FROM "OCCUPIED TERRITORIES" TO "DISPUTED TERRITORIES"

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"Occupation" as an Accusation

At the heart of the Palestinian diplomatic struggle against Israel is the repeated assertion that the Palestinians of the West Bank and Gaza Strip are resisting "occupation." Speaking recently on CNN's Larry King Weekend, Hanan Ashrawi hoped that the U.S. war on terrorism would lead to new diplomatic initiatives to address its root "causes." She then went on to specifically identify "the occupation which has gone on too long" as an example of one of terrorism's sources. In other words, according to Ashrawi, the violence of the intifada emanates from the "occupation."

Mustafa Barghouti, president of the Palestinian Medical Relief Committees and a frequent guest on CNN as well, similarly asserted that: "the root of the problem is Israeli occupation." Writing in the Washington Post on January 16, 2002, Marwan Barghouti, head of Arafat's Fatah PLO faction in the West Bank, continued this theme with an article entitled: "Want Security? End the Occupation." This has become the most ubiquitous line of argument today among Palestinian spokesmen, who have to contend with the growing international consensus against terrorism as a political instrument.

This language and logic have also penetrated the diplomatic struggles in the United Nations. During August 2001, a Palestinian draft resolution at the UN Security Council repeated the commonly used Palestinian reference to the West Bank and Gaza Strip as "occupied Palestinian territories." References to Israel's "foreign occupation" also appeared in the Durban Draft Declaration of the UN World Conference Against Racism. The Libyan ambassador to the United Nations, in the name of the Arab Group Caucus, reiterated on October 1, 2001, what Palestinian spokesmen had been saying on network television: "The Arab Group stresses its determination to confront any attempt to classify resistance to occupation as an act of terrorism."

Three clear purposes seem to be served by the repeated references to "occupation" or "occupied Palestinian territories." First, Palestinian spokesmen hope to create a political context to explain and even justify the Palestinians' adoption of violence and terrorism during the current intifada. Second, the Palestinian demand of Israel to "end the occupation" does
not leave any room for territorial compromise in the West Bank and Gaza Strip, as suggested by the original language of UN Security Council Resolution 242 (see below).

Third, the use of "occupied Palestinian territories" denies any Israeli claim to the land: had the more neutral language of "disputed territories" been used, then the Palestinians and Israel would be on an even playing field with equal rights. Additionally, by presenting Israel as a "foreign occupier," advocates of the Palestinian cause can delegitimize the Jewish historical attachment to Israel. This has become a focal point of Palestinian diplomatic efforts since the failed 2000 Camp David Summit, but particularly since the UN Durban Conference in 2001. Indeed, at Durban, the delegitimization campaign against Israel exploited the language of "occupation" in order to invoke the memories of Nazi-occupied Europe during the Second World War and link them to Israeli practices in the West Bank and Gaza Strip.4

The Terminology of Other Territorial Disputes

The politically-loaded term "occupied territories" or "occupation" seems to apply only to Israel and is hardly ever used when other territorial disputes are discussed, especially by interested third parties. For example, the U.S. Department of State refers to Kashmir as "disputed areas."5 Similarly in its Country Reports on Human Rights Practices, the State Department describes the patch of Azerbaijan claimed as an independent republic by indigenous Armenian separatists as "the disputed area of Nagorno-Karabakh."6

Despite the 1975 advisory opinion of the International Court of Justice establishing that Western Sahara was not under Moroccan territorial sovereignty, it is not commonly accepted to describe the Moroccan military incursion in the former Spanish colony as an act of "occupation." In a more recent decision of the International Court of Justice from March 2001, the Persian Gulf island of Zubarah, claimed by both Qatar and Bahrain, was described by the Court as "disputed territory," until it was finally allocated to Qatar.7

Of course each situation has its own unique history, but in a variety of other territorial disputes from northern Cyprus, to the Kurile Islands, to Abu Musa in the Persian Gulf -- which have involved some degree of armed conflict -- the term "occupied territories" is not commonly used in international discourse.8

Thus, the case of the West Bank and Gaza Strip appears to be a special exception in recent history, for in many other territorial disputes since the Second World War, in which the land in question was under the previous sovereignty of another state, the term "occupied territory" has not been applied to the territory that had come under one side's military control as a result of armed conflict.

No Previously-Recognized Sovereignty in the Territories

Israel entered the West Bank and Gaza Strip in the 1967 Six-Day War. Israeli legal experts traditionally resisted efforts to define the West Bank and Gaza Strip as "occupied" or falling under the main international treaties dealing with military occupation. Former Chief Justice of the Supreme Court Meir Shamgar wrote in the 1970s that there is no de jure applicability of the 1949 Fourth Geneva Convention regarding occupied territories to the case of the West Bank and Gaza Strip since the Convention "is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign."

In fact, prior to 1967, Jordan had occupied the West Bank and Egypt had occupied the Gaza Strip; their presence in those territories was the result of their illegal invasion in 1948, in defiance of the UN Security Council. Jordan's 1950 annexation of the West Bank was
recognized only by Great Britain (excluding the annexation of Jerusalem) and Pakistan, and rejected by the vast majority of the international community, including the Arab states.

At Jordan's insistence, the 1949 Armistice Line, that constituted the Israeli-Jordanian boundary until 1967, was not a recognized international border but only a line separating armies. The Armistice Agreement specifically stated: "no provision of this Agreement shall in any way prejudice the rights, claims, and positions of either Party hereto in the peaceful settlement of the Palestine questions, the provisions of this Agreement being dictated exclusively by military considerations" (emphasis added) (Article II.2).

As noted above, in many other cases in recent history in which recognized international borders were crossed in armed conflicts and sovereign territory seized, the language of "occupation" was not used -- even in clear-cut cases of aggression. Yet in the case of the West Bank and Gaza, where no internationally recognized sovereign control previously existed, the stigma of Israel as an "occupier" has gained currency.

Aggression vs. Self-Defense

International jurists generally draw a distinction between situations of "aggressive conquest" and territorial disputes that arise after a war of self-defense. Former State Department Legal Advisor Stephen Schwebel, who later headed the International Court of Justice in the Hague, wrote in 1970 regarding Israel's case: "Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title."9

Here the historical sequence of events on June 5, 1967, is critical, for Israel only entered the West Bank after repeated Jordanian artillery fire and ground movements across the previous armistice lines. Jordanian attacks began at 10:00 a.m.; an Israeli warning to Jordan was passed through the UN at 11:00 a.m.; Jordanian attacks nonetheless persisted, so that Israeli military action only began at 12:45 p.m. Additionally, Iraqi forces had crossed Jordanian territory and were poised to enter the West Bank. Under such circumstances, the temporary armistice boundaries of 1949 lost all validity the moment Jordanian forces revoked the armistice and attacked. Israel thus took control of the West Bank as a result of a defensive war.

The language of "occupation" has allowed Palestinian spokesmen to obfuscate this history. By repeatedly pointing to "occupation," they manage to reverse the causality of the conflict, especially in front of Western audiences. Thus, the current territorial dispute is allegedly the result of an Israeli decision "to occupy," rather than a result of a war imposed on Israel by a coalition of Arab states in 1967.

Israeli Rights in the Territories

Under UN Security Council Resolution 242 from November 22, 1967 -- that has served as the basis of the 1991 Madrid Conference and the 1993 Declaration of Principles -- Israel is only expected to withdraw "from territories" to "secure and recognized boundaries" and not from "the territories" or "all the territories" captured in the Six-Day War. This deliberate language resulted from months of painstaking diplomacy. For example, the Soviet Union attempted to introduce the word "all" before the word "territories" in the British draft resolution that became Resolution 242. Lord Caradon, the British UN ambassador, resisted these efforts.10 Since the Soviets tried to add the language of full withdrawal but failed, there is no ambiguity about the meaning of the withdrawal clause contained in Resolution 242, which was unanimously adopted by the UN Security Council.
Thus, the UN Security Council recognized that Israel was entitled to part of these territories for new defensible borders. Britain's foreign secretary in 1967, George Brown, stated three years later that the meaning of Resolution 242 was "that Israel will not withdraw from all the territories."11 Taken together with UN Security Council Resolution 338, it became clear that only negotiations would determine which portion of these territories would eventually become "Israeli territories" or territories to be retained by Israel's Arab counterpart.

Actually, the last international legal allocation of territory that includes what is today the West Bank and Gaza Strip occurred with the 1922 League of Nations Mandate for Palestine, which recognized Jewish national rights in the whole of the Mandated territory: "recognition has been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country." The members of the League of Nations did not create the rights of the Jewish people, but rather recognized a pre-existing right, that had been expressed by the 2,000-year-old quest of the Jewish people to re-establish their homeland.

Moreover, Israel's rights were preserved under the United Nations as well, according to Article 80 of the UN Charter, despite the termination of the League of Nations in 1946. Article 80 established that nothing in the UN Charter should be "construed to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments." These rights were unaffected by UN General Assembly Resolution 181 of November 1947 -- the Partition Plan -- which was a non-binding recommendation that was rejected, in any case, by the Palestinians and the Arab states.

Given these fundamental sources of international legality, Israel possesses legal rights with respect to the West Bank and Gaza Strip that appear to be ignored by those international observers who repeat the term "occupied territories" without any awareness of Israeli territorial claims. Even if Israel only seeks "secure boundaries" that cover part of the West Bank and the Gaza Strip, there is a world of difference between a situation in which Israel approaches the international community as a "foreign occupier" with no territorial rights, and one in which Israel has strong historical rights to the land that were recognized by the main bodies serving as the source of international legitimacy in the previous century.

After Oslo, Can the Territories be Classified as "Occupied"?

In the 1980s, President Carter's State Department legal advisor, Herbert Hansell, sought to shift the argument over occupation from the land to the Palestinians who live there. He determined that the 1949 Fourth Geneva Convention governing military occupation applied to the West Bank and Gaza Strip since its paramount purpose was "protecting the civilian population of an occupied territory."12 Hansell's legal analysis was dropped by the Reagan and Bush administrations; nonetheless, he had somewhat shifted the focus from the territory to its populace. Yet here, too, the standard definitions of what constitutes an occupied population do not easily fit, especially since the implementation of the 1993 Oslo Agreements.

Under Oslo, Israel transferred specific powers from its military government in the West Bank and Gaza to the newly created Palestinian Authority. Already in 1994, the legal advisor to the International Red Cross, Dr. Hans-Peter Gasser, concluded that his organization had no reason to monitor Israeli compliance with the Fourth Geneva Convention in the Gaza Strip and Jericho area, since the Convention no longer applied with the advent of Palestinian administration in those areas.13

Upon concluding the Oslo II Interim Agreement in September 1995, which extended Palestinian administration to the rest of the West Bank cities, Foreign Minister Shimon Peres
declared: "once the agreement will be implemented, no longer will the Palestinians reside under our domination. They will gain self-rule and we shall return to our heritage."14

Since that time, 98 percent of the Palestinian population in the West Bank and Gaza Strip has come under Palestinian jurisdiction.15 Israel transferred 40 spheres of civilian authority, as well as responsibility for security and public order, to the Palestinian Authority, while retaining powers for Israel's external security and the security of Israeli citizens.

The 1949 Fourth Geneva Convention (Article 6) states that the Occupying Power would only be bound to its terms "to the extent that such Power exercises the functions of government in such territory." Under the earlier 1907 Hague Regulations, as well, a territory can only be considered occupied when it is under the effective and actual control of the occupier. Thus, according to the main international agreements dealing with military occupation, Israel's transfer of powers to the Palestinian Authority under the Oslo Agreements has made it difficult to continue to characterize the West Bank and Gaza as occupied territories.

Israel has been forced to exercise its residual powers in recent months only in response to the escalation of violence and armed attacks instigated by the Palestinian Authority.16 Thus, any increase in defensive Israeli military deployments today around Palestinian cities is the direct consequence of a Palestinian decision to escalate the military confrontation against Israel, and not an expression of a continuing Israeli occupation, as the Palestinians contend. For once the Palestinian leadership takes the strategic decision to put an end to the current wave of violence, there is no reason why the Israeli military presence in the West Bank and Gaza cannot return to its pre-September 2000 deployment, which minimally affected the Palestinians.

Describing the territories as "Palestinian" may serve the political agenda of one side in the dispute, but it prejudges the outcome of future territorial negotiations that were envisioned under UN Security Council Resolution 242. It also represents a total denial of Israel's fundamental rights. Furthermore, reference to "resisting occupation" has simply become a ploy advanced by Palestinian and Arab spokesmen to justify an ongoing terrorist campaign against Israel, despite the new global consensus against terrorism that has been formed since September 11, 2001.

It would be far more accurate to describe the West Bank and Gaza Strip as "disputed territories" to which both Israelis and Palestinians have claims. As U.S. Ambassador to the UN Madeleine Albright stated in March 1994: "We simply do not support the description of the territories occupied by Israel in the 1967 War as occupied Palestinian territory."

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Notes
1. CNN Larry King Weekend, "America Recovers: Can the Fight Against Terrorism be Won?," November 10, 2001 (CNN.com/transcripts).
4. See Bayefsky, op. cit. U.S. and European officials may use the term "occupation" out of a concern for the humanitarian needs of the Palestinians, without identifying with the PLO political agenda at Durban or at the UN.


8. The Japanese Foreign Ministry does not use the language of "ending the Russian occupation of the Kurile Islands," but rather resolving "the Northern Territory Issue." (www.mofa.go.jp/region/europe/russia/territory). U.S. Department of State "Background Notes" describe the Turkish Republic of Northern Cyprus as the island's "northern part [which is] under an autonomous Turkish-Cypriot administration supported by the presence of Turkish troops" -- not under Turkish occupation.


12. Under the Carter administration, Hansell's distinction led, for the first time, to a U.S. determination that Israeli settlement activity was illegal since it purportedly contravened Article 49 of the Fourth Geneva Convention which stated that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it is occupying." Subsequently, the Reagan and Bush administrations altered the legal determination of the Carter period, changed the U.S. voting pattern at the UN, and refused to describe Israeli settlements as illegal, even if American political objections to settlement activity continued to be expressed. One reason was that the Fourth Geneva Convention applied to situations like that of Nazi-occupied Europe, which involved "forcible transfer, deportation or resettlement of large numbers of people." This view was formally stated by the U.S. Ambassador to the UN in Geneva, Morris Abram, on February 1, 1990, who had served on the U.S. staff at the Nuremberg trials and, hence, was familiar with the legal intent behind the 1949 Fourth Geneva Convention.

13. Dr. Hans-Peter Gasser, Legal Adviser, International Committee of the Red Cross, "On the Applicability of the Fourth Geneva Convention After the Declaration of Principles and the Cairo Agreement," paper presented at the International Colloquium on Human Rights, Gaza, September 10-12, 1994. Gasser did not state that in his view the territories were no longer "occupied," but he did point out the legal complexities that had arisen with Oslo's implementation.


16. The present intifada violence resulted from a strategic decision taken by Yasser Arafat, as admitted by numerous Palestinian spokesmen:

- "Whoever thinks the intifada broke out because of the despised Sharon's visit to the Al-Aqsa Mosque is wrong....This intifada was planned in advance, ever since President Arafat's return from the Camp David Negotiations," admitted Palestinian Communications Minister 'Imad Al-Faluji (Al-Safir, March 3, 2001, trans. MEMRI). Even earlier, Al-Faluji had explained that the intifada was initiated as the result of a strategic decision made by the Palestinians (Al-Ayyam, December 6, 2000).

- Arafat began to call for a new intifada in the first few months of the year 2000. Speaking before Fatah youth in Ramallah, Arafat "hinted that the Palestinian people are likely to turn to the intifada option" (Al-Mujahid, April 3, 2000).

- Marwan Barghouti, the head of Fatah in the West Bank, explained in early March 2000: "We must wage a battle in the field alongside of the negotiating battle...I mean confrontation" (Ahbar Al-Halil, March 8, 2000). During the summer of 2000, Fatah trained Palestinian youths for the upcoming violence in 40 training camps.

- The July 2000 edition of Al-Shuhada monthly, distributed among the Palestinian Security Services, states: "From the negotiating delegation led by the commander and symbol, Abu Amar (Yasser Arafat) to the brave Palestinian people, be ready. The Battle for Jerusalem has begun." One month later, the commander of the Palestinian police told the official Palestinian newspaper Al-Hayat Al-Jadida: "The Palestinian police will lead together with the noble sons of the Palestinian people, when the hour of confrontation arrives." Freih Abu Middein, the PA Justice Minister, warned that same month: "Violence is near and the Palestinian people are willing to sacrifice even 5,000 casualties" (Al-Hayut al-Jadida, August 24, 2000 -- MEMRI).

- Another official publication of the Palestinian Authority, Al-Sabah, dated September 11, 2000 -- more than two weeks before the Sharon visit -- declared: "We will advance and declare a general intifada for Jerusalem. The time for the intifada has arrived, the time for intifada has arrived, the time for Jihad has arrived."

- Arafat advisor Mamduh Nufal told the French Nouvel Observateur (March 1, 2001): "A few days before the Sharon visit to the Mosque, when Arafat requested that we be ready to initiate a clash, I supported mass demonstrations and opposed the use of firearms." Of course, Arafat ultimately adopted the use of firearms and bomb attacks against Israeli civilians and military personnel. On September 30, 2001, Nufal detailed in al-Ayyam that Arafat actually issued orders to field commanders for violent confrontations with Israel on September 28, 2000.