

# Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law

Peter Malanczuk\*

## I. Introduction

The Middle East peace process is a complex web of international negotiations based upon the structure set up at the Madrid Conference that was held on 30 October 1991 and was co-sponsored by the United States and Russia (then the USSR).<sup>1</sup> There are two different but parallel negotiating tracks, a bilateral one and a multilateral one. The bilateral track consists of four separate sets of direct negotiations between Israel, and Syria, Lebanon, Jordan and the Palestinians. The multilateral track aims at building confidence among the regional parties and at solving a number of complicated issues which are addressed in five different forums comprising representatives from states in the region as well as of the international community. The working groups of the multilateral negotiations are focusing on water, environment, arms control, refugees and economic development.<sup>2</sup> With regard to the bilateral negotiations between Israel and the three Arab States, the purpose is to conclude peace treaties, which in the case of Jordan has been accomplished with the Peace Treaty signed on 26 October 1994.<sup>3</sup>

The most interesting bilateral negotiations from an international legal perspective are those between Israel and the Palestinians.<sup>4</sup> It is upon some of the basic legal

\* Department of International Relations and Public International Law, Faculty of Political and Socio-Cultural Sciences, University of Amsterdam.

1 See P. Malanczuk, 'Israel: Status, Territory and Occupied Territories', EPIL II (1995), 1468-508, at 1501-8; *The Middle East Peace Process, An Overview*, Information Division, Ministry of Foreign Affairs, Jerusalem, December 1995. For a general legal analysis see E. Cotran and C. Mallat (eds), *The Arab-Israeli Accords: Legal Perspectives*, (1996) (the book was not yet available at the time of writing).

2 See also M. Cogen and A. François, 'Realizing the Right to Self-Determination of the Palestinian People: The European Union and the Peaceful Settlement of the Israeli/Palestinian Conflict', in N. Sybesma-Knol and J.V. Bellingen (eds), *Naar een nieuwe interpretatie van het Recht op Zelfbeschikking* (1995) 345-73.

3 Text in ILM 34 (1995) 43.

4 See , for example, the contributions by E. Benvenisti, 'The Status of the Palestinian Authority', and by E. Cotran, 'Some Legal Aspects of the Declaration of Principles: A Palestinian View', in *The Arab/Israeli Accords, supra* note 1; E. Benvenisti, 'The Israeli-Palestinian Declaration of

aspects of these negotiations and their results so far that the present article concentrates. Within the limited scope of this article, it is impossible to address the complicated legal details of the process, including the diverse issues addressed in the agreements already in force and those which have been postponed to a later stage. The article, therefore, selects some more basic aspects of the agreements between Israel and the PLO with the purpose of examining the relevance of international law and of highlighting some of the more fundamental legal issues. Following a general overview of the bilateral and multilateral legal framework of the peace process in section II, it discusses the legal nature of the agreements between Israel and the PLO - section III. It then, in section IV, addresses the legal effect of the arrangements upon the basic relationship between the parties and upon the status of the West Bank and Gaza (section V). It further examines the relevant dispute settlement mechanisms (section VI). The article concludes with some reflections on the role of international law in the Middle East peace process in general (section VII).

## II. The Bilateral Legal Framework

The historic event of the Israeli-Palestinian accord was formalized at a ceremony in Washington on 13 September 1993 where the Declaration of Principles on Interim Self-Government ('DOP') was signed by the Israeli Prime Minister Rabin and by PLO Chairman Arafat.<sup>5</sup> The DOP has four annexes concerned with elections, early withdrawal from the Gaza Strip and Jericho area, Israeli-Palestinian economic cooperation, and cooperation at the regional level. In addition, there are 'Agreed Minutes' which, as an 'integral part' of the Declaration, amplify various of its provisions. Finally, the Declaration is supplemented by an exchange of letters, dated 9 September 1993, which, *inter alia*, confirm the recognition by the PLO of Israel's right to exist, of the renunciation of terrorism and an undertaking to amend the Palestinian Covenant and the recognition by Israel of the PLO as the representative of the Palestinian people.

The ultimate aims of the Declaration, as stated in the preamble, are to 'put an end to decades of confrontation and conflict and to live in peaceful coexistence, mutual dignity and security' and to 'achieve a just, lasting and comprehensive peace settlement and historic reconciliation'. The parties further accepted that 'the peace process ... as well as the new relationship established between the two Parties ... are irreversible'. The Declaration is not a comprehensive arrangement with practical results, but rather a statement of agreed principles to guide a negotiating process through several stages to establish the 'agreed framework for the interim period'

Principles: A Framework for Future Settlement', *EJIL* 4 (1993), 542-54; R. Shihadeh, 'Can the Declaration of Principles Bring About a "Just and Lasting Peace"?' , *ibid.*, 555-63; A. Cassese, 'The Israel-PLO Agreement and Self-Determination', *ibid.*, 564-71.

<sup>5</sup> *Declaration of Principles on Interim Self-Government Arrangements*, Government of Israel, Ministry of Foreign Affairs, September 1993.

(Article II). An 'interim' or 'transitional period' of 5 years is envisaged until the implementation of the permanent status arrangements. The time-frame is based on the one included in the 1978 Camp David Accords, concluded between Israel and Egypt, although these are not mentioned due to Palestinian objections. The interim period starts with the withdrawal of Israeli forces from Gaza and the Jericho area (Article V). Negotiations on the final status of the West Bank and Gaza are scheduled to commence at the beginning of the third year of this five year period at the latest.

The Agreement on the Gaza Strip and the Jericho area, signed in Cairo on 4 May 1994 (Gaza-Jericho Agreement)<sup>6</sup>, marked the first stage of implementing the DOP provisions dealing with the withdrawal of Israeli military forces from the Gaza Strip and the Jericho Area and the transfer of powers to a Palestinian authority, the members of which at this stage were not elected but appointed by the PLO with the approval of Israel. With regard to the West Bank, the DOP envisaged some 'Early Empowerment' arrangements concerning this area as the second stage of implementation. On 29 August 1994, Israel and the PLO accordingly signed an Agreement on the Preparatory Transfer of Powers and Responsibilities providing for the transfer of six civil spheres to the Palestinian Authority. An additional eight spheres were likewise transferred on the basis of a Protocol on Further Transfer of Powers and Responsibilities, signed on 27 August 1995. The third stage of implementation of the DOP was reached with the Interim Agreement on the West Bank and the Gaza Strip, which was signed in Washington on 28 September 1995 (Interim Agreement).<sup>7</sup> This agreement intends to extend arrangements made for Palestinian self-government in the Gaza Strip and the Jericho area throughout the West Bank. The Interim Agreement is a complicated document of more than 300 pages and includes seven annexes. It lays down detailed provisions on the election of the Palestinian Council and provides for the transfer of powers and responsibilities to the Council as well as for extensive arrangements on security issues, including the redeployment of Israeli military forces in the West Bank, which issue is partly also addressed in the nine maps attached to the agreement. Furthermore, the relations between Israel and the Palestinian Council are addressed with regard to legal and economic matters. It also sets out a framework for enhancing cooperation between the two parties and deals with the release of Palestinian prisoners and detainees.

6 *Agreement on the Gaza Strip and the Jericho Area*, Cairo, May 4, 1994, Ministry of Foreign Affairs, Jerusalem.

7 *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, Washington, D.C., September 28, 1995, Ministry of Foreign Affairs, Jerusalem. See J. Singer, 'The West Bank and Gaza Strip: Phase Two, Justice' - *The International Association of Jewish Lawyers and Jurists No. 7 December 1995*, 5-17. The Interim agreement was witnessed and countersigned by the heads of States, foreign ministers or representatives of the United States, the Russian Federation, Egypt, Jordan, Norway and the European Union.

It is important to note that arrangements made by the Interim Agreement incorporate or supersede all of the provisions made in the three earlier agreements.<sup>8</sup> The new arrangements remain in force throughout the five year transitional period which started from the date on which the Gaza-Jericho Agreement had entered into force (4 May 1994) and thus shall be completed by 4 May 1999. Negotiations on permanent status issues are to commence not later than the third year of the interim period.<sup>9</sup> The Interim Agreement specifies this date as 4 May 1996.<sup>10</sup> Issues to be addressed in the permanent status negotiations include 'Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours and other issues of common interest'.<sup>11</sup> The permanent status arrangements arising from the negotiations are to be implemented at the end of the five year transitional period.

### III. The Legal Nature of the Agreements Between Israel and the PLO

While the Peace Treaty between Israel and Jordan (as in the case of the Camp David Agreements between Israel and Egypt) is clearly a treaty between states governed by international law in the sense of the 1969 Vienna Convention on the Law of Treaties<sup>12</sup>, the legal nature of the agreements between Israel and the PLO is a matter of dispute. Some authors argue that '[t]he PLO's lack of status as a state precludes characterization of the Declaration as a treaty or international convention, and hence as a hard law instrument in the traditional sense.'<sup>13</sup> It is suggested that it is 'rather an agreement between the State of Israel and the PLO, "representing the Palestinian people"' and that '[b]ecause the Declaration of Principles accepts some, but not all, elements of Palestinian statehood, Palestine may be considered a "quasi-state" for purposes of the agreement; that is an entity enjoying certain prerogatives ordinarily reserved to states, but not fulfilling all of the traditional prerequisites for statehood.'<sup>14</sup> The same author concludes that, although the agreement is 'a soft law document in the traditional sense', it nevertheless is 'an agreement with considerable binding force' which 'appears on close analysis to embody a solid, substantive ac-

8 The arrangements made for the Gaza Strip were generally kept, except for some modifications gained from the experience with the implementation of the Gaza-Jericho Agreement. The arrangements for the Jericho area were replaced by the new arrangements designed for the West Bank as a whole. Under the Interim agreement the Palestinian Council assumes the powers and responsibilities transferred to the Palestinians under the preparatory transfer agreements.

9 Art. V. DOP.

10 Art. XXXI(5) Interim Agreement.

11 Art. V(3) DOP.

12 Text in: I. Brownlie, *Basic Documents in International Law*, 4th ed. (1995) 388.

13 Note, 'The Israel-PLO Declaration of Principles: Prelude to a Peace?', *Va. J. Int'l. L.* 34 (1994), 435-69, at 452.

14 *Ibid.*, 465.

cord'.<sup>15</sup> Other authors have also expressed doubts (at least) on whether the Israel-PLO agreements are international instruments.<sup>16</sup>

In the view above there is some confusion on two different issues which need to be distinguished in the analysis. The first issue concerns the law to be applied to the agreement, in particular, whether it is an agreement concluded under international law. The second issue is whether, or to what extent it is a legally binding or non-binding agreement, and what the legal consequences of it are.

With regard to the first issue, it is correct that the PLO is not a state in the sense of international law and that it also does not represent any existing State of 'Palestine'. The establishment of a 'State of Palestine' was proclaimed with the Algiers Declaration of 15 November 1988 and it was recognized by many former communist states and developing countries which entered into diplomatic relations with the representatives of this state. However, this 'State of Palestine' does not fulfill one of the essential criteria under international law for the existence of a state<sup>17</sup> because there is no effective sovereign control over the territory and population claimed to form the basis of the 'State of Palestine'.<sup>18</sup>

This does not mean that the Israel-PLO agreements cannot be treaties under international law. It is true that the 1969 Vienna Convention on the Law of Treaties only applies to treaties concluded between states. But that does not affect, as expressly acknowledged in Article 3 of the Convention, the legal validity of, and the application of international rules on the law of treaties to, agreements concluded between states and other 'subjects of international law'.<sup>19</sup> Independently of the attitude taken by Israel towards the PLO in the past<sup>20</sup>, in international practice the latter has become recognized as a national liberation movement<sup>21</sup> with the right to self-determination<sup>22</sup>, which, although it does not exercise effective territorial jurisdiction, is a partial subject of international law with the legal capacity to maintain diplomatic relations with states and international organizations recognizing it and to conclude treaties. As a partial subject of international law, the PLO is not equal to a state, but that does not affect the validity of a treaty it concludes with a state.<sup>23</sup>

15 Ibid., 467.

16 See, for example, Y.Z. Blum, 'From Camp David to Oslo', Israel LR 28 (1994), 211, at 212-3.

17 See generally P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997) Ch. 5 (forthcoming).

18 See Malanczuk, *supra* note 1 at 1491-2; Boyle, 'The Creation of the State of Palestine', *EJIL* 1 (1990) 301; J. Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?', *ibid.*, 307.

19 For the text of the Convention see *supra* note 12.

20 Even Israeli authors agree that the international status of the Palestinian people, and the PLO as its representative, was not dependent upon recognition by Israel, see E. Benvenisti *supra* note 4 at 544. See also K.C. Goller, 'Legal Analysis of the Security Arrangements Between Israel and the PLO', Israel LR 28 (1994), 236, at 239 note 9.

21 See F.L.M. Van de Craen, 'Palestine Liberation Movement', EPIL 12 (1990) 278-82.

22 See, for example, P.J. de Waart, *Dynamics of Self-Determination in Palestine: Protection of Peoples as a Human Right*, (1994).

23 See also F.A.M. Alting von Geusau, 'Breaking Away Towards Peace in the Middle East', *Leiden Journal of International Law* 8 (1995), 81-101, 91-3; Benvenisti *supra* note 4 at 544-5.

Yehuda Blum argues that, even if one would be prepared to recognize that national liberation movements could have the status as subjects under international law, 'it does not necessarily follow that agreements entered by them become *international* agreements; partial and limited subjects of international law logically have only partial capacities under that law'.<sup>24</sup> This argument is not convincing for the following reasons. If the Israel-PLO agreements are not international agreements under public international law, then they must be governed by some national legal system, as in the case of so-called 'state contracts' concluded by a host state and a foreign company (unless, as more frequently in the past, a reference in the contract is made to international law as the governing law, which does not necessarily elevate the contract to the level of a treaty in the international law sense).<sup>25</sup> Quite apparently, this would lead to absurd results.

Moreover, there are two clear indications in the agreements themselves that the parties consider them to be international law agreements. First, there is express reference in some provisions that certain action has to be taken 'in accordance with international law'. Second, as will be discussed below, the methods of dispute settlement provided for in the agreements are the typical ones of international law dispute settlement procedures. An additional argument can be found in the facts that the United Nations has endorsed the Israel-PLO Accord, that other states have signed as witnesses and that a multilateral international framework has been created in support of the Middle East Peace process, all of which does not lend support to the view that the agreements are non-international ones. The agreements made between Israel and the PLO include the recognition by Israel of the PLO as the representative of the Palestinian people, and thereby are clearly governed by international law.

The second issue is: what kind of agreements are these under international law? Although the DOP is entitled 'Declaration', its content reveals that the parties did not want to enter into a mere 'gentlemen's agreement' or just intended a declaration of policy. There is, furthermore, no reason to consider whether the text could be qualified as non-binding on the grounds that it lacks precision, in the sense that Judge Lauterpacht argued in his declaration attached to the Judgment of the International Court of Justice in the *Sovereignty of Certain Frontier Land* case, namely that 'the ... provisions ... must be considered as void and inapplicable on account of uncertainty and unresolved discrepancy'.<sup>26</sup> First, the view held by some authors that the vagueness of treaty provisions may lead to the conclusion that these provisions are not legally binding is in itself incorrect. If the parties intended to conclude a treaty, then it is binding as a whole, even if some parts contain broad or unclear language. Vague provisions may give the parties a broad margin of discretion, but, as Bernhardt notes, that is not to say that they are without legal significance and binding substance.<sup>27</sup> Secondly, even if one would like to take the contrary view, the

24 Supra note 16 at 213.

25 See Malanczuk (1997), *supra* note 17, Ch. 6.

26 ICJ Reports 1959, 209, at 231.

27 See R. Bernhardt, 'Treaties', EPIL 7 (1984), 459-64, at 461.

detailed nature of many of the obligations laid down in the Israel-PLO agreements (especially after the DOP) clearly show that the provisions are sufficiently clear and that the parties intended to enter into binding commitments and not merely conclude a non-binding agreement.<sup>28</sup> This is also true with regard to the agreement to later negotiate on the permanent status. It is generally accepted that an obligation to take part in negotiations and to conduct them in good faith 'may form the valid and practical object of an international undertaking'.<sup>29</sup>

There are other arguments supporting the view that the agreements between the PLO and Israel are legally binding ones. First, if they were supposed to be non-binding it would not have been necessary to include dispute settlement provisions which also provide for the option of arbitration which is a form of legally binding third-party settlement.<sup>30</sup> Secondly, it has also been argued by the parties themselves (at least by the Israeli side) that the disrespect of fundamental provisions of the agreement by one party may result in the right of the other party to terminate it.<sup>31</sup> This only makes sense if the agreement is considered a legally binding treaty, because if it is a non-binding agreement there is logically no need to terminate it; there are no obligations in the legal sense anyway. Finally, also in view of the nature of the issues to be settled between the parties, it is hardly conceivable that either of the parties would like to understand the commitments made as merely non-binding ones from which one side could withdraw at will.

The parties to the Israel-PLO agreements have laid down very specific obligations for the transitional period and concluded a *pactum de negotiando* regarding the permanent status with very clear time-limits. The agreements in their entirety are 'hard law' and not any kind of so-called 'soft law'<sup>32</sup>, even with regard to the agreement to negotiate on the permanent status. Although an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it implies that serious efforts towards that end must be made<sup>33</sup>. The parties are legally obliged to make use of all available means of negotiation in good faith with a view of achieving a definite substantive agreement and they must continue or even renew these negotiations as long as one side insists on further discussion and the other side cannot rely on a valid ground recognized in the law on treaties for terminating a treaty or withdrawing from its operation.<sup>34</sup> It can be further argued that this is even true in cases in

<sup>28</sup> See F. Münch, 'Non-Binding Agreements', EPIL 7 (1984), 353-8. With regard to the DOP, Cassese, *supra* note 4, distinguishes between three classes of legal commitments: obligations which become immediately operative, obligations to conclude agreements (*pacta de contrahendo*) and obligations to negotiate future agreements (*pacta de negotiando*).

<sup>29</sup> Judge De Visscher in his dissenting opinion to the ICJ's Advisory Opinion of 11 July 1950 on South West Africa, ICJ Reports 1950, 186, at 188.

<sup>30</sup> See text below.

<sup>31</sup> See Singer, *supra* note 7.

<sup>32</sup> On the confusing concept of "soft law" see Malanczuk *supra* note 17, Ch. 3.

<sup>33</sup> See the decision of the Tribunal in the *German External Debts Arbitration*, ILR 47 (1974), 418, at 4453-4. See further U. Beyerlin, 'Pactum de contrahendo, Pactum de negotiando', EPIL 7 (1984) 371-6.

<sup>34</sup> See M. Akehurst, 'Treaties, Termination', EPIL 7 (1984), 507-10.

which the parties have set a fixed date for the accomplishment of their mutual obligation to negotiate. Thus, Israel and the PLO can be viewed as being under a legal obligation to continue with their negotiations on permanent status even if not all issues have been solved by the deadline set in 1999. In addition, while negotiations are in progress the parties are obliged to refrain from acts which would frustrate the object of the intended agreement.

#### IV. The Legal Effects of the Agreements on the Basic Relationship Between the Parties

The basic relationship between Israel and the PLO has been fundamentally altered by steps of legal recognition, barring them in the future from treating each other only as *de facto* entities.<sup>35</sup> The process of legal recognition commenced with the letter from the PLO chairman Arafat of 9 September 1993 stating that 'the PLO recognizes the right of the State of Israel to exist in peace and security.' The PLO further renounced the use of terrorism and other acts of violence. It also affirmed that 'those articles of the Palestinian Covenant which deny Israel's right to exist ... are now inappropriate and no longer valid' and undertook to initiate the required changes in the Covenant. In his reply letter of 9 September 1993, Israel's Prime Minister confirmed, in view of the commitments made by the PLO that 'the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people...'.

There has been some discussion in the literature on the legal nature of these letters, especially on whether they constitute unilateral promises which, as such, are legally binding.<sup>36</sup> In the present author's view, it would be more accurate to regard the exchange of these letters as constituting a binding international agreement in itself because the obligations undertaken are not unilateral in nature but based upon reciprocity leading to the agreement, as expressed in both letters, to commence negotiations on a peace settlement.<sup>37</sup> However, the issue has lost its practical significance since the undertakings expressed in the letters of 9 September 1993 have been incorporated by reference in the 1994 Cairo Agreement which is clearly a bilateral agreement.<sup>38</sup>

In renouncing terrorism and the use of force (between which a definite line is not always easily drawn) the PLO has rendered moot the controversial issue of the extent to which international law and the principle of self-determination permits the

35 See J.A. Frowein, 'De facto Régime', EPIL I (1992), 966-8.

36 See Goller, *supra* note 20, 237 et seq.

37 An international agreement can be based on or reflected by several separate documents. A unified text signed by both parties is not required. International agreements can even be concluded orally with binding force, although this is, of course, for reasons of evidence among others, not the rule in practice.

38 See Goller, *supra* note 20 at 247 et seq.

use of armed force in so-called wars of national liberation, and the intervention by third states in support of such wars.<sup>39</sup> The PLO has agreed to pursue its goal of independent statehood through peaceful negotiations and thereby renounced, with legally binding effect, any right it may or may not have had to use the methods it employed in the past. In explicitly recognizing Israel's right to exist in peace and security (which is accepted under general international law and by the international community irrespective of the status of the occupied territories)<sup>40</sup>, the PLO has also waived any claim to replace Israel by a Palestinian State. The Covenant of the PLO was, in fact, amended accordingly in May 1995.

Israel, on the other hand, if the PLO respects the obligations it has undertaken, no longer can invoke the right to use armed force, Article 51 of the UN Charter, or any customary international law right of self-defence vis-à-vis the PLO.<sup>41</sup> Israel has also accepted the obligation to settle the problems with the PLO in peaceful negotiations. Furthermore, Israel has explicitly accepted in the DOP that the 'legitimate rights of the Palestinian people' must be realized in the permanent status negotiations.<sup>42</sup>

While this may be interpreted as an indirect reference to the right of the Palestinian people to self-determination<sup>43</sup>, it is known that the views of the parties on the meaning of this is quite divergent. While the Palestinian side envisages an independent State of Palestine with at least part of Jerusalem as its capital, the Israeli side prefers some form of Palestinian autonomy (or 'self-government') only, perhaps within a confederation with Jordan, and insists on keeping an undivided Jerusalem as its capital. Legally speaking, between the parties the matter is kept deliberately open and the outcome will depend on the permanent status negotiations.

Although there is an agreement to disagree on these and other issues for the time being, this does not mean that the Palestinians have given up their right to self-determination in the sense of to 'freely determine their political status'. The PLO has merely agreed to suspend the full exercise of the right (in the sense of claiming independent statehood) until the completion of the negotiations on permanent status. The Palestinian right to self-determination remains legally limited by the provisions of the agreements so far reached with Israel. As long as these arrangements remain legally in effect and are not suspended or terminated on a valid ground under the law of treaties, the highly controversial notion of self-determination, its precise meaning

39 See H. Wilson, *International Law and the Use of Force by National Liberation Movements*, (1988).

40 See Malanczuk, *supra* note 1.

41 See generally P. Malanczuk, 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility', in: M. Spinedi and B. Simma (eds), *United Nations Codification of State Responsibility*, (1987) 197-286.

42 Article III(3) DOP.

43 For a discussion see Cassese, *supra* note 4.

in international law and its exact legal consequences<sup>44</sup> are not of practical relevance for the peace process. At any rate, it is also an exercise of the right to self-determination that the PLO, as representative of the Palestinian people, has decided to pursue the specific course of the negotiations with Israel.

The above conclusion is supported by a provision in the Interim Agreement itself, which provides:

Nothing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.<sup>45</sup>

As correctly noted by the Israeli side, interim arrangements are interim arrangements only:

[T]hey are not in any way intended to influence the outcome of the permanent status negotiations. In other words, in the upcoming permanent status negotiations, no party may be barred from raising a claim or argument regarding the permanent status merely because that party has agreed in the Interim Agreement that a different arrangement may be implemented during the interim period.<sup>46</sup>

## V. The Legal Effects of the Agreements on the Status of the West Bank and Gaza

The legal status of the territories occupied by Israel since 1967 is controversial<sup>47</sup>. The basic positions of the parties with regard to the areas currently designated for Palestinian autonomy under the arrangements can be briefly summarized as follows. Israel does not consider the West Bank and Gaza part of its sovereign territory and has made no attempts of *de iure* annexation as in the cases of East Jerusalem and the Syrian Golan Heights (which the international community has not recognized because annexation is no longer accepted in international law as a valid method to acquire territory). Israel views them as 'territories under the control of an Israeli military government', although it also emphasizes that it 'has a claim to sovereignty over these areas'.<sup>48</sup> Furthermore, Israel still officially holds the view that the West Bank and Gaza are not *de iure* 'occupied territory' in the sense of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the humanitarian provisions of which it has agreed to observe only on a *de facto* basis) with the

<sup>44</sup> See P. Malanczuk, 'Minorities and Self-Determination: Reflections on International Law in General, Including Some Recent Developments in Ethiopia' in N. Sybesma-Knol and J.v. Bellingen (eds), *Naar een nieuwe interpretatie van het Recht op Zelfbeschikking* (1995) 169-94.

<sup>45</sup> Art. XXXI(6) Interim Agreement.

<sup>46</sup> Singer, *supra* note 7 at 8.

<sup>47</sup> See Malanczuk, *supra* note 1.

<sup>48</sup> See J. Singer, 'Aspects of Foreign Relations Under the Israeli-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza', Israel LR 28 (1994) 268, at 276.

argument that sovereignty in these areas was never vested in Jordan and Egypt.<sup>49</sup> The Palestinian claim to sovereignty in these areas, including the claim to independent statehood is primarily based upon the principle of self-determination. The legal status of Jerusalem, in this connection, is one of the most vexed problems.<sup>50</sup> The international community, as witnessed in the UN Security Council Resolutions 242 and 338, clearly regards the territories as being under the international law of military occupation, has repeatedly called for Israeli withdrawal<sup>51</sup>, declared as null and void Israeli attempts at prohibited annexation of occupied territory, and condemned the de facto creeping annexation of areas under military control by Israeli settlement policy.

The approach of the parties to the Israeli-PLO agreements has been, in essence, to postpone the difficult issue of Jerusalem to the negotiations on permanent status and to freeze the status of the West Bank and Gaza in the transitional period, allowing both sides to retain their respective positions for the later permanent status discussions. Thus, Article XXXI(8) of the Interim Agreement states that the status of the West Bank and Gaza 'will be preserved during the interim period.' The same agreement lays down that;

[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.<sup>52</sup>

It is concluded that the implication of this prohibition to change the status of the West Bank and Gaza, being one of the fundamental elements of the agreement, is

that any attempt made by either side to change this status (such as by declaring an independent Palestinian State or by annexing the areas to Israel) may be considered a material breach and a ground for terminating the agreement.<sup>53</sup>

From the Israeli point of view, the nature of the regime established in the West Bank and the Gaza Strip for the duration of the transitional period 'is that of a Palestinian autonomy under the supreme authority of the Israeli military government.'<sup>54</sup> However, explicit language confirming this view is not to be found in any of the relevant documents. The alleged nature of the regime is rather to be inferred from the fact that Israel has not devolved responsibility to Palestinian authorities in essential areas, such as external security or external relations, as well as from the interpretation of certain provisions of the Interim Agreement and the DOP. One of the main arguments advanced by the Israeli side is that, while the Israeli Civil Administration for the occupied territories is dissolved, the military government is not, even

49 Statement of Israel's Ambassador to the UN, UN Doc. A/32/PV 47 of 26 October 1977.

50 See P. Malanczuk, 'Jerusalem', EPIL 12 (1990), 184-95; with Addendum in EPIL III (1996) (forthcoming).

51 There is, however, a dispute on the exact extent to which such withdrawal is required by the ambivalent French and English versions of Resolution 242; see Malanczuk, *supra* note 1.

52 Art. XXXI(7) Interim Agreement.

53 Singer, *supra* note 7 at 8.

54 Singer, *supra* note 7 at 7.

if Israeli military forces are withdrawn. Reference is made, *inter alia*, to Article I(5) of the Interim Agreement, which states:

After the inauguration of the Council, the Civil Administration in the West Bank will be dissolved, and the Israeli military government shall be withdrawn. The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council.

A further provision invoked is Article XVII(4) of the Interim Agreement which provides:

a. Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis.

b. To this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis *in personam*.

The Legal Adviser of the Israeli Ministry of Foreign Affairs, Joel Singer, who negotiated, on behalf of Israel, the DOP and the subsequent agreements with the PLO, concludes from these provisions:

It follows that, unlike the Civil Administration, the military government does not dissolve. Instead, it simply withdraws physically from its former location, but continues to exist elsewhere as the source of authority for the Palestinian Council and the powers and responsibilities exercised in the West Bank and the Gaza Strip.<sup>55</sup>

It seems that the military commanders of the Israeli Defence Forces in the West Bank and the Gaza Strip issued proclamations on the implementation of the Interim Agreement, as in the case of the previous agreements with the PLO, incorporating the provisions of the agreement in domestic Israeli law.<sup>56</sup>

Israel further argues that the aforementioned provisions also clarify that the so-called 'residual powers' are retained by Israel. Reference is also made to art. I(1) of the Interim Agreement stating that 'Israel shall continue to exercise powers and responsibilities not so transferred' to the Council. This would imply that, if the agreement is silent on where a particular power rests, it is then retained by Israel. Such possession of 'residual powers' is described as being 'normally, an *indicia* of being the source of ultimate authority'.<sup>57</sup>

Palestinian authors argue that, especially in view of the agreement that Israel retains jurisdiction over the Israeli settlements, this would be tantamount to annexation and in fact preempt the outcome of the final status negotiations.<sup>58</sup> But this conclusion neglects the fact that this arrangement is not based on a unilateral Israeli act but on an agreement between the parties. Furthermore, as has been noted above, it is also clear from a legal point of view that this is only an interim arrangement without

55 Singer, *ibid.*, at 8.

56 *Ibid.*

57 *Ibid.*

58 Shihadeh, *supra* note 4 at 557.

legal (as distinct from political) prejudice to the negotiations on permanent status. Behind this issue is a much more fundamental question, namely whether the legal status of the territories from which Israel has agreed to withdraw has changed. The powers which Israel has exercised in the past in these areas were those of a military government under the conditions of prolonged military occupation.<sup>59</sup> Legally speaking, the power of a military occupant derives from the effective control it has over the occupied territories. Article 42 of the applicable Regulations Respecting the Laws and Customs of War on Land of 1907 states:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Does the law on military occupation cease to apply after the withdrawal of Israeli forces on the basis of the agreements with the PLO? Benvenisti has the following view:

After relinquishing its control, as envisioned in the Declaration, at least in Gaza and Jericho, Israel will have no effective control, and thus no right to reoccupy those areas. As provided for in the Declaration, the Palestinian entity in Gaza and Jericho has a life of its own, and does not draw its authority from the Israeli occupation or from the Declaration, but from the Palestinian people's right to self-determination. Therefore, the Declaration establishes an irreversible step towards the settlement of the conflict.<sup>60</sup>

There are two main points to be made in this connection. First, it is doubtful whether the DOP constitutes an 'irreversible step' because it is conceivable that there may be problems on the way to peace which may cause Israel to reoccupy the areas from which it has withdrawn. Whether such action is legally justified or not, in that case the law of war would again be applicable. This is the essence of distinguishing between the *ius ad bello* and the *ius in bello* in international law. Second, it is doubtful whether the laws of war, *inter alia*, protecting the civilian population fully cease to apply simply because of the Israeli withdrawal. Israel has retained jurisdiction over Israelis and the Israeli settlements in the respective areas, controls security and external relations and has retained the 'residual power'. In effect, Israel is therefore still an occupant with regard to the fields which it has not transferred to the Palestinians for self-government. A different conclusion would lead to the absurd result of legalizing the current status quo, including the Israeli settlements, from the viewpoint of international law.

One could further argue that the international law of occupation seems to set certain limits to Israel's scope of discretion to relieve itself of its responsibilities to protect the interests of the occupied territories by concluding an agreement to trans-

59 See A. Roberts, 'Prolonged Military Occupation: The Israeli Occupied Territories Since 1967', *AJIL* 84 (1990) 44-103.

60 Benvenisti, *supra* note 4 at 546.

fer powers to local groups.<sup>61</sup> Article 47 of the Fourth Geneva Convention of 1949, which is applicable to the West Bank and Gaza<sup>62</sup>, states:

Protected persons who are in occupied territories shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.<sup>63</sup>

However, this provision does not really fit to the current situation in the West Bank and Gaza as regards the agreements concluded with the PLO and the establishment of Palestinian institutions. As the occupying power, Israel is not unilaterally creating new institutions, such as the Palestinian Council, and the agreements concluded with the PLO are not agreements with existing local authorities in the occupied territories. The agreements are made with an entity recognised as representing the people in the occupied territories as a whole and, on the basis of the claim to self-determination, is demanding a much more intensive transfer of responsibilities than the current transitional arrangements provide for and which are a necessary precondition for a possible full termination of the status of the West Bank and Gaza as occupied territories in the future. Article 47 is not applicable to this unique kind of situation because there is no autonomy, possibly as a pre-stage to independence, without the delegation of authority and responsibility. The purpose of Article 47 is to ensure the protection of the inhabitants of territory remaining under military occupation; the purpose of the agreements with the PLO is to arrive at a lasting and definite peace settlement. One cannot have one's cake and eat it too. What is required, therefore, is a differentiated application of the laws of war to the occupied territories in the light of the agreements themselves.

## VI. The Dispute Settlement Mechanisms

Another important aspect of the Israeli-PLO accords is the question of which kind of dispute settlement mechanisms have been agreed upon by the parties. As a starting point, it is important to remember that in the decentralized international legal system there is no compulsory binding decision by a third party in disputes without the agreement in one form or another of the parties to the dispute.<sup>64</sup> States prefer non-binding methods such as direct negotiation, or mediation or conciliation by a third party. If a legally binding decision is sought in exceptional cases, then the preference

61 For this argument see E. Benvenisti, 'Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements', *Israel LR* 28 (1994), 297-317, at 300.

62 See E. Benvenisti, *The International Law of Occupation*, (1993) 109-112; A. Roberts, *supra* note 59 at 44; Malanczuk, *supra* note 1.

63 Text in: A. Roberts and R. Guelff (eds), *Documents on the Laws of War*, 2nd ed. (1989) 288.

64 See Malanczuk, *supra* note 17, Ch. 18.

in practice is to chose the more flexible form of arbitration rather than adjudication, by, for example, bringing the case to the International Court of Justice.

This general attitude is also reflected in the DOP. Article XV provides:

1. Disputes arising out of the application or interpretation of this Declaration of Principles, or any subsequent agreements pertaining to the interim period, shall be resolved by negotiations through the Joint Liason Committee to be established pursuant to Article X above.
2. Disputes which cannot be settled by negotiations may be resolved by a mechanism of conciliation to be agreed upon by the parties.
3. The parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both parties, the parties will establish an Arbitration Committee.

Similar provisions, with explicit reference to Art XV, are to be found in Article XVII of the Gaza Strip-Jericho Agreement and in Article XXI of the West Bank-Gaza Strip Interim Agreement. The option of recourse to the International Court of Justice was not available to the parties because under the Statute of the Court only states may appear in contentious cases<sup>65</sup> and the PLO is not a state. The weakness of the third-party dispute settlement methods envisaged in the Israeli-PLO accords is that both the non-binding method of conciliation and the legally binding method of arbitration require a further specific agreement of both sides. They are thus both only optional. However, one should not forget that arbitration has been used recently in the Middle East context in the follow-up of the Camp David Agreements to settle the dispute between Israel and Egypt on the issue of Taba.<sup>66</sup>

## VII. Conclusion: The Role of International Law

To analyse the Middle East peace process from the perspective of international law may seem a rather moot exercise, especially from the viewpoint of those who belong to the so-called 'realist' school of thought in international affairs.<sup>67</sup> The realists would quite rightly point out that rules and principles of international law that may or may not apply to the situation in Palestine have not been enforced in the past and that there are rather conflicting interpretations of what the legal status actually is. It must be admitted that this perception is basically true and that the role of international law in the Arab-Israeli wars and in the governance of the territories occupied by Israel has in fact been a very limited one. In the four and a half decades of continuous belligerency and quasi-belligerency in the Middle East since the declaration of independence of the State of Israel, with incompatible claims of two peoples to the same territory, sheer power and military force have been the main controlling

65 Art. 35 of the Statute of the International Court of Justice.

66 See R. Lapidot, 'Taba Arbitration', EPIL 12 (1990), 365-7.

67 See Malanczuk, *supra* note 17, Ch. 1.

elements of the tragedy and not norms of international law, at least as far as the direct actors involved are concerned.

However, it is submitted that, although the role of international law in the Arab-Israeli conflict has been only subsidiary at best, it has been not entirely insignificant for two main reasons. First, even with regard to the past, it should be noted that all sides involved in the conflict have made frequent references to international law on various issues in order to support their respective positions with legal argument. Such arguments have been summarized elsewhere by the present author, and they shall not be repeated here.<sup>68</sup> Naturally these references are quite divergent, but they show at least that international law was needed to add legitimacy to claims and to justify conduct. Second, third states and international bodies have based their attitudes towards the problems arising from the Palestine problem on accepted norms of international law. For example, the Israeli annexation of East Jerusalem in 1967 violated a fundamental norm of international law, namely that the acquisition of territory by the use of armed force is prohibited and does not confer a legal title upon the belligerent occupant under the laws of war, which caused many states not to recognize Jerusalem as the capital of Israel and to keep their embassies located in Tel Aviv.<sup>69</sup> Another example is the failure of the Proclamation of the State of Palestine in 1988 by the PLO with regard to the West Bank. The attempt to thereby establish an independent Palestinian State was unsuccessful because one of the central criteria for the existence of a state under international law (in this case the effective control over the territory claimed)<sup>70</sup> was lacking and thus prevented recognition by all states and by international organizations.<sup>71</sup>

But it is also true that the international community, in view of the strong support given to Israel by the United States during the Cold War period and thereafter, failed to introduce any effective sanctions to force Israel to abide by the many UN resolutions that were adopted against it. On the other hand, such resolutions tended to isolate Israel and its supporters politically, on more than one occasion, in favour of the Palestinian cause and claim to self-determination. Faced with the problem of terrorism, Israel, not surprisingly, detected a strong bias against it in the UN General Assembly. One of the more problematic resolutions which equated Zionism with racialism<sup>72</sup> was fortunately revoked in 1991<sup>73</sup>.

Be that as it may, since the historic agreement reached between the government of Israel and the PLO in 1993, a new perspective on the role of international law in the political struggle in the Middle East has now emerged because legal instruments adopted by the conflicting parties have become an important tool of conflict resolution and the central points of reference in structuring their relations.

68 See Malanczuk, *supra* note 1 at 1468-508, with extensive references to the literature.

69 See Malanczuk, *supra* note 50.

70 See Malanczuk, *supra* note 17, Ch. 5.

71 See Malanczuk, *supra* note 1, 1490-2.

72 UNGA Res. 3379(XXX) of 10 November 1975.

73 See Malanczuk, *supra* note 1 at 1501.