

Forum: Towards Peace in the Middle East?

The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement

Eyal Benvenisti *

I. Introduction

On 13 September 1993 the Government of Israel and PLO representatives signed the 'Declaration of Principles on Interim Self-Government Arrangements'.¹ The Declaration was preceded by an exchange of letters between PLO Chairman, Yasser Arafat, and Israel's Prime Minister, Yitzhak Rabin on 9 September 1993. The letters and the Declaration set the stage for the settlement of the Israeli-Palestinian conflict. Indeed, since this conflict has been at the heart of a wider confrontation between Israel and the Arab world,² these instruments may pave the way for peace in the Middle East. These documents, however, are only the beginning of a long and difficult process of reconciliation. Heavy stumbling blocks are yet to be negotiated away. Under these circumstances, one would expect the Declaration to be ambiguous and vague. And indeed it is. In this article I shall describe what has been achieved, seeking to point out the ambiguities and their possible interpretations. I shall also outline the major difficulties that lie ahead. Before doing so, a note on the significance of the Declaration and the letters of mutual recognition is called for.

II. The Significance of the Declaration and the Letters of Mutual Recognition

The Declaration and the letters which preceded it bring to an end a century-old ideological and legal controversy over the rights of the two sides regarding Palestine/*Eretz-Israel* (the Land of Israel), territory that both communities regard as their homeland. The Declaration does not contain an agreement as to the political borders which are to separate the two communities or the nature of the future Palestinian entity. However, inherent in the Declaration and the letters is a mutual recognition by the parties of the other's existence and of its right to live side by side on

* Lecturer, the Hebrew University, Faculty of Law. LL.B. (the Hebrew University); LL.M., J.S.D. (Yale Law School). I thank Dr. Eyal Zamir, for his most valuable comments on an earlier draft.

1 Hereafter referred to as the Declaration.

2 The Arab-Israeli war in 1948 broke off when Arab armies invaded Palestine, a move they have claimed was an act of individual and collective self-defence. See *Cablegram from the Secretary-General of the League of Arab States to the Secretary-General of the United Nations*, 15 May 1948, UN Doc. S/745, reprinted in 3 UN SCOR, Supp., May 1948, at 83-88; J.N. Moore, *The Arab-Israeli Conflict*, Vol. III (Documents) (1974) 938, at 942-943.

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this tiny strip of land.³ Explicit Palestinian recognition of Israel appears in Chairman Arafat's letter dated 9 September 1993;⁴ Israeli recognition of the Palestinian people and of the PLO as its representative appears in Prime Minister Yitzhak Rabin's response of the same day.⁵ This mutual recognition is also reiterated in the Declaration.⁶

From the perspective of the Palestinians, the Declaration and the letters represent an abandonment of an uncompromising path of armed struggle to be followed until the destruction of the State of Israel is attained, as stipulated in the Palestinian National Charter of 1968.⁷ In fact, on 15 November 1988 the Palestinian National Committee declared its willingness to negotiate a settlement of the conflict on the basis of UN resolutions, including Security Council Resolutions 242 and 338, a settlement which would entail an Israeli withdrawal to the borders of 4 June 1967.⁸ However, this declaration did not expressly recognize Israel's right to exist.⁹ Israel, on the other hand, has offered in the past to settle the conflict,¹⁰ and has even reached an agreement with Egypt to this end.¹¹ However, it has always insisted on relating to the Palestinians as a community of individuals, consisting of the Arab residents of Judea, Samaria and Gaza, and at no time did it formally recognize the existence of a Palestinian people, certainly not with the PLO as its representative.¹²

The mutual recognition not only changes the nature of the struggle over the land of Israel from a legal-ideological confrontation to a pragmatic conflict, contoured by security grounds only, but it also transforms the sides into equal parties. On the one hand, Israel is a sovereign State which is recognized as such by its enemy. On the other hand, though the Declaration itself does not recognize the PLO as the representative of a State, the Israeli recognition of the Palestinian people

- 3 The introduction to the Declaration states that: '[The two sides] agree that it is the time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security.'
- 4 'The PLO recognizes the right of the State of Israel to exist in peace and security.'
- 5 '[T]he government of Israel has decided to recognize the PLO as the representative of the Palestinian people...'
- 6 Israel signed the Declaration with the 'PLO team ... representing the Palestinian people...' (from the preamble of the Declaration).
- 7 Palestine National Charter, 1968, reprinted in J. N. Moore, *supra* note 2, at 705; R. Lapidot and M. Hirsch, *The Arab-Israeli Conflict and its Resolution: Selected Documents* (1992) 136.
- 8 See the Palestinian National Council's Political Communique, which accompanied the Declaration of Independence of 15 November 1988, reprinted in 27 ILM (1988) 1664, at 1665; Lapidot and Hirsch, *supra* note 7, 344, at 348.
- 9 That declaration called, *inter alia*, for 'The Security Council's establishment and assurance of arrangements for security and peace among all the concerned States in the region, including the Palestinian State.' (Sec. 2(c) of the Political Communique, *ibid.*).
- 10 The last formal offer was made by the Likud government, decision No. 453 of 14 May 1989: trans. and rep. in Lapidot & Hirsch, *supra* note 7, at 357.
- 11 A Framework for Peace in the Middle East agreed at Camp David (hereafter referred to as the Camp David Accord), 17 September 1978, 1138 UNTS No. 17853, at 39. rep. in Lapidot & Hirsch, *supra* note 7, at 195; J.N. Moore, *The Arab Israeli Conflict*, Vol. IV: *The Difficult Search for Peace (1975-1988)* Part 1 (1991) 307.
- 12 Indeed, in the English version of the Camp David Accord (*ibid.*) the term 'Palestinian people' is mentioned, as are 'the legitimate rights of the Palestinian people and their just requirements', but an accompanying letter to the agreement clarified that Israel understands this term as describing the 'Palestinian Arabs'. See letter from President Carter to Prime Minister Begin of 22 September 1978, 78 US Dep't State Bull. No. 2019 at 10 (October 1978), rep. in Lapidot & Hirsch, *supra* note 7, at 206; Moore, *supra* note 11, at 320. The Israeli Government's offer of 1989 referred to the Palestinians as 'the Arabs of Judea, Samaria, and the Gaza district', (see *supra* note 10, Art. 1), or 'the Palestinian Arab inhabitants of Judea, Samaria, and the Gaza district' (*supra* note 10, Arts. 4(d), 9 et seq.).

does constitute an implied recognition of the right of that people to determine freely its political status, and to pursue freely its economic, social, and cultural development.¹³ Indeed, the Declaration explicitly recognizes the right of the Palestinian people 'to govern themselves' in the West Bank and Gaza strip (Article III(1)). One can argue that the consequence of recognizing the Palestinian people and its right to govern itself in the West Bank and Gaza is recognition in principle of the right of this people to establish a state in these areas if it so desires. In light of this recognition, the Declaration is an agreement between two equal subjects of international law.

The international status of the Palestinian people, and of the PLO as its representative, is of course not dependent upon Israeli recognition. Since the mid-seventies there has been evident, if only partial, support in the international arena for the PLO as an organization which represents the Palestinian people, and which has a right to self-determination in parts of Palestine.¹⁴ After the Algiers Declaration of 15 November 1988, which declared the establishment of the State of Palestine, many states in the former Eastern Bloc and the Third World recognized this 'State', and maintained diplomatic relations with its representatives.¹⁵ This recognition, which was based on the right of peoples to self-determination, resembled the recognition of the international status of other peoples' representatives who have sought independence by basing themselves on this right,¹⁶ among them the Algerian F.L.N.,¹⁷ the African Independence Party of Guinea and the Cape Verde Islands which gained independence in Guinea-Bissau¹⁸ and the POLISARIO in Western-Sahara.¹⁹ These organizations, with varying degrees of success, have won international recognition, and thus prompted scholars to maintain that the organizations constituted subjects – if of a special nature – of international law.²⁰ Finally, the agreements between national liberation

- 13 Israel ratified on 18 August 1991 the 1966 Covenant on Civil and Political Rights, and the 1966 Covenant on Economic, Social, and Cultural Rights. Article 1(1) of both treaties provides: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.' In Article 1(3) of both Covenants, the member States take upon themselves to advance the realization of the right to self-determination and to honour the right in accordance with the provisions of the UN Charter.
- 14 The General Assembly invited the PLO in 1974 to participate in its meetings and in its work at the General Assembly with 'observer' status: *Observer Status for the Palestine Liberation Organization*, General Assembly Res. 3237, 29 UN GAOR: Supp. (No. 31) at 4, UN Doc. A/9631 (1974). On 15 December 1988, the General Assembly (General Assembly Res. 43/177) changed the PLO designation in the UN to 'Palestine', following the Algiers Declaration.
- 15 On the status of 'the Palestinian State' following the Algiers Declaration see, e.g., Boyle, 'The Creation of the State of Palestine', 1 *EJIL* (1990) 301; Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' 1 *EJIL* (1990) 307; Lapidoth, Colvo-Goller, 'Les éléments constitutifs de l'état et la déclaration du Conseil National Palestinien du 15 Novembre 1988', *RGDIP* (1992) 777.
- 16 For an analysis of this practice see: Reisman and Suzuki, 'Recognition and Social Change in International Law: A Prologue for Decisionmaking', in M. Reisman and B. Weston (eds), *Towards World Order and Human Dignity: Essays in Honor of Myres S. McDougal* (1976) 403; rep. in M. McDougal and M. Reisman (eds), *International Law Essays* (1981) 493, at 527-530; J. Crawford, *The Creation of States in International Law* (1979) 258-263.
- 17 On the recognition of the State of Algeria, still in exile, see M. Bedjaoui, *Law and the Algerian Revolution* (1961) 110-138.
- 18 For a comparison between the Guinea-Bissau, whose establishment was declared in 1973, and the Palestinian entity before the Declaration see Crawford, *supra* note 16, at 310.
- 19 This movement declared the establishment of the Arab Saharan Democratic Republic, which was recognized by the Organization of African Unity. Regarding this see E. Benvenisti, *The International Law of Occupation* (1993) 151-153.
- 20 Barberis, 'Nouvelles questions concernant la personnalité juridique internationale', 179 *RdC* (1983-I) 145, 239-268; A. Cassese, *International Law in a Divided World* (1986) 90-99; H. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988) 117-127.

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movements and the states against whom they fought, which brought to an end the conflicts between them, were drafted as international agreements, and thereby reinforced the claim that these organizations, at least at the stage of the signing of these agreements, had become subjects of international law.²¹

During the public debate sparked off in Israel following the signing of the Declaration, the question repeatedly arose as to whether the Declaration is an accomplished and irreversible fact, or whether, perhaps, Israel preserves the legal power to break free of the Declaration and the agreements expressed in it, in the event that the PLO reneges on its commitments. After having concluded that the Declaration is an agreement between two subjects of international law, such a question must be answered by looking into the law of treaties.

The 1969 Vienna Convention on the Laws of Treaties applies, as is stipulated in Article 2(1)(a), only to international agreements between States.²² However, as further stipulated in Article 3 of this Convention, the narrowing of the applicability of the Vienna Convention does not affect the validity of international agreements between States and other subjects of international law (international organizations, for example) and the rules described in the Convention might also apply to these other agreements. We should therefore turn to the customary laws of treaties, some of which are reflected in the Convention.

The general principle which is expressed in Article 60(1) of the Vienna Convention establishes that a substantive breach of a bilateral treaty by one of the parties entitles the other to rely on the breach as grounds for terminating the treaty or suspending its execution, partially or fully. According to Article 70 of the Vienna Convention – which is based on international custom²³ and therefore relevant to the Declaration – when a treaty is brought to an end, the parties to the treaty are released from any obligation further to perform it. Nonetheless, the termination of the treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. Examples of such ‘legal situations’ are the delimitation of borders, territorial arrangements, and recognitions.²⁴ There is therefore a solid basis for the claim that the mutual recognition which is inherent in the Declaration and the exchange of letters created a new legal situation that can no longer be reversed by the parties concerned. Moreover, there is a basis for the argument that the Declaration creates a Palestinian entity, with defined borders and broad jurisdiction (to be described below), at least in the Gaza Strip and Jericho, if not in other areas of the West Bank. Accordingly, under the principle embodied in Article 70(1)(b) of the Vienna Convention, the termination of the Declaration will not nullify what has been established under it.

The same conclusion can be drawn from the analysis of Israel’s status in the West Bank and Gaza. Being an occupying power, Israel draws its powers from the effective control it has there.²⁵

- 21 Barberis, *supra* note 20, at 259-264, describes these agreements. Bedjaoui, *supra* note 17, at 181-185, details agreements signed between the provisional Algerian government and states that recognized it at the time.
- 22 ‘[T]reaty’ means an international agreement concluded between states...’.
- 23 On the practice in this matter and for the opinion of experts see Lord A. McNair, *The Law of Treaties* (1961) 531-533.
- 24 See G. Fitzmaurice, Special Rapporteur, *Law of Treaties – Second Report*, Document A/CN.4/107, ILC Yearbook, Vol. II (1957) 16, 67: ‘Familiar examples [of no return to the antecedent state of affairs after termination of treaties] would be transfer of territory effected under a treaty, boundary agreements or delimitations, and territorial settlements of all kinds; ... recognitions of any kind...’.
- 25 Effective control is a necessary element in defining a situation as occupation. See Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907 (hereafter referred to as ‘The Hague Regulations’): ‘Territory is considered occupied when it is actually placed

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.

III. What Has Been Accomplished?

A. A Framework for Several Processes

As a framework for negotiations, the Declaration establishes basic principles only, and provides for distinct stages for the settlement of the conflict through a number of parallel as well as consecutive processes in which negotiations are to be held.

On 13 October 1993, the day of the Declaration's entry into force (Article XVII(1)), in accordance with the Declaration, several committees were established: a Liaison Committee, to deal with issues requiring coordination, other issues of common interest, and with disputes (Article X); an Economic Cooperation Committee in charge of the development and implementation of the programs mentioned in Annexes III and IV (Article XI); and a committee for regional cooperation, to which representatives of the governments of Egypt and Jordan will also be invited and whose task is to advance cooperation among the participants. This committee is supposed to establish a Continuing Committee to agree on the modalities of the admission of persons displaced from the West Bank and Gaza in 1967, as well as the measures necessary to prevent disorder (Article XII). The special agreement for Gaza and Jericho (Annex II) provides also for the establishment of a joint Coordination and Cooperation Committee for mutual security purposes (Annex II, Article 3(e)).

The Liaison Committee will also serve as a framework for conducting negotiations for the resolution of disputes as to the interpretation and implementation of the Declaration, or any other agreements pertaining to the interim period (Article XV(1)). On this committee there will be an equal number of members from each side, and its decisions will be made by consensus and not by majority rule (Agreed Minutes; comment to Article X of the Declaration). In cases where such disputes are not resolved through negotiations in the Liaison Committee, the parties should refer to an agreed-upon mechanism of conciliation. Disputes relating to the interim period, which cannot be settled through conciliation, may be submitted to arbitration. Note that resort to arbitration is qualified: only disputes relating to the interim period, and not the permanent status period, may be submitted to arbitration.²⁶ In addition, there has to be a specific agreement over the nature of the Arbitration Committee, as well as on the issues to be submitted to arbitration (Article XV(3)).

B. The Stages for Implementation

Although the Declaration leaves a great deal of work for the committees, and many important issues are left without an agreed settlement, the Declaration sets out basic principles which will

under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'

26 Yet in some cases it would be difficult to differentiate between matters that relate to the interim or to the final stage, since many issues of significance, postponed to the final stage of negotiations, will be addressed already in the Interim Agreement: see *infra*, Part IV(B).

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guide the various committees. It is useful to delineate these principles through their division into the three phases of implementation that the Declaration envisages. This section describes the timetable for implementation as it appears in the Declaration. Note, however, that the schedule envisaged in the Declaration is quite tight. In view of the many issues yet to be resolved, it may be the case that negotiations and other events would cause some delays in the implementation of the various stages.

Phase 1: Withdrawal from the Gaza Strip and 'Jericho Area'

According to Article XIV of the Declaration and Annex II, Israel will withdraw within a short period from the Gaza Strip and the area of Jericho. It should be noted that the Declaration does not define both areas territorially. The term 'Gaza Strip' connotes, in ordinary parlance, the area between the 'Green Line' (the line of 4 June 1967) and the international border with Egypt. Thus, although this area is not defined in the Declaration, it may be assumed that the territorial borders of the Gaza Strip are not in dispute, and that they stretch from the Green Line to the border with Egypt in the south, and the Mediterranean Sea in the west. The Declaration does not define the area of the settlements, which are to stay under Israeli control, and thus there is doubt as to how their boundaries are to be defined. Do these include only the areas already built, or do they also encompass the areas which have already been approved for further development, and even the land cultivated by the settlers? Nor is there any agreement over the maritime boundaries of the Strip. The borders of the 'Jericho area' are not defined even in an implied manner, and thus the issue is left open to negotiation.

Annex II to the Declaration foresees a very tight schedule for the completion of Israeli withdrawal from these areas. Before 13 December 1993, the parties are to sign an agreement on the withdrawal of Israeli military forces (Article XIV and Annex II(1)); from the date of the signing of this agreement, and within a time period of only four months (i.e., 13 April 1994 at the latest as stipulated in Annex II(2)), Israel must withdraw its military forces according to the agreement. At the date of withdrawal, a five-year transitional period will begin (Article V(1)), which will end at the latest on 13 April 1999, with the agreement on a permanent solution to the Israeli-Palestinian conflict.

According to Annex II, the agreement regarding Gaza and Jericho will delineate the powers of the Palestinian authority to be established in these areas. These powers are described in residual language, and they exclude from this authority matters of external security, foreign relations, settlements and Israelis. Mutual agreement is necessary in order to remove additional subjects from the scope of powers and responsibilities of the Palestinian authority (Article 3.b of Annex II and the Agreed Minutes, comment regarding Annex II).

In the second phase, i.e., after the elected Council is inaugurated, as described below, this Council will have authority over the Gaza strip and the Jericho area, which will remain part of the West Bank and Gaza, being 'a single territorial unit, whose integrity will be preserved during the interim period'. (Article IV). Therefore, once inaugurated, this Council will receive the powers of the Palestinian authority which is expected to commence functioning earlier (upon Israel's withdrawal). Nonetheless, from a functional perspective there will be a difference between the powers of the Council in Gaza and Jericho and its powers in the other areas of the West Bank.

Israel's powers in the Gaza strip and the Jericho area will apply to Israelis and Israeli settlements in these territories. The Israel Defence Forces and Israeli citizens will be able to travel freely on roads in these areas, and the IDF will remain responsible for the security and public order of the Israelis (Annex II, Article 3(b); Agreed Minutes, comment to Annex II). Beyond this, in light of the fact that Israel is responsible for matters of external security and for the foreign relations of these areas, it is reasonable to assume that Israel will feel entitled to redeploy its forces along the international borders of these areas (the borders with Egypt and Jordan) and to control

border crossings.²⁷ Apart from this, after the Israeli withdrawal, with the exception of the areas of the settlements, Israel will remain without authority to act within the territories from which it has withdrawn. In order to justify such action, notwithstanding the agreements, Israel would have to rely on the right to self-defence.

Israeli withdrawal and the transfer of responsibility to a Palestinian authority will bring about, it appears, a change in the legal status of the territories of Gaza and Jericho. Lacking effective Israeli control, these territories would no longer be subject to occupation.²⁸ It could be argued that granting effective and exclusive control in those areas to the Palestinian authority will provide the final condition missing for the fulfilment of the Algiers Declaration of November 1988, and the establishment of the State of Palestine.²⁹ If indeed the framework of the agreements between Israel and the Palestinians will leave in the hands of the Palestinian authority (and after it, the elected Council) effective and exclusive control of its own matters as well as residual powers, then such an argument would carry much weight.³⁰ However, it should be emphasized that the phrasing of the Declaration may also be interpreted to support the reverse stance, as the Palestinian authority's lack of jurisdiction over matters of external security and foreign relations denies the Palestinian entity the conventional indicators of independence, as described under the Montevideo formula.³¹ This interpretation is supported by the emphasis on the transfer of authority from the IDF to the Palestinian authority, (rather than assigning original powers in the Declaration), and by the wording of Article 6 of Annex II, which provides that in the interim period, the status of the Gaza strip and the Jericho area will remain unchanged, and will continue to be an integral part of the West Bank and the Gaza Strip.

Phase 2: The Interim Period

The interim period will begin with the Israeli withdrawal from Gaza and Jericho (i.e., no later than 13 April 1994). During this period, a 'Palestinian Interim Self-Governing Authority' (the elected Council) will be established in the remaining areas of the West Bank, which will not be included in the Jericho area. Elections to the Council will be held, no later than 13 July 1994, 'under agreed supervision and international observation, while the Palestinian police will ensure public order' (Article III). A number of issues concerning these elections are left to further negotiations, as described in Annex I.³² Another agreement that must be reached

- 27 Note that Article XIII of the Declaration, which deals with redeployment of the IDF, also applies to the Gaza Strip, and thus supposedly presumes that IDF forces may redeploy within the Gaza Strip.
- 28 See Article 42 of the 1907 Hague Regulations, *supra* note 25.
- 29 On this 'missing' condition see Crawford, *supra* note 15, at 309.
- 30 This claim is supported by Israel's recognition of the Palestinian people, and impliedly of its rights under the 1966 Covenants (see *supra* text to note 13).
- 31 Article 1 of the Montevideo Convention on Rights and Duties of States of 1933, 165 *L.N.T.S.* 19. The fourth criterion for statehood in this Article is the 'capacity to enter into relations with other States'. The Restatement (Third) on the Foreign Relations Law of the United States (1987) follows this formula by requiring that the entity 'has the capacity to engage in foreign relations'. (Sec. 201). On the Montevideo formula see Crawford, *supra* note 16, at 36-48. See especially the criticism of the fourth criterion at 47-48, and the emphasis on the better criterion of independence, which is 'the central criterion of statehood' (at 48 et seq.).
- 32 A highly symbolic issue concerns the right of Palestinians living in Jerusalem to take part in the elections. Some Israelis have expressed the fear that the recognition of the right of those Palestinians to be elected to the Council (and not only to participate by voting) would jeopardize Israel's claim to control a unified Jerusalem (including the eastern part, occupied in 1967). This concern seems exaggerated since the Council would have no powers over any part of Jerusalem.

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before the elections is the agreement on the interim period, called the Interim Agreement (Article VII(1)).

Jerusalem, Israeli settlements, military locations and borders will remain outside of the Council's jurisdiction, which otherwise will include the West Bank and Gaza.³³ Difficulties may arise as to the relevant boundaries of the Israeli settlements.³⁴ Yet the most problematic issue could be the definition for 'Jerusalem' which would remain outside the jurisdiction of the elected Council. Would it include Arab neighbourhoods that are now included in the municipal boundaries of Jerusalem? Would it set apart the large Jewish neighbourhoods, situated in close vicinity to the city yet outside its municipal boundaries? It is possible to argue that the Declaration implicitly referred to the existing municipal borders of Jerusalem. But had this been the intention, it could have been easily clarified in the document. The lack of definition may be intentional, and may become an issue in the negotiations of the Interim Agreement, despite the fact that any interim demarcation would not prejudice the rights of either party in the final agreement (Article V(4)).³⁵

To prepare the ground for the Council's work, the Declaration provides for a preparatory transfer of powers and responsibilities from the military government and the Civil Administration to the Palestinians who will be authorized for this purpose.³⁶ This process would commence upon the entry into force of the Declaration and the withdrawal from Gaza and Jericho. The powers transferred will be in the areas of education, culture, health, social welfare, direct taxation and tourism (Article VI, and the Agreed Minutes, comment to this Article).

After the inauguration of the elected council (within an indefinite period following its election, which should take place no later than 13 July 1994), a change will be effected in the structure of powers in the territory of the West Bank outside of the Jericho area. The change includes a division of powers between Israel and the elected Council as detailed below.

The Powers of the Elected Council

The powers of the elected council will be established in the Interim Agreement according to the principles of Article VII of the Declaration. These principles point to the granting of legislative and executive authority to the Council, as well as to the establishment of independent judicial organs (Article VII(2), Article IX(1)). Upon the inauguration of the Council it will take over those matters which will first be transferred to the Palestinian authority in Gaza and Jericho as specified in Annex II; the matters which will be transferred according to Article VI(2) (education and culture, health and social welfare, direct taxation and tourism); and further subjects which will be mutually agreed upon. Upon its inauguration the Council will establish various authorities to deal with matters of electricity, land, water, the environment, as well as an authority to administrate the Gaza Sea Port, a development bank, and an export promotion board.

The Council will be responsible for public order and internal security. A 'strong police force' will stand at the disposal of the Council, which will ensure public order and internal security in the territories under its jurisdiction (Article VIII and Annex II, Article 3(c)). Still, the responsibility to defend against external threats, as well as the responsibility for the overall

33 Note that there are two incompatible lists of matters that remain outside the Council's jurisdiction: Article V(3) (which does not refer to military locations), and the Agreed Minutes (which do not mention borders).

34 The question of the definition of the settlement areas will arise beforehand in the negotiations relating to Gaza and Jericho (see *supra* text notes 26 to 32, discussion of phase 1).

35 See also *infra* text notes 42 to 43, discussion of phase 3.

36 The Palestinian side is responsible for appointing authorized persons for this purpose (Agreed Minutes, comment to Article 6(2)).

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security of Israelis in the territories, and for public order in the settlements, will remain in Israeli hands (Article VIII).

One might learn from the establishment of the various authorities under the aegis of the elected Council (e.g., an electricity authority, water administration authority, and others mentioned in Article VII(4) of an implied consent to hand over further powers to the Council, beyond those which have already been transferred according to Article VI of the Declaration. Thus, for example, the Palestinian water and land authorities will evidently be authorized to undertake certain activities in the areas under their jurisdiction. The dissolution of the Civil Administration (Article VII(5)) may also foreshadow the transfer of its duties to the Council, although this might not necessarily be the case, as it is possible that some of the powers of the Civil Administration will be transferred to the military government.³⁷ In the end, it is all dependent on the explicit definition of authority as it takes shape in the Interim Agreement mentioned in Article VII of the Declaration.

It has already been noted that the Palestinian authority, and after it the elected Council will have residual powers in the Gaza Strip and the area of Jericho. In contrast, in the remaining areas of the West Bank that will come under the jurisdiction of the Council, residual powers will be held by Israel, as stated in the Agreed Minutes (comments to Articles IV and VII(5) of the Declaration).

The Status and Powers of the Israeli Defence Forces

Beginning with the entry into force of the Declaration and up until the eve of the elections for the Council (13 July 1994), the IDF will redeploy its forces in the West Bank (Article XIII). This redeployment, it appears, is subject to the IDF's sole discretion, and there is no obligation to receive the other side's consent. Nonetheless, there is agreement on the principle that military forces will be redeployed outside of populated areas (Article XIII(2)). The continuation of the redeployment to designated places will take place gradually, and will parallel the Palestinian police's assumption of duties. After the inauguration of the elected Council, the transfer of the various powers to it, and the redeployment of the IDF, the military government is said to withdraw, and the Civil Administration to be dissolved (Article VII(5)).

The redeployment does not curtail Israel's powers over these areas. Israel's redeployment of forces is not tantamount to complete withdrawal, and its powers over the West Bank area are not dependent upon the question of where the IDF will situate its military locations. Curiously, several provisions in the Declaration and in the Minutes note 'Israel' as the body which continues to wield authority after the said withdrawal, as opposed to the Israeli military government, established by the IDF in 1967.³⁸ However, it is actually the military government that is the body authorized according to international law to exercise authority in the territory subject to belligerent occupation, and the one that, since 1967, has acted as such in the territories.

The claim might be made that, with the withdrawal from the Gaza Strip, from the area of Jericho, and perhaps also from other areas in the West Bank, together with the dissolution of the Civil Administration and the withdrawal of the military government (as envisioned in Article VII(5) of the Declaration), the Israeli occupation of these areas will come to an end. This claim would be based on the loss of effective control, which is a necessary condition for the definition of a territory as subject to military occupation.³⁹ While this would seem a powerful

37 See the comment on Article VII(5) in the Agreed Minutes.

38 See for example Article XIII(2) of the Declaration; the Agreed Minutes, comment to Article VII(5).

39 See *supra* note 25.

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argument with respect to Gaza and Jericho, it appears rather weak with respect to the West Bank. In this latter region, the more reasonable interpretation is one according to which the IDF continues to hold that region under the laws of occupation, to the extent that these have not been changed or modified by the Declaration and subsequent agreements. This interpretation is based on the continuation of Israeli *de facto* control (despite a redeployment of forces); on its continuing responsibility in the interim period over important matters such as land, water, commercial relations, and more; and on the fact that unlike the Civil Administration the military government is not being dissolved. Such a situation, in which one state controls a territory during a stage of transition from hostile to peaceful relations, is recognized in international legal literature as a situation of 'armistice occupation'.⁴⁰ The accepted approach as to this type of occupation is that the occupying force is subject to the instructions of the agreement between the parties, and in addition – unless the parties have provided otherwise – to the constraints and powers provided for in the law of belligerent occupation.⁴¹ According to this interpretation, the IDF retains its authority under international law, subject to any agreement. Thus, the IDF will continue to be subject in the execution of its various powers in the West Bank, including its use of its residual powers, to the norms of international law which deal with occupied territories. It will therefore remain responsible for maintaining public order and ensuring those human rights applicable in situations of occupation.⁴²

Phase 3: Permanent Status Negotiations

The Declaration foresees a final settlement of the conflict, which will commence no later than the end of the five-year transitional period, i.e., 13 April 1999 (Article V(1)). This settlement will be based on Resolutions 242 and 338 of the Security Council of the UN (Article I). Negotiations for this purpose, which are to begin no later than 13 April 1996 (Article V(2)), will tackle the most contentious issues, such as the status of Jerusalem and the return of the refugees of 1948.

If no agreement is reached, the question will arise as to the legal significance of such a situation. The starting point for the analysis of this issue is the fact that the termination of the Declaration will not lead to a return to the situation that existed prior to its signing.⁴³ It appears that military occupation in the West Bank (excluding Jericho) will continue, while in Gaza and Jericho a Palestinian State will be an established fact.

IV. The Implications of the Declaration on the Final Agreement

The parties emphasize in the Declaration that 'the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached in the interim

40 On armistice occupation see Bothe, 'Occupation After Armistice', R. Bernhart (ed.), 4 EPIL (1982) 63; Roberts, 'What is a Military Occupation?', 55 BYBIL (1984) 249, 265-267. Bothe notes that many of the agreements reached at the conclusion of hostilities during the two world wars, before peace treaties were signed, were of such a character. For an interesting comparison of the occupation of the Rhineland during the period of armistice and later, when the same area was occupied under the terms of a peace treaty, see E. Fraenkel, *Military Occupation and the Rule of Law* (1944).

41 See Bothe, *ibid.* at 63; Roberts, *ibid.* at 267.

42 On the applicable human rights under occupation see E. Benvenisti, 'The Applicability of Human Rights Conventions to Israel and to the Occupied Territories', 26 *Israel Law Review* (1992) 24.

43 See *supra* text to note 24.

period'. (Article V(4)).⁴⁴ However, one may expect that this principle is only partly true. It is possible to identify two types of issues that remain to be settled. The first type concerns questions of territories and status. The second type concerns the future relationships between the two parties. While the first type of questions will indeed await the final agreement, issues of the second type will most probably be settled already in the Interim Agreement.

A. Questions of Territories and Status

The most politically contentious and symbolically loaded questions will not be negotiated before April 1996. In the meantime, existing arrangements will not prejudice the rights and claims of the parties. These issues include the political character of the future Palestinian entity (an independent state or a Jordanian-Palestinian confederation), the future borders it will have with Israel, security arrangements, the status of East-Jerusalem,⁴⁵ the right of the Palestinian 1948 refugees to return,⁴⁶ and the future of Israeli settlements in the West bank and Gaza. The only significant principle that delimits the final outcome is the ambiguous one embodied in Security Council Resolution 242 (Article 1).⁴⁷ Indeed, the agreement to postpone negotiations on these issues greatly facilitated the mutual acceptance of the Declaration.

B. Questions Relating to Cooperation Between the Parties

Whereas the first type of issues will be left to the final stage of negotiations, a different future awaits the issues concerning the relationship between Israel and the Palestinian entity (in the interim period and beyond). The Interim Agreement is expected to establish a number of important arrangements in this respect, which will be designed in view of the forthcoming permanent status, and thus will most probably extend to the final agreement as well.

At the outset, it is necessary to emphasize the unique relationship between Israel and the Palestinians. Both communities are destined to share a tiny piece of land. The two neighbours will remain to a certain extent interdependent. This interdependency calls for close cooperation between the communities, and for alignment of policies. Indeed, Israel would view cooperation as the best incentive for the Palestinians to keep their commitments, and therefore would push for such arrangements. At the same time, a future bond with Israel's developed and relatively much stronger economy could be problematic for many Palestinians, who struggle for the ideal

44 A similar clause is found in Annex II, concerning the status of the Gaza Strip and Jericho area (Article 6).

45 Although the Declaration mentions 'Jerusalem' rather than 'East-Jerusalem', the real dispute is over the eastern part, over which Israel extended its sovereignty in 1967. The Political Communique of the PNC from 15 November 1988 refers only to 'Arab Jerusalem' as the area from which Israel is required to withdraw (*supra* note 7, Sec. 2(b)). 'Arab Jerusalem' corresponds to 'East Jerusalem.' It seems plausible that it was Israel who insisted on the unqualified term 'Jerusalem', since it rejects any attempt to assign, even in an implied manner, different status to the eastern part of the city.

46 The Declaration recognizes in principle the right of the refugees of 1967 to return (Article XII).

47 On the different interpretations of Resolution 242 see e.g. Shapira, 'The Security Council Resolution of November 22, 1967 – Its Legal Nature and Implications', 4 *Israel Law Review* (1969) 229; Goldberg, 'UN Security Council Resolution 242 and the Prospects for Peace in the Middle East', 12 *Colum. J. Trans. L.* (1973) 187; de Valdes, 'The Authoritativeness of the English and French Texts of Security Council Resolution 242', 71 *AJIL* (1977) 311; Lapidoth, 'Security Council Resolution 242 at Twenty Five', 26 *Israel Law Review* (1992) 295.

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that the notions of 'independence' or 'sovereignty' connote. The choice between coordinated or individualistic policies will already be reflected in the Interim Agreement.

Article XI and Annexes III and IV embody the initial choice to coordinate economic and related activities. The Annexes describe a long list of areas of possible cooperation, among them water, electricity, energy resources, finance, transport, communications, trade, industry, tourism and the protection of the environment. From an economic point of view, this close cooperation makes much sense. Moreover, it also strengthens the ties between the parties. Yet such cooperation could prevent the Palestinians from establishing separate trade agreements with third countries like Jordan. Politically, for the Palestinians, such an approach might seem less palatable if they would not have equal say in the planning of the policies. This could be especially sensitive if such cooperation is to start during the interim period, with Israel remaining in control of the West Bank (excluding the Jericho area), and possessing residual powers, including the power to levy indirect taxes and customs duties (unless the Interim Agreement would provide otherwise).⁴⁸ Indeed, there are already signs of Palestinian resistance to Israeli ideas that in the interim period there will be a single market that would include Israel and the West Bank, with the same indirect taxation (value-added tax), a single currency, free movement of workers (that is, from the West Bank and Gaza to Israel) and minimal trade barriers.⁴⁹

While cooperation in the economic area is a matter that may be resolved one way or the other, cooperation in other areas is essential. The need to coordinate issues of water utilization and environmental protection stem from the fact that the country may be divided up politically, but not physically. Israel and the Palestinians share the greater part of their water resources. An underground aquifer, called the Mountain Aquifer, supplies about one-third of the water consumed in Israel annually, as well as most of the water consumed by the Palestinians in the West Bank.⁵⁰ The Gaza Strip, although it does not share water resources with Israel, is far from being self-sufficient in water. It urgently needs additional resources to alleviate the severe shortages and the low quality of its water.⁵¹ To complicate the picture even more, Israel and the Palestinians also have major stakes in the waters of the Jordan River system (which is also shared by Lebanon, Syria and Jordan). In the semi-arid conditions of the Middle East, access to shared water resources is of utmost importance to all the neighbouring countries, and thus may prove to be, as indeed has been in the past, a source of friction and even armed conflicts.

There are two interrelated issues that must be settled by the parties in this context: the allocation of existing and potential shared resources, and the management of these resources (including related systems like sewage systems and sewage-treatment facilities) to protect the waters from contamination.

Israel and the Palestinians have different views over the proper allocation of their shared water resources. Palestinians view most of the water of the Mountain Aquifer as their own, since most of the water reaches this aquifer from the Judea and Samaria mountains in the West

48 See *supra* text to notes 38-39.

49 See, e.g., 'Israel resists a Palestinian demand to establish customs stations on the passages to the autonomy zone', *Ha'aretz* (a daily newspaper, in Hebrew) 5 November 1993, at A1; 'We don't want customs union', *Ha'aretz*, 3 November, at C1.

50 On the utilization of the Mountain Aquifer and the rights of both sides to its waters see Benvenisti and Gvirtzman, 'Harnessing International Law to Determine Israeli-Palestinian Water Rights: The Mountain Aquifer', 32 *Natural Resources Journal* (forthcoming, Winter 1993).

51 A. Melloul & M. Bibas, *Hydrological Situation in the Coastal Aquifer of Gaza Strip from 1985 to 1990* (1992, in Hebrew, with abstract in English); H. Awartani, 'A Projection of the Demand for Water in the West Bank and Gaza Strip 1992-2005', (a paper submitted at the First Israeli-Palestinian International Academic Conference on Water, December 1992).

Bank.⁵² Yet this claim conflicts with Israel's use of the greater part of these waters since before 1967. Customary international law, as delineated in a number of instruments and in state practice, calls for an equitable utilization of shared waters.⁵³ Recourse to this formula, however vague,⁵⁴ may aid in bridging this conflict, and indeed the parties do refer to it. According to Annex III of the Declaration, cooperation in the field of water is to be the first topic on the agenda of the joint Continuing Committee for Economic Cooperation. Such cooperation will begin with examining 'proposals for studies and plans on water rights of each party, as well as on the equitable utilization of joint water resources for implementation in and beyond the interim period'.

But determining drawing rights is only part of the problem. The other part concerns the protection of the resources against overuse and pollution. This issue is crucial to Israel, being the country on the downstream side of the Mountain Aquifer, a resource that is very vulnerable to pollution originating in the West Bank. The way to address this issue is through coordination of the policies of the co-riparians in the spheres of water-use, agriculture, use of pesticides, etc. It is also necessary to mutually monitor the relevant activities on both sides of the political border (i.e., actual amounts of water used, location of wells, irrigation methods, use of pesticides, etc.). For these tasks, the establishment of joint commissions for water and environmental protection is indispensable.⁵⁵

Thus, the final agreement between the parties may be achieved without mechanisms for cooperation in economic and other spheres. However, it will be necessary to establish reliable mechanisms for cooperation in the areas of water and the environment.

V. Conclusion

The Declaration is the necessary first step towards the settlement of the Israeli-Palestinian conflict, and hopefully towards peace in the Middle East. It changed irreversibly the course of history in this part of the world. The two sides expressed their willingness to live side by side, yet peace is still far away. There are many stumbling blocks on the road ahead, which the Declaration evaded, but which are not insurmountable. If the pragmatic tone of the Declaration continues, peace is surely envisionable.

52 See, e.g., Zarour and Isaac, 'Nature's Apportionment and the Open Market: A Promising Solution to the Arab-Israeli Water Conflict', 18 *Water International* (1993) 40.

53 On the different claims and the international law on this subject see Benvenisti and Gvirtzman, *supra* note 50.

54 For an elaboration on this principle see, e.g., The International Law Association's 'Helsinki Rules', *Report of the Fifty-Second Conference* (1967) at 484 et seq.; Bourne, 'The Right to Utilize the Waters of International Rivers', 3 *Can. Y.B. Int'l L.* (1965) 187, 199; Lipper, 'Equitable Utilization', in A. Garretson, R. Haydon and C. Olmstead (eds), *The Law of International Drainage Basins* (1967) 41, 45; Handl, 'The Principle of "Equitable Use" as applied to Internationally Shared Natural Resources: Its Role in Resolving Potential International Disputes Over Transfrontier Pollution', 14 *RBDI* (1978) 40, 46, 52-54; Buirette, 'Génése d'un droit fluvial international général', 95 *RGDIP* (1991) 5, 38; Benvenisti, 'Equity and the Apportionment of Shared Water Resources', (forthcoming, 1994).

55 The necessity to utilize shared aquifers jointly stems from the fact that aquifers are vulnerable to pollution, even more than surface waters. See Hayton & Utton, 'Transboundary Groundwaters: The Bellagio Draft Treaty', 29 *Natural Resources Journal* (1989) 663.