrangements and challenge the Israeli control of the land and the continued existence of the settlements.

## I. How Israeli Settlements have been Left Untouched by the DOP

It is quite obvious that the Israeli side went to great lengths to defeat any of the attempts by the Palestinians to introduce articles which could later be interpreted as enabling the Palestinian Self-Government Authority to extend its jurisdiction to Israeli settlements. Although there is no statement in the DOP itself excluding the settlements from the jurisdiction of the Palestinian Council, their exclusion results from Agreed Minutes attached to the Declaration. Thus, Article IV, which discusses jurisdiction of the Palestinian authority, states that:

Jurisdiction of the Council will cover West Bank and Gaza territory, except for issues that will be negotiated in the permanent status negotiations.

4 See W.W. Harris, *Taking Root, Israeli Settlement in the West Bank, the Golan and Gaza-Sinai, 1967-1980* (1980). Also see M. Benvenisti, *The West Bank Data Project, A Survey of Israel's Policies* (1984).

5 Article in the *Jerusalem Post* of 11 November 1993 in which it is reported that: 'A government-appointed committee has approved a plan for massive Jewish development in the administered territories, from the Eastern borders of Jerusalem to the outskirts of Jericho.'

6 Official Publication of Ministry of Education and Culture, Central Office of Information, Ministry of Foreign Affairs, *Declaration of Principles of Interim Self-Government Arrangements*, September 1993.

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These are defined in Article V(3) as including settlements.

Article IV continues with a statement which was the subject of lengthy negotiations in the period preceding the direct Israeli Government/PLO negotiations. It provides that 'the two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period'. Should the Palestinians interpret this as granting the Self-Government Authority jurisdiction over the settlements, section B of the Agreed Minutes indicates that:

It is understood that: 1. Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations: Jerusalem settlements, military locations and Israelis.

Not only are the settlements explicitly excluded from the general jurisdiction of the Palestinian Authority, any exercise by the Palestinian Self-Government Authority in the specific spheres which shall be transferred to it will not empower the Palestinian Council to exercise these over the settlements or their Israeli inhabitants. Section B.2 of the Agreed Minutes makes it clear that 'the Council's jurisdiction will apply with regard to the agreed powers, responsibilities, spheres and authorities transferred to it'. Any transfer of authority will therefore be carefully tailored to exclude settlements, and no transfer could possibly be open-ended or territorial, extending to all the inhabitants of the territory of the West Bank and Gaza regardless of the nationality of the inhabitants residing in it.

Moreover, the DOP strictly defines the powers to be transferred to the Palestinian Council. Residual powers shall remain within the jurisdiction of the Israeli Government. Thus, although Article VII(5) provides that:

After the inauguration of the Council, the Civil Administration will be dissolved and the Israeli military government will be withdrawn.

The Agreed Minutes regarding this Article specify that:

The withdrawal of the military government will not prevent Israel from exercising the powers and responsibilities not transferred to the Council.

The consequences of this Article are detrimental. Until the signing of the DOP, all the areas in which the settlements were established (with the exception of East Jerusalem) were outside the jurisdiction of Israel. Despite the arrangements that led to their *de facto* inclusion within Israel it was never admitted that a *de jure* annexation had taken place. Now, however, it is agreed that the Government of Israel will exercise direct jurisdiction over these areas. This will be tantamount to annexation. It must be pointed out here that this contradicts Article V(4) that the 'outcome of the permanent status negotiations should not be ... preempted by agreements reached for the interim period'. The Agreed Minutes seem to do exactly this. By giving the Israeli Government direct jurisdiction over the settlements established in occupied territories, albeit in limited spheres, the outcome of the permanent status negotiations is preempted.

Finally, in the Agreed Minutes to Annex II it is stated that:

It is understood that subsequent to the Israeli withdrawal, Israel will continue to be responsible for external security, and for internal security and public order of settlements and Israelis. Israeli military forces and civilians may continue to use roads freely within the Gaza Strip and the Jericho area.

## II. Land and Water Rights under the Interim Arrangements

In the preamble of the DOP the Israeli Government and the PLO agreed on several objectives. These are: to recognize their mutual legitimate and political rights; to strive to live in peaceful coexistence and mutual dignity and security and to achieve a just, lasting and comprehensive peace settlement and historic reconciliation.

To achieve these objectives, the two sides agreed on a series of steps enumerated in the Declaration. Their direct aim, specified in Article I, is to establish 'for a transitional period not exceeding five years', the Palestinian Interim Self-Government Authority. The indirect aim, which is enunciated in the same Article, is to ensure that this transitional period is to lead 'to a permanent settlement based on Security Council Resolutions 242 and 388'.

It is true that Israel has its own interpretation of Resolution 242,<sup>7</sup> but the principle on which the resolution is based, and which is confirmed in its preamble, is 'the inadmissibility of the acquisition of territory by war'. Most countries in the world consider the areas which Israel gained in 1967 – including East Jerusalem which was unilaterally annexed – as territories acquired by war. In affirming that the transitional period is to lead to a permanent settlement based on Resolutions 242 and 338, Article I states that:

It is understood that the interim arrangements are an integral part of the whole peace process.

The question that must be asked here is how the DOP (which effectively confirms Israeli gains by keeping them intact) could lead to a permanent settlement based on a resolution that prohibits the acquisition of territory by war? In these conditions, how could it bring about a just and lasting peace, recognizing the Palestinians' legitimate political rights as stated in the DOP?

I have shown above how Israeli settlements as well as Israeli citizens are excluded from the jurisdiction of the Palestinian Council. What is conspicuous is the lack of a definition of settlements anywhere in the DOP. What then is meant by the term 'settlements' which appears many times in the Declaration? Are they just those areas which are actually inhabited by Israeli Jews, or do settlements also include the entire web of legal and administrative arrangements that has been woven over the past quarter century to achieve, through quasi-legal manoeuvres, the annexation in all but name of the occupied territories to Israel, excluding those areas inhabited by Palestinians?<sup>8</sup>

What is clear, as I have already described above, is that except for those authorities which are transferred to the Palestinian Council, all residual powers remain with Israel. Therefore, it will not be within the power of the Palestinian Council to reverse any of these legal arrangements which enabled the settlements to come into existence in the first place, or which now sustain them within the areas which have been reserved to them. This includes the changes in the local law which led to the change in the designation of the land on which the settlements were built and the statutory land use plans which marked out the majority of the land in the occupied territories for the present and future use of the settlements. It also includes the 1982 agreement which established the Israeli National Water Company Mekarot as the sole administrator of all the water in the West Bank and the Gaza Strip.

The above is further confirmed by the limited legislative powers which the Palestinian Council is allowed to enjoy. Article IX, entitled 'Laws and Military Orders', states in section 1 that:

<sup>7</sup> See G. Aronson, *Creating Facts, Israel, Palestinians and the West Bank* (1987) 84.

<sup>8</sup> For a summary of these legal manoeuvres see the article by this author, 'Negotiating Self-Government Arrangements', *XXI Journal of Palestine Studies* (1992) 22.

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The Council will be empowered to legislate, in accordance with the Interim Agreement, within all authorities transferred to it.

However, this Article should be read in conjunction with Articles VI(2) and the Agreed Minutes relating to it which have already been referred to above. It is clear from these that the Palestinian Council will not be able to introduce any legislation that can alter the rights acquired by the Israeli settlers, thanks to the legal changes introduced by Israel in the course of the last 26 years. It also means that it cannot alter the land use schemes which are already in force since these are statutory and would require an authority with the requisite power to make these changes. The military orders through which Israel had initially introduced these changes, as well as the laws 'presently in force in remaining spheres', are subject to review by both parties.

As a result of these exclusions and limitations, the Palestinians will be virtually confined to the geographic areas they now inhabit and will be able to achieve only very limited expansion beyond them during the five-year period of the interim phase.<sup>9</sup> Similarly, their use of water is also circumscribed since this vital natural resource will continue to be under the exclusive control of the Israel National Water Company Mekarot, as it has been since 1982.<sup>10</sup> The only reference to land and water comes in Article VII(4), in the DOP, where it is mentioned that the Council will establish a Palestinian Land Authority and a Palestinian Water Administration Authority. However, in view of the limitations regarding legislative powers, the land and water authorities can only administer the land and water which under existing arrangements have been reserved for Palestinian use. All the rest shall remain for the exclusive benefit of the Israeli settlers.

Before examining how the terms of the DOP could be used to enable it to achieve the objectives it strives to realize, it may be useful to explore how a 6 per cent minority of Israelis have come to enjoy over 60 per cent of the land.<sup>11</sup> Legal distortions can be grouped into three categories:

First, the Israeli Area Commander exercises legislative powers in excess of those provided in the Fourth Hague Convention regarding the Laws and Customs of War on Land (1907) and its annexed Regulations, although the latter were ruled as applicable to the military

9 See *The Real Map, A Demographic and Geographic Analysis of the Population of the West Bank and the Gaza Strip*, Report No. 5 by the Peace Now Settlement Watch Committee (November 1992) 23-24, 'the Government of Israel control more than 60% of the land in the West Bank'. In the Gaza Strip 65% of the land is in Palestinian hands. The settlers living there comprise less than 0.5% of the population. The report continues:

The parallel and separate systems for Palestinians and for Jewish settlers which were developed in the territories are clearly expressed in the allocation of lands. Such were the orders of the Military of Defence and the Governments of Israel. According to these instructions, significantly more land has been allotted for the development of the Jewish settlements than for the Palestinian residents.

10 'For one million Palestinians in the West Bank, the present overall residential consumption of water is approximately 35 million cubic meters. In the Jewish settlements, it is nine million for an estimated 100,000 Jewish settlers. However, data for the end of 1991 appearing in publication of the World Zionist Organization concerning 70 Jewish settlements in the territories (including the Gaza Strip, but without the settlements in the Jordan Valley) reveals that the residential consumption of water in the Jewish settlements is even higher. The data is presented in Appendix 2 for 41 non-agricultural Jewish settlements. According to the World Zionist Organization, the overall population of these Jewish settlements was 12,270 and their actual water consumption totalled approximately 1,306,000 cubic meters, that is, approximately 106 cubic meters per capita/per annum.' *Ibid.* at 26.

11 *Ibid.* at 3.

12 *Izat Mohammed Mustafa Dwaikat and Others v. Government of Israel and Others*, High Court of Justice 390/79 (1980, 34 Piska Din (1) 1).

administration of occupied territories by the Israeli High Court of Justice in 1967.<sup>12</sup> Article 43 of the regulation states that:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the territories.

As any study of the 1,400 military orders already issued by Israel regarding the West Bank will confirm,<sup>13</sup> Israel has gone beyond the limits allowed by international law. Among these changes, which have had an important bearing on the question of land acquisition and use, is military order 59, as amended, which expanded the definition of what Israel considers public land. Further, order 418 expanded the powers of the Israeli-staffed Supreme Planning Council to include the authority to issue planning permits anywhere in the area, and to amend and annul any such permit.<sup>14</sup>

Secondly, concomitant with this expanded power to alter the existing law and introduce new legislation, and just as significant, was the Israeli High Court ruling which considered Israeli settlers in the occupied territories as constituting part of the local population.<sup>15</sup> This meant that in addition to the privileges granted these settlers by successive Israeli Governments to encourage Israelis to settle in the occupied areas,<sup>16</sup> they also came to enjoy the privileges provided by the local law to local residents. The judgment also meant that Israeli citizens could avoid the limitations which Jordanian law imposed on non-locals. Further, Israeli planning law became part of the law of the occupied territories, and it provides that land-use plans be for the benefit of the local population. Thus, when Palestinians opposed a regional plan that led to the expropriation of thousands of hectares of land in order to build roads connecting settlement to Israel, while avoiding Palestinian towns and villages, the planning committee responded that the plan was for the benefit of the local population by whom they meant the Israeli settlers.<sup>17</sup>

13 See Playfair, 'Playing on Principles? Israel's Justification of its Administrative Acts in the Occupied West Bank', in E. Playfair, *International Law and the Administration of Occupied Territories* (1992) 205.

14 Clause 7 of military order 418 states that:  
The Supreme Planning Council may:  
(1) Amend or cancel or suspend for any reasonable movement the effect of any design or license...  
(4) Exempt anyone from the necessity of obtaining any license which the law requires.

15 The first case where the Israeli High Court considered Israeli settlers in the occupied territories as part of the local inhabitants was the *Electricity Company for the District of Jerusalem Ltd. v. The Minister of Defence et al.* (1972) Piska Din 27(1) 124, 138 F. This was confirmed in *The Teachers' Housing Cooperative v. Commander of the IDF and the Higher Planning Commission*, High Court of Justice 393/82.

16 According to the Peace Now Settlement Watch Committee, *supra* note 9, at 5:  
In per capita terms, Jewish settlers received 50 times more government grants than Palestinians. In 1989, the government granted a per capita average of NIS [New Israeli Shekel] 1.050 to Jewish settlers. The Civil Administration (which is the IDF [Israel Defence Forces] organ that administers the Palestinians) granted the Palestinian Councils less than an average of NIS 20 per capita.

17 Objection before the Supreme Planning Council, Secondary Committee for roads number 00375 (5). The decision was dated 22 March 1993.

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Moreover, civil administration was largely in the hands of Israeli settlers, whose interests were opposed to those of the Palestinian majority. As a result, while changes in the law enabled the settlements to be established and achieve phenomenally speedy growth, the Palestinian communities were subjected to restrictive applications of the law that made any growth dependent on a range of permits that were difficult if not impossible to obtain.

The Palestinian side did its best at the time to oppose these distortions, but its legal challenge was confined to the system itself. These attempts were doomed. The question now is whether the Palestinians will get the opportunity to redress these difficulties at any stage in the political process which began in October 1991 with the Madrid Peace Conference. If this can only be done at the final stage of the negotiations, the consequences of these distortions will have gone so far that the objective of achieving a just and lasting peace settlement may prove unattainable. However, the issue goes beyond the mere interest of the Palestinian people. The Israeli occupation of the Palestinian territories is among the longest in modern history. It is also one of the most observed, documented and analysed recorded occupations. What is at stake is the efficacy and relevance of international law and in particular the Hague Regulations and the Fourth Geneva Convention<sup>18</sup> as legal instruments governing the behaviour of an occupier in the modern world. The failure to find the means to bring about a final negotiated settlement based on respect of international law would be a failure on the part of the international community.

The question is whether law shall govern relations between nations or whether it is power that will ultimately be the sole arbiter. If the interim arrangements, based as they are on the consolidation of the gains achieved by Israel in violation of the norms and prohibitions of international law, shall shape the permanent settlement and determine the division of the land between the occupied and the citizens of the occupier, the success of the Israeli occupier in avoiding the application of international law shall be confirmed.

### III. What Can the International Community Do?

The process that began in Madrid in 1991 was based on the view that the resolution of the Israeli-Palestinian conflict shall be achieved in phases. What we now have in the DOP is only the preamble to the first phase which shall begin with the limited withdrawal of Israeli forces from the Gaza Strip and Jericho. The next phase is what the Madrid formula called the permanent status. Israeli policy throughout the 26 years of occupation has been based on the creation of facts – facts which former Israeli Prime Minister Menahim Begin, one of the main proponents of settlement, intended to become irreversible.<sup>19</sup> Although that aim may not have been achieved, these facts are already proving an obstacle to the expected transition through a negotiated political process that avoids violent means. How much more of an obstacle will they be if during the five years of the transitional period the current pace of consolidation of existing settlements shall be allowed to continue unabated or unchallenged?

Under these circumstances what could be a possible role for third parties to this conflict? In the past the international community voiced its objection to Israel's settlement policies by

18 75 UNTS (1950) 31

19 M. Benvenisti has made the point that the Likud Government has implemented a settlement policy completely different from that of Labor. The difference does not lie only in the policy of building settlements in areas heavily populated by Arabs, which is an abomination to Labor; the major innovation has been aimed at 'creating internal political facts, not geostrategic facts'. The Likud 'estimated correctly that the decision about the future of the territories would result from domestic political struggles within the state of Israel rather than from direct external military or political pressure'. M. Benvenisti, *supra* note 4, at 59.

voting for United Nations resolutions which considered settlements illegal. Now that the world community is committed to the success of the negotiated settlement between the parties what could be its new role?

There is no dearth of United Nations General Assembly resolutions which recognize the 'inalienable rights of the Palestinian peoples in Palestine'<sup>20</sup> and which ask States to extend their support to the Palestinian people through its representative, the Palestine Liberation Organization, in its struggle to restore its right to self-determination and independence in accordance with the Charter of the United Nations.<sup>21</sup>

Many of the rich members of the UN are now committed to extending economic assistance to the Palestinian people to support the peace settlement. The fundamental question, however, is whether the DOP and the interim agreements that will be negotiated under it, will enable the Palestinian people to exercise their inalienable right to self-determination. This will depend on whether the Palestinian Council will be an effective government or a mere replacement of the Israeli Civilian Administration exercising limited power and jurisdiction. This in turn will depend both on the source of the Council's authority and its scope. The answers to these questions will have a bearing on the applicability of the Fourth Geneva Convention<sup>22</sup> to the occupied territories and consequently the legal status of these territories. Perhaps the international community should focus its efforts in the first place on ensuring the continued applicability of the Fourth Convention until a legal and viable constitutional transformation becomes possible.

The international community can also assist in encouraging legal processes that allow the questions of land ownership and zoning in the occupied territories to be opened up once again, with the hope that a more equitable division of the land will prevail.

On 19 December 1968, military order 291 suspended the land registration process that had been going on since 1928. Shortly thereafter, the military authorities began issuing unilateral orders declaring private Palestinian lands to be 'public' lands. These were then administered by the Israeli Land Authority and granted to settlers. Because of the limited legislative power allowed to the Palestinian Council under the DOP and the exclusion of jurisdiction over any matter that affects settlements or Israelis, the future Palestinian Council will not be able to cancel military order 291 and resume the land registration process in the territory under Israeli control. The international community could play a role in this vital and fundamental area. Perhaps a legal mechanism can be found where nominated experts from outside the area could arbitrate the question of legal ownership and consider whose claims to the land under the law as it existed at the beginning of the occupation is the better claim.

Similarly the present zoning schemes could be subject to international scrutiny and a process could be found whereby the real needs of the different communities could be assessed. The Scottish planner, Anthony Coon, who studied the land planning in the West Bank concluded that it constituted 'discrimination on a grand scale'. He called the Israeli military government's achievement one 'which makes the efforts of the planning system in the erstwhile "white" area of South Africa seem half-hearted'.<sup>23</sup> Such a demonstratively unequal division of the land between the minority of the settlers and the majority of Palestinians cannot possibly foster the conditions during the five-year interim period that will ensure that the two sides live in peaceful coexistence and mutual dignity. It did not work in South Africa; why should it work in Palestine/Israel?

20 G.A. Res. 3236, 22 November 1974.

21 G.A. Res. 34/44 Article 115, 23 November 1979.

22 *Supra* note 18.

23 A. Coon is senior lecturer at the Centre for Planning, Strathclyde University, Scotland. A lengthy study entitled *Urban Planning in the West Bank Under Military Occupation*, commissioned by Al-Haq, the West Bank affiliate of the International Commission of Jurists, was published in 1992.

