

International Law Association
(British Branch)
Annual Conference, Sheffield University, United Kingdom
April 26, 27, 28

RECOGNITION OF PALESTINIAN STATEHOOD: A CLARIFICATION OF THE INTERESTS OF THE CONCERNED PARTIES

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“The Egyptian people
Are fighting valiantly
For human rights.

The Israeli Knesset
Is fighting valiantly
To abolish
Human rights”¹

This article examines the international law strategies for recognition of Palestinian statehood by translating the historical and contemporary legal precedents—as well as facts on the ground—into legal claims; by evaluating the “soft law” effects of international relations on the general merits for or against recognition; and by assessing the prospects for a politically successful recognition strategy. With the ultimate goal being peaceful coexistence of the Israelis and Palestinians, this presentation asserts that a two-state status quo offers the most just and effective stabilizing force, and advises policies for achieving the international law status of the state of Palestine, with its attendant benefits and responsibilities.

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¹ Poem by Uri Avnery, Haaretz Gush Shalom (February 18, 2011)

INDEX

INTRODUCTION 3

I. BACKGROUND FACTS RELEVANT TO THE CLAIMS FOR PALESTINIAN STATEHOOD 5

A. THE LAND AND PEOPLE OF PALESTINE AND ERETZ ISRAEL5

B. THE RECOGNITION OF THE STATE OF ISRAEL.....7

C. PALESTINE MANDATE AND UN SYSTEM9

D. CONFLICT FOLLOWING THE PARTITION RESOLUTION11

II. THE INTERNATIONAL LAW CRITERIA OF STATEHOOD & THE PROCESS OF RECOGNITION..... 17

A. PALESTINIAN’S STATEHOOD AND THE LEAGUE OF NATIONS MANDATE19

B. THE RELEVANCE OF RECENT CASE LAW.....27

C. REPRESSIVE AND DISCRIMINATORY BEHAVIORS OF THE STATE OF ISRAEL.....30

D. CONTEMPORARY INTERNATIONAL RELATIONS.....36

III. INTERESTS OF THE PARTIES 38

A. PALESTINIAN INTERESTS IN A TWO-STATE SOLUTION.....38

B. ISRAELI INTERESTS IN A TWO-STATE SOLUTION41

C. U.S. INTERESTS IN A TWO-STATE SOLUTION.....46

IV. THE ROAD MAP FOR SECURING THE RECOGNITION OF PALESTINIAN STATEHOOD 58

A. THE PA SHOULD ESTABLISH A FUNCTIONING GOVERNMENT EXPLICITLY BASED ON INTERNATIONAL LAW CRITERIA59

B. THE PA SHOULD PROMOTE “GOOD GOVERNANCE” BY ESTABLISHING THE PRECONDITIONS FOR A PARLIAMENT TO CREATE A CONSTITUENT ASSEMBLY AND TO DRAFT A NEW, SOVEREIGN CONSTITUTION.60

C. THE PLO SHOULD REAFFIRM THE 1988 DECLARATION OF INDEPENDENCE IN LIGHT OF THE CREATION OF A NEW GOVERNMENT AND A NEW CONSTITUTION.....60

D. THE PA SHOULD SECURE BILATERAL RECOGNITION OF THE NEW GOVERNMENT AND STATE WORLDWIDE.....60

E. THE PA SHOULD ENCOURAGE REGIONAL ORGANIZATIONS TO RECOGNIZE THE NEW GOVERNMENT AND STATE.....61

F. THE PA SHOULD SEEK TO SECURE A GA RESOLUTION RECOGNIZING THE DECLARATION OF INDEPENDENCE, THE CONSTITUTION, AND GOVERNMENT OF THE PALESTINIAN STATE.61

G. THE PA SHOULD SEEK TO SECURE SECURITY COUNCIL SUPPORT.....62

H. PA STRATEGY TO MOVE AROUND A U.S. VETO OF SECURITY COUNCIL RECOGNITION OF PALESTINIAN STATEHOOD AND SOVEREIGNTY UNDER INTERNATIONAL LAW.....63

V. CONCLUSION 64

INTRODUCTION

The recognition of Palestinian statehood has now become an important issue in the evolution of the conflict between the state of Israel and the Palestinian people. The issue has been made more interesting by decisions of the Canadian Supreme Court and the International Court of Justice (ICJ).² In particular this article refers to the judgment of the ICJ concerning the Unilateral Declaration of Independence of Kosovo³; this judgment adds insights to the prospect of a Palestinian claim to statehood and independence, from an international law perspective. More generally, 2010 culminated in the widespread perception that Israel's leaders seek to maintain the status quo indefinitely, leaving Palestinians as an occupied people which ostensibly secures Israeli interests.⁴ If true, such a position is contrary to Israel's international legal obligations and places Palestinian aspirations at heightened risk.⁵ As the Palestinians' representatives began seeking support for international recognition for the state of Palestine, Israel reached out to other countries—most significantly, the United States—to block such a move.⁶ In December 15, 2010 the United States Congress passed a resolution condemning acts by the Palestinians to seek unilateral (meaning without the permission of Israel) recognition of the state of Palestine.⁷ Recent developments in the Israeli-Palestinian conflict suggest that a clarification of international law standards regarding new states as well the issue of recognition of Palestinian statehood is ripe for analysis.

State recognition is widely perceived to be a political fact with legal consequences.⁸ In the real world context of state recognition, the legal aspect actually reflects the circumstances of the proto-state (including its political background), making the distinction between political fact and legal consequence less clear.⁹ Analyzing the prospects for any proto-state requires the serious consideration of international law processes—the clarification of which may guide the development of outcomes in particular cases. The contemplated transition in proto-Palestine is one such case.

There are many more international law issues than mere state recognition that are implicated in an effort to establish a sustainable solution to this longstanding conflict. The international law jurisdiction over the Israeli-Palestinian conflict is exceedingly complex.¹⁰ Frequently, there is a

² *International Law in Brief*, Developments in international law, prepared by the Attorney-Editors of International Legal Materials, The American Society of International Law (1998); See also Canuel, Edward, *Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence*, T 20 B. C. Int'l & Comp. L. Rev. 85 (1997)

³ *ICJ finds that Kosovo's Declaration of Independence not in Violation of International Law*, European Journal of International Law Blog (July 23, 2010)

⁴ *Israel and America; Obama in the middle*, The Economist: American Politics; Lexington's Notebook (May 25th 2011)

⁵ *Israel Must Meet International Obligations: Fayyad*, RAMALLAH, West Bank (Feb 11, 2009)

⁶ Mark Perry and Ali Abunimah, *The US role as Israel's enabler: The Palestine Papers*, Al Jazeera (26 Jan 2011)

⁷ *House Resolution Opposes Unilateral Declaration of Palestinian State*, 111th CONGRESS 2d Session, H. RES. 1765 Condemning the ongoing Palestinian rocket attacks on Israeli civilians, and for other purposes, December 15, 2010; On December 15, 2010, the United States House of Representatives passed by voice vote House Resolution 1765 opposing any efforts by the Palestinian Authority to unilaterally declare statehood or seek recognition outside of talks with Israel. The resolution calls for a negotiated settlement to the Israeli-Palestinian conflict and urges the Obama administration to lead the effort to persuade other nations to oppose a unilateral declaration or a Palestinian state and to affirm that the United States would not recognize such a state. The resolution was sponsored by Reps. Howard Berman (D-CA), Ted Poe (R-TX), Shelley Berkley (D-NV), Ileana Ros-Lehtinen (R-FL), Gary Ackerman (D-NY) and Dan Burton (R-IN).

⁸ Philip Marshall Brown, *The Effects of Recognition*, The American Journal of International Law, Vol. 36, No. 1, pp. 106-108 (Jan., 1942)

⁹ Coggins, Bridget L., *Secession, recognition & the international politics of statehood*, Ohio State University (2006)

¹⁰ See the *Faisal-Weizmann Agreement of January 3, 1919* and the *Declaration of Principles On Interim Self-Government Arrangements (Oslo Accords) of September 13, 1993*.

contest between apparently settled international law standards and the brute facts of either denial or noncompliance—a challenge to the role of international law for effectively providing appropriate normative guidance to the parties.¹¹ Moreover, the Israeli-Palestinian conflict is one that generates dynamism of facts. Since new facts are generated continuously, those facts redefine contextual reality and, as changed contexts emerge, the contextual background itself is redefined. This implies that new facts reshape the legal framework and the relevant discourse. Nevertheless, the complexity attending the normative salience of international law and the context of brute power relations can be unpacked through configurative legal analysis, which uses the legal process as a tool for clarifying problems (rather than narrowly demanding prescriptive outcomes). Using configurative analysis, this presentation envelopes the necessary contextual background within which the contestations of international law norms and the search for satisfactory conclusions are important.

International law functions not only by declaring the operative rules and principles that form its procedural and substantive background but also (as an epistemological tool) by reframing the search for relevant facts having important legal effects.¹² In the context of the Israeli-Palestinian conflict, both sides contest the contextual reality and, consequently, the urgency of addressing particular factual and legal issues. The unwillingness of the parties (through their constituted leadership) to confront legitimate issues of coexistence corresponds with a prevalent ambivalence toward legal norms that direct effective solutions. An appropriate approach to international law may permit us to better identify and understand problems that ultimately require solutions consistent with evolving legal and political reality.

This article focuses on one aspect of a complex context of claims and counterclaims by the Israeli and Palestinian peoples: the status of Palestinian claims to statehood under international law. These claims have been variously contested by the Israeli authorities as well as members of the international community. We aim to explore the precise legal and political grounds for these claims and contestations, in order to arrive at a contextual reality that will permit the Israelis and Palestinians to move forward in the process of arriving at a fair and settled agreement—a status which is necessary for individuals to begin to accept the status quo and build upon these foundations with activities that will enrich the region and the lives of its people.

From the onset, we wish to point out that we assign a positive value judgment to *both* perspectives; pro-Israel and pro-Palestine. From this perspective we have tried to provide as objective an appraisal of the claim of Palestinians to independence and statehood. We have tried to view this taking into account the interest of the most prominent stakeholders. We have come to the conclusion that the recognition of Palestinian statehood is in the common interest of all the parties and more generally of the world community. This article therefore, suggests appropriate international law strategies to expeditiously secure the international recognition of statehood for the Palestinian community.

The plan of this article is to provide the background facts important to the respective claims of both the Israelis and the Palestinians. In particular the Palestinian claim rest on the boundaries

¹¹ Hans Kelsen, *Principles of International Law*, 2d ed. (1967)

¹² *Id.*

recognized by the Security Council. Israeli claims, which are not clearly delineated, are probably influenced by the historical claim to Israeli boundaries reflected in the Eretz Israel idea. The article reviews Israeli statehood recognition and places the Palestinian issue in the context of the League of Nations Mandate System and the United Nations. The article traces the conflict following partition and reviews the issue of Palestinian statehood in terms of mandate expectations as well as contemporary expectations of international law. Guidance is sought from recent case law concerning the claims relating to Quebec and Kosovo. The article also reviews the problems of Israeli occupancy and its effect on Palestinian rights and international relations. The article also seeks to clarify, as objectively as possible, the United States national interests in an expeditious solution to the problem of the conflict between the Israelis and the Palestinians. On the basis of the policy clarifications of the respective interests we provide a provisional conclusion which favors the recognition of Palestinian self-determination, statehood, and sovereignty. The penultimate part of the article examines the interests of the Palestinians in the achievement of a two State solution to advance peace in the region. The article also seeks to clarify the possible Israeli interests in securing a two State solution to advance the settlement of problems in the region. Finally the last part of the article reviews the strategic options that the Palestinians might employ in seeking to advance the claims to sovereignty, self-determination and statehood.

I. BACKGROUND FACTS RELEVANT TO THE CLAIMS FOR PALESTINIAN STATEHOOD

A. THE LAND AND PEOPLE OF PALESTINE AND ERETZ ISRAEL

Prior to the British conquest and the assumption of the Palestine Mandate responsibilities, the territory was part of the Ottoman Empire; and that Empire (although multiethnic) incorporated territories and populations of the Middle East that were largely—from a cultural point of view—Arabic.¹³ Recent history of Palestine shows how Palestine had been under the control of various external forces, first subject to the force of invading conquerors and then the paternalistic caprice of colonial rule.¹⁴ The Palestinian territories prior to WWII were an international mandate under the authority of the League of Nations.¹⁵ Britain, which had conquered an occupied territory, displacing the Ottoman Empire, was the power granted the mandate to administer Palestine.¹⁶ This reflected the political reality that the conquerors could retain their conquests subject to a weak form of international concern under the League's mandate system. One of the obligations of the mandatory power was to secure the well-being and interests of the people under its control and authority. Making this international obligation more complex, Great Britain's Balfour Declaration (articulated in 1917 prior to the end of the war) asserted British sympathies for Zionist ambitions in the Palestinian territories for Jewish immigration and settlement.¹⁷ In this sense, the Declaration was probably not consistent with the mandatory obligations of a Class A Mandate. British practices,

¹³ Mim Kemal Oke, *The Ottoman Empire, Zionism and the Question of Palestine (1880-1908)*, International Journal of Middle East Studies, Vol 14, No. 3 pp. 329-341 (Aug., 1982)

¹⁴ Bethell, Nicholas, *The Palestine Triangle: the Struggle Between the British, the Jews and the Arabs, 1935-48*, London: Deutsch (1979)

¹⁵ League of Nations, *Articles of the Palestine Mandate* (July 24, 1922)

¹⁶ Stefan Brooks, *British Mandate for Palestine*, In Spencer C. Tucker *The Encyclopedia of the Arab-Israeli Conflict*. 3. Santa Barbara, California: ABC- CLIO. pp. 770 (2008)

¹⁷ Schneer, Jonathan. *The Balfour Declaration: The Origins of the Arab-Israeli Conflict*, Random House (2010)

which allowed significant Jewish immigration, had the consequence of creating a critical Jewish presence in Palestine which eventually shaped future events.¹⁸ What is most salient during this period of recent history is the lack of promotion of self-determination for the Palestinian residents by the UK.¹⁹

The defeat of the Ottoman Empire during the First World War meant that the conquering power had acquired temporary dominion over Palestine by conquest. The peace process created a new international institution, The League of Nations.²⁰ Under the Charter of the League a dispensation was made that the territories conquered by the conquerors would remain under the control subject to a legal regime called the League of Nations Mandate System.²¹ The conquerors could keep the conquests, but mandate obligations required them to administer these territories in the interest of the inhabitants.²² Palestine was a class A mandate.²³ This class A mandate would be somewhat distinctive in the sense that it contained a clause that was not expressed in Article 22 of the League Covenant. This clause involved the encouragement of Jewish immigration for the establishment of a natural home for the Jews who were a minority in Palestine.²⁴ There was an ostensible incompatibility between the British Balfour Declaration for promoting immigration to Palestine and the requirements of Article 22. According to Balfour;

“The contradiction between the letters of the Covenant and the policy of the allies is even more flagrant in the case of “independent nation” of Palestine than in that of “independent nation” of Syria. For in Palestine we do not propose to even go to the form of consulting the wishes of the present inhabitants of the country.”²⁵

Balfour was very explicit about the problem of the assuming mandate responsibility and the British commitment regarding Jewish immigration. In correspondence with Prime Minister Lloyd, George Balfour wrote in 1919 “the weak point of our position of course is that in the case of Palestine we deliberately and rightly declined to accept the principle of self-determination”.²⁶ He stressed that the position of Jews outside of Palestine was a matter of global importance and added that he believed that Jews had a historic claim to a home in their ancient land.²⁷ Thus, there was the mandate of Palestine administered by Great Britain which had incompatible objectives that were never clearly put on the table so as to rationally reconcile them with the precise terms of the mandate international obligations. The mandate’s central normative obligation was to exercise the mandate in the interest of local inhabitants.²⁸ There is abundant evidence that the constitutional

¹⁸ Avi Shlaim, *The Balfour Declaration And its Consequences*, in Wm. Roger Louis, ed., *Yet More Adventures with Britannia: Personalities, Politics and Culture in Britain*, London, I. B. Tauris, 2005, pp. 251-270

¹⁹ Edward W. Said, *The Politics of Dispossession: Struggle for Palestinian Self-determination, 1969-94* (1995)

²⁰ Northedge, FS., *The League of Nations: Its Life and Times, 1920-1946*. New York: Holmes & Meier (1986)

²¹ Matz, N., *Civilization and the Mandate System under the League of Nations as Origin of Trusteeship*, Max Planck Yearbook of United Nations Law, Volume 9, 2005, p. 47-95; See also Anghie, Antony, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34(3) New York University Journal of International Law and Politics 513 (2002)

²² *Id.*

²³ Eli E. Hertz, *Mandate for Palestine; The Legal Aspects of Jewish Rights* (2005)

²⁴ Mark Rosenblit, *International Law and the Jewish People’s Collective Rights of Settlement and Self-Determination in the Land of Israel* (2006)

²⁵ John Quigley *Statehood of Palestine – International Law in the Middle East Content, Page 75* (2010)

²⁶ Archibald Paton Thornton, *Imperialism in the twentieth century*, University of Minnesota Press, P. 123 (1977); See also Isaiah Friedman, *The question of Palestine: British-Jewish-Arab relations, 1914-1918*, Second Expanded Edition, Transaction Publishers, P.325 (1992)

²⁷ *Id.*

²⁸ Hertz, *Supra*

position of Palestine was as a proto state.²⁹ In short Britain, the mandatory power, was never recognized as exercising sovereign authority over Palestine. There is a strong view among *juris consults* that the locus of authority in ‘Class A’ mandate Territories was vested in the population of the territories themselves.³⁰ Indeed for a multitude of purposes Palestine was viewed as a State. Indeed a Permanent Court of International Justice in the Mavrommatis Palestine Concession’s Case³¹ clearly regarded Palestine as a State.³²

The general conclusions that we might draw from the British administered Palestinian Mandate is that unlike the mandates in Syria and Iraq there was no progression of indigenous self determination to statehood.³³ However there is considerable consensus in scholarship and practice that Palestine was a proto state and that its latent sovereignty was rooted in the Palestinian inhabitants of the territory.³⁴ Attributes of sovereignty were residing in the body politic and the Mandate administration.³⁵ The fact that statehood was not achieved for the Palestinians could be found in the Great Britain’s commitment to the Balfour Declaration for the creation of a homeland for the Jewish Diaspora which would occupy the boundaries of the ancient state of Israel. The United Kingdom was therefore in a profound decisional dilemma; fulfilling the mandate obligations repudiated by Balfour and realizing that Balfour declaration promises repudiated the mandate. This was a dilemma that has not been resolved yet. Perhaps the British foreign office had a version of “Foggy Bottom”³⁶, considered that it could simply muddle along in the hope that its convenient conclusion might somehow present itself.

B. THE RECOGNITION OF THE STATE OF ISRAEL

When Britain, the mandatory power, requested in 1947 that the United Nations consider the future dispensation for the territory defined within the Palestinian Mandate, the U.N. General Assembly created a special committee to investigate the international legal status of the Palestinian territory.³⁷ The committee determined that the British Mandate should be terminated and that independence should be granted to Palestine at the earliest possible time.³⁸ Despite the recommendation of “independence,” the Committee stipulated that the relinquishment of the territory to its populations – a majority of the committee was committed to a partitioned Palestine

²⁹ Quigley, P. 75

³⁰ Yoram Rabin & Roy Peled, *Transfer of Sovereignty over Populated Territories from Israel to a Palestinian State: The International Law Perspective*, 17 MINN. J. INT’L L. 59 (2008)

³¹ Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30) (1924)

³² Quigley, P. 75

³³ Primeau, Tomas Hopkins, and Corntassel, Jeff, *Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"*, Human Rights Quarterly - Volume 17, Number 2, pp. 343-365 (May 1995)

³⁴ *The International Status of the Palestinian People*, Prepared for, and under the guidance the Committee on the Exercise of the Inalienable Rights of the Palestinian People, UNITED NATIONS, New York (1981)

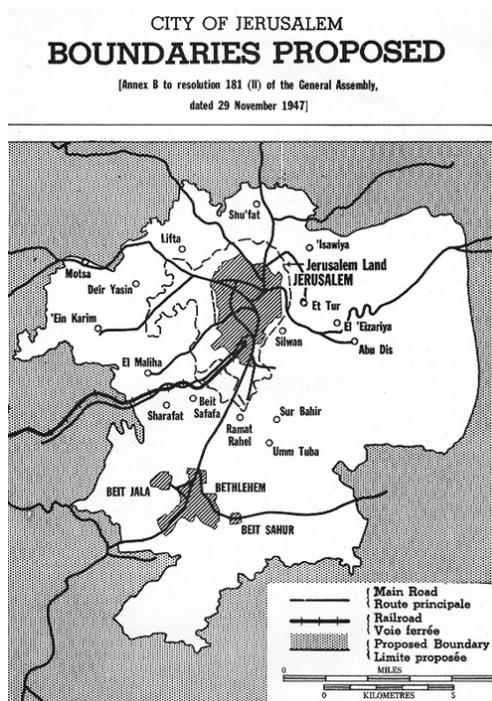
³⁵ *Id.*

³⁶ Terms of derision normally applied to the US Department of State which manages US foreign policy.

³⁷ *United Nations General Assembly Resolution 106*, (May 15, 1947); The problems facing the General Assembly in connection with the commission of inquiry centered on its composition, the scope of its investigation and the role of the Great Powers. While the United States wanted to exclude the Great Powers, the Soviet Union argued for their inclusion. The Soviet delegate, Andrei Gromyko, asked that the commission consider immediate independence for Palestine. On 15 May 1947, the Assembly resolved to create an 11-nation committee on Palestine (UNSCOP). The Resolution was adopted by 47 in favour, 7 against (Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Afghanistan and Turkey) and one abstention (Thailand).

³⁸ *Id.*

with a Jewish state and an Arab state – was nevertheless to be linked in an economic association.³⁹ The status of Jerusalem, it was recommended, should be a separate entity under international supervision.⁴⁰ The U.N. General Assembly, after lengthy debate, decided (with more than 2/3 of a majority) to accept the partition recommendations. The U.N. General Assembly decision came in the form of UNGA Resolution 181, November 1947.⁴¹ Of particular importance is paragraph 3 of Resolution 181, which provides: “Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948. The boundaries of the Arab State, the Jewish State, and the City of Jerusalem shall be as described in Parts II and III below.”⁴²



³⁹ UN Special Committee on Palestine; Recommendations to the General Assembly, September 3, 1947. In the summer of 1947 UNSCOP traveled to Palestine and held hearings in Jerusalem. The Palestine Arabs boycotted it. After completing its work in Palestine, the Committee drew up its recommendations in Geneva. The majority report recommended the partition of Palestine into Arab and Jewish States and an international regime for Jerusalem, all three linked in an Economic Union. The minority report recommended the creation of a federal unitary State, with Jerusalem as its capital. Chapters V, VI, VII and VIII follow.

⁴⁰ *Id.*

⁴¹ UNGA Resolution, No. 181(II) of 29 Nov 1947; United Nations General Assembly Resolution 181 called for the partition of the British-ruled Palestine Mandate into a Jewish state and an Arab state. It was approved on November 29, 1947 with 33 votes in favor, 13 against, 10 abstentions and one absent (see list at end of document). The resolution was accepted by the Jews in Palestine, yet rejected by the Arabs in Palestine and the Arab states.

⁴² UNGA Resolution, No. 181(11) of 29 Nov 1947; Plan of Partition with Economic Union, Part 1: Future Constitution and Government of Palestine; (A) Termination of Mandate, Partition and Independence; Paragraph 3.

Of particular interest are the terms indicating that two states “shall” come into existence after the termination of the Mandate.⁴³ This seems to suggest that, by decision of the UN General Assembly, there is a legal expectation that the two communities within the territorial space of Palestine shall, according to the boundaries delimitations of partition, establish sovereign states under the authority of the UN Charter. This is probably an unusual approach to either the creation or recognition of an entity with sovereign status under international law.⁴⁴ The conventional approach would start with a community acting as a people and with discernable leadership and representation expressing a claim to self-determination and independence.⁴⁵ This claim may then be further supported by facts relating to the expression of territorial control, or some dimensions thereof, as well as organized political authority sufficient to give coherence to the claim for self-determination and independence.⁴⁶ This claim would be followed by a degree of structured organization of the authority components of the claimants so that the elements of basic governance within such a context are discernable.⁴⁷ Sometimes such an internally-created entity will initiate the development of a future transitional or tentative framework of constitutional governance which would be the factual precondition that should result in a declaration of independent statehood.⁴⁸

In a sense, Resolution 181 seems to have influenced the Jewish community in the partitioned part of Palestine to declare on May 14, 1948 the existence of the state of Israel.⁴⁹ This declaration was followed by other sovereign states bilaterally recognizing the state of Israel as a sovereign nation-state.⁵⁰ This indicates that the declaration not only met certain factual preconditions but also that those preconditions proceeded from the expectation in Resolution 181 that each community would establish the preconditions for a declaration of statehood. In this sense, the Israeli declaration was preceded by the GA decision, established the territorial contours of the state of Israel in terms of the partition resolution. Moreover, the Resolution gave a quasi-judicial imprimatur that the international community expected that communities within the partitioned territories to seize the opportunity for declaring statehood. It therefore would seem to be rare that the creation of a state and its declaration by its people is preceded by a legal fact creating some factual conditions and suggesting that there is an expectation that, from these factual conditions, the community will seize upon the legal “green light” of statehood. Usually, it is the entity having established core minimum facts on the ground regarding a claim to statehood that now will seek recognition from an organization like the UN that it is entitled to recognition as a sovereign state.⁵¹

C. PALESTINE MANDATE AND UN SYSTEM

⁴³ *Id.*

⁴⁴ James Crawford, *The creation of states in international law* (2006)

⁴⁵ *Montevideo Convention on the Rights and Duties of States*, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (1933)

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Bardo Fassbender, *The United Nations Charter As Constitution of The International Community*, 36 Colum. J. Transnat'l L. 529 (1998)

⁴⁹ *The Declaration Of The Establishment Of The State Of Israel* (May 14, 1948); On May 14, 1948, on the day in which the British Mandate over a Palestine expired, the Jewish People's Council gathered at the Tel Aviv Museum, and approved a proclamation declaring the establishment of the State of Israel. The new state was recognized that night by the United States and three days later by the USSR.

⁵⁰ *Id.*

⁵¹ Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 Colum. J. Transnat'l L. 403 (1998-1999)

By 1948, Britain had had enough of the internal unrest and acts of terrorism directed at British forces by Zionist militias in Palestine and therefore ceded to the United Nations the mandate and attendant responsibilities.⁵² Within the United Nations, a resolution was generated in which it provided for a partition of Palestine for the establishment of a Jewish state (57% of the land) and for an Arab state (43% of the land).⁵³ U.N. General Assembly resolutions are, in general, not legally binding, although they suggest that they are (as a matter of good faith) politically binding.⁵⁴ In any event, it was the expectation of the target audience that the partition lines constituted a legally binding definition of respective territorial claims. In addition, the Resolution does not declare the existence of two states. Rather, it declares that the territorial partition is expected to constitute the boundaries of a Jewish and Arab state, subject to further conditions. This critical junction theoretically permitted the removal of the colonial power and ostensibly transferred control to the U.N., which sanctioned the occupancy of Palestinian territories by growing numbers of Jewish immigrants.⁵⁵

To a large extent, the new Jewish settlers were refugees from elsewhere⁵⁶; but the Jewish settlers also staked their claim to Palestinian lands based on a “right of return” to what is considered by many Jews their biblical and historical birthright.⁵⁷ For the resident Palestinians, it was overwhelming and threatening to see such an influx of outsiders claiming the best pieces of land and having no control over the immigration, taxation, and property policies, which gave preference to the Jewish settlers. More challenging to the indigenous Palestinian population, perhaps, may have been the claim that these settlers, many of whom had never set foot in Palestine, claimed a superior heritage to the land.⁵⁸ Nevertheless, Jewish culture—shaped in many ways by the exile from Palestine and the recurring experiences of extreme marginality and persecution from majority cultures everywhere—solidified around the identity of a community united in the Diaspora and destined to return.⁵⁹ Arguably, it was this strength of identity—tied to a geographic location—that permitted the Jewish settlers to assert and achieve independent statehood after the Partition in 1948, when the Palestinian residents could not.

The Partition Resolution prescribed the creation of two states, each guaranteeing certain (new) standards of normative state behavior; but the Partition Resolution was only partially carried out.⁶⁰ The partition claim requires each community to create a constituent assembly of each “state”

⁵² *A Summary of Zionist Terrorism in the Near East — 1944-1948*; Prepared for Dr. Ralph J. Bunche, UN Mediator for Palestine, The French Connection New York (October 1, 1948)

⁵³ UNGA Resolution no.181 (11) approved in Lake Success N.Y. in November 29, 1947 with 33 votes in favor, 13 against, 10 abstentions and one absent.

⁵⁴ Dakas C.J. Dakas, *The Juridical Character of United Nations General Assembly Resolutions on Permanent Sovereignty over Natural Wealth and Resources* (1996)

⁵⁵ Victor Kattan, *The Palestine Question in International Law*, ed., British Inst. Comp. & Int'l L. 2008; See also Rashid Khalidi, *International Law and Legitimacy and the Palestine Question*, 30 HASTINGS INT'L & COMP. L. REV. 174 (2006-2007)

⁵⁶ *Ten Countries Reply to the U.N. on Jewish Immigration into Palestine*, Press Release PAL/39, United Nations Department of Public Information Press and Publications Bureau; Lake Success, New York (19 June 1947)

⁵⁷ Masalha, N., *The Bible and Zionism; Invented Traditions, Archeology and Post-Colonialism in Israel-Palestine*, Vol. I (2007); See also Nils A. Butenschon, *Accommodating Conflicting Claims to National Self-Determination, the Intractable Case of Israel/ Palestine*, 13 Int'l J. on Minority & Group Rts. 285 (2006)

⁵⁸ Kathryn Westcott, *Settlers: Claiming the 'Promised Land'*, BBC News (18 February, 2003)

⁵⁹ Safran, William, *The Jewish Diaspora in a Comparative and Theoretical Perspective*, Israel Studies - Volume 10, Number 1, pp. 36-60 (Spring 2005)

⁶⁰ Ron Wilkinson, *Resolution 181: A state for some, occupation for others*, Al-Jazeera, BADIL (November 27, 2004)

for the purpose of drafting “a democratic constitution for its state.”⁶¹ Such a drafting would be guided by an international mandate “guaranteeing all persons equal and nondiscriminatory rights in civil, political, economic, and religious matters, and the enjoyment of human rights and fundamental freedoms, including the freedom of religion, language, speech, and publication, education, assembly, and association.”⁶² Israel was recognized as a state with the promise that a formal constitution would be adopted no later than October 1, 1948.⁶³ However, the plan of drafting a comprehensive written constitution for the State of Israel, consistent with the expectations of Resolution 181, was never realized.⁶⁴ In fact, the state of Israel is officially a Jewish state, and it has no constitution.⁶⁵ Although there was a declaration of the establishment of the state of Israel, which announced that the new state “will uphold the full social and political equality of all its citizens without distinction of religion, race, or sex...,”⁶⁶ this declaration was not passed by the Knesset and therefore has no legal efficacy within Israel.⁶⁷ Only one state was created (although it failed to adhere to the prescribed state behavior required of the Partition Resolution); and one state failed to be born.

D. CONFLICT FOLLOWING THE PARTITION RESOLUTION

Armed conflict broke out between the newly born Jewish state and surrounding Arab states.⁶⁸ To the historians of Israel, the resulting conflict became the War of Independence.⁶⁹ To the Palestinians’ historians these events were catastrophic and the term “Nakba”⁷⁰ symbolized them.⁷¹ Since the Israelis thought that the Arab initiation of conflict was, in effect, a violation of international law, and since they repelled Arab attacks and occupied territories beyond the partition line⁷², the question that emerged was—since the Israelis considered themselves to be victims, and

⁶¹ UNGA Resolution, No. 181(II) of 29 Nov 1947; Plan of Partition with Economic Union, Part 1: Future Constitution and Government of Palestine; (B) Steps Preparatory to Independence

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Justice Dalia Dorner, *Does Israel Have a Constitution?*, 43 St. Louis L.J. 1325 (Fall, 1999)

⁶⁵ Dafnah Sharfman, *Living without a constitution: civil rights in Israel* (1993)

⁶⁶ *Declaration of the Establishment of the State of Israel* (May 14, 1948)

⁶⁷ Gavison, Ruth, *Legislatures and the Quest for a Constitution: The Case of Israel*, 11 Rev. Const. Stud. 345 (2005-2006)

⁶⁸ James L. Gelvin, *The Israel-Palestine conflict: one hundred years of war*, Cambridge University Press (2005)

⁶⁹ Chaim Herzog, Shlomo Gazit, *The Arab-Israeli wars: war and peace in the Middle East from the 1948 War of Independence to the present*, Random House Digital, Inc. (2005)

⁷⁰ Ahmad H. Sa'di, Lila Abu-Lughod, *Nakba: Palestine, 1948, and the claims of memory*, Columbia University Press, p. 5-9 (2007) – “The Nakba is often reckoned as the beginning of contemporary Palestinian history, a history of catastrophic changes, violent suppression and refusal to disappear.”; See also David W. Lesch, Benjamin Frankel, *History in Dispute: The Middle East since 1945*, (Illustrated ed.). St. James Press. p. 102 (2004); “The Palestinian recalled their “Nakba Day”, their “catastrophe” — the displacement that accompanied the creation of the State of Israel — in 1948.”

⁷¹ Ronit Lentin, *The contested memory of dispossession: Commemorizing the Palestinian Nakba in Israel*, Thinking Palestine, London, Zed Books (2008)

⁷² Blum, Yehuda Z., *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 Isr. L. Rev. 286, p.286 (1968); The Arab States’ reliance on chapter VIII of the U.N. Charter to justify their armed intervention in Palestine was shown by the United States delegate to be devoid of any legal merit. Senator Austin stated that

“[t]heir statements are the best evidence we have of the international character of their aggression... They tell us quite frankly that their business is political... Of course, the statement that they are there to make peace is rather remarkable in view of the fact that they are waging war. We find that this is characterized on the part of King Abdullah by a certain contumacy towards the United Nations and the Security Council. He has sent us an answer to our questions addressed to him as a ruler who is occupying land outside his domain by the Security Council, a body which is recognized in the world to ask these questions of him... The contumacy of that reply to the Security Council is the very best evidence of the illegal purpose of his government in invading Palestine with armed forces and conducting the war which it is waging there. It is against the peace. It is not on behalf of peace.

since they were somewhat victorious⁷³, there was a feeling that the victim was entitled to the spoils (including ground gains in territory) from the conflict. Unfortunately, modern international law is not as generous regarding the acquisition of territory through the use of force.⁷⁴ Thus, there was (and remains) a concern about the extension of Israeli sovereignty beyond its lawfully declared partition borders.⁷⁵ These new borders were somewhat stabilized by the Armistice Agreements between Israel and the Arab states, which agreements were founded on the military status quo.⁷⁶ A principle of realism seemed to influence the international appraisal of Israel's new borders, which were shaped by the Armistice Agreements. The United States' delegation to the UN was instructed to support Israel's request to keep the Negev.⁷⁷ The US considered that, practically, the Israeli borders were now a non-issue.

Since 1948, there was the Suez invasion of 1956, the Six-Day War of 1967, the October War of 1973, Israel's invasion of Lebanon in 1982, and the most recent War in Lebanon in 2006, and "Operation Cast Lead" in Gaza during winter of 2008-2009.⁷⁸ It was after the 1964 Six-Day War that a number of Palestinian organizations joined together to form the PLO⁷⁹ (Palestine Liberation Organization). The Palestinian Covenant stipulated that: (1) Israel should be removed from its role as occupier of the West Bank and Gaza, (2) a Palestinian state is to be established in the West Bank and Gaza, and (3) the state of Israel is to be dismantled.⁸⁰ Clearly, this final point hardened the resolve of the Israeli policy makers to strengthen its occupancy of the West Bank and Gaza.⁸¹ In any event the occupancy of Palestine left no doubt that Israel envisioned an indefinite occupation regime. This policy was supported by the full might of the IDF (Israeli Defense Forces).⁸² This compelled the PLO to look to other strategies to advance its objectives.⁸³ It sought to secure for its cause and its people a maximum amount of diplomatic recognition. It stressed that the foundations of Palestinian claims to statehood were founded on the principle of self-determination, to which there was substantial commitment internationally.⁸⁴ For example, Art. 1(2) of the Charter expresses

It is an invasion with a definite purpose... Therefore, here we have the highest type of international violation of the law. The admission by those who are committing this violation."

⁷³ Bar-Tal, Daniel, *Societal Beliefs in Times of Intractable Conflict*, International Journal of Conflict Management, Vol. 9 Issue 1, p22-50; , 29p (Jan1998)

⁷⁴ Henry J. Steiner, et al, *International Human Rights in Context*, Oxford Univ. Press (2007)

⁷⁵ Joseph N. Cleary, *Literature, partition and the nation-state: culture and conflict in Ireland, Israel and Palestine*, Cambridge University Press (2002)

⁷⁶ Ehud Yaari, *Armistice Now: An Interim Agreement for Israel and Palestine*, 89 Foreign Aff. 50 (2010)

⁷⁷ Steven L. Spiegel, *The Other Arab-Israeli Conflict: Making America's Middle East Policy, from Truman to Reagan*, University of Chicago Press (1986)

⁷⁸ *Rulers of Palestine: Chronology Factsheet*, Sadaka; The Ireland Palestine Alliance (2009)

⁷⁹ Some historians including the Israeli historian Ilan Pappé hold that the war was more than simply a matter of Israeli independence, a specific strategy existed to drive out the indigenous Palestinian population, seize their land, and create the conditions for a Jewish majority state. See *The Ethnic Cleansing of Palestine* (2006), *The Modern Middle East* (2005), *A History of Modern Palestine: One Land, Two Peoples* (2003), and *Britain and the Arab-Israeli Conflict*, London: Vallentine, Mitchell (1988)

⁸⁰ Y Harkabi, *Palestinian covenant and its meaning* (1979)

⁸¹ Graham Usher, *Closures, Cantons and the Palestinian Covenant*, Middle East Research and Information Project, MER199 (April 24, 1996)

⁸² John J. Mearsheimer & Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy*, Middle East Policy, Volume 13, Issue 3, pages 29–87, September 2006

⁸³ Yodfat, Aryeh, et al., *PLO Strategy and Tactics*, St. Martin's Press (1981)

⁸⁴ Maria J. Stephan, *Fighting for Statehood: The Role of Civilian-Based Resistance in the East Timorese, Palestinian, and Kosovo Albanian Self-Determination Movements*, 30 Fletcher F. World Aff. 57 (2006)

the idea of respect for the principle of self-determination of peoples.⁸⁵ The principle is reiterated in Art. 55.⁸⁶ Two significant conventions—the ICCPR⁸⁷ and the ICESCR⁸⁸—“all people have rights to self-determination. By virtue of that right, they freely pursue their cultural status and freely pursue their economic, political, and cultural development.” The U.N. Declaration on Friendly Relations also affirms the principle of self-determination of peoples and stipulates that every state has a duty to respect this right in accordance with the provisions of the Charter.⁸⁹ Also in 1993, the World Conference on Human Rights adopted the Vienna Declaration and Program of Action.⁹⁰ This document stresses its affirmation of the right of self-determination of all peoples. The Helsinki Final Act stresses as well the salience of the right to self-determination.⁹¹

The PLO also secured recognition of its role as representative of the Palestinian people in their quest for self-determination.⁹² Recognition was given by the Arab League and the majority of UN Members.⁹³ This process has resulted in over 100 states recognizing the PLO.⁹⁴ Over 60 states provide the PLO with full diplomatic status.⁹⁵ 50 states recognize the PLO but have not authorized the establishment of PLO embassies.⁹⁶ States also permit PLO offices to function under the name of the Arab League.⁹⁷ These developments do not indicate the existence of a Palestinian state or government in exile. It focused on the PLO as the sole representative of Palestinian self-determination rights.⁹⁸ As early as 1969, the UNGA began adopting Resolutions that recognized the

⁸⁵ United Nations Charter; signed at the San Francisco War Memorial and Performing Arts Center in San Francisco, United States, on 26 June 1945. Chapter I, Article 2 - To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

⁸⁶ United Nations Charter, Chapter IX – With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

⁸⁷ *International Covenant on Civil and Political Rights, Part I Article I*; Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49

⁸⁸ *International Covenant on Economic, Social and Cultural Rights, Part I Article I*; Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27

⁸⁹ General Assembly Resolution 2625, Session XXV of 24 October 1970; Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations; 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. No. 28 at 121, 65 Am.J.Int'l L. 243. *Supra*

⁹⁰ *Vienna Declaration and Programme of Action; World Conference on Human Rights*, Vienna, 14-25 June; 1993 Distr. GENERAL, A/CONF.157/23, 12 July 1993.

⁹¹ *Conference on Security and Cooperation in Europe; Final Act, Helsinki* (1 August 1975)

⁹² Madiha Rashid al Madfai, *Jordan, the United States and the Middle East Peace Process, 1974-1991*, Cambridge Middle East Library, Cambridge University Press p. 21 (1993): "On 28 October 1974, the seventh Arab summit conference held in Rabat designated the PLO as the sole legitimate representative of the Palestinian people and reaffirmed their right to establish an independent state of urgency."

⁹³ Silverburg, Sanford R., *The Palestine Liberation Organization in the United Nations: Implications for International Law and Relations*, 12 Isr. L. Rev. 365 (1977)

⁹⁴ *Recognizing the Palestinian State on the 1967 border & Admission of Palestine as a Full Member of the United Nations*, PLO Negotiations Office (JULY 2011) Up to this moment 122 UN Member States recognized Palestine; See also Santiago González Vallejo, *Recognition of the State of Palestine and the hypocrisy*, Committee in Solidarity with the Arab Cause (2011); See also Stephen D. Krasner, *Problematic sovereignty: contested rules and political possibilities* (2001)

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Cassese, Antonio, *The Israel-PLO Agreement and Self-Determination*, 4 Eur. J. Int'l L. 564 (1993)

Palestinian right to self-determination as well as the recognition of the PLO as the representative of the Palestinian people.⁹⁹ The PLO secured an invitation to participate in UN deliberations and conferences organized under the authority of the GA as well as the Security Council.¹⁰⁰ The PLO has had observer status at the UN.¹⁰¹ Israel, however, has resisted the idea of “creeping” recognition of Palestinian institutions¹⁰² because they suggest a “creeping” validation of their claims.¹⁰³

Two of the critical decisions of the UN Security Council concerning the Palestinian-Israeli conflict are Resolution 242 (22 November 1967)¹⁰⁴ and Resolution 338 (22 October 1973)¹⁰⁵. Resolution 242 recognizes the inadmissibility of the acquisition of territory by war.¹⁰⁶ Thus, the Resolution stipulates that a form of “creeping” annexation of the West Bank and Gaza is effectually a violation of Resolution 242 and general international law.¹⁰⁷ The Resolution also stipulates that the Charter requires a “just and lasting peace,” which includes some of the following principles: (1) the Israeli armed forces withdraw from occupied territories¹⁰⁸; (2) an end to the claim of belligerency¹⁰⁹; and (3) a respect for the sovereignty, territorial integrity, and political independence of all states in the area¹¹⁰. The Resolution also stipulates that freedom of navigation in international waters be respected, refers to a just settlement of the refugee problem and to the territorial inviolability and political independence of every State through the establishment of demilitarized zones.¹¹¹ In

⁹⁹ *The Right of Self-determination of the Palestinian People; Prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, United Nations, New York (1979); See also Stephen Bowen, *Human rights, self-determination and political change in the occupied Palestinian territories*, Martinus Nijhoff Publishers (1997)

¹⁰⁰ *Invitation to the Palestine Liberation Organization to Participate in the Efforts for Peace in the Middle East*, United Nations General Assembly Resolution 3375, 2399th Plenary Meeting (November 10, 1975)

¹⁰¹ *Observer status for the Palestine Liberation Organization*, A/RES/3237 (XXIX) (22 November 1974)

¹⁰² Denis J. Sullivan, *NGOs in Palestine: Agents of Development and Foundation of Civil Society*, *Journal of Palestine Studies*, Vol. 25, No. 3, pp. 93-100 (Spring 1996)

¹⁰³ By “creeping” we mean incremental steps toward international recognition. For example they had multilateral and bilateral degrees of diplomatic recognition. See Wasim I. Al-Habil, *Occupations, Diaspora, and the Design of Local Governments for a Palestinian State (Dissertation)*, Al-Aqsa University (Palestine) (July, 1996)

¹⁰⁴ United Nations Security Council Resolution 242 (S/RES/242) (November 22, 1967): Following the June '67, Six-Day War, the situation in the Middle East was discussed by the UN General Assembly, which referred the issue to the Security Council. After lengthy discussion, a final draft for a Security Council resolution was presented by the British Ambassador, Lord Caradon, on November 22, 1967. It was adopted on the same day. This resolution, numbered 242, established provisions and principles which, it was hoped, would lead to a solution of the conflict. Resolution 242 was to become the cornerstone of Middle East diplomatic efforts in the coming decades. *Israel Ministry of Foreign Affairs*.

¹⁰⁵ United Nations Security Council Resolution 338 (S/RES/338) (1973); In the later stages of the Yom Kippur War -- after Israel repulsed the Syrian attack on the Golan Heights and established a bridgehead on the Egyptian side of the Suez Canal -- international efforts to stop the fighting were intensified. US Secretary of State Kissinger flew to Moscow on October 20, and, together with the Soviet Government, the US proposed a cease-fire resolution in the UN Security Council. The Council met on 21 October at the urgent request of both the US and the USSR, and by 14 votes to none, adopted the resolution on October 22, 1973.

¹⁰⁶ United Nations Security Council Resolution 242 of November 22, 1967 (S/RES/242) Second paragraph; “Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security...”

¹⁰⁷ Ninth emergency special session; General Assembly Provisional Verbatim Record of the Tenth Meeting. Held at Headquarters 9 New York, on Thursday, 4 February 1982 at 3 p.m., A/ES-9/PV.10 (4 February 1982)

¹⁰⁸ United Nations Security Council Resolution 242 of November 22, 1967 (S/RES/242) 1(i); Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;

¹⁰⁹ United Nations Security Council Resolution 242 of November 22, 1967 (S/RES/242) 1(ii);

(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

¹¹⁰ *Id.*

¹¹¹ United Nations Security Council Resolution 242 of November 22, 1967 (S/RES/242) 2(a)(b)(c); Affirms further the necessity

Resolution 338, the Security Council called upon all relevant parties to implement Security Council Resolution 242 after a cease-fire.¹¹²

These Resolutions imply that the right to self-determination implicates rights that accrue at a minimum to a de facto state, regarding claims to sovereignty, territorial integrity, and independence. It therefore calls for an end to Israeli occupation. The United States, which has been a strong supporter of Israel,¹¹³ has been reluctant to recognize Palestinian identity in the international environment.¹¹⁴ This has been done pursuant to the Sinai Agreement of 4 September 1975.¹¹⁵ In this Agreement, the US pledged to not negotiate with the PLO or to recognize it so long as it refuses to recognize the right of Israel to exist and so long as the PLO refuses to accept Resolutions 242 and 338. Additionally, US Congress added a further element of the US commitment—namely, that the PLO must renounce terrorism.¹¹⁶ In short, the US position was that, once the PLO publically accepted these Resolutions, recognized Israel as a sovereign state, was prepared to negotiate peace with Israel, and renounced terrorism, the US would have a certain degree of negotiating flexibility with the PLO. When President Jimmy Carter became President in 1977 he launched a significant initiative on the part of the United States to secure a permanent settlement. These initiatives culminated in the Camp David Accords.¹¹⁷ The Accords generated two critical frameworks; a Framework for Peace in the Middle East, which dealt with the status of the Palestinian rights, and the second, a Framework for the Conclusion of a Peace Treaty between Egypt and Israel. The first framework agreement was founded on the stipulations in Security Council Resolutions 242 and 338.¹¹⁸ This carried the following binding consequence for the parties; the United States, which had supported these resolutions in the Security Council, now explicitly endorse them as a foundation for the first framework agreement of the Camp David Accords. In effect the Security Council resolutions became a cornerstone of official U.S. foreign policy. Since Israel signed onto these Accords it also in good faith expressed its endorsement of the same Security Council resolutions. Egypt and the Palestinian representatives gave a similar endorsement to these Resolutions. While progress was made, which resulted in the Peace Treaty between Egypt and Israel in 1979, a little progress was made on the first framework agreement of the Accords. However, Camp David

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- (a) For guaranteeing freedom of navigation through international waterways in the area;
 - (b) For achieving a just settlement of the refugee problem;
 - (c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

¹¹² United Nations Security Council Resolution 338 (S/RES/338) (1973); The Security Council,

- (1) Calls upon all parties to present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions after the moment of the adoption of this decision, in the positions they now occupy;
- (2) Calls upon all parties concerned to start immediately after the cease-fire the implementation of Security Council Resolution 242 (1967) in all of its parts;
- (3) Decides that, immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

¹¹³ Carol Migdalovitz, *Israel: Background and Relations with the United States*, Congr. Research Serv., RL33476, (2009)

¹¹⁴ Jim Zanotti, *The Palestinians: Background and U.S. Relations*, Congr. Research Serv., RL34074 (2010)

¹¹⁵ *Interim Agreement between Israel and Egypt* (September 4, 1975)

¹¹⁶ Clyde, M., *Palestinians and Middle East Peace: Issues for the United States*, CRS Issue Brief for Congress; Foreign Affairs, Defense, and Trade Division, Congressional Research Service ~ The Library of Congress; Order Code IB92052 Updated April 26, 2005

¹¹⁷ *A Framework for Peace in the Middle East, Camp David Accords*, September 17, 1978; See also Shibley Telhami, *Power and Leadership in International Bargaining: The Path to the Camp David Accords*, Columbia University Press (1992)

¹¹⁸ *Id.*

established that both Israel and the United States were clearly committed to respecting the international law principles established in these resolutions.

Subsequent U.S. practice has tended to retreat from the Carter breakthrough at Camp David. For example it may be noted that the US also refused to recognize Palestinian claims to self-determination because it would lead to the creation of a separate state.¹¹⁹ In 1984, Congress codified the provisions of Resolution 242 into law, adding as a new condition that the PLO must renounce terrorism. In November 1988, the PLO, issued a declaration of independence proclaiming “the establishment of the state of Palestine, in the land of Palestine, with its capital in Jerusalem.”¹²⁰ The implicitly recognized Israel’s right to exist.¹²¹ Later, Arafat (representing the PLO) through a Palestinian communiqué explicitly accepted Israel’s right to exist, accepted UN Resolutions 242 & 338, and renounced all forms of terrorism.¹²² After a series of PLO statements and clarifications, the U.S. Administration said on December 14, 1988, that PLO head Yasir Arafat had met the U.S. conditions for a dialogue. Secretary Shultz authorized Robert Pelletreau, U.S. Ambassador to Tunisia, as the sole channel for the dialogue but the dialogue was suspended by the George H.W. Bush Administration on June 20, 1990, after Arafat refused to condemn in unequivocal terms a thwarted seaborne terrorist attack against Israel. In the meanwhile, as Palestinians sought recognition before UNESCO and the WHO, President Bush declared that any UN agency recognizing the PLO would face a threat of a cut-off of US funding.¹²³ On September 10, 1993, the same day that Israel and the PLO exchanged letters of mutual recognition, the United States announced a resumption of the U.S.-PLO dialogue.¹²⁴

The Oslo Accords, formally designated as the Declaration of Principles on Interim Self-Government Arrangements [for the Palestinians], were secretly negotiated in Oslo, Norway, hosted by the Fafo institute, and completed on 20 August 1993. They were publicly signed in Washington, DC on 13 September 1993, in the presence of PLO chairman Yasser Arafat, Israeli Prime Minister Yitzhak Rabin and US President Bill Clinton.¹²⁵ The Accords initially generated promising understandings that a peaceful settlement was achievable by providing a framework for the future relations between the two parties, for the creation of a Palestinian National Authority (PNA) and for the withdrawal of the Israel Defense Forces (IDF) from parts of the Gaza Strip and West Bank.¹²⁶ The principal understanding that emerged from this process was the creation of a Palestinian National Authority (PNA), which would administer the territory under its control, the withdrawal of Israeli defense forces from the West Bank and parts of Gaza Strip.¹²⁷ This arrangement was envisioned to last for 5 years, with the understanding that further negotiations would be covering

¹¹⁹ Crawford, James, *The Creation of the State of Palestine: Too Much Too Soon*, 1 Eur. J. Int'l L. 307 (1990)

¹²⁰ Prince, James L., *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 Stan. J. Int'l L. 681 (1988-1989); See also Documents / PLO, *Palestinian Declaration of Independence*, November 15th, 1988, Palestine Media Center

¹²¹ The Palestinian National Council: Political Communiqué, 27 ILM 161 (1988)

¹²² Barry E. Carter & Phillip R. Trimble, *International Law* 450, Little, Brown & Co. (1991)

¹²³ Barry E. Carter & Phillip R. Trimble, *International Law* 450, Little, Brown & Co. (1991)

¹²⁴ Clyde R. Mark, *Israeli-United States Relations*, Foreign Affairs, Defense, and Trade Division (Updated April 28, 2005)

¹²⁵ Arabic/Islamic - Miscellaneous, *Declaration of Principles on Interim Self-Government Arrangements* ("Oslo Agreement") (13 September 1993) (TEXT)

¹²⁶ Graham Usher, *Palestine in crisis: the struggle for peace and political independence after Oslo*, Pluto Press (1995)

¹²⁷ Nathan J. Brown, *Palestinian politics after the Oslo accords: resuming Arab Palestine*, University of California Press (2003); See also John G. Hall, *The Palestinian National Authority (Creation of the Modern Middle East)*, Chelsea House Publications; 2 edition (November 2008)

the issues of Jerusalem, refugees, settlements, security, and borders.¹²⁸ As different political forces began to emerge within Israel and as its politics veered toward ultra nationalism, these final status issues never became matters for conclusive decision.¹²⁹

The not-quite-obvious subtext of Oslo was the concession that a Palestinian National Authority (PA) without an ostensible claim to sovereignty would in effect concede that the 1988 declaration of Palestinian independence was premature.¹³⁰ On the other hand, the PA's future would be tied to a final status settlement agreement. So long as Israel was reluctant to settle these issues, there could be no final settlement and no hope of an independent state. Moreover, tying the status of the PA to a process of agreement with Israel permits the Israelis to essentially exercise a veto over Palestinian claims to statehood by simply delaying the agreement process while creating facts in which Israeli sovereignty gets extended by the de facto extension of settlement activity.¹³¹ It thus became apparent to the Palestinians that the new governing authorities in Israel, led by ultranationalist Benjamin Netanyahu and his Likud party, were not committed to advancing the peace process because they opposed the creation of a Palestinian state.¹³² Having structured the legal expectations in terms of Israel and the PA, the Israeli negotiators had a veto over claims to self-determination, independence, and sovereignty. We now turn to the question of the possible recognition of an independent sovereign status for the Palestinian people in light of the current impediments.

II. THE INTERNATIONAL LAW CRITERIA OF STATEHOOD & THE PROCESS OF RECOGNITION

The interrelated legal issues of the “criteria of statehood” that are recognized today, as well as the specific effects and implications of the different aspects of recognition, are complex matters in international law.¹³³ This complexity got aggravated after the Second World War when under the U.N. Charter a clearer picture of a framework of an international constitutional system emerged.¹³⁴

¹²⁸ *Declaration of Principles On Interim Self-Government Arrangements (September 13, 1993) (The Oslo Agreements)*, ARTICLE I: AIM OF THE NEGOTIATIONS –

“The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.

It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.”

¹²⁹ Dani Filc, Udi Lebel, *The Post-Oslo Israeli Populist Radical Right in Comparative Perspective: Leadership, Voter Characteristics and Political Discourse*, *Mediterranean Politics*, Vol. 10, Iss. 1 (2007) – The “Oslo war” era was an era of transformations within the Israeli radical right because of Palestinian terror attacks which began as a response to the Oslo agreements. Those terror activities reshaped the Israeli political right wing, which transferred itself to what we call the “new” Israeli right. (*Emphasis added*)

¹³⁰ Prince, James L., *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 *Stan. J. Int'l L.* 681 (1988-1989)

¹³¹ Khalil Shikaki, *Willing to Compromise; Palestinian Public Opinion and the Peace Process*, United States Institute for Peace; Special Report 158 (January 2006)

¹³² Ira Chernus, *Israel and the Palestinians through the looking glass*, CBS News (May 27, 2011)

¹³³ Lloyd, David O., *Succession, Secession, and State Membership in the United Nations*, 26 *N.Y.U. J. Int'l L. & Pol.* 761 (1993-1994); See also van der Vyver, J. D., *Statehood in International Law*, 5 *Emory Int'l Rev.* 9 (1991)

¹³⁴ Nagan, Winston P. & Hammer, Craig, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 *Me. L. Rev.* 429 (2008)

Statehood and recognition thus became tied to a broader framework of issues and values.¹³⁵ Among the issues is the question of an entry into the International Constitutional System as well as exclusion from it. This issue is tied to the emergence of self determination as a peremptory norm of international law as well as the strength accorded to traditional principles of *uti possedatis*, which in general discourages secession from a sovereign state.¹³⁶

The status of Palestine draws sustenance from recent developments in international law. It is also influenced by its rather unique history as a Class ‘A’ mandate under the League of Nations. The evidence of practice under the League demonstrates that Palestine was not subject to an alien sovereignty.¹³⁷ It was considered a state on a pathway to independence.¹³⁸ We explore these issues by first setting out the basic law as it currently clarifies the definition of state and the process of recognition. The definition of a state in international law is still influenced by Article I of the Montevideo Convention on the Rights and Duties of States.¹³⁹ In this view a state is a territorially defined or definable entity. It has a relatively stable population; population and territory under the control of its own government. This entity engages or has the competence to engage in formal and diplomatic relations with other states and entities in the International Environment.¹⁴⁰ An aspect implicit in the criteria of statehood is that the entity should claim that it is a State.

When we come to the question of the recognition of statehood we can see how the international system functions on two parallel tracks.¹⁴¹ First, recognition is decentralized and a matter of state sovereign discretion.¹⁴² That is to say other states may or may not recognize the entity regardless of meeting the minima of statehood. There are circumstances in which there is an obligation in international law not to recognize a state which has the minimum criteria¹⁴³, if that state has sought to establish itself in violation of the U.N. Charter.¹⁴⁴ The other track is the recognition of a state as a member of an international body whose membership is restricted to sovereign states only.¹⁴⁵ However, such recognition does not require that the sovereign formally recognize the government of another state, although the system provides for the recognition *de facto* of a state which acknowledges that a government and a state exist.¹⁴⁶ That recognition could be targeted as recognizing a state but not necessarily recognizing the government. Recognition by an organization

¹³⁵ Crawford, James R., *The Creation of States in International Law*, Second Edition (2007)

¹³⁶ Suzanne Lalonde, *Determining boundaries in a conflicted world: the role of uti possidetis*, McGill-Queen's Press - MQUP, (2002)

¹³⁷ Wasim I. Al-Habil, *Occupations, Diaspora, and the Design of Local Governments for a Palestinian State (Dissertation)*, Al-Aqsa University (Palestine) (July, 1996); See also John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, Rutgers Law Record, vol. 35 (Spring 2009); See also Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness*, Columbia University Press (2009)

¹³⁸ *Id.*

¹³⁹ *Article I of the Montevideo Convention on the Rights and Duties of the States*, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19. (1933)

¹⁴⁰ See Restatement of the Law; the Foreign Relations of the United States Volume I, Section 201, Page 72 (1987)

¹⁴¹ Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705 (1988); See also Crawford, *Supra*

¹⁴² *Id.*

¹⁴³ It is generally considered that the four criteria of statehood from the *Montevideo Convention on the Rights and Duties of States* concluded by Latin American states and the USA are the minimum criteria for statehood under customary international law. See *China and the Principle of Self-Determination of Peoples*, St Antony's International Review 6, no. 1: 79–102 p.89 (2010) - "...the Montevideo Principles are a normative statement of the expected attributes of a sovereign state, and thus appear to be minimum criteria."

¹⁴⁴ Lloyd, David O., *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U. J. Int'l L. & Pol. 761 (1993-1994)

¹⁴⁵ Kelley, Judith G., *The Concept of International Delegation*, 71 Law & Contemp. Probs. 1 (2008); See also Yuen-Li Liang, *Recognition by the United Nations of the Representation of a Member State: Criteria and Procedure*, The American Journal of International Law, Vol. 45, No. 4, pp. 689-707 (Oct., 1951); See also Crawford, *Supra*

¹⁴⁶ *Id.*

like the U.N. is also influenced by the fact that the U.N. recognition of a state is premised on the state's ability to uphold U.N. Charter values including its commitment to peace.¹⁴⁷ These principles are more explicitly expressed in The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.¹⁴⁸ The principles are as follows: (1) states shall refrain from the threat or use of force against the territorial integrity or political independence of any state; (2) states shall settle their international disputes by peaceful means; (3) states shall not intervene in matters within the domestic jurisdiction of any state; (4) states have a duty to cooperate with another in accordance with the Charter; (5) equal rights and self-determination of peoples; (6) sovereign equality of states; (7) states shall fulfill in good faith their obligations under the United Nations Charter.¹⁴⁹ With these principles in mind we review the claim of the Palestinians to the recognition of statehood in international law.

A. PALESTINIAN'S STATEHOOD AND THE LEAGUE OF NATIONS MANDATE

The criteria of statehood that requires a body politic is generally known as a population.¹⁵⁰ The population issue in Palestine has been contentious since the initiation of the Class A mandate.¹⁵¹ The mandate recognized a population of Palestinians under Article 22 of the League Mandate.¹⁵² This recognition was influenced by the Mandate purpose to secure the population's right to self-determination.¹⁵³ However, Britain the mandatory power had prior to assuming mandate responsibilities announced a policy for Palestine to secure a homeland in Eretz Israel for the Jewish people in the Diaspora.¹⁵⁴ This was expressed in the Balfour Declaration.¹⁵⁵ Balfour in confidence expressed the view to the British Prime Minister that the major purpose of Article 22, namely the self-determination for Palestinians inhabitants, could not be implemented because of the undertaking to promote a Jewish homeland in Palestinian territory.¹⁵⁶ As it turned out, because Britain was not able to emerge with a successful solution to this problem, it passed the matter on to the U.N. General Assembly.¹⁵⁷ Article 22, which juridically established a right of self-determination

¹⁴⁷ Grant, Thomas D, *States Newly Admitted to the United Nations: Some Implications*, 39 Colum. J. Transnat'l L. 183 (2000-2001); "As the highest international organ consisting of states, the United Nations sets forth as its chief admissions criteria commitment to peace and possession of the attributes of statehood."

¹⁴⁸ General Assembly Resolution 2625, Session XXV of 24 October 1970; *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*; G.A. Res. 2625, 25 U.N. GAOR Supp. No. 28 at 121, 65 Am.J.Int'l L. 243 (1970)

¹⁴⁹ *Id.*

¹⁵⁰ Frank Sargent Hoffman, *The sphere of the state; or, The people as a body-politic*, G.P. Putnam's Sons (1895); See also Qerim R., *Old Problems and New States*, Taipei Times Page 9 (March 23, 2008)

¹⁵¹ Assaf Likhovski, *Law and identity in mandate Palestine*, UNC Press Books (2006)

¹⁵² Boyle, Francis A., *The Creation of the State of Palestine*, 1 Eur. J. Int'l L. 301 (1990)

¹⁵³ Quigley, John, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. Int'l L. J. 1 (1989)

¹⁵⁴ Butenshon, *Accommodating Conflicting Claims to National Self-Determination, the Intractable Case of Israel/Palestine*, Nils A., 13 Int'l J. on Minority & Group Rts. 285 (2006)

¹⁵⁵ Solomon Zeitlin, *Jewish Rights in Eretz Israel (Palestine)*, The Jewish Quarterly Review; New Series, Vol. 52, No. 1, pp. 12-34 (Jul, 1961)

¹⁵⁶ Archibald Paton Thornton, *Imperialism in the twentieth century*, University of Minnesota Press, P. 123 (1977); See also Isaiah Friedman, *The question of Palestine: British-Jewish-Arab relations, 1914-1918*, Second Expanded Edition, Transaction Publishers, P.325 (1992)

¹⁵⁷ Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, Eugene V., 5 Yale Stud. World Pub. Ord. 147 (1978-1979)

for the Palestinians, was left unimplemented.¹⁵⁸ The critical question is how much of this right has survived to strengthen the claim to statehood under international law for the people of Palestine. To the extent that the government of Israel may provide some impediments to the realization of statehood, international law may support a weakening of the Israeli position. One factor that has influenced Israeli perspectives is the claim that the Palestinians are not a people for the purpose of the population requirement of statehood.¹⁵⁹ The evidence from careful research demonstrates a continuity of Palestinian national identity.¹⁶⁰ Israel has promoted the argument that Palestinians are simply Arabs and therefore indistinguishable from other Arabs in surrounding states.¹⁶¹ Some Arab nationalists have in fact supported this view in the early efforts to create a Pan-Arab Union.¹⁶² The strength of nation-state national identity proved too strong for this innovation. We would therefore submit that Palestinians are a national body politic, with strong national identity, and with an identity that is continuous, particularly during the period of the League Mandate and under the U.N. Charter framework.

The next key criterion is that the body politic must be territorially determined or determinable.¹⁶³ In general we would suggest that boundaries indicated in relevant U.N. Security Council Resolutions established conditions which are determined or determinable. There exist factors in the context which suggest that Israel, a key negotiator, may have broader territorial ambitions and this may emerge at the expense of Palestinian statehood.¹⁶⁴ A justification for Israeli territorial concerns has been suggested by Prime Minister Netanyahu in his speech before the UN on Friday September 23, 2011.¹⁶⁵ Essentially Netanyahu insists that because of the diminutive territorial status of the State of Israel and a period of fifty years of war and insurrection, the State of Israel has some implicit claims to territorial enhancement to ensure a higher level of security for the State.¹⁶⁶ That is the practical issue. The Prime Minister noted that many States entertained a military

¹⁵⁸ Boyle, Francis A. (1990) *Supra*

¹⁵⁹ Avi Shlaim, *The Iron Wall*, p. 311 (2001) - "It is not as though there were a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them. They did not exist." pace former Israeli prime minister Golda Meir. ; See also *In the Reference RE Secession of Quebec Case* [Supreme Court of Canada [1998] 2 S.C.R. 217] the Court in section I, Paragraphs 123, 124, 125, explores and clarifies the problem of defining peoples in international law. Additionally the Court clarifies the notion of colonial or oppressed people. Section III, Paragraph 131, 133, 134, 135, 136, 137, 139

¹⁶⁰ Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness*, Columbia University Press (2009)

¹⁶¹ Einhorn, Talia, *The Arab-Israeli Peace Process: The Law Reform Perspective*, 3 Eur. J.L. Reform 149 (2001)

¹⁶² C. Ernest Dawn, *The Formation of Pan-Arab Ideology in the Interwar Years*, International Journal of Middle East Studies, 20, pp 67-91 (1988)

¹⁶³ Crawford (2007) *Supra*

¹⁶⁴ Daniel J. Castellano, *A Brief History of the Arab-Israeli Conflict* (2007)

¹⁶⁵ *Full Text Israel Political Brief September 23, 2011: Israel Prime Minister Benjamin Netanyahu's Speech at the UN / United Nations* (Full Text Transcript Excerpts) Together with Israel Word Press (September 23, 2011)

¹⁶⁶ *Id.* - "The truth is — the truth is that Israel wants peace. The truth is that I want peace. The truth is that in the Middle East at all times, but especially during these turbulent days, peace must be anchored in security. The truth is that we cannot achieve peace through U.N. resolutions, but only through direct negotiations between the parties. The truth is that so far the Palestinians have refused to negotiate. The truth is that Israel wants peace with a Palestinian state, but the Palestinians want a state without peace. And the truth is you shouldn't let that happen..." "Israelis are prepared to have a Palestinian state in the West Bank, but we're not prepared to have another Gaza there. And that's why we need to have real security arrangements, which the Palestinians simply refuse to negotiate with us." "And these critics continue to press Israel to make far-reaching concessions without first assuring Israel's security." "So in the face of the labels and the libels, Israel must heed better advice. Better a bad press than a good eulogy, and better still would be a fair press whose sense of history extends beyond breakfast, and which recognizes Israel's legitimate security concerns." "And there are many other vital security issues that also must be addressed. Take the issue of airspace. Again, Israel's small dimensions create huge security problems. America can be crossed by jet airplane in six hours. To fly across Israel, it takes three minutes. So is Israel's tiny airspace to be chopped in half and given to a Palestinian state not at peace with Israel?" "I bring up these problems because they're not theoretical problems. They're very real. And for Israelis, they're life-and- death matters. All these

presence in other States for mutual security purposes; for example France in Africa and the United States in Europe and Japan.¹⁶⁷ It is possible that the Prime Minister is also influenced by the idealism of the restoration of the historic boundaries of ancient Israel, the Eretz Israel idea.

One pressing issue is the dynamism of territories and the requirement under the Montevideo state qualifications that, if there is to be a Palestinian state, this state has to have agreed-upon boundaries that provide a viable territorial base for a state.¹⁶⁸ The apparently interminable negotiations also formed a basis by which Israel can change the facts regarding the appropriate reach of territory that may fall within any settlement. Essentially, one of the ways that the territorial question can be effectually pre-determined prior to negotiation is by a continuation and expansion of the Israeli settlement program. Politically, the expansion of settlements is a cornerstone of the ultranationalist program and policy in Israel.¹⁶⁹ This policy goes forward amidst a propaganda campaign that insists that only the Israelis make concessions and that the Palestinians “take and take.”¹⁷⁰ It is worth a reminder that the Oslo Accords, in which Peres was a key player, involved Arafat giving up on the 1947 U.N. boundaries for the one defined in 1967.¹⁷¹ In doing so, Arafat gave up 22% of the historic Palestine¹⁷²; and Israel enlarged its territory on the Historic Palestine from owning 56% to owning 78%.¹⁷³

The Obama Administration has insisted that there be a freeze on settlement building projects on Palestinian land.¹⁷⁴ Netanyahu agreed to a 10-month freeze in order to encourage the initiation of talks.¹⁷⁵ However, the Israeli media maintains that, during these 10 months, construction was the same as in the previous 10 months.¹⁷⁶ The Obama Administration has pressed Netanyahu to give another 2 months for the freeze.¹⁷⁷ The US administration has had no influence on Netanyahu settlement policies.¹⁷⁸ Moreover the American administration’s position is weakened by the pressure of the Washington Pro Israeli lobby.¹⁷⁹

potential cracks in Israel’s security have to be sealed in a peace agreement before a Palestinian state is declared, not afterwards, because if you leave it afterwards, they won’t be sealed. And these problems will explode in our face and explode the peace.” “And we will know that they’re ready for compromise and for peace when they start taking Israel’s security requirements seriously and when they stop denying our historical connection to our ancient homeland.”

¹⁶⁷ *Id.* – “I explained this to President Abbas. He answered that if a Palestinian state was to be a sovereign country, it could never accept such arrangements. Why not? America has had troops in Japan, Germany and South Korea for more than a half a century. Britain has had an air base in Cyprus. France has forces in three independent African nations. None of these states claim that they’re not sovereign countries.”

¹⁶⁸ Weiner, Justus Reid; Morrison, Diane, *Legal Implications of Safe Passage Reconciling a Viable Palestinian State with Israel’s Security Requirements*, 22 Conn. J. Int’l L. 233 (2006-2007)

¹⁶⁹ Nur Masalha, *Imperial Israel and the Palestinians: the politics of expansion*, Pluto Press (2000)

¹⁷⁰ Allan C. Brownfeld, *Finally, Israel’s Settlements Policy, Turn Toward Extremism Making Impact on Jewish Opinion*, Washington Report Archives; Israel and Judaism (2011-2015) (March 2011)

¹⁷¹ Henry Siegman, *Netanyahu’s Freeze Scam*, Huffington Post (October 1, 2011)

¹⁷² *What do you know about Historic Palestine?*, New England Committee to Defend Palestine, necdp, general_v.1r (2003)

¹⁷³ MJ Rosenberg, *Remember these digits: 78-22*, Common Ground News Services, 17 April 2008; Hussein Agha, Robert Malley, *Camp David: The Tragedy of Errors*, The New York Review of Books (August 9, 2001)

¹⁷⁴ Elise Labott, *Obama drops demand that Israel freeze settlements*, CNN State, September 22, 2009

¹⁷⁵ Barak Ravid and Agencies, *Netanyahu declares 10-month settlement freeze ‘to restart peace talks*, Haaretz.com (November 25, 2009)

¹⁷⁶ Bronner, E., *Despite Settlement Freeze, Buildings Rise*, New York Times; Middle East (July 14, 2010)

¹⁷⁷ Ravid, B., *Obama in personal appeal to Netanyahu: Extend settlement freeze for two months*, Haaretz.com (September 30, 2010)

¹⁷⁸ Elliot Abrams, et al, *U.S.-Israel Unsettled Relationship*, Council on Foreign Relations (March 18, 2010); See also MJ Rosenberg, *On Israel and Palestine, Obama Is Rick Perry*, Political Correction (September 23, 2011); See also Alessandro Bruno, *Palestine: The Prospects for a Two-State Solution*, NewNations.com Special Report.

¹⁷⁹ Jim Lobe, *Politics Thrives Palestine Under the Bus*, Inter Press Service (Sep 24, 2011); See also Thomas McAdams Deford, *Mac Deford: Obama (and US strategic interests) vs. the Israel lobby*, The Free Press (September 21, 2011)

The question is why is Netanyahu reluctant to stop the settlement expansion? The longer it continues, the more intractable the foundation of a viable peace becomes. In fact, the settlement strategy may be meant to be a deal breaker. Why would Netanyahu be interested in telling the United States he's for a settlement to the conflict while his activities and behavior all point in the direction of a strategy designed to continue indefinitely with no final conclusion, except one that is created on the ground? Settlements are fact creating and contain the capacity for re-writing the map, making it impossible for future Israeli authorities to undo the map. Netanyahu has refused to give any assurance about the settlement freeze.

Netanyahu rules with a complex coalition of ultranationalist interests. Many of those interests are not far from his own ultranationalist leanings. Indeed, Netanyahu (the person) is deeply psychologically committed to 2 pillars of ultranationalist idealism. First, that the only legitimate boundaries of the state of Israel are not defined by international law but by the history and antiquity of Jewish culture.¹⁸⁰ This point was also stressed by Balfour.¹⁸¹ The historical boundaries of Israel, therefore, include Ancient Sumeria and Judea.¹⁸² In short, the only boundaries acceptable to him are the boundaries of Eretz Israel (a greater Israel).¹⁸³ In this Israel, there is no room for Palestinians. The boundaries of greater Israel direct us to his second principle of ultranationalist idealism: the idea that there will never be a Palestinian state.¹⁸⁴ It has long been accepted in ultranationalist circles that the Palestinians are not a real national entity or people and thus, as the argument goes, the Palestinians may not claim on the basis of national identity that they are people qualified to carry the mantle of statehood.¹⁸⁵

When we come to the question of the governance of the Palestinian entity this represents a more complex issue. Under the Oslo Accords a Palestinian Authority was set up.¹⁸⁶ The agreement left final status issues as matters to be negotiated between Israel and the PA.¹⁸⁷ This implicitly left the PA with a certain measure of internal autonomy, and some measure of external competence, but the Oslo understandings suggest that final status includes Palestinian statehood. This understanding carries the assumption that the PA does not claim full sovereign independent status since the status must be negotiated with Israel. Clearly to establish a promising claim for statehood the Palestinians would have to repudiate any understanding that statehood is conditioned by an Israeli veto. The veto would not be exercised in any formal sense. It could be reflected simply in a strategy that is unwilling or reluctant to achieve a settlement. In this sense if Palestinian statehood is tied to the conclusion of an agreement with Israel, and Israelis are reluctant to conclude, their conduct amounts to a veto if it is also claimed that statehood cannot be considered by the UN or the international

¹⁸⁰ *In Oval Office, Bibi Offers History Lessons to Obama*, ABC News (May 20, 2011)

¹⁸¹ Jonathan Schneer, *The Balfour Declaration: the origins of the Arab-Israeli conflict*, Random House Digital, Inc. (2010)

¹⁸² George Berkin, *Return Israel to pre-1967 borders? How about returning U.S. to 1844 (or 1802 or 1861) borders?*, NJ Voices The Star-Ledger (May 25, 2011)

¹⁸³ Taufiq Rahim, *Time is running out for Israel to salvage a two-state solution*, The National (Sep 22, 2011); See also Ludwig Watzal, *Israeli Rejectionism – Book Review*, The Palestine Chronicle (September 23, 2011); See also Shelef, Nadav G., *From "Both Banks of the Jordan" to the "Whole Land of Israel": Ideological Change in Revisionist Zionism*, Israel Studies, Volume 9, Number 1, pp. 125-148 (Spring 2004)

¹⁸⁴ Yossi Gurvitz, *Netanyahu says "no" to the two-states solution*, +972 Magazine; Independent Reporting and Commentary from Israel and the Palestinian Territory (May 21, 2011)

¹⁸⁵ I.M. Kane, *Palestinians are not the Indigenous People of Palestine*, The Millstone Diaries (August 8, 2011)

¹⁸⁶ Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States; See also Nathan J. Brown, *Palestinian politics after the Oslo accords: resuming Arab Palestine*, University of California Press (2003)

¹⁸⁷ *Id.*

community unless there is an Israeli agreement. The strategy of now seeking to secure the recognition of statehood must as well address this question. Additionally we suggest later in this article that more should be done to strengthen the framework of governance internally and externally and including the constitutional foundations of a future Palestinian State.

It could be argued that Resolution 181 at least implies the idea that international law supports the notion of “an Arab state” as part of the Partition Plan.¹⁸⁸ It could also be argued that the Security Council Resolutions recognizing the West Bank and Gaza as Palestinian territories is *de jure* recognition that the boundaries of the Palestinian people are determinable and that the UN Security Council Resolutions provide the baseline for determining the boundaries. These resolutions form the foundation of negotiations relating to the Oslo Accords, which essentially involved an acceptance by the parties of these boundaries.¹⁸⁹ This means that Palestinians have already conceded a huge portion of Palestinian land to Israel in order to secure agreement to settlement. From the standpoint of the traditional criteria of what constitutes a state¹⁹⁰, Palestinian lands for a state are determinable.¹⁹¹ Second, although Israel occupies those lands, the occupancy vests no title in the occupier.¹⁹² The trumping legal principle is the legally binding Security Council Resolutions.¹⁹³

The second criterion of statehood is that there should be a permanent (Palestinian) population.¹⁹⁴ There is a permanent Palestinian population in the West Bank and Gaza.¹⁹⁵ What makes a final settlement complex is that there are now millions of (absentee) Palestinians whose citizenship rights were abrogated by Israeli legislation and administrative measures.¹⁹⁶ Still, we can conclude that, at a minimum, there is at least a minimum Palestinian population inside the territories occupied by Israel to qualify as a permanent population.

The third criterion of statehood is the criterion of having in place a functioning government.¹⁹⁷ This issue is somewhat more problematic, because the Palestinian Authority (PA)

¹⁸⁸ Eli E. Hertz, *UN Resolution 181 – The Partition Plan; A “Green Light” for Jewish Statehood - A ‘Dead’ Blueprint for Peace*, Myths and Facts (2009)

¹⁸⁹ Louis Kriesberg, *The Relevance of Reconciliation Actions in the Breakdown of Israeli–Palestinian Negotiations, 2000*, Peace & Change, Volume 27, Issue 4, pages 546–571 (October 2002); See also Sara Roy, *Why Peace Failed: An Oslo Autopsy*, Current History, vol. 100, number 651 (January 8, 2002)

¹⁹⁰ *Montevideo Convention of 1933 on the Rights and Duties of States, Supra*

¹⁹¹ Gudrun Kramer, Graham Harman, *A History of Palestine: From the Ottoman Conquest to the Founding of the State of Israel*, Princeton University Press (2011); See also Mushtaq H. Khan, *Palestinian State Formation since the Signing of the Oslo Accords*, (supported by UNDP Palestine, but the opinions expressed here are solely those of the author), EPrint UK (2009); See also Ghazi Falah, David Newman, *The spatial manifestation of threat: Israelis and Palestinians seek a ‘good’ border*, Political Geography, Volume 14, Issue 8, Pages 689-706 (November 1995); See also Howley, James D., *Measuring Up: Do the Palestinian Homelands Constitute a Valid State under International Law*, 8 Dick. J. Int'l L. 339 (1989-1990)

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Crawford (2007) *Supra*

¹⁹⁵ Giridhar, Kavith, *Legal Status of Palestine*, Drake Undergraduate Social Science Journal; Spring (2006); *Id.*

¹⁹⁶ Stephen Lendman, *Israel's Proposed Counterterrorism Law*, The People's Voice (September 3, 2011); See also David A. Kirshbaum, *Israeli Military Oppression and Exploitation of Palestinian Society in Gaza and the West Bank?: How it Works*, Israel Law Resource Center, February (2007); See also Sammy Smooha, *Minority status in an ethnic democracy: The status of the Arab minority in Israel*, Ethnic and Racial Studies, Volume 13, Issue 3 (1990)

¹⁹⁷ *Montevideo Convention of 1933 on the Rights and Duties of States, Supra*; See also Nathan J. Brown, *Palestinian politics after the Oslo accords: resuming Arab Palestine*, University of California Press (2003)

was created as an interim entity and not a permanent governing authority.¹⁹⁸ Here, the Palestinians, by drafting a valid constitution and creating a government under that constitution, could meet the criteria of statehood unambiguously.¹⁹⁹ The PA does meet some of the criteria relating to the capacity to enter into relations with other states.²⁰⁰ The degree of recognition that Palestinian entities have received suggests that the Palestinian leadership is capable of discharging these obligations. The PA has relations with at least 140 other states²⁰¹ that could qualify as meeting the minimum requirements of diplomacy.²⁰² Additionally, the observer status of the PLO at the UN²⁰³ and the degree of the PA and the PLO's participation in international organizations²⁰⁴ significantly enhances the claim that a future government has the capacity to enter into relations with other states and entities in the international environment.

These are the criteria indicated in the Montevideo Convention on the Rights and Duties of States.²⁰⁵ Since the adoption of the UN Charter, there has been a modest change in the notion of sovereignty as the criterion of the legal personality of the state.²⁰⁶ That change requires that as well that a state as a sovereign entity is able and willing to accept the rights (as well as the obligations) of a state under the charter of the United Nations.²⁰⁷ Since this would include the fundamental purpose and values behind the UN Charter, it would be appropriate that the constitution of a Palestinian state and its practices reflect on issues of international peace and security, commitment to the Rule of Law, a commitment to fundamental human rights, and a commitment to global security and democracy. These latter criteria are ones that bring an element of “authority” to the expression of sovereignty.

It could be argued that Israeli sovereignty is somewhat diminished by its unwillingness to adopt the constitutional guidelines of Resolution 181. It has been commonly assumed that Resolution 181 provided the international legal imprimatur for the creation of the Israeli State and

¹⁹⁸ Hajjar, Lisa, *Law against Order: Human Rights Organizations and (versus) the Palestinian Authority*, 56 U. Miami L. Rev. 60 pp. 60 (2001-2002); “The PA is an “interim government”, not a sovereign state. It lacks independence, control over borders, natural resources, trade, immigration, and other trappings of sovereignty. It also lacks control over “national time.””

¹⁹⁹ John Quigley, *The Palestinian Declaration to the International Criminal Court: The Statehood Issue* (2009); See also Timo Hohmuth, *Foundations of Public International Law: Examine critically the requirements for the creation of a state in modern international law*. Law - European and International Law, Intellectual Properties (2000); Sanborn, McCleary H. III, *Standing before the International Court of Justice: The Question of Palestinian Statehood Exemplifies the Inconsistencies of the Requirement of Statehood*, 7 Cal. W. Int'l L.J. 454 (1977)

²⁰⁰ Christopher C. Joyner, *International law in the 21st century: rules for global governance*, Rowman & Littlefield (2005); See also *Israel-Palestine Liberation Organization: Agreement on Preparatory Powers and Responsibilities*, International Legal Materials, Vol. 34, No. 2, pp. 455-481 (March 1995); See also Fassberg, Calia Wasserstein, *Israel and the Palestinian Authority: Jurisdiction and Legal Assistance*, 28 Isr. L. Rev. 318 (1994)

²⁰¹ Taylor & Francis Group, *Europa World Year Book*, Europa Publications. p. 3325 (2004)

²⁰² Jan Melissen, *Wielding Soft Power: The New Public Diplomacy*, Netherlands Institute of International Relations (May 2005); See also Adam Watson, *Diplomacy: The Dialogue Between States*, Psychology Press (1984); See also Smith Simpson, *The Nature and Dimensions of Diplomacy*, Annals of the American Academy of Political and Social Science, Vol. 380, Resources and Needs of American Diplomacy, pp. 135-144 (November 1968)

²⁰³ *Observer status for the Palestine Liberation Organization*, A/RES/3237 (XXIX) (22 November 1974)

²⁰⁴ *The World Factbook; Appendix B: International Organizations and Groups*, CIA (2011)

²⁰⁵ *Article 1 of the Montevideo Convention on the Rights and Duties of States*, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (1933)

²⁰⁶ Zohar Nevo, Tamar Megiddo, *Lessons From Kosovo: The Law of Statehood and Palestinian Unilateral Independence*, Journal of International Law & International Relations - Special Issue; Borders and Boundaries: Secession in the 21st Century, Volume 5, Number 2 (Summer 2009)

²⁰⁷ Islami, Iliriana, *The Insufficiency of International Legal Personality of Kosovo as Attained through the European Court of Human Rights: A Call for Statehood*, 80 Chi.-Kent L. Rev. 83 (2005); See also Araujo, Robert John, *The International Personality and Sovereignty of the Holy See*, 50 Cath. U. L. Rev. 291 (2000-2001); See also Eric A. Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, Bridgeport Law Review/Quinnipiac Law Review 23.Quinnipiac L. Rev. 23-45 (2004)

an Arab State. Resolution 181 contained certain guidelines as to what the political structure of rights and duties of the future States should encompass. The Israeli leadership took the green light of the Resolution 181 and declared its independence. The Declaration was a document that complied fully with the guidelines of Resolution 181. However, although there was an intent that the Declaration should be the inspiration for the new Israeli Constitution, such a Constitution did not emerge.²⁰⁸ This means that Israel effectually refused to adopt its own declaration of independence as containing legally binding prescriptive norms.²⁰⁹ In this sense, Israeli objections to Palestinian statehood would appear to be objections to the mandate of international law itself. Our sense is that the only stumbling block on the pathway to the recognition of Palestinian statehood would be the United States exercising a veto over the process in the Security Council. This would be an ill-advised vote, however, it is one that the Palestinians must strategically seek to overcome or minimize through the use of international provisions such as “Uniting for Peace” which we will discuss in a latter part of this article.²¹⁰

Currently, there are more or less 140 countries that already recognize Palestinian statehood.²¹¹ Such recognition is in the first instance a matter of state sovereignty exercised bilaterally.²¹² The nature of these agreements gives an advantage to the Palestinians for them to try to secure an overwhelming bilateral commitment for a recognition of Palestinian sovereignty. Already, important Latin American states have given their commitments. Additionally, it could also be advantageous for Palestinians to seek recognition of their statehood in regional international organizations such as the League of Arab States, the African Union, OAS, European Union, [Asian Union, etc.] Regional recognition would be politically efficient for the Palestinians to develop their constitution and constitute their government.²¹³ With this background, it may be vastly more difficult for the United States to exercise a veto in the face of an overwhelming global consensus.

It would seem to be clear that the recognition of Palestinian statehood must meet the Montevideo criteria of statehood²¹⁴ and more under the U.N. Charter. It must be noted that Montevideo was modified by post World War II developments regarding the criteria of statehood in

²⁰⁸ *The Declaration Of The Establishment Of The State Of Israel* (May 14, 1948); On May 14, 1948, on the day in which the British Mandate over a Palestine expired, the Jewish People's Council gathered at the Tel Aviv Museum, and approved a proclamation declaring the establishment of the State of Israel. United States gave a *de facto* recognition to the new state that night and three days later USSR gave it *de jure* recognition; See also Philip Marshall Brown, *The Recognition of Israel*, *The American Journal of International Law*, Vol. 42, No. 3, pp. 620-627 (Jul., 1948); See also Talknic, *The recognition of Israel. De jure? De facto? The Jewish State?*, *Israel & the Palestinians*, LEGALITIES (January 2, 2010); See also *Legal Basis of the State of Israel*, *Palestine Facts* (2011)

²⁰⁹ *The Declaration Of The Establishment Of The State Of Israel* (May 14, 1948); On May 14, 1948; Paragraph 12: “THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.”

²¹⁰ *Uniting for Peace*, General Assembly Resolution 377 (V); New York November 3, 1950

²¹¹ Boyle, Francis A. *The creation of a state of Palestine*, *EJIL* (online version), vol. 1, No 1, art.20 (1990)

²¹² Alexander Cooley & Lincoln A. Mitchell, *Engagement without Recognition: A New Strategy toward Abkhazia and Eurasia's Unrecognized States*, *The Washington Quarterly*, Volume 33, Issue 4, pages 59-73 (2010)

See also Alexis Arieffff, *De Facto Statehood?; The Strange Case of Somaliland*, *Yale Journal of International law* (2008); See also; Radon, Jenik, *Sovereignty: A Political Emotion, Not a Concept*, 40 *Stan. J. Int'l L.* 195 (2004)

²¹³ Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19; Jackson, Vicki C., *What's in a Name - Reflections on Timing, Naming, and Constitution-Making*, 49 *Wm. & Mary L. Rev.* 1249 (2007-2008)

²¹⁴ *Id.*

international law.²¹⁵ The first issue is the recognition of their claims to territory. First, UNGA Resolution 181 develops the partition of land.²¹⁶ The boundaries indicated in that Resolution were the boundaries adopted by Israel to define its territorial space.²¹⁷ Since the Palestinians were not an organized entity at that time²¹⁸, they were not in a position to either adopt the U.N. partition scheme or even to repudiate it. Nevertheless, it is worth noting that, as we had earlier discussed, Israel's boundaries were in part defined and Palestinian boundaries in this sense were determinable. In this sense it should be noted that determinable boundaries would meet the criterion of territoriality for State recognition. After the 1967 war, Israel occupied Gaza and the West Bank.²¹⁹ It still occupies those territories. However, Israel has agreed to Resolutions 242 and 338; and the Palestinians have agreed to the territorial dispensation indicated in these resolutions. This means that Palestinians, in effect, accept less territory than originally envisioned in Resolution 181. Boundaries may be redefined by agreement. This means that Israel needs an agreement that will accommodate its settlement activity in Palestinian territory. In short, settlement activity flies in the face of U.N. Resolutions 242 & 338, and is therefore unlawful. Here the lawfulness of the boundaries under these resolutions is grounded in the Security Council's competence to make binding international law.²²⁰ The unlawfulness can be cured by an agreement between Israel and the Palestinians. Such an agreement or understanding, for it to have legal efficacy, would probably have to be sanctioned or approved by the Security Council.²²¹ One final point—the matter that does not make it into the front lines of negotiation—is the deep belief of Israeli ultranationalists that international law boundaries in the context of this conflict are not legitimate. They use the legitimate boundaries of Israel as defined by ancient history, in which the ancient state of Israel was sovereign over lands, now claimed to be Palestinian.²²² This is a deeply-held belief²²³; and it may well be that, so long as the extreme ideology of ultranationalism controls the government of Israel, there will be no final settlement that involves territorial determinations incompatible with the Eretz Israel idea.

The next element of statehood is the element of governance.²²⁴ It would seem that the agreement to create the PA with a degree of internal autonomy goes a long way toward the requirement that there be a discernable form of governance with lines of authority. However, it has been clearly understood that the PA is not really meant to be a governing body in an international

²¹⁵ Grant, Thomas D., *Defining Statehood: The Montevideo Convention and its Discontents*, 37 Colum. J. Transnat'l L. 403 (1998-1999)

²¹⁶ Eli E. Hertz (2009) *Supra*

²¹⁷ *Id.*

²¹⁸ Boyle, Francis A., *The Creation of the State of Palestine*, 1 Eur. J. Int'l L. 301 (1990)

²¹⁹ Harris, William W., *Taking root: Israeli settlement in the West Bank, the Golan, and Gaza-Sinai, 1967-1980*, Research Studies Press, Vol. I, xxii p. 223 (1980)

²²⁰ Paul C. Szasz, *The Security Council Starts Legislating*, The American Journal of International Law, Vol. 96, No. 4 pp. 901-905 (2002)

²²¹ Paul C. Szasz, *The Security Council Starts Legislating*, The American Journal of International Law, Vol. 96, No. 4 pp. 901-905 (2002); See also Rostow, Eugene V., *Drafting of Security Council Resolution 242: The Role of the Non-Regional Actors*, 25 N.Y.U. J. Int'l L. & Pol. 489 (1992-1993)

²²² Solomon Zeitlin, *Jewish Rights in Eretz Israel (Palestine)*, The Jewish Quarterly Review; New Series, Vol. 52, No. 1, pp. 12-34 (Jul, 1961)

²²³ Rynhold, Jonathan, *Re-conceptualizing Israeli Approaches to "Land for Peace" and the Palestinian Question since 1967*, Israel Studies, Volume 6, Number 2, pp. 33-52 (Summer 2001)

²²⁴ Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19; See also Boyle, Francis A., *The creation of a state of Palestine*, EJIL (online version), vol. 1, No 1, art.20 (1990)

sense.²²⁵ This means that the PLO and its allies must reconstitute the PA in the form of a recognizable government, with a working draft constitution, and with a framework of transparency, responsibility, and accountability. It would also be appropriate that such an organization draft a constitution that approximates international standards in order to show that the Palestinian governing authority is willing, ready, and able to meet its international responsibilities under the UN Charter. It bears notice that the UN partition plan stipulated the following:

“The Constituent Assembly of each [of the Arab and Jewish] State shall draft a democratic constitution for its state ... guaranteeing all persons equal and nondiscriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association (quoted from UNGA Resolution No. 181(II) of 29 Nov 1947 Recommending a Partition Plan for Palestine: Plan of Partition with Economic Union, Part 1: Future constitution and Government of Palestine, Art. 10.)”²²⁶

It is worthy of note that the declaration of the establishment of the State of Israel indicated that the new state “will uphold the full social and political equality of all its citizens without distinction of religion, race, or sex.”²²⁷ After this promising start, the declaration was never adopted by the Knesset; and no efforts were made to draft a constitution along these lines.²²⁸ In our view, both Israelis and Palestinians would have benefited by establishing the State of Israel with a constitution based on this declaration. It should be noted that the Knesset delegated the task of drafting a constitution to its Constitution, Law, and Justice Committee, which has never presented the Knesset with a draft constitution.²²⁹

B. THE RELEVANCE OF RECENT CASE LAW

Case law frequently provides the particulars of the background context within which the nuanced particulars of decisions emerge on the complex question of the validity of claims to statehood in international law. The operational norm reflects complexity in the sense that these norms are in ostensible conflict. International law protects the territorial integrity of the nation-state and does not in general favor claims for self-determination and independence that require the breakup of the state.²³⁰ The circumstances under which secession may succeed tend to be fairly situation-specific.²³¹

There seem to be two salient formulas relevant to this context. The first presents a unified state in which one part of the state (defined by territory or the identity of the citizens) seeks to secede from the union and form a separate state. The consensus seems to be that, unless there is

²²⁵ Hajjar, Lisa (2002) *Supra*

²²⁶ UN General Assembly Resolution 181 (Partition Plan), P. 10 (November 29, 1947)

²²⁷ *The Declaration of Israel's Independence 1948*, Issued at Tel Aviv on May 14, 1948 (5th of Iyar, 5708)

²²⁸ Shimon Shetreet, *Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset*, 77 Tul. L. Rev. 659 (2003); See also Dalia Dorner, *Does Israel Have a Constitution*, 43 St. Louis U. L.J. 1325 (1999)

²²⁹ Jonathan Cook, *Israeli Constitutional Committee Faces Double Bind*, MER 231 - Two State Dis/Solution (2004)

²³⁰ Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, International Organization, Volume 55, Issue 02, pp 215 – 250 (2001)

²³¹ Buchanan, A., *Theories of Secession*, Philosophy & Public Affairs, Volume 26, Issue 1, pages 31–61, January 1997; See also Brilmayer, Lea, *Secession and Self-Determination: A Territorial Interpretation*, 16 Yale J. Int'l L. 177 (1991)

extreme ostracism or persecution of the separatist group by the unified state, secession should not be permitted.²³²

The Supreme Court of Canada, in the case *Reference RE Secessions of Quebec*²³³, analyzed the scope of the right to self-determination with regards of the province of Quebec. The Court considered the questions put to it concerning whether the legislature might under international law have the right to unilateral secession from the State of Canada²³⁴. In an exhaustive analysis of the right to self-determination in international law the Court ruled that in effect the population of Quebec was not an oppressed people and has not experienced attacks on their physical integrity or the massive violation of fundamental rights.²³⁵ The Court saw the international right of self-determination as being confined to situations of former colonies with there is oppression or situations of foreign military occupation.²³⁶ As indicated above, the claims related to Quebec for the possibility of unilaterally secession were rejected by the Supreme Court of Canada because the claims of the Quebecois were not sustained by any sense of repression or disidentification by the

²³² *Id.*

²³³ *Reference re Secession of Quebec*, Supreme Court of Canada [1998] 2 S.C.R. 217

²³⁴ *Reference re Secession of Quebec*, Supreme Court of Canada [1998] 2 S.C.R. 217 – P. 2: “Pursuant to s. 53 of the Supreme Court Act, the Governor in Council referred the following questions to this Court:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?”

²³⁵ *Reference re Secession of Quebec*, Supreme Court of Canada [1998] 2 S.C.R. 217;

P. 135:

“As stated by the amicus curiae, Addendum to the factum of the amicus curiae, at paras. 15-16:

[translation] 15. The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the amicus curiae, an oppressed people.”

P. 154:

“Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.”

²³⁶ *Reference re Secession of Quebec*, Supreme Court of Canada [1998] 2 S.C.R. 217;

P. 138:

“In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination...”

P. 154:

“a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states...”

state, which is in fact a Rule of Law-governed state.²³⁷ This decision supports the legal position of Palestinian statehood in the sense that it clarifies specific circumstances under which self-determination and secession are valid in international law. These circumstances favor Palestinian rights.

The ICJ upheld Kosovo's unilateral claim for independence and statehood under international law.²³⁸ There, particular facts concerning Kosovo seemed to have influenced the determination that Kosovo could secede from Yugoslav sovereignty. Kosovo was in fact an autonomous region under the 1974 Yugoslavian Constitution.²³⁹ As the constitution became eroded, Serbian repression and notorious discrimination characterized the position of the Kosovo majority.²⁴⁰ In fact, international intervention was influenced by the prospect of a program of massive ethnic cleansing of the region. This established a provisional form of governance under U.N. authority.²⁴¹ A further factor that supported the validity of the declaration of Kosovo independence was the fact that negotiations for an internal settlement toward a final status seemed to be carrying on interminably and aimlessly.²⁴²

The situation in Kosovo and the occupied territories has some similarity in the sense that, in both cases, the framework for continued negotiations toward a final settlement was actually taking place under the authority of U.N. Security Council Resolutions. In Kosovo, the interim government's mechanism was directly created by the Security Council Resolution²⁴³; in the context of the occupied territories of Palestine, the Oslo Accords—which came under the broad authority of U.N. Security Council Resolutions—also created the Palestinian Authority as an interim institution of governance²⁴⁴. In Kosovo, the International Court of Justice held that the representatives of the Kosovo people were not limited in their residual claim to sovereignty and independence by the U.N. Security Council Resolutions.²⁴⁵ Similarly, U.N. General Assembly Resolutions would seem to strengthen the residual competence of the Palestinian people to declare their sovereignty and independence. Unlike the Quebecois, the Palestinian claim also does not involve an issue of secession of titled territory from Israel; because Israel has no sovereign title to the territories it occupies.

We would submit that the factual background of and reasoning of the courts in the discussed cases provides support for Palestinian claims to statehood and independence under international law. In the case of Kosovo the court did not include a finding of Kosovo's statehood but what makes the case relevant to the Palestinian situation, is that the governance of Kosovo at the time of its declaration of independence was set up under U.N. authority with provisional

²³⁷ Johan D. Van Der Vyver, *Self-determination of the Peoples of Quebec under International Law*, Journal of Transnational Law and Policy, Vol. 10, Issue 1 (2000)

²³⁸ Alexander Orakhelashvili, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, Max Planck Yearbook of United Nations Law, Volume 12 p. 1-44 (2008)

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Security Council Resolution 1244; Adopted by the Security Council at its 4011th meeting, on 10 June 1999; S/RES/1244 (1999)

²⁴² Alexander Orakhelashvili (2008) *Supra*

²⁴³ *Id.*

²⁴⁴ Hajjar, Lisa (2002) *Supra*

²⁴⁵ Alexander Orakhelashvili (2008) *Supra*

institutions of self-governance.²⁴⁶ Additionally, Serbia's claim to territorial authority over Kosovo could be seen as stronger than Israeli claims to prevent the recognition of Palestinian statehood. Kosovo was actually territorially a part of Serbia, whereas Israeli claims over Palestinian territories are those of an occupying entity. It would therefore appear that the case law from the International Court of Justice and from the Canadian Supreme Court favors the lawfulness of the claim of representatives of the Palestinian people to the recognition of statehood, independence, and sovereignty.

C. REPRESSIVE AND DISCRIMINATORY BEHAVIORS OF THE STATE OF ISRAEL

Resolution 181, also known as the Partition Plan, also established criteria for citizenship without regard to religion or ethnicity; "Palestinian citizens residing in Palestine outside the City of Jerusalem, as well as Arabs and Jews who, not holding Palestinian citizenship, reside in Palestine outside the City of Jerusalem shall, upon the recognition of independence, become citizens of the state in which they are resident and enjoy full civil and political rights."²⁴⁷ Subsequent Israeli legislation and practice has ignored these issues. Those practices generated a huge Palestinian refugee crisis.²⁴⁸ Most recently, Prime Minister Netanyahu wanted to affirm the validity of internal Israeli practices on citizenship and statelessness by having the Palestinian Authority agree that Israel (from the perspective of the Palestinians) is a "Jewish state."²⁴⁹

A brief reference should be made to the laws dealing with a preference for persons of Jewish identity. The Law of Return (Amendment No. 2), 1970 (amending the Law of Return (1950)) effectually defines who is a Jew and, by implication, who is not.²⁵⁰ Greater specificity is giving to these distinctions with regard to Palestinians in the Absentee Property Law of 1950, the Entering into Israel Law of 1952 and Israeli National Law of 1952.²⁵¹ The Absentee Property Law defined the mass of Palestinian Arabs as "refugees" from territories that Israel conquered in the 1948 war.²⁵² The law denies them the citizenship rights envisioned in Resolution 181 and also denies them the rights to their properties inside Israel.²⁵³ The status of "absentee" is inherited as well, meaning that children of Palestinian Arabs will also be considered "absentee."²⁵⁴

The absentee law simultaneously affects civic status and land rights. This issue with respect to land rights is supplemented by legislation and administrative practices which are supported by

²⁴⁶ *Id.*

²⁴⁷ 1947 U.N. Partition Plan, (c) Declaration Chapter (3)(1)

²⁴⁸ Yoav Peled and Nadim Rouhana, *Transitional Justice and the Right of Return of the Palestinian Refugees*, Israel and the Palestinian Refugees; Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Volume 189, Part 2, 141-157 (2007); See also Elia Zureik, *Palestinian Refugees and Peace*, Journal of Palestine Studies, Vol. 24, No. 1, pp. 5-17 (Autumn, 1994); See also Radley, Kurt Rene, *The Palestinian Refugees: The Right to Return in International Law*, 72 Am. J. Int'l L. 586 (1978)

²⁴⁹ Netanyahu: Only when Palestinians recognize Israel as a Jewish state will they be ready for peace - PM tells Jewish leaders that peace requires security and that Israel's security needs are growing more and more. By Haaretz Service and Natasha Mozgovaya (October 22, 2010)

²⁵⁰ Yehuda, Savir, *The Definition of a Jew under the Law of Return*, Southwestern Law Journal, 17 Sw. L.J. (1963)

²⁵¹ Jeremy Forman & Alexandre Kedar, *From Arab land to 'Israel Lands': the legal dispossession of the Palestinians displaced by Israel in the wake of 1948*, Environment and Planning D: Society and Space, volume 22, pages 809-830 (2004)

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Palestinian Refugee Children; International Protection and Durable Solution*, Information & Discussion Brief, Issue No. 10 (December 2006)

Israel basic laws.²⁵⁵ Four cornerstones make up the legal basis of the Israel land policy; the Basic Law establishing the Israel Land Administration (1960)²⁵⁶; the Israel Lands Law (1960)²⁵⁷; the Israel Land Administration (1961)²⁵⁸; and the Covenant between the State of Israel and the World Zionist Organization (Jewish National Fund) (1961).²⁵⁹ The net result of these laws is that non-Jews are excluded by law from 92.6% of the land of pre-1967 Israel.²⁶⁰ These and other administrative measures have created a complex background generating great sensitivity and salience to the settlement activity in Palestinian lands since 1948 and after 1967.

In addition, the state of Israel has a formidable array of defense (emergency) regulations so that the state is administered under a dual military-civilian system.²⁶¹ The defense emergency regulations, which were inherited from Britain, include the power to detain (detention), the power to deport, the power to take possession of land, the power to forfeit and demolish property, and the power to declare closed areas.²⁶² These were supplemented by the Foundation of Legislation Law of 1980, which strengthened the powers of the state and weakened the rights of Palestinians.²⁶³

Under the authority of this arsenal of complex laws, the critical question is of course the status of Palestinians in the territories that came under Israeli control after the 1967 war. In 1967, Israel attacked Syria and occupied the Golan Heights.²⁶⁴ It also occupied the West Bank in Gaza, and the Sinai Peninsula up to the Suez Canal.²⁶⁵ Technical international law does not validate the acquisition of territory by the use of force.²⁶⁶ On the other hand, the occupancy of such territory, over time, may generate new facts and new expectations if the legal statuses of the occupancy (and those who suffer occupancy) are not appropriately clarified. The Palestinians have reasserted their claim to statehood covering the territories now occupied by Israel—namely, Gaza and the West Bank. The Israelis while negotiating have been negotiating with a view to interminable negotiations.

²⁵⁵ *Basic Law: Israel Lands*, Passed on July 25, 1960, by the fourth Knesset - The basis of the law is the special relationship between the People of Israel and the Land of Israel and its redemption. The law ensures that the state lands, which constitute about 90% of the lands in the state, should remain national property. The law prohibits the transfer of ownership over lands owned by the state, the Development Authority or the Jewish National Fund, either by sale or by any other means, with the exception of types of land or transactions, that have been specified in the law.

²⁵⁶ Draft Proposal for the Israel Land Administration Law, 5720-1960 (Hatzot Hok 34)

²⁵⁷ *Israel Lands Law 5720-1960 s. 1.* - Passed by the Knesset on the 1st Av, 5720 (25th July, 1960) and published in *Sefer Ha-Chukkim* No. 312 of the 5th Av, 5720 (29th July, 1960), p. 56; the Bill and an Explanatory Note were published in *Hatzot Hok* No. 413 of 5720, p. 34.; In "*Laws of the State of Israel: Authorized Translation from the Hebrew, Volume 14*". Government Printer, Jerusalem, Israel, p. 49-50 (1948-1987)

²⁵⁸ *Israel Land Administration Law, 5720-1960, s. 3.* (*Hatzot Hok 34*) (I.L.A. 14 LSI 50) (Entered in effect in 1961) - 93% of the land in Israel is in the public domain; that is, either property of the state, the Jewish National Fund (JNF) or the Development Authority. The Israel Land Administration (ILA) is the government agency responsible for managing this land which comprises 4,820,500 acres (19,508,000 dunams). "Ownership" of real estate in Israel usually means leasing rights from the ILA for 49 or 98 years.

²⁵⁹ The "Land Covenant" was signed on November 28, 1961. The text appears at *Reshumot* (Official Gazette), *Yalkut Ha-Pirsumim*, No. 1456, June 7, 1968, at 1597-1598 (Hebrew). For English text, see 2 Pal. Y.B. Int'l. L. 214 (1985)

²⁶⁰ Stephen Lendman, *Israel's Discriminatory Land Policies*, *rense.com* (2009)

²⁶¹ Moshe Lissak *The Unique Approach to Military-Societal Relations in Israel and its Impact on Foreign and Security Policy*, in *Peacemaking in a divided society: Israel after Rabin* By Sasson Sofer (2001)

²⁶² David A. Kirshbaum, *Israeli Emergency Regulations & the Defense (Emergency) Regulations of 1945*, Israel Law Resource Center (February, 2007)

²⁶³ *Foundations of Law, 5740—1980; Passed by the Knesset on the 10th Av, 5740 (23rd July, 1980) and published in Sefer Ha-Chukkim No. 978 of the 18th Av, 5740 (31st July, 1980), p. 163; the Bill and an Explanatory Note were published in Hatzot Hok No. 1361 of 5738, p. 307, in "Laws of the State of Israel: Authorized Translation from the Hebrew, Volume 34", Government Printer, Jerusalem, Israel (1948-1989), p. 181, Israel Law Resource Center (February, 2007)*

²⁶⁴ Harris, William W. (1980) *Supra*

²⁶⁵ *Id.*

²⁶⁶ Sharon Korman, *The right of conquest: the acquisition of territory by force in international law and practice*, Oxford University Press (1996)

It is possible that there are interests in Israel that see continuous negotiation as an opportunity to incrementally change facts on the ground, with settlement activity, with strategically placed roads for exclusive Israeli use²⁶⁷, as well as limits to Palestinian development and civil rights.

For example, the West Bank aquifer is a major water resource.²⁶⁸ Israelis uses approximately 800 liters of water per day while Palestinians are allowed to use only an approximate of 200 liters per day.²⁶⁹ Israeli prohibits Palestinians from drilling into the aquifer without permits.²⁷⁰ Palestinian construction of catchment basins to collect rainwater is prohibited.²⁷¹ A wide variety of goods are deemed to be “war goods” (such as sewing machines); and perishable Palestinian exports are delayed so that they are destroyed.²⁷² Moreover, income to Palestinians is restricted so that Palestinian incomes have to be 20+ times less than that of Israelis.²⁷³ The occupier also limits entrepreneurial activity that may compete with Israelis’. The occupier also disrupts Palestinian schooling²⁷⁴, and the system of strategic roads has made communication a nightmare.²⁷⁵ The Israeli policy of targeted assassinations has focused on eliminating educated and moderate Palestinians, making it difficult to create a competent government authority.²⁷⁶ Israel also controls airspace and prevents Palestinian fishing operations in the Mediterranean.²⁷⁷ Tens of thousands of homes have been demolished²⁷⁸; and hundreds of thousands of fruit and nut trees have been destroyed.²⁷⁹

The continuance of the conflict escalates tensions and, in turn, accelerates inter-group hostility between the Palestinians and Israelis. One of the significant problems of inter-group escalating tensions is the propensity to shape human behaviors in terms of the perspectives of racism.²⁸⁰ This is a problem that cuts both ways. In the context of Israel, domestic critics seriously lament “the filthy wave of racism that is engulfing us.”²⁸¹ The charge that Israel generates strong racist constituencies is both serious as well as a matter of extreme concern to the Israeli authorities.

²⁶⁷ A.S. Hakkerta, V. Gitelmana, A. Cohenb, E. Dovehb, T. Umanskyb, *The evaluation of effects on driver behavior and accidents of concentrated general enforcement on interurban roads in Israel*, Accident Analysis & Prevention, Volume 33, Issue 1, Pages 43-63 (January 2001); See also Rami S. Abdulhadi, *Land Use Planning in the Occupied Palestinian Territories*, Journal of Palestine Studies Vol. 19, No. 4, pp. 46-63 (Summer 1990)

²⁶⁸ Miriam R. Lowi, *Bridging the Divide: Transboundary Resource Disputes and the Case of West Bank Water*, Vol. 18, No. 1 pp. 113-138, (Summer, 1993); See also Joyce R. Starr, *Water Wars*, Foreign Policy No. 82 (Spring, 1991), pp. 17-36; See also *The Water Issue and the Palestinian-Israeli Conflict*, The Center for Policy Analysis on Palestine, Information Paper No.2 (1993)

²⁶⁹ *World Bank Report - Assessment of Restrictions on Palestinian Water Sector Development*, Pg. 11 (2009)

²⁷⁰ Miriam R. Lowi (1993) *Supra*

²⁷¹ *Id.*

²⁷² Erik Schechter, *Legal Scholars Weigh in on Gaza Blockade, Flotilla Deaths*, Carnegie Council; The Voice of Ethics in International Affairs (June 28, 2010)

²⁷³ Nadim Kawach, *Real per capita income of Palestine plunges*, International Solidarity Movement (January 17, 2010)

²⁷⁴ Ismael Abu-Saad, *State-Controlled Education and Identity Formation Among the Palestinian Arab Minority in Israel*, American Behavioral Scientist, vol. 49 no. 8 pp. 1085-1100 (April 2006)

²⁷⁵ Tom Selwin, *Landscapes of Separation: Reflections on the Symbolism of By-pass Roads in Palestine*, in “Contested landscapes: movement, exile and place” By Barbara Bender & Margot Winer (2001)

²⁷⁶ Gal Luft, *The Logic of Israel's Targeted Killing*, Middle East Quarterly, pp. 3-13 (2003)

²⁷⁷ *Israel's control of the airspace and the territorial waters of the Gaza Strip*, B'Tselem; The Israeli Information Center for Human Rights in Occupied Territories (September 27, 2010)

²⁷⁸ Farrell, Brian, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 Brook. J. Int'l L. 871 (2002-2003)

²⁷⁹ Atyaf Alwazir, *Uprooting Olive Trees in Palestine*, ICE Case Number: 110 (November 2002)

²⁸⁰ Faye V. Harrison, *Facing Racism and the Moral Responsibility of Human Rights*, Annals New York Academy of Science (2000); See also Proudford, Karen L., *Notes on the Intra-Group Origins of Inter-Group Conflict in Organizations: Black-White Relations as an Exemplar*, 1 U. Pa. J. Lab. & Emp. L. 615 (1997-1998); See also David Erdal, et. al, *On Human Egalitarianism: An Evolutionary Product of Machiavellian Status Escalation?*, Current Anthropology, Vol. 35, No. 2, pp. 175-183 (Apr., 1994)

²⁸¹ Uri Avnery, *The Darkness to Expel* (Dec 25, 2010)

The link between racism and the occupation is indicated in the actual practices of sustaining the occupation itself. A recent book titled *The Occupation of the Territories* is summarized in Avnery's newsletter. The book deals with the testimonies of ordinary Israeli soldiers dealing with the daily and nightly life of occupation. According to Avnery, "There are accounts of nocturnal incursions into quiet Palestinian villages as exercises—breaking into random houses where there were no 'suspects', terrorizing children, women and men, creating mayhem in the village—all this to 'train' the soldiers. There are stories about the humiliation of passers-by at the checkpoints ("Clean up the checkpoint and you will get your keys back!"), casual harassment ("He started to complain, so I hit him in the face with the butt of my weapon!"). Every testimony is meticulously documented: time, place, unit." According to Avnery, the matter-of-factness and the effort to avoid outrageous incidents strengthen the credibility of the book. "The ostentation of the book is not to uncover atrocities and show the soldiers as monsters. It aims to present a situation: the ruling over another people, with all the high-handed arbitrariness that this necessarily entails, humiliation of the occupied, corruption of the occupier. According to the editors, it is quite impossible for the individual soldier to make a difference. He is just a cog in a machine that is inhuman by its very nature."²⁸² These reports should also be understood in the context of right-wing elements in Israel seeking to depreciate the civic status of Arab citizens. This context includes loyalty oaths, religious edicts that forbid Jews from renting apartments from Arabs, demonstrations in Bet Yam calling for the expulsion of all Arabs, and Tel Aviv's Hatikva Quarter demanding the expulsion of foreign workers and refugees.²⁸³ Jews have been millennial victims of racism, and there is a great sensitivity to the concern that some elements in Israel promote a racist agenda. The right-wing racists seek to challenge the "unequaled humanity" of the Judaic tradition.²⁸⁴ The religion demands "the treatment of 'gerim' (foreigners living in Israel) be treated as Israelites" because "you were foreigners in the land of Egypt."²⁸⁵ It should also be noted that foreign women are critical to the Jewish biblical history. Bathsheba, the mother of Solomon, had been the wife of a Hittite.²⁸⁶ Her later husband, David, was the descendent of Ruth, who was Moabite.²⁸⁷ One of Israel's great kings—King Ahab—was married to a Phoenician.²⁸⁸ Our sense is that the occupation is a major contributor to the disturbing emergence of right-wing inspired racism in Israel. In this sense, Israel would benefit as much as the Palestinians from a just settlement.

When the list of depredations is viewed in the aggregate, there is a sense that the occupying authority wants life to be an impossible struggle for the residents of the West Bank and Gaza. Palestinian resistance is equated with terrorism²⁸⁹ but, if they resist with non-violence they are not a serious negotiating party or, the strategies of non-violence are simply viewed as weakness, permitting

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ David Adams Leeming, *The Oxford companion to world mythology*, Oxford University Press (2005)

²⁸⁷ *Id.*

²⁸⁸ Philip J. King & Lawrence E. Stager, *Life in biblical Israel*, Westminster John Knox Press (2001)

²⁸⁹ Assaf Moghadam, *Palestinian Suicide Terrorism in the Second Intifada: Motivations and Organizational Aspects*, *Studies in Conflict & Terrorism*, 26:65–92 (2003); See also Tomis Kapitan, *The Terrorism of 'Terrorism'*, In James Sterba, ed., *Terrorism and International Justice*, 47-66 (Oxford, 2003); See also Ariel Merari, *Terrorism as a Strategy of Insurgency*, *Terrorism and Political Violence*, Vol.5, No. 4, pp. 213-251 (Winter 1993)

the Israeli side to up the ante.²⁹⁰ There are of course perspectives from the Palestinian side and perspectives from the Israeli side. Any balanced account in law must certainly acknowledge the reality of these perspectives. One balancing factor to be considered is the Palestinian Authority's relationship with Hamas.²⁹¹ The ambiguous nature of this relationship undermines the authority of the PA; and the anti-Semitic posturing of Hamas challenges the willingness of other states to recognize a Palestinian state having ties to such an organization.²⁹²

Another balancing factor is the complexity of Israeli society, which has a courageous community of human rights activists.²⁹³ This community (which supports the individual rights of Israelis as well as Palestinians) has gone mostly unheard in recent years, as the powerful ultranationalist establishment came to the fore with strong support from religious ultranationalists.²⁹⁴ The ultranationalist Israeli establishment is often supported uncritically by some 52 U.S.-based Jewish groups (sometimes described as "The Lobby").²⁹⁵ While these groups apparently work to support "Israel," the reality is that these groups largely channel money in support of the extreme Israeli ultranationalist cause.²⁹⁶ Such distribution of outside funding serves to marginalize center-left opinion in Israel.²⁹⁷ The influence of these groups is astonishing,²⁹⁸ and suggests great complexity and concern about U.S. involvement in the Middle East negotiations.

One thing is clear—the system of occupancy administration falls radically short of the responsibilities of belligerent occupancy under international law and significantly undermines humanitarian and human rights law. This weakens claims by the Israeli authorities for continued occupation of Gaza and the West Bank. The influence of the Israeli ultranationalists on the American neo-con political interests was reflected in the vastly ambitious doctrine of the "Clean Break."²⁹⁹ This doctrine, which sought to reshape the entire state structure of the Middle East, in effect implies that the Palestinian problem in Israel is a sideshow.³⁰⁰ The Clean Break Doctrine promoted the idea of regime changes for the dictators of the Middle East on the basis that one could not make peace with authoritarian despots.³⁰¹ Regime change favored democracy. Events in

²⁹⁰ *Id.*

²⁹¹ Michael Schulz, *The Role of Hamas in Building Palestinian Democracy in the Midst of Violence*, in "The democratization project: opportunities and challenges" By Swedish Network of Peace, Conflict, and Development Research; Conference, Anthem Press (2009)

²⁹² *Id.*

²⁹³ Oren Yiftachel, *Israeli Society and Jewish-Palestinian Reconciliation: 'Ethnocracy' and Its Territorial Contradictions*, Middle East Journal, Vol. 51, No. 4, pp. 505-519 (Autumn, 1997)

²⁹⁴ *Id.*

²⁹⁵ George P. Schultz, *The "Israel Lobby" Myth*, U.S. News and World Report, (September 9, 2007); See also John J. Mearsheimer & Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy*, Middle East Policy, Volume 13, Issue 3, pages 29–87, September 2006

²⁹⁶ *Financing the Israeli Occupation: The Direct Involvement of Israeli Banks in Illegal Israeli Settlement Activity and Control over the Palestinian Banking Market; Who Profits from the Occupation*, Coalition of Women for Peace (2010); See also Christopher Bollyn, *The Real Cost Of US Support For Israel - \$3 Trillion*, (September 19, 2003)

²⁹⁷ *Id.*; See also Mead, Walter Russell, *Jerusalem Syndrome - Decoding the Israel Lobby*, 86 Foreign Aff. 160 (2007)

²⁹⁸ Charles S. Liebman, *Pressure without sanctions: the influence of world Jewry on Israeli policy*, Fairleigh Dickinson Univ Press (1977); See also John J. Mearsheimer, Stephen M. Walt, *The Israel lobby and U.S. foreign policy*, Macmillan, Political Science (2007); See also Robert C. Lieberman, *The Israel Lobby and American Politics*, Perspectives on Politics Perspectives on Politics, 7: 235-257 (2009)

²⁹⁹ Adam Shapiro, E. Faye Williams, and Khaled Dawoud, *Neocon Middle East Policy: The "Clean Break" Plan Damage Assessment*, Institute for Research (March 2005)

³⁰⁰ *A Clean Break: A New Strategy for Securing the Realm* - prepared in 1996 by a study group led by Richard Perle for Benjamin Netanyahu, the then Prime Minister of Israel. The report explained a new approach to solving Israel's security problems in the Middle East with an emphasis on "Western values". It has since been criticized for advocating an aggressive new policy including the removal of Saddam Hussein from power in Iraq. Institute for Advanced Strategic and Political Studies (July 2006)

³⁰¹ *Id.*

Tunis and Egypt and other parts of the Middle East which indicate strong popular demands for democracy made have heard Netanyahu although currently Netanyahu wishes that they had not taken him so seriously of the democracy question.³⁰² Presumably he misses the stability of an authoritarian friend like Mubarak.

On the other hand, deeply rooted in the Israeli ultranationalist agenda is the idea of a return to an exclusively Jewish state without Arabs; that state's boundaries being the boundaries of Eretz Israel.³⁰³ The current state of negotiations has floundered on the rock of Israeli settlement activity. The US has now admitted that it is incapable of generating inducements to Mr. Netanyahu for a settlement freeze.³⁰⁴ However, the freeze is the essential precondition for Palestinian cooperation in the negotiation process.³⁰⁵ It is unclear what further steps the US can take short of putting the squeeze on the Lobby, a squeeze that is beyond the capability of the Obama Administration.³⁰⁶ This has renewed the Palestinian interest in looking at an alternative strategy to secure its claim to statehood.

There are some—especially the Israeli ultranationalists—who propagate the notion that there is no such thing as a “Palestinian”.³⁰⁷ By refusing to permit Palestinians their identity, the propagandists are laying the groundwork for rejecting the Palestinians’ claim to be a “people” under international law for the purposes of self-determination.³⁰⁸ Some hold that the Palestinians are simply Arabs (and are therefore indistinguishable from the Arabs of contiguous states).³⁰⁹ Under international law, there is the recognition of rights of entities other than states; and this includes the right of a people to self-determination.

As we had previously discussed the right of peoples to self-determination has evolved by virtue of a framework of complex international agreements and international practices.³¹⁰ However, there is not a clear-cut, formal definition of the idea of “peoples.” Given this degree of unclarity, there is sufficient identity, coherence, and visible indicators of who a Palestinian is that, as a practical matter, it would be quite counter-intuitive to regard the Palestinians as not a people entitled to self-determination under international law. The nature of the right of self-determination is expressed in a multitude of international instruments like Art. 1(2)³¹¹ and Article 55³¹² of the UN Charter which

³⁰² *Speech by Prime Minister Benjamin Netanyahu to a Joint Meeting of the United States Congress*, By Benjamin Netanyahu (May 24, 2011) – “Fifteen years ago, I stood at this very podium. By the way, it hasn’t changed. (Laughter.) I stood here and I said that democracy must start to take root in the Arab world. Well, it’s begun to take root, and this beginning holds the promise of a brilliant future of peace and prosperity, because I believe that a Middle East that is genuinely democratic will be a Middle East truly at peace.”; See also Kevin Connolly, *Arab Spring challenges Netanyahu*, BBC News (May 7, 2011); See also Elad Benari, *Netanyahu: Arab Democracy Would Solve the Problem of Peace; Prime Minister Netanyahu addresses Middle East instability on YouTube: “Arab democracies are the best thing that could happen to Israel.”*, Israel National News (7/6/2011)

³⁰³ Biger, Gideon, *The boundaries of Israel–Palestine past, present, and future: a critical geographical view*, Israel Studies (March 22, 2008)

³⁰⁴ Jill Dougherty and Elise Labott, *U.S. ends bid for renewed Israeli settlement freeze*, CNN (December 07, 2010)

³⁰⁵ Ashraf Khalil, *Palestinians say full settlement freeze is precondition to new peace talks*, Correspondent of The Christian Science Monitor (August 27, 2009)

³⁰⁶ Avnery, Uri, *Israel lobby humiliates Obama Administration* (15 March 2009)

³⁰⁷ Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness*, Columbia University Press (2009)

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Antonio Cassese, *Self-determination of Peoples; A legal Reappraisal*, A Grotius Publication; Cambridge University Press (1997)

³¹¹ *United Nations Charter*, signed at the San Francisco War Memorial and Performing Arts Center in San Francisco, United States, on 26 June 1945. Chapter I, Article 2 - To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

express the idea of respect for the principle of self-determination of peoples, the ICCPR³¹³ and the ICESCR³¹⁴, both stating that “all people have rights to self-determination”, the U.N. Declaration on Friendly Relations, which also affirms the principle of self-determination of peoples and stipulates that every state has a duty to respect this right in accordance with the provisions of the Charter,³¹⁵ the 1993 World Conference on Human Rights, which adopted the Vienna Declaration and Program of Action³¹⁶ stressing its affirmation of the right of self-determination of all peoples, and the Helsinki Final Act which stresses as well the salience of the right to self-determination.³¹⁷ It seems to be clear that the processes by which Israel exercises occupancy control over the Palestinians undermines most of the central elements of the scope of the right of self-determination.

D. CONTEMPORARY INTERNATIONAL RELATIONS

To some extent, Israel achieved statehood by first gaining support in the international community as a proto-state (especially by using formal legal tools like treaties) and then by unilaterally acting with sovereignty as a realized state (particularly by throwing off the paternalistic yoke of the U.N. requirements and by going to war with the neighboring militants threatening the new state’s borders and existence).³¹⁸ The ruling authority of Israel was able to do this because it had the force of global opinion behind it.³¹⁹ What seems to threaten the present leadership of Israel (who oppose the creation of a Palestinian state) so much right now is the wave of global support for the emerging state of Palestine.³²⁰

Looking at the example of Israel’s achievement of statehood³²¹ (in partial defiance of U.N. requirements³²²), it would seem that one clear sign of self-determination is that the proto-

³¹² *United Nations Charter*, Chapter IX – With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

³¹³ *International Covenant on Civil and Political Rights, Part I Article I*; Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49

³¹⁴ *International Covenant on Economic, Social and Cultural Rights, Part I Article I*; Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27

³¹⁵ General Assembly Resolution 2625, Session XXV of 24 October 1970; *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*; 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. No. 28 at 121, 65 Am.J.Int’l L. 243. *Supra*

³¹⁶ *Vienna Declaration and Programme of Action; World Conference on Human Rights*, Vienna, 14-25 June; 1993 Distr. GENERAL, A/CONF.157/23, 12 July 1993

³¹⁷ *Conference on Security and Cooperation in Europe; Final Act, Helsinki* (1 August 1975)

³¹⁸ Jonathan Adelman, *The Rise of Israel: A History of a Revolutionary State*, Routledge; Taylor & Francis Group (2008)

³¹⁹ Davis B. Bobrow, *International Public Opinion: Incentives and Options to Comply and Challenge*, University of Pittsburgh Graduate School of Public and International Affairs (2005); See also Rusciano, Frank L., *Global Opinion Theory and the English School of International Relations*, *New Global Studies*: Vol. 4 : Iss. 2, Article 3. (2010)

³²⁰ Paul Chamberlin, *The Struggle Against Oppression Everywhere: The Global Politics of Palestinian Liberation*, *Middle Eastern Studies*, Volume 47, Issue 1 (2011)

³²¹ Zohar Segev, *American Zionists' Place in Israel after Statehood: From Involved Partners to Outside Supporters*, *American Jewish History*, Volume 93, Number 3, pp. 277-302 (September 2007); Jerome B. Polisky & Frances R. Wolpawb, *Jewish statehood legitimated: Abba Hillel silver at the American Jewish conference*, *Quarterly Journal of Speech* Volume 58, Issue 2 (1972)

³²² Jonathan Adelman, *The Rise of Israel: A History of a Revolutionary State*, Routledge; Taylor & Francis Group (2008); See also Yoram Shachar, *Jefferson Goes East: The American Origins of the Israeli Declaration of Independence*, *Theoretical Inquiries in Law*, Volume 10, Number 2 Article 10 (July 2009)

government makes decisions in the best interest of the polity, whether or not these are the prescribed rules of formulation set out by the controlling entities in international law. Nevertheless, the proto-Palestine ruling authority must make the correct evaluations of what is an “assertion of sovereignty” and what is, frankly, detestable under contemporary international law standards. The proto-state, while it must achieve sufficient independence to earn the qualification of “self-determined,” is very vulnerable to international opinion. Indeed, the fact that it must “earn” recognition (including independence) illuminates the forceful role of foreign opinion and international expectation in contemporary international law. While international relations do not directly make law, they do frame the issues for the interpretation of relevant law standards.

Over the last few months the Palestinians have been deciding whether to seek full membership at the Security Council, or to petition the General Assembly for an enhanced observer status.³²³ In January 2010, the Palestinian Foreign Minister, Riad Malki, declared his intention to seek UN recognition of Palestinian statehood in September 2011. He also stated that he is currently lobbying for supporting votes worldwide.³²⁴ However, the UN route is not necessarily an easy process. As we will discuss in more detail, because the General Assembly can only vote on membership based on a positive recommendation from the Security Council, in order to obtain UN membership, Minister Malki would have to first gain support from the Security Council.

We have described the scenario of separatists granted the right to self-determination under international law. That is one way that global opinion may frame the situation in the occupied Palestinian territories. Another scenario presents a framework unsupported by international law—that of South Africa, a unified state in which the pre-colonial residents of the state are ruled by the colonists in a disadvantageous way that denies the inherent dignity and self-determination of the pre-colonial citizens.³²⁵ Here, the consensus seems to be that, even with extreme persecution of one group, the state should remain united, but there should be a change in the laws and the leadership of the state to enforce the equality of all citizens under a single set of laws.³²⁶ However, there are distinct differences between the former apartheid situation in South Africa and that of the occupied Palestinian territories.³²⁷

First, the Jewish settlers have effectively ousted the former natives from the most valuable lands (with historical monuments, urban development, and access to significant resources like water)³²⁸; and the leadership of Israel seems intractably set against welcoming Palestinians into a

³²³ Thomas, Katherine Reece, *Non-Recognition, Personality and Capacity: The Palestine Liberation Organization and the Palestinian Authority in English Law*, 29 *Anglo-Am. L. Rev.* 228 (2000); See also Efraim Inbar, *The Rise and Demise of the Two-State Paradigm*, Volume 53, Issue 2, Pages 265-283 (2009); Tilley, V., *A Palestinian Declaration of Independence: Implications for Peace*, *Middle East Policy*, 17: 52–67 (2010)

³²⁴ Mohammed Daraghme, *Palestinians Say They'll Go to UN for Recognition*, ASSOCIATED PRESS (Jan. 10, 2011)

³²⁵ Glaser D., *Zionism and Apartheid: a moral comparison*, *Ethnic and Racial Studies*, Volume 26, Number 3, pp. 403-421(19) (May 2003)

³²⁶ Mark Marshall, *Rethinking the Palestine Question: The Apartheid Paradigm*, *Journal of Palestine Studies*, Vol. 25, No. 1, pp. 15-22 (Autumn, 1995); See also Rikhi Jaipal, *A Personal View of Consensus Making in the UN Security Council International Security*, Vol. 2, No. 4, pp. 195-200 (Spring, 1978); See also Travers, Patrick J., *Legal Effect of United Nations Action in Support of the Palestine Liberation Organization and the National Liberation Movements of Africa*, 17 *Harv. Int'l. L. J.* 561 (1976)

³²⁷ Marwān Bishārah, *Palestine/Israel: peace or apartheid : occupation, terrorism and the future*, Zed Books (2002); See also Jimmy Carter, *Palestine: peace not apartheid*, Simon and Schuster (2006)

³²⁸ Schnell, I. and Mishal, S., *Place as Source of Identity in Colonizing Societies: Israeli Settlements in Gaza*, *Geographical Review*, 98: 242–259 (2008); See also Atyaf Alwazir, *Uprooting Olive Trees in Palestine*, ICE Case Number: 110 (November 2002); See also Gamal Abouali, *Natural Resources Under Occupation: The Status of Palestine Water Under International Law*, 10 *Pace Int'l L. Rev.* 411 (Fall 1998)

secular state of Israel as citizens and equals.³²⁹ Under international law, it is the sovereign right of Israel to determine who may become a citizen, who may be a resident, and what type of laws will govern the people within its borders.³³⁰ Unless the Israeli polity itself changes these standards in constitutive acts (or violates human rights obligations to the extent that international entities pierce Israel's sovereignty), external forces cannot transform Israel into a unified, secular, equal rights-based state.

Second, the ousting of the Palestinians through military combat seems to have effectively settled Israel's legal claim to the land seized in the 1948 war and subsequent military combat fought over Jewish settlers' lands. As a result, Israel has continued to gain land and extend its constructive borders through combat.³³¹ Israeli settlements in Palestinian territories provoke protests and violent reactions of Palestinians, who, having no state, do not have a clear right to defend themselves militarily under international law.³³² If they claim such a right they risk being characterized as terrorists. This is a unique situation, produced as a result of evolving international law regarding non-state combatants.³³³ It would seem to require further evolution of international law, to provide status for peoples who have no entity with sufficient international personality to protect and provide for them. Given that the state is the most important viable juridical personality in contemporary international law for the protection of peoples and individuals under duress from another state, and that no state contiguous to the borders of the PA (especially Israel) has provided this, as one scholar has put it, "[m]aintaining the occupation is clearly unsustainable because of the raging violence and the continuation of the state of war..."³³⁴

III. INTERESTS OF THE PARTIES

While it is clearly in our interest to suggest that respect for the international rule of law (especially regarding human rights norms) is best for all, we address the particular parties individually as follows;

A. PALESTINIAN INTERESTS IN A TWO-STATE SOLUTION

The advantages of a recognized state begins with the idea that a duly recognized state would sharpen the legal question of Israel's continued occupation. The occupation in the face of recognized statehood would be tantamount to the occupation of territory by the use of force (in

³²⁹ D. Newman, *The geopolitics of peacemaking in Israel–Palestine*, Political Geography, Volume 21, Issue 5, Pages 629-646 (June 2002); See also Yiftachel, O., 'Ethnocracy': *The Politics of Judaizing Israel/Palestine*. *Constellations*, 6: 364–390 (1999); See also Yoav Peled and Gershon Shafira, *The Roots of Peacemaking: The Dynamics of Citizenship in Israel, 1948–93*, *International Journal of Middle East Studies*, 28: 391-413 (1996)

³³⁰ *Id.*; See also Joseph H. Beale, *The Jurisdiction of a Sovereign State*, Harvard Law Review, Vol. 36, No. 3, pp. 241-262 (January 1923)

³³¹ Jeremy Forman & Alexandre Kedar, *From Arab land to 'Israel Lands': the legal dispossession of the Palestinians displaced by Israel in the wake of 1948*, *Environment and Planning D: Society and Space*, volume 22, pages 809 – 830 (2004); See also Bisharat, George E., *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 *Am. U. L. Rev.* 467 (1993-1994)

³³² Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, *The American Journal of International Law*, Vol. 99, No. 1, pp. 62-76 (Jan., 2005)

³³³ MC Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, *The Journal of Criminal Law & Criminology*, Vol. 98, No. 3 (2008)

³³⁴ Alon Ben-Meir, *Negotiating an Israeli-Palestinian Breakthrough* (December 18, 2008)

violation of U.N. Charter Art. 2(4)).³³⁵ Thus, Resolution 242, which calls for the end of occupation, in light of legally recognized statehood, would add to the illegality of occupation by the assumption that the IDF's occupancy is now that of an aggressor.³³⁶ A fully recognized state would make it difficult for Israel to negotiate or discuss matters, which is a matter of state responsibility, are violations of international law. Additionally, the creation of a regularly constituted parliament, regularly constituted administrative agencies, regularly constituted courts, the organization of the professions with state regulation and backing, the organization of education and social services, should all hopefully progress with the security of established and definable institutions of authoritative and controlling decision making. Most importantly for the Palestinians, the structures of good governance require transparency, responsibility, and accountability, and a respect for the Rule of Law.³³⁷ To the extent that the Authority is relatively informal at present,³³⁸ it suggests that influence may be generated by third party forces, which may be partial to strategies of coercion and violence.³³⁹ Thus, the benefits of open and transparent good governance could in fact be a critical dimension of political responsibility in maintaining peace and security. It is usually where governance is unformulated and loosely organized that there is an opportunity for penetration by terroristic operatives.³⁴⁰ From the establishment of a state, there would be a state constitutional ideology that stresses the respect for human rights and fundamental freedoms. All Palestinians would benefit from this.³⁴¹ The current table below provides a statistical indication of the costs to the Palestinians of the current occupation policy and the value of sovereign status.³⁴²

³³⁵ Bisharat, George E., *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 Am. U. L. Rev. 467 (1993-1994); See also Oscar Schachter, *The Right of States to Use Armed Force*, Michigan Law Review, Vol. 82, No. 5/6, Festschrift in Honor of Eric Stein, pp. 1620-1646 (Apr. - May, 1984)

See also Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, The American Journal of International Law Vol. 64, No. 5, pp. 809-837 (Oct., 1970)

³³⁶ *Id.*

³³⁷ Amir N. Lichta, Chanan Goldschmidta, Shalom H. Schwartz, *Culture rules: The foundations of the rule of law and other norms of governance*, Journal of Comparative Economics Volume 35, Issue 4, Pages 659-688 (December 2007); See also John Graham, Bruce Amos and Tim Plumtre, *Principles for Good Governance in the 21st Century* Policy Brief No.15 (2003)

³³⁸ Y. Sayigh, *Palestine's prospects*, Survival Vol. 42, Iss. 4 (2010); See also Breger, Marshall J. & Quast, Shelby R., *International Commercial Arbitration: A Case Study of the Areas under Control of the Palestinian Authority*, 32 Case W. Res. J. Int'l L. 185 (2000)

³³⁹ Kledja Mulaj, *Violent Non-State Actors in World Politics*, Columbia University Press (2009); See also Suzuki, Eisuke, *Extraconstitutional Change and World Public Order: A Prologue to Decision-Making*, 15 Hous. L. Rev. 23 (1977-1978); See also Herbert W. Simonsa, *Persuasion in social conflicts: A critique of prevailing conceptions and a framework for future research*, Volume 39, Issue 4 (1972)

³⁴⁰ Black, D., *The Geometry of Terrorism. Sociological Theory*, 22: 14-25 (2004); See also Kevin Siqueira, *Participation in organized and unorganized protests and rebellions*, European Journal of Political Economy, Volume 19, Issue 4, Pages 861-874 (November 2003); See also Michael Stohl, *The Politics of terrorism*, CRC Press (1988)

³⁴¹ The remarks of Dr. Saeb Erakat, the Chief negotiator of the PLO articulates the Palestinian interest in terms of the problem that it experiences: "We are marking 44 years of settlement-colony expansion. Israel's illegal and discriminatory policies have led to the displacement and dispossession of our people, and are aimed at making the establishment of a Palestinian state impossible. Dr. Erakat added that "if the members of international community are serious about the two-state solution they must, at the very least, recognize the State of Palestine on the 1967 borders. This will send a clear message to Israel that in the 21st century, borders are determined by international law and not by settlement colonies that are built on land that was acquired by force." He continues: "while it is true that Israel's policies are threatening the very possibility of the two-state solution, its efforts to undermine the rights of the Palestinian people have failed. In the face of nearly 50 years of unrelenting efforts by Israel to change the geography and demography of our land, we are still here, struggling peacefully for justice, equality, and freedom." - Palestine Liberation Organization; Negotiations Office - Press Release (June 4, 2011)

³⁴² Negotiations Affairs Department, Palestine Liberation Organization, *Palestinian Monitoring Group; Monthly Summary of Israeli Violations*, 01 February 2011 – 28 February 2011 (08 March 2011)

SUMMARY TABLE OF EVENTS IN THE OCCUPIED PALESTINIAN TERRITORY – FEBRUARY 2011

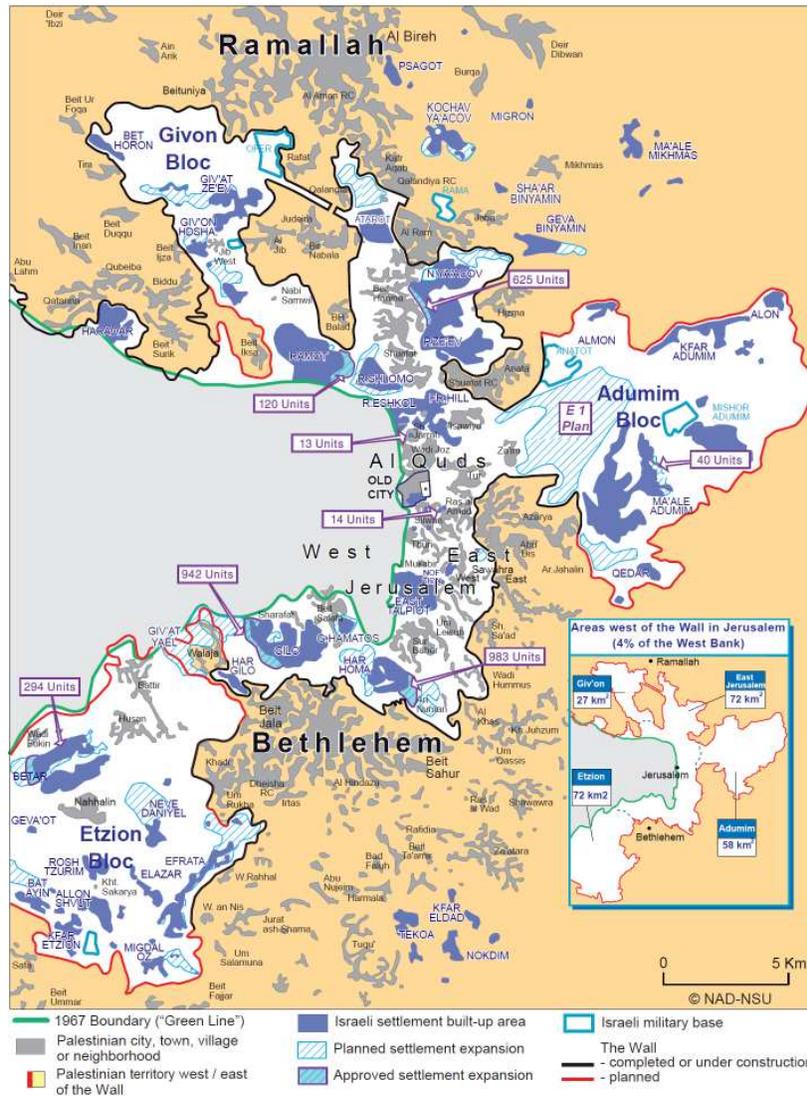
EVENT	WEST BANK	GAZA STRIP	TOTAL	NOTES
Deaths	1	6	7	Includes a civilian, whom Israeli settlers killed with sharp tools in Jerusalem city.
Injuries	34	45	79	Includes 16 children; three female civilians; and a journalist. Injured children included an infant baby girl as well as a girl run over by an Israeli settler vehicle.
Attacks	86	65	151	The Israeli military carried out 24 attacks during raids on Palestinian residential areas; 68 attacks during confrontations with Palestinians; and 35 attacks from Israeli army military posts on civilian houses and property. The Israeli navy opened fire on Palestinian fishing boats and territory on three occasions. Israeli combat aircraft carried out 18 aerial attacks on Palestinian territory and combat helicopters opened machinegun fire on civilians and property on one occasion. Israeli troops positioned at checkpoints and Israeli settlers opened fire on civilians and property on one occasion each.
Raids	652	14	666	22 in Jerusalem; 73 in Ramallah; 47 in Jenin; 19 in Tubas; 52 in Tulkarem; 71 in Qalqiliya; 87 in Nablus; 39 in Salfit; 36 in Jericho; 69 in Bethlehem; 137 in Hebron; two in Northern Gaza; two in Gaza; one in Central Gaza; four in Khan Yunis; and five in Rafah.
Arrests	259	1	260	37 in Jerusalem; 25 in Ramallah; 22 in Jenin; 12 in Tubas; six in Tulkarem; 18 in Qalqiliya; 21 in Nablus; 17 in Salfit; 14 in Jericho; 22 in Bethlehem; 65 in Hebron; and one in Northern Gaza. Arrested civilians included 45 children, three university students, and four Palestinian security officers.
Home Demolitions	1	1	2	The Israeli military demolished two civilian homes in the districts of Jerusalem and Central Gaza.
Attacks on Public & Private Property	106	10	116	Destruction of Property: Israeli troops and settlers destroyed two petrol stations; wheat crops; barracks; tents; olive trees; civilian vehicles; house furniture; a swimming pool; civilian houses; sheep pens; a bulldozer; a Palestinian Police officer's ID card; a commercial premise; electricity posts; water wells; a blacksmith's and carpenter's workshops; and a drug store. Confiscation of Property: The Israeli military confiscated personal computers; a truck; a hunting rifle; tractors; a vehicle; a fishing boat; and nets.
Home Occupations	4	—	4	The Israeli military occupied and converted into military posts civilian homes in the districts of Jerusalem (1); Ramallah (2); and Hebron (1).
Closure of Crossing Points	—	134	134	International crossing points were closed on 47 occasions (Rafah Crossing to Egypt and continuing closure of Yasser Arafat International Airport) and crossing points to territory under Israeli administration on 87 occasions.
Flying Checkpoints	681	—	681	The Israeli army set up flying checkpoints and searched Palestinian civilians and vehicles in and around Palestinian residential areas in the districts of Jerusalem (65); Ramallah (48); Jenin (7); Tubas (6); Tulkarem (23); Qalqiliya (138); Nablus (145); Salfit (31); Jericho (61); Bethlehem (45); and Hebron (112).
Medical Obstruction	1	—	1	The Israeli military impeded access to an ambulance to transport an ill child in Bethlehem district.
Attacks on Religious Sites	3	—	3	The Israeli military raided the grounds of the Al Aqsa Mosque compound; demolished a mosque; raided a mosque; and delivered a notice for the demolition of a mosque.
School Disruption	1	—	1	The Israeli military raided and searched a basic school in Dahiyat al Baladiya area in Hebron city.
Provocation of Palestinian Forces	25	—	25	The Israeli military provoked or harassed Palestinian National Security force on 10 occasions, Civil Police on 13 occasions, and Preventive Security on two occasions.
Settlement Activity	8	—	8	The Israeli military constructed a wall around a settlement and levelled land for the expansion of settlements as well as for the construction of a religious school and a military installation. The Israeli authorities also approved the construction of settlement housing units in East Jerusalem.
Settler Violence	78	—	78	In addition to killing a civilian, Israeli injured and assaulted several civilians. Israeli settlers also threw stones at civilians and property; damaged crops and olive trees; attempted to seize control of civilian land; set fire to a civilian house, a bulldozer, and civilian vehicles; raided Palestinian towns and villages; caused damage to the environment; destroyed a swimming pool, electricity posts, and a commercial premise. Israeli settler vehicles also ran over and wounded three children.
TOTAL	1940	276	2216	

The recognition of a sovereign Palestinian state would improve the negotiating stature of the Palestinian negotiators. At present, negotiations are structured around those of a sovereign State and its officials (Israel) and those of an entity which does not have the functioning diplomatic standing of a sovereign State. This suggests that the bargaining and negotiating structure is an asymmetrical one and that the Palestinians are the weaker entity in the process of agreement making itself. They would still have to work through central issues for the purpose of a complete peaceful settlement with the state of Israel. Those issues include Jerusalem, settlements, borders and related issues, water, refugees, political prisoners, missing persons and the remains of fallen persons, issues between the state of Palestine and the state of Israel, economic and trade relations, monetary affairs and claims resolution.³⁴³ These negotiations implicate the complex map of Israel and Palestine

³⁴³ Economic and Social Council Substantive session of 2007; Item 11 of the provisional agenda: *Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan* (A/62/50) and General Assembly Sixty-second session; Item 43 of the preliminary list: *Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources* (E/2007/100) - (A/62/75-E/2007/13); See also Tanya Reinhart, *The road map to nowhere: Israel/Palestine since 2003*, Verso (2006); See also Benvenisti, Eyal & Gvirtzman, Haim, *Harnessing International Law to Determine Israeli-Palestinian Water Rights: The Mountain Aquifer*, 33 Nat. Resources J. 543 (1993)

including settlements, the wall and other issues of geographic complexity. The following map provides a guide.³⁴⁴

MAP IMPLICATING PALESTINIAN INTERESTS SUCH AS THE WALL, SETTLEMENTS AND EAST JERUSALEM



B. ISRAELI INTERESTS IN A TWO-STATE SOLUTION

Israeli interests are complex on the question of the recognition of a Palestinian state. We are rejecting the idea that the majority of Israelis will opt for a state of continual insurrectionary, low-level conflict, which is the danger of undermining the political development of appropriate institutions of good governance in the Palestinian territories. It is therefore in Israel's interest that a recognition of a Palestinian state along the lines of good governance principles will diminish the prospect of that governing authority being influenced by shadowy third party forces. This type of government will provide the Israelis with the highest level of security that they see as an important

³⁴⁴ PLO Negotiations Affairs Department, *Israeli human rights violations within the occupied Palestinian territory (oPt): January – May 2011* (June 2011) and PLO Negotiations Affairs Department; Media Brief, *Israeli Policies in Occupied East Jerusalem: Colonizing The Land and the People* (June 2011)

part of settlement. In short, constitutional good governance for the Palestinians with the prospect of enterprising freedoms being freed from the shackles of occupation could produce a stable and important political entity, which would significantly stabilize the prospects for peace and security in the region.³⁴⁵ The alternative is simply to deny any right to self-determination, realizing that this will have destructive consequences in the long term.

There are two fundamental Israeli interests in the success of a negotiator settlement with the Palestinian leadership³⁴⁶; negotiations that may be preceded or succeeded by the emergence of a sovereign Palestinian State. The first is Israel's security interests, an interest that is still dependent on United States support and could be in jeopardy if United States efforts at mediation are sabotaged by the extreme right wing that now runs Israel.³⁴⁷ Failure in this regard would compromise both US and Israeli security interests. The second major interest of Israel is the Israeli defense and promotion of the "legitimacy" of the State of Israel.³⁴⁸ This is an issue that is extremely sensitive to the current Israeli leadership and their supporters in the Diaspora community.³⁴⁹ The issue of legitimacy emerged in part by the effort on the part of Israel detractors to suggest that Israeli policy regarding non-Jewish inhabitants of the State were being subjected to policies that were analogous to some aspects of the grand design of Apartheid.³⁵⁰ Since Apartheid had been used by South African detractors to delegitimize the Apartheid State, Israel's opponents felt that Israeli policy and practices with regard to the Palestinians had vulnerabilities ominously close to the policies and practices of Apartheid.³⁵¹ For example, efforts to create a boycott of Israeli trade and cultural changes were vigorously opposed by Israeli interests. However, the problems of legitimacy seem now to be tied to the beliefs, the ideology and the policies of the extreme right wing in Israel. And these policies, which have racial overtones, which are committed to the Eretz Israel idea which suggests that repudiation of international law supported boundaries and repudiate the idea that sovereigns cannot acquire territory as a consequence of conquest, only exacerbate the problems of legitimacy. Moreover, as seen above the treatment of the Palestinians appears to be discriminatory, and the recent war in Gaza seems to have involved a vastly disproportionate use of force implicating the possibility of war crimes violations.³⁵² One of the most difficult issues at least for the United States and for many sectors of the international community is the extreme right wing ideology, with racist

³⁴⁵ John Graham, Bruce Amos and Tim Plumtre, *Principles for Good Governance in the 21st Century* Policy Brief No.15 (2003)

³⁴⁶ Dore Gold, *Israel at 60: Its Historical and Legal Rights Still Challenged?* kms1.isn.ethz.ch (2010)

³⁴⁷ *Id.*; See also *Full Text Israel Political Brief September 23, 2011: Israel Prime Minister Benjamin Netanyahu's Speech at the UN / United Nations* (Full Text Transcript Excerpts) Together with Israel Word Press (September 23, 2011) *Supra*.

³⁴⁸ *Id.*; See also Yonah, Yossi, *Israel's Political Stability: A Matter of Principle*, *Israel Studies*, Volume 5, Number 2, pp. 128-153 (Fall 2000)

³⁴⁹ Jasmin Habib, *Israel, diaspora, and the routes of national belonging*, University of Toronto Press (2004)

³⁵⁰ Abigail B. Bakan & Yasmeen Abu-Laban, *Israel/Palestine, South Africa and the "One-State Solution": The Case for an Apartheid Analysis*, *Politikon*, 37:2-3, 331-351 (2010); See also Jimmy Carter, *Palestine: peace not apartheid*, Simon and Schuster (2006); See also Glaser D., *Zionism and Apartheid: a moral comparison*, *Ethnic and Racial Studies*, Volume 26, Number 3, pp. 403-421(19) (May 2003); See also Marwān Bishārah, *Palestine/Israel: peace or apartheid : occupation, terrorism and the future*, Zed Books (2002); See also Mark Marshall, *Rethinking the Palestine Question: The Apartheid Paradigm*, *Journal of Palestine Studies*, Vol. 25, No. 1, pp. 15-22 (Autumn, 1995)

³⁵¹ *Id.*

³⁵² Barnette, J., *The Goldstone Report: Challenging Israeli Impunity in the International Legal System?*, *Global Jurist*. Vol. 10: Iss. 3 (Advances), Article 1 (2010); Compare also The Goldstone Report itself; HUMAN RIGHTS IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES: Report of the United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48 (15 September 2009)

overtones and concerns about the attacks of international legal institutions.³⁵³ These are concerns that are problematic for Israeli allies who generally represent liberal democratic ideological values. Indeed, it is maintained that the overwhelming majority of Jewish Americans are inclined to liberal democratic values.³⁵⁴ It cannot be said that these values are shared by the current ruling elite in Israel. We now proceed to consider related Israeli interests.

Any important Israeli security interest could be clarified and advanced with the recognition of Palestinian statehood. Israel has argued that rocket and terrorist attacks from the occupied territories gives it a right of self-defense to be responding to such attacks.³⁵⁵ However, this claim has not met with an approval that carries a global consensus.³⁵⁶ The technical argument against Israel's claim to assert the right of self-defense is based on the principle that the occupied territories under Palestinian Authority control are not recognized as a nation state. It is therefore maintained that Israel cannot assert its right of self-defense against an entity that is not a sovereign state in international law.³⁵⁷ This view has been supported by the following authorities. The Congress has enacted legislation expressing a contrary view, suggesting that Israel does have a right of self-defense under these circumstances.³⁵⁸ The US Congress may of course declare international law; but the currency of its declaration (which is essentially unilateral) would seem to require more acceptances internationally for it to be seen as reflecting as statement of positive international law. If the Palestinians were granted sovereign nation status, there would be no ambiguity regarding the assertion of the right of self-defense. This at least makes it unequivocal that an Israeli self-defense response is clearly consistent with international law and international obligation. At the same time, the right to self-defense in international law telegraphs clearly the corresponding obligations (of proportionality, etc.) on the Palestinian state, as well as the consequences to follow if those obligations were unmet.

One implicit principle drawn from the claim of the right of self-defense by both Israel and the United States is that there are implicitly recognizing the qualities of statehood and sovereignty of the Palestinians in the occupied territories by holding them to a standard that unequivocally applies to sovereign nation states. (They are thought to control and authorize). To the extent that the right

³⁵³ Macedo, Donaldo & Gounari, Panayota, *The Globalization of Racism*, Paradigm Publishers (2005); See also Roger Eatwell & Cas Mudde, *Western democracies and the new extreme right challenge*, Psychology Press (2004); See also Daphna Canetti-Nisim & Ami Pedahzur, *Contributory factors to Political Xenophobia in a multi-cultural society:: the case of Israel*, International Journal of Intercultural Relations, Volume 27, Issue 3, Pages 307-333 (May 2003); Cas Mudde, *The ideology of the extreme right*, Manchester University Press (2003)

³⁵⁴ Frederick D. Weil, *The Variable Effects of Education on Liberal Attitudes: A Comparative- Historical Analysis of Anti-Semitism Using Public Opinion Survey Data*, American Sociological Review, Vol. 50, No. 4, pp. 458-474 (Aug., 1985); Peter Beinart, *The Failure of the American Jewish Establishment*, The New York Review of Books (June 10, 2010)

³⁵⁵ *Full Text Israel Political Brief September 23, 2011: Israel Prime Minister Benjamin Netanyahu's Speech at the UN / United Nations* (Full Text Transcript Excerpts) Together with Israel Word Press (September 23, 2011) *Supra*; See also Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, The American Journal of International Law, Vol. 99, No. 1, pp. 52-61 (Jan., 2005)

³⁵⁶ *Id.*

³⁵⁷ Yaroslav Shiryayev, *Circumstances Surrounding the Separation Barrier and the Wall Case and their Relevance for the Israeli Right of Self-Defense*, (June 4, 2011); See also Lisa Hajjar, *International Humanitarian Law and "Wars on Terror": A Comparative Analysis of Israeli and American Doctrines and Policies*, Journal of Palestine Studies, Vol. 36, No. 1, pp. 21-42 (Autumn 2006); See also Caplen, Robert A., *Mending the Fence: How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 Fla. L. Rev. 717 (2005)

³⁵⁸ Congressional Research Service report - encyclopedic, public domain research reports written to clearly define issues in a legislative context; See also Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, The American Journal of International Law, Vol. 99, No. 1, pp. 62-76 (Jan., 2005)

of self-defense is clarified by Palestinian sovereignty, the mutual security interests of each body politic are significantly enhanced.³⁵⁹

The fate of the state of Israel may be at stake, should Israeli leaders continue to stall development of Palestinian self-determination while forbidding real integration into Israeli society. By aggravating the resentment of the Palestinians while disregarding the disapproval of global opinion, Israel faces difficult times ahead. For so long, the Palestinian militants were characterized as terrorists because the world looked down on their resistance to the emerging Jewish state of Israel³⁶⁰; but these militants may one day be labeled “freedom fighters” if the global consensus holds that the militants belong to an emerging state that was wrongly repressed by Israel.³⁶¹ In order to receive the protection of international law rules and organizations, Israel must behave with the humanity and lawfulness that international law entities (such as the U.N. Security Council) have come to expect from new states.

One of the concerns that observers in Israel had noted with considerable disquiet is the emergence of racism in Israel. They believe this is fueled by the extremist right wing political parties. The first point here is that Israeli intellectuals and human rights campaigners are embarrassed by this. The Jews in the Diaspora had been millennial victims of vicious racism which has expressed itself as an ideological structure of “anti-Semitism”.³⁶² The practices against Jews fueled by the banner of anti-Semitism culminated in the worst racist disaster the global community has ever experienced.³⁶³ That disaster in which Jews were the primary victims was the Holocaust of the Nazis.³⁶⁴ It is therefore a great embarrassment to many Jews that some extremists in Israel feel free to exhibit the worst behaviors of pathological racism.³⁶⁵ The non-settlement of matters with the Palestinians fuels this level of insecurity.³⁶⁶ It will therefore seem to be a matter of some national urgency in Israel that a settlement be expedited. We would hold that a sound settlement would serve as powerful antidote to the insipient pathologies of racism fueled by Israel right wing fanatics. The two state solution seems to be one of the most achievable objectives in a settlement and therefore is a matter of important national interest for the state of Israel. It is worthy of note that the basic and fundamental interests of the State of Israel is its right under international law and practice, to exist. It is possible that the two-state solution must do more than theoretically assure the existence of the State of Israel. Recently Fidel Castro, former President of Cuba, stressed in an interview Israel’s right to exist and its concerns in the aftermath of the Holocaust that require important future

³⁵⁹ Yaroslav Shiryayev, *Circumstances Surrounding the Separation Barrier and the Wall Case and their Relevance for the Israeli Right of Self-Defense*, (June 4, 2011)

³⁶⁰ Ronald E. Hall, *Beyond the stereotypical implications of terrorism: a sociological investigation of Arab immigrants*, International Review of Sociology, Volume 20, Issue 2 (2010); See also TUĞÇE ÖZTÜRK, *Terrorism and the Israeli-Palestinian Peace Process*, Middle East Technical University (2010); Gal Luft, *The Logic of Israel’s Targeted Killing*, Middle East Quarterly, pp. 3-13 (Winter 2003); See also John A. Noakes & Karin Gwinn, *Shifting frames of the Palestinian movement in US news*, Media Culture Society, vol. 24 no. 5 649-671 (September 2002)

³⁶¹ *Id.*; See also Scott Atran, *Genesis of Suicide Terrorism*, Vol. 299 no. 5612 pp. 1534-1539 (7 March 2003); See also Dayim Gordon, Rivca Gordon, Taher Shriteh, *Beyond intifada: narratives of freedom fighters in the Gaza Strip*, Greenwood Publishing Group (2003)

³⁶² Michel Wieviorka, *Racism and Diasporas*, Thesis Eleven, vol. 52 no. 1 69-81 (February 1998); See also Daniel Boyarin and Jonathan Boyarin, *Diaspora: Generation and the Ground of Jewish Identity*, Critical Inquiry Vol. 19, No. 4, pp. 693-725 (Summer, 1993); See also John G. Gager, *The origins of anti-semitism: attitudes toward Judaism in pagan and Christian antiquity*, Oxford University Press (1985);

³⁶³ *Id.*

³⁶⁴ *Id.*; Norman G. Finkelstein, *The Holocaust industry: reflections on the exploitation of Jewish suffering*, Verso (2003)

³⁶⁵ *Id.*

³⁶⁶ *Id.*

assurances.³⁶⁷ Castro stressed that the right to exist was a matter free from any doubt. He then added;

"Now, let's imagine that I were Netanyahu," Castro said, "that I were there and I sat down to reason through [the issues facing Israel], I would remember that six million Jewish men and women, of all ages were exterminated in the concentration camps."³⁶⁸

President Shimon Peres commented that the expressions of Fidel Castro moved him very much and added the following;

"I must confess that your remarks were, in my opinion, unexpected and rife with unique intellectual depth."³⁶⁹

And he continued;

"Cuba is an island, surrounded by water. Israel is a political island, surrounded by threats. You tried to sail to bigger seas, to show that a small geographical size doesn't have to reflect human smallness, and we are trying to prove that small political size doesn't have to reflect the size of our values. Therefore, we want to see our neighbors as friends, and the better things are for them, the better things will be for us."

"Your words presented a surprising bridge between a harsh reality and a new horizon..." "I thank you from the bottom of my heart. You proved that even those who are distant from each other can be close."³⁷⁰

One of the most important contributions that Israeli society can make to the process of the creation of a peaceful Palestinian State is to contribute positively to the construction of institutions of democratic and human rights values. Israeli society has a good progressive peace movement. This movement contrary to the right wing sentiment in Israel is not sectarian.³⁷¹ On the basis that the PLO wants to construct a nonsectarian Palestinian State it would be symbolically useful to have some modest degree of collaboration with the progressives in the region in advancing the task of nation building on democratic and human rights lines. It may be difficult even for Palestinians to work in cooperation with the Israelis, especially Israeli progressives. However, such cooperation would send a powerful signal which repudiates the racism that is a part of the current right wing agenda in Israel. Israel also has a courageous human rights movement with an abundance of legal talent and this resource could be extremely valuable in establishing ties of mutual trust and common interest in institutionalizing the culture of peace and human rights in a new Palestinian State.³⁷² Such ties driven by the forces of civil society and with financial support from progressives in the U.S. and Europe would do a great deal to change the paradigm of relations from conflict to sustainable collaboration in the common interest of all peoples in the region. It should be noted that driving force behind the Israeli peace lobby and human rights groups has a profound connection to the

³⁶⁷ Barak Ravid, *Netanyahu: Fidel Castro has a deep understanding of Jewish history*, Haaretz Service (September 13, 2011); President Peres voice appreciation for remarks by former Cuban president, who said that Israel 'undoubtedly' has a right to exist.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ Shlomo Avineri, *A Special Issue On Arab-Israeli Conflict; Israel and the new left*, Society, Volume 7, Numbers 9-10, 79-83 (1970); See also Benjamin Gidron, Stanley Nider Katz, Yeheskel Hasenfeld, *Mobilizing for peace: conflict resolution in Northern Ireland, Israel/Palestine, and South Africa*, Oxford University Press (2002); See also Mordechai Bar-On, *In pursuit of peace: a history of the Israeli peace movement*, US Institute of Peace Press (1996); Tamar Hermann, *The Israeli peace movement: a shattered dream*, Cambridge University Press (2009)

³⁷² *Id.*; Lisa Hajjar, *Human Rights in Israel/Palestine: The History and Politics of a Movement*, Journal of Palestine Studies, Vol. 30, No. 4, pp. 21-38 (Summer 2001)

sacred literature of Judaism which stresses that justice is integral to every form of human relationship. The idea is well expressed in the Book of Amos “let justice roll down like waters and righteousness like an ever-flowing stream”.

C. U.S. INTERESTS IN A TWO-STATE SOLUTION

The continuance of conflict and tension between Israel, the Palestinians, and other Middle East States constitutes a serious security concern for the United States. In large measure, the conflict (at least in terms of popular perception in the Muslim world) sees a Muslim population being deprived of its most fundamental civil, political, and economic rights, and the repression is fueled by the religious fanaticism of extremist right-wing elements in Israel, and their supporters in the United States.³⁷³ The conflict tends to assume the dimensions of ethnic/religious fanaticism, and such fanaticism invariably breeds apocalyptic visions, which are embraced by alienated terrorists. The continuance of the conflict, with no conceivable end in sight, has now become a much more immediate national security concern. The United States was attacked on September 11, 2001 by the Al Qaeda organization³⁷⁴; and one of the justifications for the attack was the unconditional U.S.’s support for Israel and its policies *vis-à-vis* the Palestinians.³⁷⁵ The U.S. response to 9/11 involved the nation in high intensity conflict in Iraq and Afghanistan.³⁷⁶ It has been recognized that a central motivating tool for the alienation of activist Muslims, and their deployment as terrorists, is facilitated by the belief that Israel and its policies of occupation represent simply an extension of U.S. policy.³⁷⁷ Hence, the anger directed at Israeli occupation and Israeli anti-Muslim policies may also be attributable to the United States as a consequence of the continuance of this conflict fuels an ostensible justification for anti-Americanism and an assumption that, fundamentally, United States, too, is anti-Muslim. Given that there is a global population of close to 2 billion Muslims, within such a large population pool the Israeli-Palestinian occupation is an obvious catalyst to move from alienation to terrorism.³⁷⁸

It appears that the Obama Administration and the U.S. security establishment are aware of these issues. When the Obama Administration came to office, they were confronted by concerns in the security establishment that dragging out this conflict served as a recruiting tool for alienated jihadist terrorists. The specific issue for the United States regarding the Israeli-Palestinian conflict became the security threat posed by ongoing conflict in the region. The current administration therefore brought a significant team of talented negotiators to press for the restart of negotiations

³⁷³ *Id.*; Naim, Abd Allah Ahmad, *Human Rights in the Arab World: A Regional Perspective*, Human Rights Quarterly, Volume 23, Number 3, pp. 701-732 (August 2001); See also See also Mayer, Ann Elizabeth, *Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct*, 15 Mich. J. Int'l L. 307 (1993-1994)

³⁷⁴ Margaret Webb Pressler, *What was 9/11?*, Washington Post (September 8, 2011); *Remembering September 11, 2001*, CNN (September 12, 2004)

³⁷⁵ Thomas W., *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race before and after September 11*, Joo, 34 Colum. Hum. Rts. L. Rev. 1 (2002-2003); Douglas Kellner, *Globalization, Terrorism, and Democracy: 9/11 and Its Aftermath*, Frontiers of Globalization Research, Part 2, 243-268 (2007)

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ Al Qaeda leader Osama bin Laden stated on one of his disseminated recordings that “if the US does not stop helping Israel to kill Palestinians, Al Qaeda will not stop killing Americans.” 163 D.L. Jones book.

toward a settlement. However, U.S. foreign policy regarding Israel is significantly conditioned by the 25+ pro-Israeli lobby groups in Washington, D.C.³⁷⁹

These groups are attentive to the needs of Israel's ultranationalist cause; and, whatever the Israeli ultranationalist cause wants, it gets. The tools used by them and their allies in the United States are sophisticated and incredibly effective. For example, for several months now, domestic Israeli lobby groups have been giving the U.S. government and Congress a full-court press to prevent the recognition of a Palestinian state and, should the matter come before the Security Council, to be assured that the United States would exercise a veto in order to prevent a resolution supporting the recognition of a sovereign Palestinian state.³⁸⁰ This requires the Palestinians to think more carefully about the principles and strategies for which it can stake a successful claim for sovereign independence. Israeli opposition effectually only carries the support of the United States because of the targeted pressure U.S. lobby groups can bring.³⁸¹

The influence of "The Lobby" is most recently evidenced in the recent House Resolution, No. 1765, reaffirming "strong opposition to any attempt to establish or seek recognition of a Palestinian state outside of an agreement negotiated between Israel and the Palestinians."³⁸² This Resolution emphasized the principle that a lasting peaceful solution will only come about through the negotiations of both parties (meaning the state of Israel and the representatives of the Palestinian people).³⁸³ What the Resolution does not address is the inability of the Palestinian representatives to negotiate any solution with Israel while the parties bear such inequality in status.³⁸⁴

³⁷⁹ Mearsheimer & Walt, "*The Israel Lobby*"; "Those neoconservative think-tanks include Project for the New American Century, and the American Enterprise Institute."

³⁸⁰ Beau Miller, *Israel Lobby Drives America's Palestine Veto*, Global, Middle East Peace Process (Policymics) (September 26, 2011); See also *U.S. Republicans urge Obama to veto Palestinian statehood bid at UN*, Wake up America! (September 11th, 2011); See also *Lobbyists push to veto Palestinian statehood*, RT.com (21 September, 2011)

³⁸¹ Congress does have significant control in foreign relations. [Treaty approval, funds]. Nevertheless, President and the Presidential Administration, which includes the appointed offices heading departments and agencies, control the pivotal aspects of foreign relations. [Presidential agreements, negotiations]. One can appraise the telling split within these different aspects of the US foreign relations machine regarding the Israeli-Palestinian conflict in this excerpt from a Congressional Research Report (addressing possession of the city of Jerusalem): "Israel annexed the city in 1967 and proclaimed it to be Israel's eternal, undivided capital. Palestinians seek East Jerusalem as their capital. Successive U.S. Administrations have maintained that the parties must determine the fate of Jerusalem in negotiations. [Nevertheless,] H.Con.Res. 60, June 10, 1997, and S.Con.Res. 21, May 20, 1997, called on the Administration to affirm that Jerusalem must remain the undivided capital of Israel. Congress has repeatedly prohibited official U.S. government business with the Palestinian Authority (PA) in Jerusalem and the use of appropriated funds to create U.S. government offices in Israel to conduct business with the PA and allows Israel to be recorded as the place of birth of U.S. citizens born in Jerusalem. These provisions are again in P.L. 111-117, the Consolidated Appropriations Act, 2010, signed into law on December 16, 2009. [However, the] State Department does not recognize Jerusalem, Israel as a place of birth for passports because the U.S. government does not recognize all of Jerusalem as part of Israel." CRS Report RL33530, prepared by Carol Migdalovitz (29 Jan 2010), *Israeli-Arab Negotiations: Background, Conflicts, and U.S. Policy*, at 51.

³⁸² H. Res. 1765, 111th Congress (2009-2010), *Supporting a negotiated solution to the Israeli-Palestinian conflict and condemning unilateral measures to declare or recognize a Palestinian state, and for other purposes*, sponsored by Rep. Howard L. Berman [CA-28] (introduced 15 Dec 2010) with 53 cosponsors, passed/agreed to in House on 15 Dec 2010, legislative text available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.RES.1765>.

³⁸³ *Id.*; i.e. The Palestinian Authority and the PLO

³⁸⁴ *House Resolution Opposes Unilateral Declaration of Palestinian State*, Jewish Virtual Library (December 15, 2010); On December 15, 2010, the United States House of Representatives passed by voice vote House Resolution 1765 opposing any efforts by the Palestinian Authority to unilaterally declare statehood or seek recognition outside of talks with Israel. The resolution calls for a negotiated settlement to the Israeli-Palestinian conflict and urges the Obama administration to lead the effort to persuade other nations to oppose a unilateral declaration or a Palestinian state and to affirm that the United States would not recognize such a state. The resolution was sponsored by Reps. Howard Berman (D-CA), Ted Poe (R-TX), Shelley Berkley (D-NV), Ileana Ros-Lehtinen (R-FL), Gary Ackerman (D-NY) and Dan Burton (R-IN); See also Josh Ruebner, *New Resolution 1765, shows that the Zion-Nazi Lobby has become just Nazi Lobby; House vote against Palestinian statehood actually showed that Israel lobby is losing its grip*, Pravda.RU (December 16, 2010)

Moreover, in condemning efforts of the Palestinian people to seek statehood (even by purely peaceful and legal means) outside of negotiation with Israel, the U.S. House undermines US treaty obligations to support the achievement of statehood for the Palestinians.

This successful lobbying effort on behalf of the state of Israel reveals two characteristic aspects of the U.S. Israeli Lobby. First, it can powerfully refocus the attention of the United States—even during the holidays, even with a “lame duck” Congress, even when the PA has committed no indiscretion to justify the United States behaving contrary to its international law obligations and its own national interests.³⁸⁵ Second, the U.S. Israeli Lobby does not engage with the U.S. government for U.S. interests but rather in the interest of Israel (this arguably to the detriment of the United States’ foreign relations and security interests).³⁸⁶ Here, the simplistic idea, which some Congressional Representatives accept, is that Israeli and U.S. interests are the same. A more discriminating view would see that Israel has discreet interests. Not all these interests are the same as U.S. interests. Moreover, from a global point of view, U.S. interests clearly transcend the particular state interests of the state of Israel. It was the statesman Disraeli who once said that “states do not have friends, they have interests.”³⁸⁷ Sorting out areas that are distinctive to Israel and distinctive to the United States would be a good starting point. It should be noted that the neoconservatives strongly believe that there are no security differences between Israeli and U.S. security. There are, moreover, reports that well-placed neoconservatives pass on sensitive information to Israeli officials on the assumption that, since there is no difference between Israel and the United States, by definition they are not really passing on secrets.

The question of whether U.S. national interests are discrete, even if somewhat overlapping, with the national interests of Israel. However, it seems clear that the continuing conflict in Israeli-occupied Palestine—an interminable status that benefits the ultra-nationalist segment of Israel by creating new facts on the ground—increasingly undermines important United States interests.

General Petraeus has raised a concern that, at least in the war against terrorism in Afghanistan, the continuance of the conflict between Israelis and Palestinians serves as a recruiting tool for the global jihadists who commit themselves to terrorist operations against U.S. forces and interests.³⁸⁸ At least from a security point of view and from the point of view of the risks to the lives of U.S. soldiers and civilians who are serving in zones of danger, there clearly is a distinct U.S.

³⁸⁵ George P. Schultz, *The “Israel Lobby” Myth*, U.S. News and World Report, (September 9, 2007); *See also* John J. Mearsheimer & Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy*, Middle East Policy, Volume 13, Issue 3, pages 29–87 (September 2006); *See also* Mead, Walter Russell, *Jerusalem Syndrome - Decoding the Israel Lobby*, 86 Foreign Aff. 160 (2007); *See also* Robert C. Lieberman, *The Israel Lobby and American Politics*, Perspectives on Politics Perspectives on Politics, 7: 235-257 (2009)

³⁸⁶ *Id.*

³⁸⁷ Said by Klemen von Metternich almost 200 years ago. With regard to national interests it should be noted that the US sent to Israel Senator Mitchell, one its most experience and acclaim diplomats. Senator Mitchell resigned his position out of frustration. Netanyahu blamed the Palestinians. The Palestinians responded with strong evidence that it was Netanyahu that undermined his mission. Consider the following: The Israelis would announce a new settlement project as Ambassador Mitchell’s plane would be landing in Tel-Aviv. He was completely undermined. Mr. Netanyahu’s statements would be amusing if the consequences of his actions weren’t so tragic.” “The record is clear. During the Proximity Talks in the summer of 2010, we gave Ambassador Mitchell detailed position papers on all the core issues, including Jerusalem, refugees, security, water, prisoners, and territory. We explicitly told Ambassador Mitchell that he was free to pass them along to Mr. Netanyahu. I challenge Mr. Netanyahu to claim that he responded to these papers or that he put forward any proposals of his own.” *See the details listed in* www.nad-plo.org.

³⁸⁸ Mark Perry, *The Petraeus briefing: Biden’s embarrassment is not the whole story*, The Middle East Channel (March 13, 2010)

interest to have the Israelis and the Palestinians shift their positions from conflict to some form of accommodation.

The current Administration has taken this matter so seriously that the President went to Cairo to address the billions of alienated Muslims.³⁸⁹ Although the speech was widely regarded as a positive sign, this speech probably sent some apprehensions through the communications networks of the Israeli ultranationalist movement (sometimes described the Israeli “right-wing”).³⁹⁰ Moreover, it is not at all clear that holding out the olive branch to the Muslim world would be a matter acceptable to the ultranationalist elements of the Israeli lobby such as the American Israel Public Affairs Committee (AIPAC).³⁹¹

The continuing deterioration of the Israeli-Palestinian conflict has gotten to the Administration.³⁹² It has therefore made it a significant initiative of its foreign policy to purposefully move the parties to a meaningful negotiations posture.³⁹³ To do this, it drew on one of the heavy weights in negotiating accommodations in situations of complex conflict: George Mitchell.³⁹⁴ Additionally, the President’s team has a strong Secretary of State (Hilary Clinton) who has no baggage suggesting any alienation against Israel.³⁹⁵ Additionally, the Vice-President, a strong supporter of Israel, is fully backing the U.S. initiative.³⁹⁶

A high point in the Obama initiative emerged in Washington D.C. on September 2, when Prime Minister Bibi Netanyahu and Palestinian President Abbas met and the Israeli Prime Minister declared that the success of the resumed negotiations would depend on both his and Abbas’ readiness to “make painful concessions.”³⁹⁷ The critical question that we address is whether Netanyahu was making a statement that was a temporary bend in the wind and which in fact he did not intend to consider seriously.

The seriousness of the breakdown in talks between the Palestinians and Israelis and the effort to undermined US mediation efforts have also prompted some of Americans most distinguished public servants to issued a widely publicized document under the title “*A letter to President Obama*”.³⁹⁸ The authors of this letter are extremely disquieted by the failure of US Middle

³⁸⁹ *Obama Egypt Speech: VIDEO, Full Text*, Huffington Post. (June 4, 2009); The Layalina Review, *Obama’s Speech in Cairo Reflects a New Direction of US Foreign Policy*, Vol. V No. 13 (June 05-June 18, 2009)

³⁹⁰ *Id.*; See also Zaki Shalom, *US-Israel Relations: Approaching a Turning Point?*, Strategic Assessment, Volume 13, No. 1 (2010); See also S Comments, *Obama tackles Mideast peace*, Strategic Comments, Volume 15, Issue 5 (2009)

³⁹¹ Schwaber, Jeff, & Kessler, Jonathan S., *The AIPAC college guide: Exposing the anti-Israel campaign on campus*, American Israel Public Affairs Committee Vol. 7 ix p.196 (1984); See also Khaled Amayreh, *More than an olive branch*, Respect-Discussion (October 22, 2010); See also David Hirst, *The gun and the olive branch: the roots of violence in the Middle East*, Nation Books (2003)

³⁹² Stephen Zunes, *The United States and the Breakdown of the Israeli-Palestinian Peace Process*, Middle East Policy (2001)

³⁹³ Asli U. Bali, *Facts, Rights, and Remedies: Implementing International Law in Israel/Palestine Conflict Sponsored by the TODA Institute for Global Peace and Policy*, Spring, 28 Hastings Int’l & Comp. L. Rev. 387 (2005)

³⁹⁴ Lenk, Arthur, *Fact-Finding as a Peace Negotiation Tool - The Mitchell Report and the Israeli-Palestinian Peace Process*, 24 Loy. L.A. Int’l & Comp. L. Rev. 289 (2002)

³⁹⁵ Dana H. Allin & Steven Simon, *Obama’s Dilemma: Iran, Israel and the Rumours of War*, Survival, Volume 52, Issue 6 (2011); See also Naseer Aruri, *United States policy and Palestine: Oslo, the Intifada and erasure*, Race & Class (2011); See also *Hillary Clinton: Israeli Settlements ‘Illegitimate’*, ABC News (February 18, 2011)

³⁹⁶ Joel Beinin & Lisa Hajjar, *Palestine, Israel and the Arab-Israeli Conflict A Primer*, The New York Times (2010)

³⁹⁷ Henry Siegman, *Netanyahu’s Freeze Scam*, Agence Global (September 30, 2010)

³⁹⁸ *A letter to President Obama; January 24, 2011*, Reproduced in The New York Review of Books, Volume LVIII, Number 11, p.67 (June 23, 2011) – The letter is cosigned by the following: David L. Boren, Zbigniew Brzezinski, Frank C. Carlucci, William J. Dillon, Chuck Hagel, Lee H. Hamilton, Gary Hart, Rita E. Hauser, Carla Hills, Nancy Kassebaum-Baker, Sandra Day O’Connor, Thomas R. Pickering, Paul Volcker and James D. Wolfensohn.

East diplomacy. They see this as exacerbating Israeli isolationism and the undermining moderation among the Palestinians. They see the political vacuum as dangerous for all parties. They therefore urged for a renewed American effort to revive its role in Middle East diplomacy. They provided a profoundly realistic summation of the central problems that confront the concerned parties. One of the issues they highlight is the vexing problem of the borders; “But it is not the State of Israel within its 1967 borders that is being challenged. It is Israel occupation, the relentless enlargement of settlements, its dispossession of the Palestinian people in the West Bank and East Jerusalem, and the humanitarian disaster caused by its blockade of Gaza that are the target of international anger and condemnation.”³⁹⁹ These writers concluded their letter with a strong paragraph and a recommended framework for a permanent status accord. We quote from their letter and summarized the gist of their recommendations:

“We understand Mr. President that the initiative we propose you take to end the suffering and statelessness of the Palestinian people and the efforts to undermine Israel’s legitimacy is not without political risks. But we believe that if the American people are fully informed by the President of the likely consequences of the abandonment of US leadership in a part of the world so critical to this country’s national security and to the safety of our military personal in the region, he will have their support.”⁴⁰⁰

It is unclear whether this letter has been distributed to the entire Congress and to the major lobby groups in Washington with an Israeli interest. We conclude this section by providing a summary of what is proposed;

1. They recommend the US staunchly defend the legitimacy of Israel. This is qualified by the phrase “within internationally recognized borders”;
2. The US must support the establishment of a Palestinian sovereign State based on the 1967 borders. Territorial adjustments are to be made by agreement only. Unilateral acquisitions of territory in violation of international borders would not be recognized nor given the legitimacy;
3. The US will work towards adjust a fair solution to the refugee problem. US commitment is based on the realism of the unlimited flow of refugees which would dramatically affect the demographics of Israel;
4. The US will have a crucial role to play in appropriate security policy for both Israel and Palestine. Here, the US supports a demilitarize Palestinian State with security mechanisms that address Israel’s concerns and still respect Palestinian sovereignty. This could include the stationing for multinational force as appropriate;
5. The policy on the emotive and touchy issue of Jerusalem, they recommend a form of complex shared control and unimpeded access to holy places;
6. The US supports the reconciliation of Fatah and Hamas on terms compatible with the above principles and UN Security Council Resolutions 242 and 338.⁴⁰¹

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

As we see in the next section these principles which provide a promising starting point for the Palestinians, represent issues that may be anathema to the current right wing extremist fringe led by Netanyahu and his acolytes.

D. U.S. INTERESTS AND THE ULTRA-NATIONALIST LEADERSHIP IN ISRAEL

The Israeli peace scholar Uri Avnery holds the view of pessimism with regard to the current leadership in Israel. “Netanyahu, of course, has no peace plan. His declared position is that the Palestinian’s must return to direct negotiations without prior conditions, but only after they official recognize Israel as ‘the state of the Jewish people.’ The Palestinians would never agree to accepting Israel as an exclusively ethnic Jewish state when there are over a million Israeli Arab citizens living there.”⁴⁰² According to Israeli scholar Uri Avnery the interjection into the negotiations of the recognition of Israel as a Jewish State has no coherent intellectual content and is used by Netanyahu “as a trick to obstruct the establishment of the Palestinian State. This week he declared that the conflict has no solution”.⁴⁰³ Avnery adds that in the right wing voice box to deny “the Jewish character” of the State is tantamount to the worst of all political felonies: to claim that Israel is a “State of all its citizens”.⁴⁰⁴

Netanyahu’s position is amplified to excess by his foreign Minister. “The position of the Israeli Foreign Minister holds out even less hope for a settlement. Leiberman believes that the Palestinians cannot be a peace partner because they do not want peace. According to Leiberman, ‘Even if we offer the Palestinians Tel Aviv and they withdraw to the 1947 borders, they will find a reason not to sign the peace treaty.’”⁴⁰⁵ “Leiberman also stresses that, currently, the Palestinians have no legitimate leaders because Mahmoud Abbas’ term expired on the 15th January, 2009. Leiberman himself also adverts to the stability of the current coalition government running Israel.⁴⁰⁶ He states ‘In the present political circumstances, it is impossible for us to present a plan for a permanent settlement, because the coalition simply will not survive.’” If Leiberman sees no final of agreement, Netanyahu holds out for an interim agreement of multigenerational duration. The idea of an interim agreement simply means that settlement expansion will occur and East Jerusalem will be incorporated into Israel.⁴⁰⁷ It should be noted that most recently Netanyahu had a telephone conversation with Angela Merkel, the German Chancellor. The gist of this conversation is reported in Avnery’s newsletter of March 5, 2011. According to Avnery;

⁴⁰² Uri Avnery’s Newsletter, *Interim Forever* January 03, 2011

⁴⁰³ Uri Avnery’s Newsletter, *Deny! Deny!*, June 18, 2011

⁴⁰⁴ Uri Avnery’s Newsletter, *The Dwarfs*, March 12, 2011 – He indicates the radical move to the extreme right under Netanyahu as been accelerated, considering the following: “he has appointed General Yaakov Amidror as Chief of the National Security Council. Amidror, the highest ranking kippa-wearing officer in the army, has never hidden his ultra-ultra nationalist views, including his total opposition to a Palestinian state and peace in general. He is, by the way, the officer who recently mentioned approvingly that some armies put “a bullet into the heads” of soldiers who don’t rise to storm an enemy position. It is only fitting that Netanyahu invited the National Front party, which includes openly fascist elements, to join his government this week. They refused, because Netanyahu is not extreme enough for them.

⁴⁰⁵ *Id.*

⁴⁰⁶ The divisions in Israeli politics show that there is a multitude of possible coalition partners; and the appropriate combination of these coalitions could govern effectively and would be more committed to a permanent settlement. Here, the degree of private sector support to Israel could be directed at those political groups acting (in terms of a coalition) to give impetus to the prospect of a permanent settlement with the Palestinians. At the same time, they could restrict funding that goes to outlandish leadership representations of people like Leiberman and Netanyahu.

⁴⁰⁷ *Id.*

“Netanyahu called to rebuke Angela Merkel for Germany’s vote in favor of the Security Council resolution condemning the settlements – the resolution blocked by the scandalous US veto. I don’t know if our Prime Minister mentioned the Holocaust, but he certainly expressed his annoyance about Germany daring to vote against the “Jewish State”.

He was shocked by the answer. Instead of a contrite Frau Merkel apologizing abjectly, his ear was filled by a schoolmistress scolding him in no uncertain terms. She told him that he had broken all his promises, that no one of the world’s leaders believes a single word of his any more. She demanded that he make peace with the Palestinians.”⁴⁰⁸

When the Israeli Foreign Minister (Leiberman) recently spoke before the U.N. General Assembly, indicating that (contrary to Netanyahu’s Washington D.C. statements) there was no chance for a peace treaty (not within a year or 100 years), this implied a multigenerational interim agreement and limitless Israeli occupation.⁴⁰⁹ Leiberman’s solution is to radically press for an Israeli state free of Arabs.⁴¹⁰ It is unclear whether this implies ethnic cleansing for non-Jews; but that would appear to be what Lieberman has in mind.

Leiberman, as indicated, is Israel’s Foreign Minister, and as such is an important influence on Israeli foreign policy and, in particular, the promise (or lack of it) of negotiating a settlement. Recently, he summoned Israel’s 170 senior diplomats to provide them with a firsthand account of his thinking.⁴¹¹ It should be understood that, according to Avnery, Netanyahu does not have a peace plan. He has only insisted that the Palestinians return to negotiations without prior conditions, but only after they recognize Israel as a state of the Jewish people.⁴¹² It should be also noted that such recognition clearly repudiates the Israeli Declaration of Independence, which rejects such a chauvinistic definition of the state.⁴¹³ It is unlikely that the Palestinians who are committed to a secular state would seek to endorse a racially chauvinistic state. Leiberman holds to a view that is more concrete and more radically right-wing than Netanyahu.⁴¹⁴ Leiberman firmly believes that the Palestinians do not want peace. According to Leiberman, “ ‘Even if we offer the Palestinians Tel Aviv and a withdrawal to the 1947 borders, they will find a reason not to sign a peace treaty.’ (The 1947 borders, fixed by the United Nations, gave Israel 55% of the country, while the 1949-1967 borders left Israel with 78%.)”⁴¹⁵ Additionally, Leiberman believes that, since the term of Mahmoud Abbas has expired, there is no one to negotiate with.⁴¹⁶ Finally, Leiberman stresses that moving purposefully with peace negotiations would split the right-wing coalition and possibly their

⁴⁰⁸ *Id.*

⁴⁰⁹ *Foreign Minister Lieberman Addresses the UN General Assembly*, Israel Ministry of Foreign Affairs (28 Sep 2010)

⁴¹⁰ Ian Deitch, *Avigdor Lieberman: Cut Ties With Palestinians*, Huffington Post (August 7, 2011)

⁴¹¹ Uri Avnery, *Interim Forever* January 03, 2011; Mr. Netanyahu’s visit to the US was really designed to lay a political foundation for a complete rejection of the two-state solution which represents broadly the official US perspective. Consider the following: “The Israeli government is implementing its vision for the destruction of a two-state solution presented by Prime Minister Netanyahu to the American Congress. This settlement is not only another obstacle to returning to negotiations, but it also raises tensions, institutionalizes discrimination, and brings those with extremist beliefs in close proximity to Palestinian residential areas,” said Dr. Erekat. He asserts that Israel’s action in implanting settlers in Palestinian neighborhoods is an attempt to destroy the social fabric of Palestine. “What it has done in places such as Hebron, Silwan and Sheikh Jarrah has broken families apart, terrified children, and left people homeless.” Palestine Liberation Organization; Negotiations Office, May 26, 2011

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

government would not survive.⁴¹⁷ In short, the survival of the current coalition is far more important than reaching a permanent settlement with the Palestinians. Since Lieberman believes this coalition will last indefinitely, peace will not be possible presently or indeed in the coming decades. What therefore Israel should strive for is “a long-term interim agreement.”⁴¹⁸ The essence of this is of course a long-term period of occupancy. The carrot to the Palestinians would essentially be to give them a bigger piece of the economic pie. Avnery sums up Lieberman as follows: “[T]he occupation will continue until one of the following happens: either the Palestinian standard of living will reach that of Israel or the Messiah will come—whichever happens first. In any case, there is no clear indication that either will happen within the next few decades...”⁴¹⁹

Netanyahu put some mild distance between Lieberman’s views and his own. The mildness of the distance may suggest that Netanyahu is (in principle) on the same page as Lieberman. We must therefore look more carefully at what Netanyahu’s not-fully-expressed policies are. It would seem that these policies will be critical for a better U.S. understanding of its role in this region. Netanyahu’s father, Benzion Netanyahu, was a professor of history.⁴²⁰ He was an extreme ultranationalist intellectual and a deep believer in the Eretz Israel defining the target boundaries of Israel.⁴²¹ Netanyahu was raised in a family in which Israel’s historic boundaries were sacred and inviolable.⁴²² According to an Israeli journalist, Netanyahu would “not dare to face his father and tell him that he has given away parts of Eretz Israel.”⁴²³ This means that all the private motives in Netanyahu’s personality are predisposed to not carrying through a successful peace negotiation in which boundary settlements are envisioned.⁴²⁴

The most recent breaking development concerning settlement activity has emerged as the Israeli government has apparently secured the assurance of a U.S. veto.⁴²⁵ The U.S. has justified the veto, as has Israel, that a resolution supporting a Palestinian State is an impediment to the process of direct negotiations between the Palestinians and Israeli to secure a settlement. As we noted earlier this year, the Israeli Prime Minister rejected a U.S. call for a temporary cessation of settlement building activity in order restart the negotiations toward a comprehensive settlement.⁴²⁶ The current

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ Shlaim, Avi., *The Likud in Power: The Historiography of Revisionist Zionism*, Israel Studies, Volume 1, Number 2, pp. 278-293 (Fall 1996); See also Christopher Shea, *Benzion Netanyahu on "the Arabs"*, The Boston Globe (April 7, 2009); See also Uri Avnery’s Newsletter, *His Father’s Boy*, (October 9, 2010)

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ Avnery’s Newsletter, *Bibi and the Yo-Yos*, May 28, 2011 - Avnery’s comment on Netanyahu’s performance in Washington and its effort to align the US with its extremist right wing views is insightful. Central to Netanyahu’s posture is the structure of its deal breaking principles. Netanyahu’s deal breakers are summarized: “NO return to the 1967 borders. NO Palestinian capital in East Jerusalem. NO to even a symbolic return of some refugees. NO military withdrawal from the Jordan River - meaning that the future Palestinian state would be completely surrounded by the Israeli armed forces. NO negotiation with a Palestinian government “supported” by Hamas, even if there are no Hamas members in the government itself. And so on – NO. NO. NO. The aim is clearly to make sure that no Palestinian leader could even dream of entering negotiations, even in the unlikely event that he were ready to meet yet another condition: to recognize Israel as “the nation-state of the Jewish people” – which includes the dozens of Jewish Senators and Congressmen who were the first to jump up and down, up and down, like so many marionettes. Netanyahu, along with his associates and political bedfellows, is determined to prevent the establishment of a Palestinian state by all and any means.”

⁴²⁵ *U.S. says it will veto Palestinian statehood bid at the UN*, Channel 6 News (8 September 2011); *Palestinians still lack one vote at UN Security Council: FM*, English.news.cn (2011-09-29)

⁴²⁶ Henry Siegman, *Netanyahu’s Freeze Scam*, Huffington Post (October 1, 2011)

Israeli authorities have now approved the construction of 1,100 new Israeli housing units in East Jerusalem, on lands that ostensibly are within the dominion of the Palestinians.⁴²⁷ Clearly such a move at this time tremendously undermines the representations made by the Israeli Prime Minister and the American President at the UN. The United States, the European Union and the UN have all expressed “disappointment” at this initiative and its unfortunate timing.⁴²⁸ US Secretary of State, Hillary Rodham Clinton indicated that this issue was quote “counterproductive to efforts to launch peace talks.”⁴²⁹ She added that this amounted to provocative action.⁴³⁰ Richard Miron, spokesman for UN Middle East Envoy Robert Serry, indicated that the Jerusalem housing announcement “sends the wrong signal at this sensitive time.”⁴³¹ Palestinian leaders had indicated that there be a halt to settlement building as a condition for the resumption of peace talks.⁴³²

It seems to us that only strong pressure, sufficiently important to compel him to shift his position, will make the difference. Without such pressure, Obama is wasting his time. And, by pressure, we do not mean only the pressure of the government. Critical to pressuring Netanyahu will be a significant number of Congressional Representatives, supporting the Administration, and (even more critically) getting the major Jewish organizations in the United States to be willing to fully support a realistic peace process, because it is in the national interest of the United States and of Israel. So long as the Israeli support groups in the United States provide support only to the Israeli ultranationalists, the greater will be the intransigence of the Israeli ultranationalists to commit to a realistic settlement. This is not to say that the Israeli ultra nationalism is the exclusive stumbling block to a final resolution; but it certainly is a crucial threshold barrier. Finally, a continuation of conflict may suggest to the ultranationalists in Israel that conflict favors them in the long haul, because there are 400 lethal nuclear arsenals in Israel.⁴³³ These arsenals are themselves a destabilizing force, which become even more dangerous when the levels of conflict sporadically spiral out of control.⁴³⁴ They also create an incentive for the states surrounding Israel to acquire nuclear weapons capabilities.⁴³⁵ Thus, the conflict has global implications. Our sense is that a majority of the Israelis would opt for a reasonable settlement with a reasonable adjustment of territorial interests. We do not believe that a majority of Israelis are opposed to a Palestinian state living in peace with Israel. However, like most ultranationalist groups, the Israeli ultranationalist contingency is engaged, energized, and occasionally fanatical.

Israel and the United States have divergent interests regarding military intervention in the Middle East and sustaining the role of international law regarding such interventions. The Bush Administration allied itself with Israel interests in the Middle East and the United States ended up

⁴²⁷ *Israel approves 1,100 homes in east Jerusalem*, Gainesville Sun; Associated Press (September 28, 2011)

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Israel's Nuclear Weapons Program*, Nuclear Weapon Archive (Last changed 10 December 1997); See also Farr, Warner D., *The Third Temple's Holy of Holies: Israel's Nuclear Weapons*, Counterproliferation paper no. 2 (September 1999); See also Daalder, Ivo & Lodal, *Logic of Zero - Toward a World without Nuclear Weapons*, Jan 87 Foreign Aff. 80 (2008); See also *Israel – Nuclear Weapons*, Federation of American Scientists (2007)

⁴³⁴ *Id.*

⁴³⁵ *Id.*

fighting wars both questionable for the benefit to U.S. interests and for the legal right to preemptively engage in such wars under international law.⁴³⁶ The U.S. policy leaders at the time invested in extravagant security ideas originally generated by the Likud, such as the “Clean Break” doctrine. This doctrine found itself mutated after 9/11 into the Bush Doctrine, which its claim to preemptive intervention.⁴³⁷ Here, with the Israeli right-wing cheering, U.S. invaded Iraq, generating a massive anti-Americanism not only in the Islamic world but elsewhere as well.⁴³⁸ Nevertheless, the roots of the desire to attack Iraq came from the Likud’s Clean Break Doctrine and, their interest in regime change was because they saw Saddam Hussein as a serious security challenge to Israel.⁴³⁹ With Saddam gone, there has been a relentless campaign to regime change Iran.⁴⁴⁰ In fact, the Israeli attack on Lebanon and Hezbollah was, in effect, a transparent effort to provoke Iran into intervention to protect its client (Hezbollah).⁴⁴¹ When Iran restrained itself, the Israelis found themselves in the midst of a significant tactical defeat.⁴⁴² Still, Netanyahu and others (and their surrogate voices in the United States) stridently demand a U.S. attack on Iran.⁴⁴³ These views are vigorously promoted by the Likud’s neoconservative allies.⁴⁴⁴ The question here is—exactly to whom is Iran such a monumental threat? How imminent is this threat (if it is a threat)? Clearly, both the United States and Israel have interests in the evolution of Iranian politics; but these interests are not the same. The Netanyahu “Clean Break” Doctrine had significant influence on the “Bush Doctrine”, in particular, its commitment to preemptive action and regime change.⁴⁴⁵ The adherence to this doctrine in the United States is largely—but not exclusively—affiliated with the pro-Israeli lobby groups as well as the Republican neo-cons.⁴⁴⁶

In the Senate, Senators Graham and Lieberman have been most articulate in demonizing Iran, describing the country as “extreme”, “expansionist”, and “terrorist”.⁴⁴⁷ Graham has specifically indicated that the military option against Iran should have in mind “the goal of changing the regime.”⁴⁴⁸ Bill Kristol, the editor of the Weekly Standard and director of the Foreign Policy Initiative, is a leading voice following Richard Perle in the neoconservative movement.⁴⁴⁹ Kristol

⁴³⁶ *Did Israel Lead the US into the War on Iraq?* By Mitchell Plitnick, Director of Education and Policy, Jewish Voice for Peace; Joel Beinín, Professor of Middle East Studies at Stanford University; and Cecilie Surasky, Director of Communications, Jewish Voice for Peace.

⁴³⁷ Hichem Karoui, “*Conservative Revolution*” *Against America; The Bush Legacy: Debate about a doctrine and its tributaries*, Social Sciences and Humanities, Volume 1 No 3 (2010); See also W. Patrick Lang, *Drinking the Kool-Aid*, Middle East Policy, Vol. XI, No. 2 (Summer 2004); See also Mark Gerard Mantho, *The Bush Doctrine: Origins, Evolution, Alternatives*, Gastpublikation des Project on Defense (April 2004)

⁴³⁸ Sukumar Muralidharan, *Israel: An Equal Partner in Occupation of Iraq*, Economic and Political Weekly, Vol. 39, No. 41, pp. 4517-4520 (Oct. 9-15, 2004); See also Patrick J. Buchanan, *Whose War?*, The American Conservative (2003)

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*; See also Gawdat Bahgat, *Iran and the United States: The Emerging Security Paradigm in the Middle East*, Parameters, pp. 5-18 (Summer 2007); See also Roger Howard, *Iran in crisis?: nuclear ambitions and the American response*, Zed Books (2004)

⁴⁴¹ *Id.*; See also Nakhleh, Hany T., *The 2006 Israeli War on Lebanon: Analysis and Strategic Implications*, DTIC Document (2007)

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ Mark Gerard Mantho, *The Bush Doctrine: Origins, Evolution, Alternatives*, Gastpublikation des Project on Defense (April 2004)

⁴⁴⁶ Hichem Karoui, “*Conservative Revolution*” *Against America; The Bush Legacy: Debate about a doctrine and its tributaries*, Social Sciences and Humanities, Volume 1 No 3 (2010)

⁴⁴⁷ Robert Dreyfuss, *Lieberman, Graham: Bomb, Bomb, Bomb Iran*. The Nation (October 4, 2010)

⁴⁴⁸ *Id.*; James Rosen, *Lindsey Graham says U.S. must prepare to attack Iran*, McClatchy Newspapers (September 20, 2010)

⁴⁴⁹ Justin Vaïsse, *Why Neoconservatism Still Matters*, Perspectives; Lowy Institute for International Policy (2010); See also John R. Krimer, *Our Puppet Government*, CCB Publishing (2008)

believes that the credible threat of a military strike is the only option in order to constrain Iranian ambitions.⁴⁵⁰ John Bolton, who was the Bush Administrations' undiplomatic ambassador to the U.N., has declared that sanctions and negotiations against Iran are useless.⁴⁵¹ He has stated that the goal of neoconservative opinion makers should be to prepare U.S. public opinion to support an Israeli attack on Iran.⁴⁵² One of the most vociferous exponents of the use of force against Iran is Reuel Marc Gerecht, who believes "an Israeli bombardment remains the only conceivable means of derailing or seriously delaying Iran's nuclear program..."⁴⁵³ Gerecht also believes that an attack on Iran would force regime change. The hardline ideologue Daniel Pipes is one of the most aggressively pro-Likud voices in D.C.; he also has strong Islamophobia.⁴⁵⁴ Pipes has recently stated that the recipe for salvaging the Obama Presidency is the bombing of Iran.⁴⁵⁵ Pipes maintains that if the United States is reluctant, Israeli "should do the job." Pipes is viewed by other conservatives as an extremist.⁴⁵⁶

The neoconservatives were the biggest drumbeaters for the attack on Iraq and the neglect of Afghanistan. It was Iraq that was Israel's major security concern. The Iraq war was a trillion dollar war.⁴⁵⁷ The price continues to mount.⁴⁵⁸ Additionally, there is strong opinion in the United States indicating war fatigue.⁴⁵⁹ We would submit that it is not in the national interest of the United States at this time to start a new war in the Middle East. Moreover, it is doubtful, notwithstanding the unpopular attitude of the Iranian regime, that the majority of the American people would support a new neoconservative adventure. In this sense, it would be of value for the Obama Administration to repudiate those aspects of the Bush Doctrine that are controversial and challenge international law. The pressures from Israel and its supporters in the United States for a new war stem from the security problems that are a product of the unstable situation in the region, generated significantly by the lack of settlement between the Israelis and the Palestinians.

The United States has an interest in halting the evolution of Israel as a center of international crime. Some analysts believe it to be the premier money-laundering nation in the world and claim that Israeli criminal cartels are deeply involved with smuggling blood diamonds, white slavery, human trafficking, drug trafficking, and more.⁴⁶⁰ While assistance to Israel is clearly not meant to support the criminal elements of Israeli society, it seems clear that not enough is being done by Israeli government to bring these criminal elements under control. This, in turn, suggests that the

⁴⁵⁰ Jamie Fly & William Kristol, *A Period of Consequences; Our dangerous Iran policy*, The Weekly Standard Magazine, Vol. 15, No. 38 (Jun 21, 2010); See also Amitai Etzioni, *Iran: The Military Option*, TPM (July 28, 2010)

⁴⁵¹ John Bolton, *Get Ready for a Nuclear Iran*, The Wall Street Journal (May 2, 2010); See also Robert Dreyfuss, *Iran Sanctions: Not Just Useless but Counterproductive*, The Nation (June 9, 2010)

⁴⁵² Damien McElroy, *John Bolton demands US support for Israeli strike on Iran*, The Telegraph (15 Jul 2008); See also Ali Gharib, *Bolton Attacks Obama For Not Greenlighting Israeli Attack On Iran, But Bush Didn't Either*, Think Progress (Jul 13, 2011)

⁴⁵³ Gerecht, Reuel Marc. Should Israel Bomb Iran? Better safe than sorry Jul 26, 2010, Vol. 15, No. 42

⁴⁵⁴ Eli Clifton, *Daniel Pipes steps out of the closet... as an Islamophobe*, Lobelog: Foreign Policy (January 19, 2010); See also Sheila Musaji, *Daniel Pipes, Islam 2.0 and Islamophobia 3.0*, The American Muslim (March 26, 2011)

⁴⁵⁵ Daniel Pipes, *How to Save the Obama Presidency: Bomb Iran*, National Review Online (February 2, 2010); See also Arlen Specter (interviews Daniel Pipes), *Bomb Iran?*, Fox 29 News, Philadelphia (February 4, 2011)

⁴⁵⁶ Robert Dreyfuss, *The Hawks Call for War Against Iran*, The Nation (Dec. 2, 2010)

⁴⁵⁷ David Leonhardt, *What \$1.2 Trillion Can Buy*, The New York Times (January 17, 2007); See also, *Cost of Iraq War 2008*, ZFacts (Nov 21, 2008)

⁴⁵⁸ *Id.*

⁴⁵⁹ Paul Pillar, *War fatigue in America*, War in Context; News Source (June 6, 2011)

⁴⁶⁰ Radio Islam; Jews and Crime <http://www.radioislam.org/crime/index.htm>

Israeli government condones or even colludes with these criminal non-government actors—a behavior that must not be allowed in Israel, Palestine, or *anywhere* on the world stage.

The U.S. supplies Israel with the best military technology⁴⁶¹; but in the future this may not be in the best interest of the United States. Despite the history of good relations in the past, Israel and the United States have been on rocky footing in recent times. The United States could not influence the Israeli government to halt settlements no matter how many highest-grade fighter planes the United States offered them. Nor could the United States induce Israel to behave with transparency and in conformity with international law regarding their nuclear weapons. Indeed, Israel has a significant trade in weapons sales; and holds that the weapons sales issues⁴⁶² mean that Israel has no friends. Given the disinclination of Israel to cooperate with U.S. diplomacy and international law norms, Israeli weapons technologies may well be deployed against U.S. troops in the future.

In these difficult financial times, there is the obvious interest of the U.S. citizens in retaining the wealth transferred to Israel for activities that do not engender peace. The state of high-security crisis in Israel is funded largely by U.S. assistance. In addition to additional sources of funding from private U.S. individuals and organizations, there is enormous pressure on the U.S. government to increase aid to Israel from 10 billion to at least 20 billion a year.⁴⁶³ It is estimated that Israel has received some 2 trillion from the American taxpayers since 1967.⁴⁶⁴ As vast billions of U.S. dollars are being borrowed to fund the security needs of the state of Israel, this debt is passed to the children of America's future, along with mounting unrest in a region under occupancy sustained by U.S. assistance. A dramatic move toward the recognition of Palestinian statehood as a step toward an accelerated peaceful settlement would lessen Israel's security anxieties and the need for assistance from borrowed trillions now owed by the U.S. taxpayers.⁴⁶⁵

U.S. policy and the interest groups involved in the Middle East should be very discriminating about which groups they support in this region and in Israel, to ensure that the U.S. interest in peace and security is not held hostage by ultranationalist zealots. In terms of contemporary international relations, Israel ultra-nationalism is a danger to regional peace and security. It is quite possible that greater Israeli interests and U.S. interests are the same, while the interests of the current Israeli leaders are different. The critical challenge for pro-Israel individuals, communities, and lobby groups in the United States is to undertake to determine which of their activities support U.S. interests—particularly national security interests and longstanding peace in the region—and which activities undermine U.S. interests.

E. GLOBAL COMMUNITY'S INTEREST IN A TWO-STATE SOLUTION

⁴⁶¹ Thom Shanker, *U.S. Quietly Supplies Israel With Bunker-Busting Bombs*, *The New York Times* (September 23, 2011); See also Amos Harel, *Israel asked U.S. to increase weapons supply, Haaretz learns; Air force seeking more JDAM bombs, and larger emergency stores held by American army*, *Haaretz* (August 6, 2010)

⁴⁶² Michel Chossudovsky's Presentation on The Dangers of a US Sponsored Nuclear War at the Perdana Peace Forum, Kuala Lumpur (December 2005)

⁴⁶³ *Israel may ask U.S. for \$20 billion more in security aid, Barak says*, *Haaretz* (March 8, 2011)

⁴⁶⁴ Christopher Bollyn, *The Real Cost Of US Support For Israel - \$3 Trillion* (September 19, 2003) ; See also Thomas R. Stauffer, *The Costs to American Taxpayers of the Israeli-Palestinian Conflict: \$3 Trillion*. Special Report (June 2003)

⁴⁶⁵ *Id.*

There are clearly some developments and precedents in international and human rights law that would benefit the global community as a result of the establishment of a Palestinian state (existing peacefully with the state of Israel). There is clearly a problem with the current status of international law regarding stateless individuals. While treaties attempt to address their problems, the reality is that customary international law affords little protection to stateless people who suffer continuing abuses by other states. Moreover, there is a problem with the U.N. Security Council veto-system, which occasionally works to undermine the efforts of widely-held global opinion. It would strengthen the force of the United Nations (and, consequently, international law) to have the U.N. Security Council bypass mechanism in effect yet again to give power to the General Assembly's voice. It reflects well of our times that the highest constituted authority speaks for even the least represented. It is the next stage in the development of the United Nations that the united "nations" include those people who still do not have a state. And if statehood is the requirement for a "nation" to have a vote, then all nations deserve a state. One final point. The Israeli right wing and its neoconservative allies have in fact been waging a relentless war against the United Nations. This is not good for Israel, for the U.S. or the U.N. The recognition of the Palestinian State may take us paused the period of international acrimony.

IV. THE ROAD MAP FOR SECURING THE RECOGNITION OF PALESTINIAN STATEHOOD

In the interest of achieving a just and stable peace in the contested lands in the control of Israel (a goal implicit in the expeditious recognition of Palestinian statehood), we make suggestions on a few policy matters. Most of these suggestions must be acted upon by the Palestinian governing bodies. Nevertheless, the transparency of these policy activities is crucial since, as indicated earlier, members of the world community (including not only Israel and members of the U.N. Security Council but also individual states and members of state associations) have important parts to play in the process of achieving a viable state of Palestine.

Of the two real paths to Palestinian statehood, one involves the help and guidance of Israel to achieve the type of state indicated in the U.N. Resolution on Partition and the Oslo Accords. Israel has long held the support of the world community—especially the United States—in its role preparing for the final agreement on Partition. However, the longer Israel delays this process (while simultaneously refusing the Palestinian people real inclusion in a unified society based on equal laws and equality of religion) and defies agreements to remain within established borders with the settlement activities, Israel increasingly risks isolating itself from the external powers that have supported their activities (and refused "unilateral" recognition to a state of Palestine). This "unilateral" path is the alternative path to Palestinian statehood—unilateral recognition under international law, bolstered by international relations, and—ultimately—sanctified by the U.N. Security Council.

The negotiations process overseen by the Obama Administration has completely broken down recently.⁴⁶⁶ This has been due in large part to extraordinary contingencies that Israeli

⁴⁶⁶ Iyad Barghouti, *Palestinian-Israeli Negotiations: An Objective in Themselves*, *The International Spectator*, Vol. 46, Iss. 1 (2011)

representatives have placed upon negotiation, which included the Palestinian recognition of Israel as an ethnically exclusive state and the premise that Jerusalem belongs to Israel (and, as such, that there are no restraints to the building of settlements in East Jerusalem).⁴⁶⁷ Moreover, as the Israelis embarked on more settlement activity, the Palestinians have refused to participate as well.⁴⁶⁸ Both President Obama and Secretary of State Clinton condemned these contingencies and the continuing settlements as unhelpful to the negotiations process.⁴⁶⁹ A more candid view may be that these activities are “deal breakers,” and the Israeli government *intends* to disappoint, recklessly undermining legitimate expectations under law to continue negotiating a fair resolution of the problem in good faith with the Palestinian people.

Such an assessment—that current Israeli leaders are actively blocking Palestinians’ effort to achieve statehood—is one that the Palestinian Authority (and the world community) must consider. In such a case, where Israeli policies actively damage Palestinians’ interests in their property, security, and ultimate self-determination, the body governing the Palestinian people in the West Bank and Gaza (currently, the PA), must consider moving forward “unilaterally”; and, so long as the PA acts with regard to contemporary standards of human rights and rule-of-law norms, the international community has an ethical obligation to support the Palestinians’ efforts. Moreover, certain states and international entities have a legal obligation to support the Palestinians’ efforts. There are strong policy decisions and moves to be made. We take the liberty of presenting some suggestions as to how to proceed strategically.

A. THE PA SHOULD ESTABLISH A FUNCTIONING GOVERNMENT EXPLICITLY BASED ON INTERNATIONAL LAW CRITERIA

The PA may not be considered to have sufficient control over Palestine, given that its authority is subordinate to Israel’s sovereign control under the Oslo Accords, and the Interim Agreement’s express prohibition of PA from conducting foreign relations.⁴⁷⁰ However the PA should move to the process of elections from the old Palestinian Parliament, to a newly constituted Parliamentary authority. It is probably appropriate that the Parliament act to create a constituent Assembly for the purpose of drafting a Constitution of the State of Palestine.

⁴⁶⁷ Carol Migdalovitz, *Israeli-Arab Negotiations: Background, Conflicts, and U. S. Policy*, DIANE Publishing (2010); See also Joel Beinin & Lisa Hajjar, *Palestine, Israel and the Arab-Israeli Conflict A Primer*, The New York Times (2010); See also

⁴⁶⁸ Karin Laub, *Peace Talks Stalled: Israeli Settlers Keep Building, So Palestinians Refuse Negotiations*, Huffington Post (October 2, 2010)

⁴⁶⁹ Ravid, Barak, *Clinton: Israel's demolition of East Jerusalem homes harms peace efforts*, Haaretz (March 3, 2009)

⁴⁷⁰ The Interim Agreement stipulates that: “In accordance with the DOP, the [PA] will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.” Interim Agreement, art. IX, 36 I.L.M. at 561. Under the Interim Agreement, the PLO may negotiate and enter into international agreements regarding certain economic development plans (as well as certain cultural, scientific and educational agreements), “for the benefit of” the PA. See Interim Agreement, art. IX(b), 36 I.L.M. at 561. Nevertheless, these limited activities “shall not be considered foreign relations.” *Id.*

B. THE PA SHOULD PROMOTE “GOOD GOVERNANCE” BY ESTABLISHING THE PRECONDITIONS FOR A PARLIAMENT TO CREATE A CONSTITUENT ASSEMBLY AND TO DRAFT A NEW, SOVEREIGN CONSTITUTION.

We are uncertain whether the documents generated by the PA amount to a constitution (as considered by constitutions in contemporary practice). We would suggest, however, that in preparation for recognition the historic documents be integrated into a formal constitution of the state of Palestine.

Our recommendation would further be that this should be a document meeting the best contemporary normative standards. In other words, the form of governance should be democratic, transparent, accountable, and responsible. It should also be founded on the “Rule of Law” principle.⁴⁷¹ Additionally, we would suggest that the PA examine the Badinter Arbitration Commission’s deliberations concerning the recognition of the statehood of the Balkan states (including Bosnia and Herzegovina).⁴⁷² The Badinter Commission carefully reviewed the constitutions of these new states for the purpose of recognition by the European Union and (later) by the United Nations. These were obtained on the basis that the constitutions made the rights and duties of individuals depend on citizenship (rather than ethnicity or religious identity).

Recognition by the United Nations, in any event, is dependent on a showing that the entity claiming sovereignty has the willingness and capability of upholding the principles of the U.N. Charter. In short, the entity must be peace loving and committed to human rights and the rule of law.

C. THE PLO SHOULD REAFFIRM THE 1988 DECLARATION OF INDEPENDENCE⁴⁷³ IN LIGHT OF THE CREATION OF A NEW GOVERNMENT AND A NEW CONSTITUTION.

By reaffirming the earlier 1988 Declaration the PA is stressing the consistent continuing demand of the right of the Palestinian people to self-determination and independence. Reaffirming this iteration strengthens the perception of the coherence and continuity of the Palestinian perspective of identity.

D. THE PA SHOULD SECURE BILATERAL RECOGNITION OF THE NEW GOVERNMENT AND STATE WORLDWIDE.

The actual process of recognition is complex. At one level, states usually claim that (as a function of their sovereignty) they have complete discretion whether to recognize another state or not.⁴⁷⁴ On the other hand, recognition by regional associations of states tends to be less politicized and more focused on the willingness and sense of obligation to conform to regional standards of peace, security, and human rights.⁴⁷⁵ We would recommend that the PA present its case to states that

⁴⁷¹ Amir N. Lichta, Chanan Goldschmidta, Shalom H. Schwartz, *Culture rules: The foundations of the rule of law and other norms of governance*, Journal of Comparative Economics Volume 35, Issue 4, Pages 659-688 (December 2007)

⁴⁷² Peter Radan, *The Badinter arbitration commission and the partition of Yugoslavia*, Nationalities Papers, Volume 25, Issue 3 (1997)

⁴⁷³ Documents / PLO, *Palestinian Declaration of Independence*, November 15th, 1988, Palestine Media Center; See also Prince, James L., *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 Stan. J. Int'l L. 681 (1988-1989)

⁴⁷⁴ Stephen D. Krasner, *Sovereignty: organized hypocrisy*, Princeton University Press (1999)

⁴⁷⁵ Rostow, Eugene V., *The Drafting of Security Council Resolution 242: The Role of the Non-Regional Actors*, 25 N.Y.U. J. Int'l L. & Pol. 489 (1992-1993)

clearly would recognize it as a state on a bilateral basis. It is possible that the Palestinians could get 90% of the world's states recognizing them.⁴⁷⁶

E. THE PA SHOULD ENCOURAGE REGIONAL ORGANIZATIONS TO RECOGNIZE THE NEW GOVERNMENT AND STATE.

These would include such organizations as the Arab League⁴⁷⁷, the Arab League Educational, Cultural and Scientific Organization (ALECSO)⁴⁷⁸ and the Economic and Social Council of the Arab League's Council of Arab Economic Unity (CAEU)⁴⁷⁹. We would also simultaneously recommend that the PA secure recognition from regional alliances of states (such as the League of Arab States, the African Union, the European Union, the Association of Southeast Asian Nations, and others). Our sense is, if a sizable number of individual states recognize Palestinian statehood, it would ease recognition in regional associations of states; and this would strengthen the sovereignty process of Palestine before the United Nations.

F. THE PA SHOULD SEEK TO SECURE A GA RESOLUTION RECOGNIZING THE DECLARATION OF INDEPENDENCE, THE CONSTITUTION, AND GOVERNMENT OF THE PALESTINIAN STATE.

The pitch to the United Nations is more complicated. The U.N. Security Council is initially seized of the matter and essentially makes a recommendation to the U.N. General Assembly whether a state should be recognized.⁴⁸⁰ The problem here is that one of the permanent members can exercise the veto power.⁴⁸¹ Still it may be of some value to have a General Assembly vote a recommendation to the Security Council that upon its findings of fact and conclusions of law the Palestinian claim to statehood is well founded from the perspective of the General Assembly. It should also be noted that Resolution 181 of the General Assembly stipulated that the partition

⁴⁷⁶ James Ball, *Palestinians: we are already recognised as a state by two-thirds of the globe UN delegation claims member countries comprising 75% of the world's population are in favour of its bid for full statehood*, *The Guardian* (September 20, 2011); See also Kirsten Sall, *First Tunisia, then Egypt, next Palestine?*, *ALJAZEERA*; Middle East (June 2, 2011); See also Jason Ditz, *Palestinian FM Predicts Most Nations Will Recognize Palestine in 201*, *Antiwar.com* (January 09, 2011)

⁴⁷⁷ League of Arab States - regional organization of Arab states in North and Northeast Africa, and Southwest Asia. It was formed in Cairo on 22 March 1945 with six members: Egypt, Iraq, Transjordan (renamed Jordan after 1946), Lebanon, Saudi Arabia, and Syria. Yemen joined as a member on 5 May 1945. The Arab League currently has 22 members and four observers. The main goal of the league is to "draw closer the relations between member States and co-ordinate collaboration between them, to safeguard their independence and sovereignty, and to consider in a general way the affairs and interests of the Arab countries.

⁴⁷⁸ The Arab League Educational, Cultural and Scientific Organization (Alecso) is a specialized agency having its headquarters in Tunis. The Organization, which works within the Arab League, is mainly concerned with enhancing and coordinating educational, cultural and educational activities in the Arab world. Alecso was founded in accordance with Article 3 of the Arab Cultural Unity Charter and its creation was officially announced in Cairo on 25 July 1970. www.alecso.org

⁴⁷⁹ Through these institutions the Arab League facilitates political, economic, cultural, scientific and social programs designed to promote the interests of the Arab world. It has served as a forum for the member states to coordinate their policy positions, to deliberate on matters of common concern, to settle some Arab disputes, and to limit conflicts such as the 1958 Lebanon crisis. The League has served as a platform for the drafting and conclusion of many landmark documents promoting economic integration. One example is the Joint Arab Economic Action Charter which sets out the principles for economic activities in the region.

⁴⁸⁰ *About UN Membership* (<http://www.un.org/en/members/about.shtml>); See also Yuen-Li Liang, *Recognition by the United Nations of the Representation of a Member State: Criteria and Procedure*, *The American Journal of International Law*, Vol. 45, No. 4, pp. 689-707 (Oct., 1951)

⁴⁸¹ Bardo Fassbender, *UN security council reform and the right of veto: a constitutional perspective*, Martinus Nijhoff Publishers (1998); See also Scharf, Michael P., *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 *Cornell Int'l L.J.* 29 (1995); See also Louis B. Sohn, *Voting Procedures in United Nations Conferences for the Codification of International Law*, *The American Journal of International Law*, Vol. 69, No. 2, pp. 310-353 (Apr., 1975)

envisioned the creation of an “Arab State”.⁴⁸² Technically General Assembly Resolutions are in general not binding.⁴⁸³ However, the target audience of this Resolution assumed that it was a legally binding instrument.⁴⁸⁴ The Israelis acted on this Resolution to declare their independent status and to regard the borders as the legal territorial boundary. When the Palestinians present their case for recognition and statehood, it would seem to be that they are simply asking for a reaffirmation of a preexistent General Assembly Resolution that appears to be the juridical standard in which Israel declared its sovereign independence. Presumably therefore the recognition here is simply a reaffirmation of Resolution 181. It is possible that the issue could be referred for confirmation to the Security Council, should that happen it might be important for the Palestinian authority to seek in advance the support of the Council.

G. THE PA SHOULD SEEK TO SECURE SECURITY COUNCIL SUPPORT.

Since the Pro-Israeli Lobby will be very active in securing the veto, the Palestinians and their allies would have to expend enormous resources to reach out to the U.S. government and, if possible, to reach out to liberal Jewish groups in the United States, in order to nullify the dominating role of AIPAC and others. If the wider assessment is that these recent Israeli moves were designed to derail the U.S.-sponsored peace talks,⁴⁸⁵ they provide a greater incentive for the recognition of a sovereign Palestinian state. Additionally it would help the Palestinian effort to influence U.S. policy and the liberal Jewish lobby groups in the U.S. if it were to secure the support of the complex groups and perspectives in Israeli society. There is a very powerful peace lobby in Israel. Their support will be critical. There is a vigorous and courageous human rights constituency in Israel and their voices would carry weight with the U.S. and with some Jewish lobby groups in the U.S. It would also be of value for the PA to seek the support of liberal and labor elements in the Knesset. This too would be useful in terms of solidifying public opinion behind their cause.

One of the strident Likud-supporting lobby groups in the United States has already been aggressively working to get the US government to exercise the veto in the Security Council over Palestinian statehood.⁴⁸⁶ This suggests that an enormous amount of political work must be done to ensure that the US does not exercise the veto and, at the minimum, remains neutral. Such a strategy must generate some support inside the United States for the recognition of the Palestinian state. We suspect that a part of that argument could be that it is not for the Netanyahu government to decide to block Palestinian statehood—this is matter for the international community. In this sense, one hopes that, for salvaging the peace process, the United States will not exercise its veto in such circumstances.

⁴⁸² *UN General Assembly Resolution 181* (Partition Plan) (November 29, 1947) *Supra*

⁴⁸³ Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, Duke Law Journal Vol. 1983, No. 4, Sep. (1983; See also United Nations Cyberschool Bus; The General Assembly is not a world government - its resolutions are not legally binding upon Member States. However, through its recommendations it can focus world attention on important issues, generate international cooperation and, in some cases, its decisions can lead to legally binding treaties and conventions. <http://www.un.org/cyberschoolbus/untour/subgen.htm>

⁴⁸⁴ John B. Quigley, *The case for Palestine: an international law perspective*, Duke University Press, p. 53 (2005)

⁴⁸⁵ Israel's foreign minister threatens to derail peace talks. World News; The Daily Telegraph 2010-09-06

⁴⁸⁶ Beau Miller, *Israel Lobby Drives America's Palestine Veto*, Global, Middle East Peace Process (Policymics) (September 26, 2011); See also *U.S. Republicans urge Obama to veto Palestinian statehood bid at UN*, Wake up America! (September 11th, 2011); See also *Lobbyists push to veto Palestinian statehood*, RT.com (21 September, 2011)

H. PA STRATEGY TO MOVE AROUND A U.S. VETO OF SECURITY COUNCIL RECOGNITION OF PALESTINIAN STATEHOOD AND SOVEREIGNTY UNDER INTERNATIONAL LAW

Given the furious lobby activity by the pro-ultranationalist lobbyists, there is a strong possibility that the United States will veto any resolution before the Security Council providing statehood for the Palestinian people. In general, a veto normally means that the matter is concluded before the United Nations.⁴⁸⁷ However, there is a little-used procedure that was invented by the United States to develop a procedure to get around the exercise of a Security Council veto, if that veto undermined the importance of protecting international peace and security. This procedure became known as the “Uniting for Peace Resolution.”⁴⁸⁸

It was used when the Security Council, because of a veto, was incapable of performing its primary functions concerning the protection and promotion of international peace and security.⁴⁸⁹ This Resolution assumed that, since the problem relating to peace and security remained, there was a residual competence in the U.N. General Assembly to pass a Resolution by a supermajority, permitting U.N. action to be taken in the protection of international peace and security.⁴⁹⁰ In this context, the PA’s allies in the General Assembly could certainly make the case that the recognition of Palestinian statehood is a major factor in promoting international peace and security in the region. Moreover, the interminable state of occupancy, which Security Council Resolution 242⁴⁹¹ stipulates must be ended, gives additional recognition to the importance for peace and security of a recognition of statehood for the Palestinian people. Judging from the support already generated for the recognition of statehood as an indispensable step to resolving conflict and crisis in the region, there should be a greater than supermajority that may be used to overcome a U.S. veto in the Security Council. This interpretative innovation to the U.N. Charter was—it should be recalled—a U.S. initiative. This initiative was upheld by the International Court of Justice in its advisory judgment of *The Expenses Case*⁴⁹². If it is clear that there already is a supermajority to support the use of the “Uniting for Peace” Resolution to overcome the exercise of a U.S. veto, the U.S. Administration may be less enthusiastic about either the exercise of the veto, or the idea that the veto will be surmounted by the overwhelming strength of international public opinion. In short, the United States, to avoid the embarrassment of complete isolation and defeat, may simply abstain in the U.N. Security Council regarding this issue.

⁴⁸⁷ Bardo Fassbender, *UN security council reform and the right of veto: a constitutional perspective*, Martinus Nijhoff Publishers (1998); See also Scharf, Michael P., *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 Cornell Int'l L.J. 29 (1995); See also Louis B. Sohn, *Voting Procedures in United Nations Conferences for the Codification of International Law*, The American Journal of International Law, Vol. 69, No. 2, pp. 310-353 (Apr., 1975)

⁴⁸⁸ *Uniting for Peace*, General Assembly Resolution 377 (V); New York November 3, 1950

⁴⁸⁹ Keith S. Petersen, *The Uses of the Uniting for Peace Resolution since 1950*, The IO Foundation and Cambridge University Press, Volume 13, Issue 2 (1959)

⁴⁹⁰ L. H. Woolsey, *The "Uniting for Peace" Resolution of the United Nations*, The American Journal of International Law Vol. 45, No. 1, pp. 129-137 (Jan., 1951)

⁴⁹¹ United Nations Security Council Resolution 242 (S/RES/242) (November 22, 1967) *Supra*

⁴⁹² ICJ Reports 1962, p 151

V. CONCLUSION

Finally, we wish to reassert that we assign a positive value judgment to being pro human rights and essential justice for all. As a jurist and a human rights practitioner, my ultimate loyalty lies not with any state, organization, or even community but instead with the values of peace, wellbeing, and freedom from fear for all individuals. From this perspective, my position is that the recognition of the state of Palestine is essential for achieving the wider realization of these values, for the people of Palestine, for the people of Israel, and even for the people of the United States. It is possible that there are other possible futures for Israel and Palestine. We have however sought to limit the scope of the spectrum so as to reduce the complexity of an already complex problem.

The issue of the UN role in the status of Palestinian claims to self-determination, statehood and sovereignty is a matter under furious debate and aggressive diplomacy in the UN. President Obama, in his speech before the United Nations General Assembly on September 21, 2011⁴⁹³, sought to framed US foreign policy in terms that justified its diplomatic efforts to block the issue from coming before the UN at all and with a clear implication that if it came before the Security Council the US would exercise its veto to block a decision on Palestinian sovereignty and statehood.⁴⁹⁴ This decision however, acknowledges that the US supports a two-state solution as a realistic basis for sustainable peace. Moreover, it stresses that Israeli Security issues still remain a stumbling block to progress. It also acknowledges that the Palestinians “deserve to know the territorial basis of their state.”⁴⁹⁵ Given the clarity of these issues the President also insists that these issues cannot be resolve with support from outside negotiating parties such as The Quartet on the Middle East, which includes the United Nations, United States, European Union and Russia.⁴⁹⁶ It is hoped that the President statement is not an inadvertent repudiation of The Quartet process, because it represents the major security players in the global environment. The problem with the negotiations is to a large extent the significant shift in Israeli politics toward the right, and an unwillingness of the President to acknowledge that the new right-wing coalition in Israel is a reluctant negotiator. Indeed, everyone knows that settlement activity should at least cease during active negotiations. This indeed was acknowledged by the Obama administration. It was rejected by Netanyahu, who knew that this was a deal breaker to continuing negotiations. In effect, the US role as an honest broker was essentially castrated and the US was left diplomatically humiliated.⁴⁹⁷ The Israeli right wing agenda also included a demand that Palestine and presumably The Quartet should recognize that Israel is not a State based on secular rights and duties if citizenship but makes rights turn on ethnicity.⁴⁹⁸ This is another deal breaker because there are a million plus Israeli citizens who would be excluded from rights because they do not have the right ethnic pedigree. This is another unnecessary stumbling block and indeed is a complete repudiation of the Israeli Declaration of

⁴⁹³ *Remarks by President Obama in Address to the United Nations General Assembly*, The White House; Office of the Press Secretary, United Nations New York (September 21, 2011)

⁴⁹⁴ *Id.*; see also *U.S. says it will veto Palestinian statehood bid at the UN*, Channel 6 News (8 September 2011); *Palestinians still lack one vote at UN Security Council: FM*, English.news.cn (2011-09-29)

⁴⁹⁵ *Remarks by President Obama* (2011) *Supra*; See also *In speech to United Nations, President Obama urges Mideast peace as Palestinian statehood vote looms*, NJ.com (September 21, 2011); See also Richard Adams, *Obama speech at the UN on Palestinian statehood – Wednesday 21 September 2011*, The Guardian (September 21, 2011)

⁴⁹⁶ *Id.*; See also Xinhua, *Palestinians welcome Mideast Quartet's role in peace process*, Global Times (February 6, 2011)

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

Independence. Given the pluralistic nature of the United States and its struggle to repudiate discrimination based on race or ethnicity it is surprising that a black President with a multi-ethnic pedigree would not call Mr. Netanyahu on this issue. Additionally, the Camp David Accords, negotiated by President Jimmy Carter, recognize Security Council resolutions, which delimit Israeli and Palestinian boundaries.⁴⁹⁹ The United States voted for these resolutions.⁵⁰⁰ Israel negotiated the Camp David Accords on the basis of these resolutions.⁵⁰¹ It is a real pity and a failure if US diplomacy not to recognize its role in the Security Council and at Camp David on the issue of boundaries. Finally, the President obscures the fact that the hidden subtext that suggests only agreement between the parties is the exclusive basis for moving forward essentially gives the Israeli right wing an indefinite veto over any otherwise legitimate international claim to self-determination, statehood and sovereignty. The Oslo Accords can never be read to suggest that they set in motion a process of negotiation that might continue in a timeless manner. Regrettably, the President's rhetoric about Palestinian and Israeli interests seems to represent only a shallow sense of what as a State the interests of Israel are, the interests of the Palestinians might be, and the national vital interests of the United States in speeding up negotiations toward a viable and sustainable conclusion. In this sense Obama's speech is devoid of strategic vision, tactical specificity or indeed a genuine understanding of the interplay of national interests, regional interests and fundamental global values.

We hope that this analysis of the legal effects of past practice and facts on the ground, in combination with policy suggestions for recognition of the state of Palestine, offers a shared backdrop against which the deliberations of Palestinians and Israelis (as well as the global community) may continue toward the universal goals of achieving self-determination, independent stability, widespread peace, and essential dignity.

⁴⁹⁹ *A Framework for Peace in the Middle East*, Camp David Accords (September 17, 1978); See also Shibley Telhami, *Power and Leadership in International Bargaining: The Path to the Camp David Accords*, Columbia University Press (1992)

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*