Pursuit of Peace, Pursuit of Human Rights

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The relation between the Human Rights agenda and efforts at reconciliation and resolution of conflict have engaged us repeatedly during the conference. We have spoken of a rigorous definition of human rights as including only those items that nations have adopted into their statutory law – a definition that would preclude even the Universal Declaration of Human Rights, which does not have the standing of law. We have been warned against defining human rights in a way that becomes indistinguishable from a purely political agenda. We have heard human rights described as having to rely on certain conditions in a society – economic, political, social – before we can realistically expect to see them generally observed.

In the context of ongoing wars we all too often see that human rights go by the board. *Infra arma leges silent*. We can of course never accept that the absence of those conditions that are more easily conducive to a human rights regime can excuse the violation of rights. But our concrete expectations certainly suffer from really adverse conditions, and that gives us the linkage between human rights and the pursuit of peace.

Peace activists actually pursue objectives distinct from those of the human rights NGOs, however closely they may be related. Working, over many years, to discover possibilities of a just peace settlement in Northern Ireland, I had the experience of seeing a great many activists who were rightly intent on flushing out and protesting every abuse of rights in the prisons, in searches of homes, or in other actions of the police or military. I had to reckon that my own agenda would be different and that I would not pursue those cases except when they fell right into my lap, as occasionally they did. In the Middle East conflict we have not seldom found the diplomats or even the Track-Two non-official peace activists neglecting human rights aspects of the situation. It has to be a mistake when it goes that far, but the agendas do differ.

As one who maintained regular contact over many years with the leadership of Israelis and Palestinians, as well as the American administrations which have involved themselves in the Middle East conflict, I have argued the importance of law as the only proper underlying assumption for the negotiation of peace between the state of Israel and the Palestinians, even publishing a book to argue that point last year.[1] The difficulty in arguing for international law in this conflict, largely the province of the United Nations as the forum within which the international community has often pronounced on aspects of

[1] Raymond G. Helmick, S.J., *Negotiating Outside the Law: Why Camp David Failed*. London, Pluto Press, 2004.

it with binding legal force, is that Israelis tend to see the United Nations and even the law itself as prejudiced against them. We reinforce that revulsion against the law when we attempt to use it in a purely retributive way, as a cudgel with which to punish the Israelis as offenders. And since Israel, with the assistance in the international forum of the United States, has the power to defy such law, it becomes a self-defeating exercise to use the law in this way.

This was shown, for instance, at the Durban conference on Human Rights in 2001, when the combined assault of all the NGOs on human rights violations by Israel against Palestinians, utilizing a retributive understanding of justice which aimed only at identifying the offender and exacting punishment, served mainly to persuade Israelis and their American backers that no justice could be found for them there. They could describe the conference itself as undermined by this process, and they had the power to ignore it.

The law, and the objective of the legal system, can be defined otherwise, by the principles of *Restorative Justice* which, without neglecting accountability of the parties for their offensive actions or the necessity for recompense, sets as its goal the restoration of civilized relations among the parties, that they equip themselves to live in peace with one another.

International law, in fact, lends itself to this understanding. It is based on the freely given consent by nations to live by its principles. Apart from fundamental principles of equity among nations, it takes its origin in treaties, among which the Charter of the United Nations has pride of place for all its members who, by joining, have freely accepted its obligations as binding upon themselves. Victim peoples always feel that the United Nations, i.e. the international community acting together through the agency of the UN, should come militarily to their rescue. But apart from the extremely rare instances when the nations appeal to the Chapter 7 powers of the UN Charter,[2] there is no policing function behind international law. It rests on agreement, and that makes the restorative character of law most proper to it.

Law Affecting the Israeli-Palestinian Conflict

The conflict between Israel and the Palestinians has been characterized by an enormous disparity of power. This did not obtain at the beginning, when Israelis believed, in 1948, that they faced existential peril. Since that time, however, the state has appeared capable, even with its small population, of defeating anything that all the Arab countries together could bring against it. The October War of 1973 shook Israel's

[2] These have been used only twice: in the Korean conflict of 1950, which was described as a police action by the UN, and in the Gulf War of 1991-92. Between those two instances, any use of these powers was impeded by the rivalry of two Permanent Members of the Security Council either of whom could veto any proposal to invoke them against their own interests. That left the UN only with the option of sending peace-keeping forces to stand between conflicting powers. In the case of the U.S. decision to invade Iraq in 2003, the Security Council refused to invoke the organization's Chapter 7 powers and the United States was left invading on its own, without that approval.

assurance of this military superiority, but against the Palestinians alone their power, backed politically as well as militarily by the United States, is incomparable.

That disparity constitutes a practically insuperable obstacle to any binding peace agreement between the Israelis and Palestinians, so long as superior power is seen as the underlying assumption of their relations. Even were a Palestinian leader – an Arafat, an Abbas or any other – to sign off on an agreement on that basis it could only be seen by the Palestinian public as a Diktat, and hence not truly binding. That means something truly unfortunate for Israelis, that they would not get the one thing they most truly need and desire, namely peace. This way all lose.

There are but two alternatives: live by the law or live without it. Living in defiance or neglect of law involves terrible consequences, always. But for Israel, and as much of the world as is affected by the Middle Eastern conflict, the consequence, loss of any prospect of eventual peace, is dreadful.

What law really pertains to this conflict? In terms of publicly certified binding actions of the international community there are myriad resolutions of the Security Council and other organs of the UN, many of them very specific to circumscribed local situations, such as the expansion of the municipal limits of Jerusalem or the claims to annexation of East Jerusalem or the Golan Heights. We can single out, as of central importance, the following:

> **Article 2 of the Charter of the United Nations**, by which every nation signatory to the Charter renounces any acquisition of territory by force. This is the basic instrument by which the United Nations Organization is intended to prevent war, hence the most important single obligation to which member nations bind themselves by entering into the organization. It does not mean that territorial boundaries can never be changed. It does mean that such boundaries may be changed only by agreement, not by force.
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> **Security Council Resolutions 242** (November, 1967) **and 338** (October, 1973). These two resolutions are the classic template by which all the nations profess that the conflict is to be resolved, though scant heed is often paid to their actual provisions. Their "land for peace" formula (to use the common short-hand description of 242) is already a compromise. In other instances where land has been captured by force, the Security Council has always demanded immediate and full withdrawal – e.g., South Korea invaded by North Korea in 1950, Lebanese territory by Israel in 1978 (though it was not until May, 2000, that the demand was obeyed), Kuwait by Iraq in 1991. The 1967 resolution on the Middle East made the withdrawal demand contingent on quite specific steps to ensure peace. Those steps have not yet been implemented, and the 1973 resolution demanded simply that the parties do what they had been commanded to do six years earlier. The Likud Party's leader, Menachem Begin, refused to accept Resolution 242 at the time, recognizing that it meant withdrawal from all the captured territory, while various Arab states and the PLO also refused to accept it on the grounds

that it contained no mention, other than a reference to "the refugee problem," of Palestinians, but by now all parties profess acceptance of these resolutions as the basis for negotiation, with some twists that endeavor to limit their scope.

General Assembly Resolutions 181 (the Partition resolution of November 1947, which authorized the establishment of two states in the territory between the River Jordan and the sea, one Jewish and one Arab) **and 194** (of December 1948, some time before the conclusion of the 1949 armistice, containing the contentious provision for the return of refugees from the 1948-49 war to their homes). Normally, resolutions of the General Assembly are without binding legal force, but in the case of these two, it was a condition of the 1949 admission of the state of Israel into the United Nations as a member that it accept these two resolutions as binding upon itself.

The Fourth Geneva Convention Relative to the protection of Civilian Persons in Time of War, of August 12, 1949. Of the four Geneva Conventions, this one particularly concerns the obligations of occupying powers in Territories they occupy. Three particular provisions are pertinent to this conflict:

1. The occupying power is responsible for the safety and adequate provision for the occupied population.

2. The occupier is prohibited from expelling residents from the occupied territory.

3. The occupier is prohibited from settling parts of its own population in the occupied territory.

Application or Non-application of This Law

Because much has been done that plainly violates these provisions, Israelis are inclined to see international law as slanted against them, and the international community that has passed these resolutions and covenants as hostile to their interests. That, however, is an error. The law is not contrary to the rights or interests of either party, but is instead the protector of both. What adherence to law accomplishes is **to overcome the disparity of power**, which so much stands in the way of any genuine resolution of this conflict, and **to establish the equality of the parties before the law**.

The law will not protect occupation, not at least beyond the provision of SCR 242 that withdrawal from territory is to depend on provisions for peace. But it will protect the rights, the safety and the interests of Israelis and Palestinians alike.

Nor will it predetermine in detail the outcome of negotiations. Rather, in the context of their equality before the law, it will free both parties to negotiate the realities of the situation.

The alternative, that the outcome of negotiations be determined by superior force, military, economic and political, is expressed in the concept that everything Israel now has is hers by right of possession. This has been the underlying assumption up to this time. It means that everything the Palestinians may receive is in Israel's gift, not a matter of right.

Such Israeli Prime Ministers as Yitzhak Rabin and Ehud Barak have come to the conclusion, for good Israeli reasons, that Israel must have peace with the Palestinians and that consequently the Palestinians must have something real for themselves. Some international observers do not believe that peace is truly the Israeli objective, but that at least some Israelis would prefer having the land to having peace. It is evident that some factions have that preference, and that some Israeli governments have pandered dangerously to these dangerous elements, dangerous as much to Israel itself as to any of their neighbors. But it is equally evident that the great majority of Israelis do make peace their real priority, so long at least as they can be safe. This is as clear as that there are some Palestinians who would prefer the defeat of Israel to establishing peace. But they too face a solid great majority of Palestinians who have decided that to live at peace with the Israeli state and society, in a Palestinian state of their own, is their objective.

On the basis, however, that everything is in Israel's gift, the negotiation becomes one between Israelis and other Israelis: those who wish to give something to the Palestinians, those who would like to give more, and those who would like to give little or nothing at all. The Palestinians are then not actually party to the negotiation, but are presented with the outcome of this negotiation among Israelis and asked to take it or leave it. This is the kind of settlement of the conflict that can only be seen, by Palestinians, as a Diktat, and non-binding. Even President Clinton, who most distinctly wanted more for the Palestinians rather than less, accepted this underlying premise that all was in the gift of the Israelis. Clinton even argued, at one point, that the Oslo Declaration of Principles superseded all the previous legal obligations and made them moot, not recognizing that it is the very acceptance of law itself, as a necessary precondition, that enables the parties to negotiate, dealing with each other as equals.

Prime Minister Barak, stretching his offer far beyond what any Israeli government had offered before, breaking significant taboos as he addressed – the first prime minister ever to do so – the delicate questions of borders, of Jerusalem, of settlements and refugees, to such an extent that he felt his offer was incomparably generous, still saw it all as in Israeli gift, never as Palestinian entitlement. It is this that ultimately poisoned the negotiations at Camp David in the year 2000.

The Law as Opportunity to Address the Realities

We do not live in 1948, nor in 1967. New things have happened since. We have in fact learned the pitfalls of establishing "facts on the ground" as deliberate defiance of law to preempt the outcome of negotiations and may not accept such lawless actions as determinative. Nevertheless, there are realities on the ground and people, both Israeli and Palestinian, who in justice must not be harmed.

The basic outlines of a peace agreement between these parties has long been evident to those, of either side, who truly want one. There must be a Palestinian state alongside Israel, on territory that makes it feasible as a state. Its borders must come close to the Green Line armistice border of 1949, with any deviation from those borders minor and the result of agreement between equal parties, not of the exercise of superior force. Jerusalem, of such importance to both peoples, must be a free and undivided city, open to both peoples and capital of both states. And the problem of refugees must be resolved by a formula, agreed by both equal parties, that does not involve the demographic disruption of either state. This has been the premise of all the most promising efforts to come to a peace agreement, from the path-breaking conversations by Likud Cabinet Minister Moshe Amirav with Sari Nusseibeh and Faisal Husseini in 1987, through the highly promising January 2001 meetings at Taba, to such model efforts as the Geneva Accords and the Nusseibeh-Ayalon "People's Voice" Statement of Principles, signed by tens of thousands of Israelis and Palestinians, for establishing the peace.

The right of return for Palestinian refugees, promised in December 1948 by General Assembly Resolution 194 and in itself a far more fundamental right in international law, has become the hardest matter to negotiate. Israel has thus far refused to acknowledge any responsibility for the refugee status of those who fled or were forced out of their homes in 1948, despite having agreed to accept Resolution 194 as binding upon itself as a condition for admission to membership in the United Nations in 1949. If the legal character of this provision is not even recognized, the Palestinians are left naked before the raw power of the Israeli state. They cannot abandon so fundamental a right, so solemnly assured by action of the international community, without discarding all claim to any rights.

Resolution 194, however, contains its own rigorous limitations on how this right of return should be implemented, and of its essence requires negotiation between the parties once the status of the refugees is recognized in law. Would Green-Line Israel, then, be inundated by three to five million returning Palestinian refugees, and cease to be the Jewish state it has always sought to be? The resolution asserts the right of the refugees to return to their homes "**to live in peace**." It foresees the situation in which a return could not be carried out in peace. Returning refugees might well be expected to come with accumulated grievances which would make for conflict, and they might well find that they would arrive among a hostile Israeli population that would prevent their living in peace. The very fact of overturning the now established demographic balance of the state of Israel, even though it would resemble and duplicate in reverse the demographic catastrophe that happened in 1948, could not occur in peace, any more than the events of 1948 themselves could have occurred in peace. Resolution 194, anticipating this, provides an alternative for those unable or unwilling to return "to live in peace," that they should instead receive full compensation.

All of this, that the actual implementation of Resolution 194 would have to be negotiated, was fully recognized by the Palestinian negotiators, at Camp David and at other stages of their effort. It was the refusal of the Israeli team to acknowledge any

responsibility of their state under this law that made the process of negotiation, as between equals before the law, impossible.

I can add two footnotes to this discussion.

One is that I kept asking Arafat and the Palestinian Authority officials, over a period of years, to do the research to find out how many Palestinians were actually likely to come to Israel under terms of this law. It was not like the situation of the Bosnian Albanians, most of whom returned to Bosnia after their expulsion in 1999. The Palestinian refugees of 1948 had been away more than fifty years, and the great majority of them, children and grandchildren of the original refugees, had become settled. The survey I had asked for was actually carried out quite convincingly by a subcommittee on the refugee problem, led by Yossi Beilin and Nabil Sha'ath, during the Taba negotiations of January, 2001.[3]

They came to a reassuring conclusion. Given the option of these refugees obtaining citizenship in the countries of their residence, in cases where they do not already have it, Beilin and Sha'ath expected no great flow of refugees from Jordan or Syria into Israel proper, nor from the remaining West Bank/Gaza refugee camps. The critical problem is the refugees living in Lebanon, where the real figure "is no less than 180,000 but no more than 220,000." These must be brought away from Lebanon, where their situation is untenable, "but the number of refugees that countries like Canada, the United States and certain European countries are willing to accept is much higher than the number remaining in Lebanon, and any of them wanting to be absorbed into the Palestinian state when it is established will be able to do so."[4]

The other footnote is to a suggestion I have been propounding myself to all parties – to Arafat, to Israeli Prime Ministers and American administrations – since the late 1980s – for agreements on Israeli residence in Palestine and Palestinian residence in Israel.

Many years ago, in conversation with Simha Dinitz, once the Israeli mbassador to the United States and, at the time I saw him, head of the Foreign Affairs Committee in the Knesset, I heard him spell out the absolute requirements for the state of Israel: that it be democratic, Jewish and safe. All of that I could readily accept, even knowing that some criticized the requirement that it be Jewish (mistakenly, I believed, since Jews have experienced such trauma in their history that this state must be the guarantee of their safety) and that the extremists in the settler movement had no real care for the state's democracy. But I saw a fourth requirement that seemed to me equally important for the good of Israel: an open border.

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[3] Detailed in Yossi Beilin, *The Path to Geneva: The Quest for a Permanent Agreement, 1996-2004* (RDV Books/Akashic Book, 2004), pp. 238f.

[4] *Ibid*., p. 238.

It is clearly of great importance to many Jews that there should be some Jewish residents in the territory of the ancient kingdoms, "Judea and Samaria" as they prefer to name them. This is of religious importance, and something Palestinians ought to acknowledge. Hebron is the test case of this desire, as it is the most important Jewish religious site after Jerusalem. The trouble is that the Jewish residents of Hebron, and many of the other settlers in the territories, are largely the wrong ones, people who are there for the destruction of Palestinians, with no intention of living in peace. Their activities deserve the designation "terrorist" as much as anything being done by Hamas or Islamic Jihad, and it is as much the responsibility of Israeli government to remove them from these areas as it is for the Palestinian leadership to deal with its own terrorist problem.

Still is should be possible for Jews whose intention is to live in peace to reside in these places and enjoy the full protection of Palestinian authority. I have long suggested that they be given the option of choosing between Israeli and Palestinian citizenship. In the last few years I hear some others who are thinking along similar lines suggest the option of dual citizenship, and I can see the sense of that. If they were to have only one or other citizenship, I would expect that most such Jewish residents would choose their Israeli identity. But they would live under Palestinian jurisdiction.

How many would likely accept that? Given adequate assistance from Israeli government in moving those who wished it back to Israel, I expect that most of the settlers now resident on occupied territory would prefer repatriation. (Removing the hardliners who would fight it would be Israel's problem.) I would expect not more than some 100,000 would choose that situation, and given some minimal agreed exchange of territory between Israel and Palestine the numbers displaced would not be excessive.

Would such Israeli residence among them be acceptable to Palestinians? In fact this was explicitly on the table at Camp David, that Jews who were content to live under Palestinian jurisdiction would be welcome.

This arrangement should be reciprocal. Comparable numbers of Palestinians, by free agreement, should be allowed to return to residence in Israel, on the same terms. If required to choose between Israeli and Palestinian citizenship, I would expect most of them would choose Israeli citizenship, seeing the advantages (thus far so much short of equal citizenship) already enjoyed by the Arab citizens of Israel. But whether with or without dual citizenship, they would live under Israeli jurisdiction.

It is in this context, if my suggestion were accepted by both parties, that I see the need for an open border. The idea of separating these peoples by a wall, a fence, a "security barrier" or whatever else one wants to call it, was a bad idea from the start. Separating them is physically impossible if Jews, even agreed numbers are to reside among Palestinians and Palestinians among Israelis, and the system of reserved roads for Israeli settlers such a gross violation of the freedom of movement of Palestinians. And any permanent separation would only stoke the animosity between the two peoples, leading inevitably to further conflict. The only good thing I can see about the "separation

barrier" currently being constructed, in the gravest possible violation of Palestinian rights, is that it is in so impossible a location that it has to come down.

With an open border, however, both peoples would have their own state, with its internationally recognized borders. Both would have all the institutions of their state and society. And at the same time, both would have access to the whole territory.

Is this utopian, or impossible? The bitter heritage of these last years, the mutual rage and Palestinian despair of the "second intifada," would have to be overcome. But things have been so terrible before, during earlier years of occupation, that neither people could feel safe in the other's territory. In the euphoria of the early Oslo years, those animosities were already overcome. Israelis found that those areas – Area A – which had come under full Palestinian jurisdiction, for security as well as administration, were good places for Israelis to go, welcoming and enjoyable to them, even though the areas still kept under full or partial military occupation were not so. I have no doubt that this could be duplicated, in both states and for both peoples, if the solution I suggest were adopted.

Israelis, moreover, under such circumstances of peace, won through so reasonable and humane a solution, would have the run of the whole Middle East, the region into which they have inserted themselves. They would no longer be confined to their own tiny bit of territory but could travel peacefully among their neighbors.

Conclusion.

In summary, I believe that adherence to international law is the key to successful negotiation of the Middle Eastern conflict. This relates very immediately to the human rights agenda, seen particularly in its character as a body of statutory law. But it will not be successful if it is seen in a purely retributive way, as a means of identifying offenders and meting out punishment. It is only in its much more natural character as restorative justice that international law will foster a genuine resolution of this conflict. For the human rights community, this means that a restorative justice outlook on human rights law is the stance that will have most success. Israelis, accustomed to being beaten over the head with appeals to law for so many years – in which they have, of course, been violating flagrantly both the law and the rights of those under their military occupation – will simply tune out appeals to law that seem intent only on flushing out their offenses and punishing them.

Seen in its other aspect, as the maintenance of a humane tradition, whether formalized as statutory law or not, and noting that the Universal Declaration of Human Rights does not have this statutory force of law, the human rights agenda also relates just as directly to the quest for peace. We spoke at the beginning of the economic, political and social conditions in a society that can foster, in the practical order, a human rights regime. Underlying all of this is a basic regard for the human dignity of the other, of the other community or people, which is a necessary precondition for genuine peace. It is to accomplish this that I recommend so strongly the appeal to law as the way to overcome

the disparity of power between the two peoples that makes genuine agreement between them impossible.

When the now much-despised Oslo Declaration of Principles was reached in 1993, both Israelis and Palestinians expressed grave reservations about the lack of agreed detail on what would constitute the peace, and also on them lengthy time-table for reaching final agreement, a process that we have since seen to fail. But what was truly accomplished at Oslo, and what constitutes it value even now, is that by this action the two peoples, Israeli and Palestinian, recognized one another's full legitimacy as peoples. That happened in the general consent of the two populations, as could be seen in the wave of good will that followed Oslo in both communities, and also in the formal agreement of leadership, which had visible assent from their peoples. It appeared to me that the Palestinians had in fact already made this commitment at their Algiers PNC of 1988, Arafat confirming it in his Geneva address and press conference at the end of that years which ushered in the first US/PLO dialogue, but it was only at Oslo that this recognition of the other's legitimacy and dignity was mutual between the two peoples.

I believed at the time that this mutual recognition was an imperishable achievement. When Binyamin Netanyahu, during his three years as Prime Minister, appeared to make it his primary objective to retract that recognition, he was unable to do so.

The breakdown into savage violence from within both communities over the last four years has done great damage to that recognition of one another's legitimacy, putting it much in question on both sides. This is what needs to be firmly reestablished as the basis for peace.