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JERUSALEM AND THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW
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On

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THE ARAB PEACE INITIATIVE:

Within the League of Arab State's broad agenda and scope of activities, a main item of concern has always been the Palestinian question and the Arab-Israeli conflict, a major destabilizing factor in the Middle East. At the Beirut Arab League Summit in 2002, the member states earnestly attempted to change the political dynamics of the conflict by unanimously adopting the "Arab Peace Initiative," as a framework for a comprehensive settlement in the region.

Since then, the Arab League has remained attached to that initiative, which in essence is complimentary to the Quartet's Roadmap and the vision of a two-state solution. However, the Arab world will have to address the greatest challenge facing the prospects of peace in the Middle East today, namely the attempt by the present Israeli government to consolidate its occupation of Palestinian territory in the West Bank including East Jerusalem, legitimize its colonies of settlement therein and annex large parts of occupied Palestinian land, as well as continuing the construction of the separation wall in spite of the world's outcry and strong opposition.

Those policies and actions raise a timely and most important subject. It concerns the violation by Israel of the rules and principles of international humanitarian law, that branch of law that has recently assumed as ever growing prominence, as an expression of the world's ideal of the rule of law in international relations. But while we may welcome the recent proliferation of instruments of international humanitarian law, we cannot but notice with concern the widening gap between the rules of international humanitarian law and their actual application. The case of the fourth Geneva Convention provides a good illustration of that regrettable situation.

IMPLEMENTATION OF THE FOURTH GENEVA CONVENTION:

The signing of the Fourth Geneva Convention in 1949 was a major breakthrough that culminated long efforts over the years to ensure a better protection for the civilians in times of war. And while the Convention which has now been ratified by 188 states, has
received universal recognition, its observance and implementation is still lacking since serious violations of its provisions have become common practice in many conflicts, such as the Arab-Israeli conflict.

Thus, a major problem facing implementation stems from the refusal of Israel the occupying power to acknowledge that definition, thereby contesting its obligation to apply the Convention. Since the main aim of the Convention resides in alleviating human suffering caused by that conflict, lengthy legal debate over the applicability of the Convention, although politically important, should therefore be minimized, so as to close the door to any pretext by the occupying power for derogations from the basic rules. Instead, efforts should be centered on the practical problems arising from occupation with a view to adopt practical steps for their early solution. And this to take place, bearing in mind that occupation is a temporary situation that allows no change under the Convention in the legal status of the territory or the continued normal life of its inhabitants in accordance with their laws, culture and traditions.

However, the most effective way to bring about an end to any violations of the applicable rules of international humanitarian law is to deal with the underlying issue of the conflict, thus bringing about an end to occupation.

In assessing now the effectiveness of the mechanisms provided under the fourth Convention for implementation of its provisions, we cannot but express consternation over the fact that the role contemplated for the Protecting Powers and the International fact-finding Commission has virtually remained dead letter. In reality, much depends in the activation of these bodies on the political and practical support they receive from the international community to accomplish their task and that community's determination to persuade Israel to cooperate with those mechanisms.

A unique feature of the four Geneva conventions and their additional Protocols lies in the collective responsibility of the Parties for their implementation, since they undertook in common Article II "to respect and to ensure respect for the Conventions in all circumstances." It underscores the particular legal nature of the Conventions, their universality and the essential value of the body of humanitarian law they incorporate. The carrying out of this solemn obligation entails in our opinion, concrete action on the part of the Parties to ensure respect for the Convention and not merely rebuke or
condemnation of the violating state.

However, the permissible limits of such action should always be consistent with the provisions of the UN Charter. In cases of serious violations, like those perpetrated in a systematic manner as deliberate policies of a state, such action should be taken in cooperation with the United Nations, which under its Charter can adopt a variety of measures, including coercive ones. And as a true reaffirmation of their collective responsibility, the High Contracting Parties of the Conventions should seek to hold periodic meetings among themselves, so as to create an institutionalized forum for undertaking effective collective action.

The measures just suggested for enhancing the implementation of the fourth Geneva Convention would apply to any occupied territory, including occupied Palestinian territory of which Jerusalem is an integral part. One crucial question raised in this regard, is the issue of the applicability of the fourth Geneva Convention in occupied Palestinian territory in the light of Israel’s refusal to accept its de jure applicability while agreeing only to its de facto application.

International legal opinion, the position adopted by the United Nations Security Council-in 24 resolutions- and the General Assembly in ordinary and emergency special sessions, as well as the International Committee of the Red Cross, all clearly confirm the applicability of the fourth Geneva Convention to the territories occupied by Israel since 1967, including Jerusalem, and call upon Israel, as party to the Convention since January 1952, to comply with its provisions and accept its de jure applicability. Israel’s contention on this issue must therefore be categorically rejected on solid legal grounds, including the inadmissibility that a duly ratified international treaty may be suspended at the wish of one of the parties, who by refusing to apply its provisions in toto seeks to establish a new category of legal rules which it might apply according to its own free discretion. Furthermore, there is ample evidence produced by several impartial bodies, governmental or non-governmental, international or even Israeli, refuting Israel’s contention that although the Convention is not legally applicable, nonetheless it implements its provisions in practice. And in the final analysis, all violations of the fourth Geneva Convention are the outcome of the very fact of Israel’s illegal occupation of the concerned Arab territories.
SETTLEMENTS: A VIOLATION OF INTERNATIONAL LAW:

The construction by Israel of settlements in east Jerusalem and the occupied Palestinian territory is clearly a violation of international law. Thus in the "Legal Consequences of the construction of a wall" advisory opinion, the International Court of Justice ruled unanimously that settlements breached Geneva Convention IV. Article 49.6 of that Convention provides: "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies." And in that context, the Court unanimously rejected Israel's claim that Geneva Convention IV is inapplicable to the occupied Palestinian territories.

In its Advisory Opinion, the International Court of Justice noted that the route of the wall enclosed 80% of the settlers living in the West Bank and that it was apparent that its "sinuous route" was intended to encompass the "great majority" of settlements. It continued that although Israel had given assurances that the wall was a temporary measure, its construction created a "fait accompli" which "could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation."

The United Nations Security Council has on numerous occasions upheld the principle of illegality of the settlements in Palestinian occupied territory including East Jerusalem. Thus resolutions 446 and 465 determined that the settlements have "no legal validity"; resolutions 465 and 476 affirmed the applicability of the Fourth Geneva Convention to the Occupied Territory; resolutions 1397 and 1850 stressed the urgency of achieving a comprehensive peace and called for a two state solution; and resolution 1515 endorsed the Quartet Roadmap. All those Resolutions adopted by the Security Council without any objection reconfirm the Council's determination that Israeli settlements are a violation of international law and an obstacle to achieving a comprehensive peace in the region.

However, one of the strongest and most explicit rejection by the Security Council of the Israeli settlements in Jerusalem and occupied Palestinian territory was contained in Resolution 465 unanimously adopted by the Council on March 1st, 1980. In operative paragraph 5 of that Resolution, the Council: "Determines that all measures taken by Israel
to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity, and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of war and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East."

THE ILLEGALITY OF THE SEPARATION WALL:

An issue of serious concern to the Palestinian people has been the impact of the construction by Israel of the Separation Wall in the occupied Palestinian territory, including in and around East Jerusalem. The international community's opposition to the wall was already reflected in the adoption by the General Assembly at its tenth emergency special session on October 21st, 2003 of a resolution by an overwhelming majority demanding that Israel stop and reverse its construction of the wall. It was reiterated when the Assembly decided by its resolution of December 8th, 2003 to request the International Court of Justice to urgently render an Advisory Opinion on the legal consequences arising from the construction of the wall.

In its opinion on the illegality of the wall, the Court relied on substantive grounds stemming from the fundamental rules and principles of the United Nations Charter, international humanitarian law and international human rights law. In the first place, the construction of the wall violates the Charter principles of the prohibition of the use of force and the right to self-determination. In essence, it fundamentally affects the demographic structure of the Palestinian occupied territories leading to its fragmentation and Bantustanisation. It makes Palestinian life burdensome, even impossible, and forces Palestinians to leave their homes while fostering the position of the unlawful Israeli settlements. That is why the wall profoundly affects the right of the Palestinian people to self-determination, which includes the right to remain in the place where they have lived for centuries, that is why it constitutes a change in status, a de facto annexation which is contrary to the prohibition of acquiring territory by force.
The wall constitutes further a violation of international humanitarian law, in particular the law of belligerent occupation, which prohibits an occupying power to destroy private property and confers on it the duty to ensure the humane and well-being of the civilian population being under its occupation, an obligation violated by Israel on a daily basis. And while the right of a party to a conflict to take measures for the protection of its own population living in its territories is certainly recognized, the wall whose route strikingly deviates from the "Green Line" into occupied Palestinian territory is therefore undeniably in contravention of international humanitarian law. In addition, the construction of the wall entails a gross violation of international human rights guarantees of the Palestinian population, embodied in international human rights treaties as well as corresponding rules of customary international law, in particular the Covenant of Civil and political Rights, the Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. Under those established rules, no security considerations may serve as a reason for limiting human rights whenever the measures affect the life and rights of an entire population in total disproportion to the perceived security threat.

The determination by the international Court that the construction of the wall built by Israel in the occupied Palestinian territory, is illegal under the rules and principles of international law and relevant United Nations resolutions, entails a series of concrete legal consequences: Israel must stop the construction immediately, provide reparation through restitution of land and compensation for other damages. Other states are entitled, even obliged as parties under the Fourth Geneva Convention, to take measures to ensure that the breach ceases and reparation is provided. And no state may recognize the de facto situation unlawfully brought about by the construction of the wall. All states are further obliged to prosecute offenders of an act that constitutes in various respects, a grave breach of the Fourth Geneva Convention. As for the United Nations, its main political organs have to pay due respect to the determination made by the Court, and reinforce their efforts to achieve a lasting and peaceful solution of the question of Palestine based on the rule of law.
THE PALESTINIANS' RIGHT OF RETURN OR COMPENSATION

An important human aspect of the issue of Jerusalem relates to the right of the expelled Palestinian refugees to return to their homes in Jerusalem or be compensated for their lost property in that city.

The rights of the Palestine refugees were first recognized by the United Nations in 1948, when the General Assembly in its resolution 194 adopted at its third session on December 11, 1948, resolved that the Palestine refugees wishing to return to their homes should be permitted to do so, and that compensation should be paid for the property of those choosing not to return and for loss or damage to such property. Since the adoption of that basic Resolution in 1948, the Palestinian rights of return and compensation have been reaffirmed by the General Assembly year after year in subsequent resolutions. And although those resolutions are considered from a technical point of view as mere recommendations, their adoption year after year over the past half a century, and by an overwhelming majority of the United Nations membership, endows them with considerable political and legal authority and moral weight. They have indeed become evidence of the international community's acknowledgment of the existence of such rights and of the necessity of their implementation.

The right of return of the Palestinian refugees first given international recognition by the United Nations in 1948, derives further legality through the recognition of the right of return to one's country in the relevant international instruments on human rights, such as the Universal Declaration of Human Rights approved by the General Assembly on December 10, 1948, and the International Covenant on Civil and political Rights approved by the General Assembly on December 16, 1966, as well as the Convention on the elimination of all forms of racial discrimination adopted by the General Assembly in 1965. In invoking their legitimate right of return in the context of those international instruments, the Palestinian refugees underline in fact their predicament, namely that they have been subject to two violations: violation of their right to stay in their country when they were illegally expelled from it and violation of their right to return to their country.

The importance attached by the General Assembly to the implementation of the right of return of the Palestinian refugees, is well reflected in the course it took in 1949 when admitting Israel to membership in the United Nations: it did so, only after taking
note of the declaration of Israel before the ad hoc political committee in respect to the implementation of the Assembly resolution calling for return of the Palestinian refugees. This was in fact evidence of the international community's conviction that the Palestinians had been illegally expelled during the process of replacing the Arab majority in Palestine with a Jewish majority in the newly created state of Israel.

In conjunction with the right of return of the Palestinian refugees, the General Assembly has also recognized in 1948 their right to compensation for their property, in case they chose not to return and for any loss or damage to such property. This right under Resolution 194 of December 11, 1948 is to be implemented according to principles of international law and equity. For an application of the principle of compensation, we may refer to a number of precedents relating to the Second World War. Thus in the former Axis and Axis occupied countries various laws were promulgated in 1944 and 1945 for the restitution of property or compensation to be paid to the victims of Nazi measures. Likewise, in the zone of Germany that was under United States jurisdiction, a general claims law was passed in 1949 which provided for restitution to the victims of Nazi action in respect of damage to their possessions and property. More recently, the principle of compensation has been invoked for the restitution of former Jewish assets in Swiss banks.

As to the compensation for the Palestinian property, its evaluation can be determined in the light of the information contained in relevant documents and materials in possession of the United Nations Conciliation Commission for Palestine. Such documents include micro-films of land registers received from the Mandatory Government, forms of identification of property parcels including individual valuation figures, and an index of owners' names which provides means of direct reference to the holdings recorded in the name of each owner.

The Palestinian refugees have further a valid claim under international law to repatriation and compensation in accordance with the law of war applicable to all hostilities. Under that law, an occupant is under the obligation to spare the civilian population and consequently his refusal to allow repatriation or compensation entails a violation of that law. Moreover, under international humanitarian law, member states of the United Nations are entitled to protest against the non-repatriation of or compensation
for the Palestinian refugees on the basis of human rights' violations falling within the scope of the relevant international instruments on the protection of human rights. And in supporting these Palestinian rights, the United Nations has acknowledged its overall responsibility in a flagrant case of denial of human rights.

In spite of the validity of the Palestinian refugees' claim to repatriation and compensation under international law, whether under United Nations resolutions or the law of armed hostilities or international humanitarian law, Israel has constantly rejected their legitimate claim. At the same time, the Israeli government has adopted internal legislation aimed at legalizing the expropriations of Arab property, as well as guaranteeing to all Jews the right to emigrate to Israel, while denying the right of return to the Palestinian refugees. In all objectivity, can there be a more flagrant case of double standards in dealing with legitimate claims?

THE RESPONSIBILITY OF THE INTERNATIONAL COMMUNITY:
In our opinion, the international community ought to reaffirm its attachment to the basic principles of international humanitarian law applicable in armed conflicts and to their universal binding nature; its confirmation of the de jure applicability of the fourth Geneva Convention in occupied Palestinian territory, including Jerusalem; its acknowledgment that the main principles enshrined in the Convention are consistent with the principles of the United Nations Charter, the Declaration of Human Rights, the Statute of the International Criminal Court, as well as the principles of customary international law; its support for the reactivation of the International fact-finding Commission as an effective monitoring and verification system; its support for enhancing the valuable role of the International Committee of the Red Cross in ensuring application of the Convention; its support for the positive supportive role which other humanitarian, governmental and non-governmental organizations and civil society can play in that field; its stressing of the constructive role the Judiciary might play in its pronouncement on humanitarian law issues with integrity and objectivity; its underlying the collective responsibility of the High Contracting Parties to the Fourth Geneva Convention to ensure implementation of the Convention, in particular those with special or close relations to the occupying power; its confirmation of the individual criminal responsibility for serious violations under the
Convention amounting to war crimes and crimes against humanity under the Statute of the International Criminal Court.

In conclusion, it is our sincere hope that the Doha Conference will represent a unique opportunity to increase world-wide awareness of the solemn obligation of States to respect the norms of international humanitarian law in armed conflict, and take collective measures to ensure their implementation by all states, including by Israel. If the Conference succeeds in that objective, it would have significantly contributed to creating a better world, a world based on the rule of law and respect for the principles of humanity and justice.