

## ARTICLE

THE LEGAL AND POLICY IMPLICATIONS OF THE POSSIBILITY OF  
PALESTINIAN STATEHOOD*Winston P. Nagan\**

&amp;

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## INTRODUCTION

The issue of Palestinian statehood should be seen in terms of other developments in the Middle East. One of the most important developments in the context of the Middle East are the events that have been characterized as the “Arab Spring.”<sup>1</sup> The Arab Spring was an assertion of unilateral initiative for popular democratic change on the part of the peoples of Tunisia, Egypt, Libya, and most recently, Syria.<sup>2</sup> The Arab Spring has, on

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<sup>1</sup> See generally Jacqueline S. Ismael & Tareq Y. Ismael, *Globalization and the Arab World in Middle East Politics: Regional Dynamics in Historical Perspective*, 21 ARAB STUD. Q. 129 (1999).

<sup>2</sup> *Id.*

the whole, received the support of the United States, in where policy makers have supported the unilateral peaceful demands of the peoples in these states. However, although these people assert their universal rights to human dignity, the Palestinian people have been denied by the international community these same universal rights.<sup>3</sup> In this sense, if Palestinian statehood is packaged as essentially an aspect of the Arab Spring, the timing of the unilateral assertion of these claims would seem to be appropriate.

Conflict between the Palestinians and Israelis may be traced back prior to the events of the Second World War (“WWII”). On the one side, the people of Israel succeeded in creating a de facto and de jure nation state flowing from the United Nations General Assembly (“UNGA”) Resolution (Decision) directing a partition of the territories between Israelis and Palestinians.<sup>4</sup> However, the territory that now comprises both Israel and the occupied Palestinian territories was vested, in the aftermath of the defeat of the Turkish Empire in World War I, with a unique international legal status created and administered by a new international organization, The League of Nations (“the League”).<sup>5</sup>

Under the Charter of the League of Nations a dispensation was made that the territories occupied by the European powers would remain under the control subject to a legal regime called the League of Nations Mandate System, which imposed obligations on the conquer states on how to administer these territories.<sup>6</sup> In this sense, the European powers could keep their conquests, but mandate obligations required them to administer these territories in the interest of the inhabitants.<sup>7</sup> One of the assumptions behind the mandate system was that the international mandate responsibilities allocated were to be discharged in the interests of the inhabitants of the

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<sup>3</sup> Human rights are commonly understood as “inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being,” and as such are conceived as universal, or applicable everywhere, and egalitarian which means that are the same for everyone. *See generally* James Nickel, *Human Rights*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010). *See generally* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (2005); MAGDALENA SEPÚLVEDA ET AL., HUMAN RIGHTS REFERENCE HANDBOOK (3rd ed. 2004).

<sup>4</sup> The Partition Plan, G.A. Res. 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947) (approved in Lake Success, N.Y., November 29, 1947 with 33 votes in favor, 13 against, 10 abstentions and 1 absent).

<sup>5</sup> *See generally* F.S. NORTHEGE, THE LEAGUE OF NATIONS: ITS LIFE AND TIMES, 1920–1946 (1986) (a concise story regarding the creation of the League of Nations focusing on the reasons for the failure of the League as a system of collective security).

<sup>6</sup> *See generally* Nele Matz, *Civilization and the Mandate System under the League of Nations as Origin of Trusteeship*, in MAX PLANCK YEARBOOK OF U.N. LAW 47 (2005).

<sup>7</sup> *Id.*; *see also* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT’L L. & POL. 513, 514-15 (2002).

territory included within the mandate.<sup>8</sup> Specifically, the mandatory power should support the aspirations of self-determination sought by the populations subject to international mandate responsibility.<sup>9</sup>

Under the League, Palestine was juridically a “Class A Mandate”.<sup>10</sup> The legal status of this international mandate suggested international responsibility for its proper management, which meant that the Palestinian population had a claim to some measure of development for self-determination and autonomy.<sup>11</sup> That autonomy, however, was not realized under the British-controlled mandate.<sup>12</sup> The problem, in part, lay in an alternative arrangement that Britain had made prior to the establishment of the League of Nations and the system of mandates. That arrangement involved Britain entering into an understanding with members of the Jewish community in the Diaspora that Britain, as a controlling power, would permit Jewish immigration to Palestine for the purpose of establishing a homeland. The famous Balfour Declaration, declared in 1916, recorded this understanding.<sup>13</sup>

It is now accepted that the quid pro quo for the Declaration came from a commitment by Jewish Americans that they would exercise influence through President Woodrow Wilson to secure U.S. involvement in the First World War (“WWI”) on the side of the Allied Powers.<sup>14</sup> When the mandate system was established for Palestine, Britain (the mandatory power) was confronted with two seemingly incompatible expectations: (1) the creation of a homeland for Jewish people in Palestine, and (2) self-determination for

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See also CHARLES HOWARD ELLIS, THE ORIGIN STRUCTURE & WORKING OF THE LEAGUE OF NATIONS 493 (2003). See generally League of Nations Covenant art. 22, available at <http://www.unhcr.org/refworld/docid/3dd8b9854.html> (last visited April 17, 2012) (The *Class A mandates* were territories formerly controlled by the Ottoman Empire that were deemed to “... have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.”).

<sup>11</sup> Matz, *supra* note 6, at 72-74; see also Anghie, *supra* note 7, at 571-72.

<sup>12</sup> See generally Stefan Brooks, *British Mandate for Palestine*, in 3 THE ENCYCLOPEDIA OF THE ARAB-ISRAELI CONFLICT 770 (Spencer C. Tucker ed., 2008).

<sup>13</sup> *Balfour Declaration (1917)*, MILESTONE DOCUMENTS, available at <http://www.milestonedocuments.com/documents/view/balfour-declaration/text>; see also Mayir Vereté, *The Balfour Declaration and Its Makers*, 6 MIDDLE E. STUD. 48, 48 (1970). See generally Avi Shlaim, *The Balfour Declaration And its Consequences*, in YET MORE ADVENTURES WITH BRITANNIA: PERSONALITIES, POLITICS AND CULTURE IN BRITAIN 251 (William Roger Louis ed., 2005).

<sup>14</sup> Vereté, *supra* note 13, at 55-56.

the Palestinians in the same territory.<sup>15</sup> Britain was unable to reconcile these expectations and when the United Nations (“UN”) was created after WWII,<sup>16</sup> Britain resolved to submit the problem to the UN for resolution.<sup>17</sup>

The result was a UNGA Resolution stipulating that there would be a Jewish and an Arab state in the territory along the lines of a partition understanding.<sup>18</sup> What emerged from this process was an independent Israeli state.<sup>19</sup> However, the Palestinians never achieved statehood. Since 1947, a multitude of wars have been fought. Between the periods of hostilities, the parties have developed strategies to strengthen their claims in the region.<sup>20</sup> Meanwhile, developments inside Israel brought to power interest groups that

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<sup>15</sup> See generally JONATHAN SCHNEER, *THE BALFOUR DECLARATION: THE ORIGINS OF THE ARAB-ISRAELI CONFLICT* (2010) (analyzing the passionate and fascinating controversy between the non-Zionist and the Zionist Jews that preceded the Balfour declaration, and explaining how the Zionists spoke in the name of Jewish nationhood while their Jewish opponents denied that Jews even constituted a separate nation).

<sup>16</sup> U.N. DEP'T OF PUB. INFO., *BASIC FACTS: ABOUT THE U.N.*, U.N. Sales No. E.04.I.7 (2006). The U.N. officially came into existence on October 24, 1945, when the Charter was ratified by China, France, the Soviet Union, the United Kingdom, the United States, and a majority of other signatories. U.N. Day is celebrated on October 24 each year.

<sup>17</sup> G.A. Res. 106 (S-1), U.N. Doc. A/RES/106(S-1) (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 U.S. 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 May 15, 1947, the Assembly resolved to create an 11-nation committee on Palestine (UNSCOP). The Resolution was adopted by 47 in favor, 7 against (Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Afghanistan and Turkey), and one abstention (Thailand); see also U.N. Special Committee on Palestine, *Recommendations to the G.A.*, U.N. Doc. A/364 Add.1 (Sept. 3, 1947) [hereinafter *Special Committee on Palestine Recommendations*] (In the summer of 1947 UNSCOP traveled to Palestine and held hearings in Jerusalem, while Palestine Arabs boycotted the hearings. 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.).

<sup>18</sup> G.A. Res. 181 (II), *supra* note 4.

<sup>19</sup> *The Declaration of the Establishment of the State of Israel, 5708-1948*, 1 L.S.I. 3 (1948) [hereinafter *Declaration of the Establishment of Israel*] (On May 14, 1948, the day in which the British Mandate over Palestine expired, the Jewish People's Council gathered at the Tel Aviv Museum, and approved the following proclamation, declaring the establishment of the State of Israel. The new state was recognized that night by the U.S. and three days later by the U.S.S.R.).

<sup>20</sup> See also *Rulers of Palestine: Chronology Factsheet*, SADAQA, THE IRELAND PALESTINE ALLIANCE (2009), <http://www.sadaka.ie/Articles/Factsheets/FACTSHEET-Chronology.pdf>. See generally Tomis Kapitan, *Violence and Self-Determination in the Israeli-Palestinian Conflict*, 36 PEACE & CHANGE 494 (2011).

were committed to the idea of an “Eretz Israel,” which refers to the “Whole Land of Israel” or “Greater Israel.”<sup>21</sup>

A “Greater Israel” would, however, in effect extinguish any territorial claims of the Palestinian people and by implication extinguish any claims to self-determination, independence, and statehood. The Palestinian people have continued to insist that the implications of such territorial claims are incompatible with their legal rights under international law,<sup>22</sup> and they have moved incrementally towards a posture where they now are seeking the recognition of Palestinian statehood.<sup>23</sup> A “Greater Israel” remains a centerpiece of the agenda of the Prime Minister Benjamin Netanyahu who has sought to justify the Eretz Israel idea on the basis that the ancient boundaries of Israel, or “boundaries of antiquity,” are legitimate boundaries that may trump Palestinian claims.<sup>24</sup>

A reliance on the “boundaries of antiquity”<sup>25</sup> would also conflict with the mandate of international law, which imposed the responsibility on the mandate powers to administer the territories in the benefit of its habitants.<sup>26</sup> To soften the conflict, the Netanyahu administration contends that expanded

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<sup>21</sup> See generally Solomon Zeitlin, *Jewish Rights in Eretz Israel (Palestine)*, 52 THE JEWISH Q. REV. 12 (1961) (Eretz Israel or “Eretz Yisrae” refers to the “Whole Land of Israel” or “Greater Israel.” It is an Israeli ideology that believes Israel should expand to take up all of the “historic” land of Israel, sometimes viewed as all of Palestine west of the Jordan river, sometimes including all the land of the original Palestine Mandate, including Transjordan, and sometimes including all of Israel as promised by God, and never fulfilled, which includes from Homs in Syria in the North and from the Euphrates River in Iraq to the Mediterranean.).

<sup>22</sup> JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 75 (2010).

<sup>23</sup> *Id.*

<sup>24</sup> Uri Avnery, *Bibi and the Yo-Yos*, ANTIWAR.COM (May 26, 2011), <http://original.antiwar.com/avnery/2011/05/25/bibi-and-the-yo-yos/>; see also Yoel Marcus, *Has Netanyahu Given Up on Greater Israel?*, HAARETZ (Sept. 7, 2010). See generally EFRAIM KARSH, *FROM RABIN TO NETANYAHU: ISRAEL’S TROUBLED AGENDA* (1997); Occupied Jerusalem, *Netanyahu vows no concessions on ‘Eretz Israel,’* AL ARABIYA NEWS (Aug. 30, 2010), <http://www.alarabiya.net/articles/2010/08/30/118062.html>.

<sup>25</sup> See G.A. Res. 181(II), *supra* note 4. See generally WILLIAM ROGERS RICHARDS, *FOR WHOM CHRIST DIED* 64 (1902) (“We have always recognized the hand of divine providence in the growth of Rome’s power as preparatory to the spread of Christianity. As in Palestine God had been dealing with His own chosen people of Israel through the ages, revealing His will through their prophets till at last the Christ was born among them; so in Italy He had been raising up another people, and making them strong to fight and wise to organize and skillful to build, that they might break down the narrow national boundaries of antiquity, and bind the many nations together by bonds of a common law and common language...” Boundaries of antiquity may also refer to the territorial limits delimited in the Partition Plan by the UN in 1947 to replace the British Mandate on Palestine.).

<sup>26</sup> See G.A. Res. 181(II), *supra* note 4; see also Gideon Biger, *The Boundaries of Israel – Palestine Past, Present, and Future: A Critical Geographical View*, 13 ISRAEL STUD. 68, 73 (2008).

boundaries are a necessary dimension of critical Israeli security interests.<sup>27</sup> This approach, focusing on the centrality of the state, attempts to weaken the force of international law by suggesting that international law has a residual interest in the reasonable security interest of the state. Another approach to the expanded boundaries problem has been the controversial support of Israeli settlements in the occupied Palestinian Territories.<sup>28</sup> In this sense, the demographic settlement by Israelis creates the impression that the demographic reality has changed and that the letter of international law must be modified to accept social and demographic reality of settlement expansion. Therefore, the longer the settlements endure, the greater the social dislocation and conflicts around efforts to unsettle the settlements.

The settlement issue has been a major flashpoint of conflict between the Israeli authorities and Palestinian leadership.<sup>29</sup> While the parties are negotiating, Israeli authorities have continued to support settlement expansion in Palestinian territories.<sup>30</sup> The Palestinians have analogized this approach to the metaphor of the parties sharing a pizza and, as one party continues to eat while the negotiations continue, the pizza radically diminishes in size.<sup>31</sup> This has impressed a state of urgency upon Palestinian

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<sup>27</sup> *Netanyahu's peace is a cynical evasion*, FIN. TIMES (Aug. 25, 2009), <http://www.ft.com/intl/cms/s/0/7f7b1c42-91a3-11de-879d-00144feabdc0.html>. See generally ALLAN GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* (1978); Kurt Rene Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 613 (1978).

<sup>28</sup> WILLIAM W. HARRIS, *TAKING ROOT: ISRAELI SETTLEMENT IN THE WEST BANK, THE GOLAN, AND GAZA-SINAI, 1967-1980*, at 223 (1980); see also Allan C. Brownfeld, *Israel and Judaism: Finally, Israel's Settlements Policy, Turn Toward Extremism Making Impact on Jewish Opinion*, WASH. REP. ON MIDDLE E. AFF. 50, 50 (2011).

<sup>29</sup> See generally MARK A. HELLER & SARI NUSSEIBEH, *NO TRUMPETS, NO DRUMS: A TWO-STATE SETTLEMENT OF THE ISRAELI-PALESTINIAN CONFLICT* (1993) (The authors are two scholars, one Israeli and one Palestinian, who engaged in a nonpolemical and serious effort to spell out the details of an Israeli-Palestinian settlement. This book is the product of intense and often uneasy discussions between them over a period of months. The authors provide an example of what is possible through dialogue by proposing that settlement is a compromise that represents the best judgment of the minimal requirements of each side for a durable peace and outlining a two-state solution. They propose a state of Israel living eventually alongside a small Palestinian state in the West Bank and Gaza with constraints on the Palestinians' exercise of sovereignty within their state.).

<sup>30</sup> Jerome Slater, *What Went Wrong? The Collapse of the Israeli-Palestinian Peace Process*, 116 POL. SCI. Q. 171, 177 (2001); see also *Israel announces huge settlement expansion*, OCCUPIED PALESTINE (Mar. 13, 2011), <http://occupiedpalestine.wordpress.com/2011/03/13/maan-news-agency-israel-announces-huge-settlement-expansion/>; *Israeli-Palestinian conflict; Rocky road to Middle East peace*, ALERTNET (Aug. 10, 2011) <http://www.trust.org/alertnet/crisis-centre/crisis/israeli-palestinian-conflict>.

<sup>31</sup> Philip Weiss, *Let's Negotiate Over How We Divide the Pizza While I Eat the Pizza*, MONDOWEISS (Sept. 27, 2011), <http://mondoweiss.net/2011/09/lets-negotiate-over-how-we>

leadership to move their agenda forward for a declaration of independence towards more well-defined, clear international protection for the boundaries of a recognized Palestinian state.<sup>32</sup> Israelis are divided on the question of recognition of a Palestinian state.<sup>33</sup> Israeli citizens who adhere to right-wing

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divide-the-pizza-while-i-eat-the-pizza.html; *see also* Richard Becker, *The Palestine Papers and the Egyptian revolutionary uprising: Connecting the struggles in the Middle East*, LIBERATIONNEWS.ORG (Feb. 3, 2011), <http://pslweb.org/liberationnews/assets/downloads/psl-statement-palestine-papers.pdf>; *Yes to Palestinian statehood: Efforts to stop the Palestinians from winning statehood at the U.N. are misguided and self-defeating*, ECONOMIST (Sept. 24, 2011), available at <http://www.economist.com/node/21530117>; THEOLOGY IN THE VINEYARD, *Palestinian Pizza* (Sept. 21, 2011), <http://theologyinthevineyard.wordpress.com/2011/09/21/palestinian-pizza/>.

<sup>32</sup> Letter from the Permanent Rep. of Jordan to the United Nations addressed to the Secretary-General, U.N. Doc. A/43/827-S/20278, at 13 (Nov. 18, 1988); *see* John Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. INT'L L.J. 2, 31 (1989) (On November 15, 1988, the Palestine National Council (PNC) proclaimed the establishment of the state of Palestine. Its Declaration of Independence relied on the right of self-determination as a norm of international law. The Declaration claimed territory in that portion of Palestine which is known as the West Bank and Gaza Strip based on longstanding occupation.).

<sup>33</sup> *Israeli Leftists Urge Europe to Recognize Palestinian State*, JERUSALEM POST (May 27, 2011), <http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=222459>; Leo Rennert, *Crisis Over Palestinian Statehood Bid Is All Israel's Fault*, AMERICAN THINKER (Sept. 16, 2011), [http://www.americanthinker.com/blog/2011/09/crisis\\_over\\_palestinian\\_statehood\\_bid\\_is\\_all\\_israels\\_fault.html](http://www.americanthinker.com/blog/2011/09/crisis_over_palestinian_statehood_bid_is_all_israels_fault.html); *see also* Amnon Kapeliok, *Israel and the Peace Process*, in 3 LEADERSHIP AND CONFLICT RESOLUTION: THE INTERNATIONAL LEADERSHIP SERIES 143 (Adel Safty ed., 2003); Shlomo Avineri, *A Special Issue On Arab-Israeli Conflict: Israel and the new left*, 7 SOCIETY 79, 79 (1970); Farooq Abbasi, *Israeli Jews Divided Over Removal of Settlements: Poll*, DAWN.COM (Oct. 28, 2010), <http://www.dawn.com/2010/10/28/israeli-jews-divided-over-removal-of-settlements-poll.html>; Saed Bannoura, *Settlers Disrupt Israeli Left Wing Protest Calling For Palestinian Statehood*, OCCUPIED PALESTINE (Apr. 22, 2011), <http://www.imemc.org/article/61115>. *See generally* MORDECHAI BAR-ON, IN PURSUIT OF PEACE: A HISTORY OF THE ISRAELI PEACE MOVEMENT (1996) (Telling the story of the Israeli peace movement and the role it played in the pursuit of peace. Providing intimate portraits about his own experiences in the movement of groups like Peace Now, Yesh Gvul, and the Women in Black and a sweeping historical synthesis of the course of the Israeli-Arab conflict with an especial emphasis in the period between 1967 and 1993.); BENJAMIN GIDRON, STANLEY NIDER KATZ & YEHEKEL HASENFELD, MOBILIZING FOR PEACE: CONFLICT RESOLUTION IN NORTHERN IRELAND, ISRAEL/PALESTINE, AND SOUTH AFRICA (2002) (An in-depth study of thirty-three peace/conflict organizations in Northern Ireland, South Africa, and Israel/Palestine. The authors provide a demonstration of how the sociopolitical and cultural context of the conflict in each region has shaped the type of organizations that have emerged, their conception of the conflict and its resolution, and how they have successfully galvanized previously weak or non-existent pro-peace political forces to become important players in the political struggle for peace.); TAMAR HERMANN, THE ISRAELI PEACE MOVEMENT: A SHATTERED DREAM (2009) (chronicling the major ideological and personal disputes that added to the failure).

political discourse are utterly opposed to a Palestinian state.<sup>34</sup> In effect, such a development would capture the ambitions of right wing interest groups for an Eretz Israel.<sup>35</sup> On the other hand, a large number of liberal and peace activist Israelis see Palestinian statehood as an important step toward a permanent peace between the two people.<sup>36</sup>

The Israeli right wing has tremendous assets to advocate in Europe and the U.S. and has sought to mobilize those assets to block a decision in favor of Palestinian statehood.<sup>37</sup> The Palestinians have managed to develop sympathy, good will, and diplomatic ties in Asia, Africa, and Latin America.<sup>38</sup> Those assets appeared to favor a speedy recognition of Palestinian statehood. Between these two postures, there is a revived level of international legal concern.<sup>39</sup> In such a historically heated and contentious international political minefield, it is important to identify and clarify the legal concerns presented by the current political dynamics, and to ensure that they are understood in terms of what the objective interests of all the stakeholders are with regard to this issue.

In this Article, we hope to contribute to the clarification of the role of international law in properly assessing the legal foundations of the claims of the respective parties. In Part I, we address the relevant aspects of the historical background of the Israel-Palestine Conflict. Part II addresses the recent developments in the law of self-determination from an international and comparative jurisprudential perspective. In Part III, we address specific aspects of continued repressive and discriminatory policies and practices the state of Israel has engaged in against the Palestinian population in the region. Part IV provides an overview of the Palestinian process for securing statehood recognition. In Part V, we review the central interests of the major parties involved in the conflict, completing the article with a brief conclusion and recommendations on how the major stakeholders in the ongoing conflict can proceed to secure a more peaceful outcome. The

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<sup>34</sup> Kapeliok, *supra* note 33, at 143.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Carta Maior, *U.S. Promises to Block Palestinian State; Europe Is Divided*, WATCHING AMERICA (Sept. 17, 2011), <http://watchingamerica.com/News/122155/united-states-promises-to-block-palestinian-state-europe-is-divided/>; see also Harriet Sherwood, *Israel launches campaign before Palestinian statehood vote*, GUARDIAN (June 10, 2011), <http://www.guardian.co.uk/world/2011/jun/10/israel-plan-block-un-palestinian-state>.

<sup>38</sup> Thalif Deen, *Will Asia, Africa Follow Latin America on Palestine?*, INTER PRESS SERVICE NEWS AGENCY (Jan. 13, 2011), <http://ipsnews.net/news.asp?idnews=54122>; see also *Palestinians admitted to UNESCO as full member*, CHANNELNEWSASIA.COM (Oct. 31, 2011), [http://www.channelnewsasia.com/stories/afp\\_world/view/1162726/1.html](http://www.channelnewsasia.com/stories/afp_world/view/1162726/1.html).

<sup>39</sup> Robert Blecher, *Palestine's Rocky Path to the U.N.*, FOREIGN AFFAIRS (Sept. 19, 2011), <http://www.foreignaffairs.com/articles/68277/robert-blecher/palestines-rocky-path-to-the-united-nations?page=show>.

Article seeks to provide enough contextual background to provide a clearer picture of the interests of key stakeholders with regard to this issue, with a necessary exploration of the complex internal political dynamics in both the political state of Israel and the Occupied Palestinian Territories.

## I. THE ISRAEL-PALESTINE CONFLICT: RELEVANT BACKGROUND

### A. *Conflicts Relating to Territory, Population and the Claims of Eretz Israel*

Prior to WWI, Palestine was a part of the Ottoman Empire.<sup>40</sup> That Empire was multiethnic, incorporating territories and populations throughout the Middle East that had largely become culturally Arabic.<sup>41</sup> In WWI, Palestine was subject to British conquest. Prior to the Versailles Peace Treaty, international law held that territorial conquest was a valid means of territorial acquisition.<sup>42</sup> The Versailles Peace Treaty generated the League of Nations.<sup>43</sup> The League likewise created a Mandate System, which established that the territories conquered by the Ally powers, did not fall within the sovereignty of the conquering powers.<sup>44</sup> Instead, the territories' legal status was made subject to the regime of the League of Nations Mandate System.<sup>45</sup> In this sense, the Peace Treaty at Versailles challenged the colonial expectation that the European powers invariably owned the territories they conquered. In short, these new territorial conquests, while under the control of the conquering powers, were nonetheless subject to a

<sup>40</sup> Mim Kemal Oke, *The Ottoman Empire, Zionism and the Question of Palestine (1880-1908)*, 14 INT'L J. MIDDLE E. STUD. 329, 330 (1982).

<sup>41</sup> See generally NICHOLAS BETHELL, *THE PALESTINE TRIANGLE: THE STRUGGLE BETWEEN THE BRITISH, THE JEWS AND THE ARABS, 1935-48* (1979) (describing the history of what Zionists call "War of Liberation," and supplementing and complementing the many partial accounts of the war that were already available at the time).

<sup>42</sup> LAWRENCE MARTIN, *THE TREATIES OF PEACE 1919-1923* (1924) (this is the source of the complete text of the 1919 Treaty). See generally GERMAN HISTORICAL INSTITUTE, *THE TREATY OF VERSAILLES: A REASSESSMENT AFTER 75 YEARS* (Manfred Franz Boemeke, Gerald D. Feldman & Elisabeth Gläser eds., 1998); Ruth Henig, *Versailles and Peacemaking*, BBC HISTORY (Mar. 3, 2011), [http://www.bbc.co.uk/history/worldwars/wwone/versailles\\_01.shtml](http://www.bbc.co.uk/history/worldwars/wwone/versailles_01.shtml).

<sup>43</sup> Leland M. Goodrich, *From League of Nations to United Nations*, 1 INT'L ORG. 3, 6 (1947); see also P.E. Corbett, *What is the League of Nations*, 5 BRIT. Y.B. INT'L L. 119, 119 (1924).

<sup>44</sup> Pitman B. Potter, *Origin of the System of Mandates under the League of Nations*, 16 AM. POL. SCI. REV. 563, 565-66 (1922).

<sup>45</sup> Matz, *supra* note 6, at 72-74; see also Anghie, *supra* note 7, at 571-72; Ernst B. Haas, *The Reconciliation of Conflicting Colonial Policy Aims: Acceptance of the League of Nations Mandate System*, 6 INT'L ORG. 521, 535-36 (1952).

new international legal regime under the authority of the League. Palestine was a League of Nations Mandate territory.<sup>46</sup> Britain, the conquering power, was granted the mandate to administer Palestine.<sup>47</sup> This reflected the political reality that the conquering powers 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 powers – the sovereign states in charge of administering the territories transferred from one sovereign state to another after WWI on behalf of the League – was to secure the wellbeing and interests of the people under its control and authority. Complicating this international obligation was Great Britain's Balfour Declaration, articulated in 1917, prior to the end of the war, a document which favored Zionist nationalist interests.<sup>48</sup> These interests included Jewish immigration and

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<sup>46</sup> *The Palestine Mandate*, League of Nations, pmb. (1922).

<sup>47</sup> Brooks, *supra* note 12, at 770.

<sup>48</sup> Jehuda Reinharz, *The Balfour Declaration and Its Maker: A Reassessment*, 64 J. MODERN HIST. 455, 495 (1992) (“Cecil drew attention to the importance of the Zionist organization in the U.S., whose support would substantially assist the cause of the Allies. ‘To do nothing was to risk a direct breach with them.’ In the end it was decided that the views of President Wilson should be obtained on the desirability, in principle, of a pro-Zionist declaration, without reference to the wording of any of the drafts. As instructed, Cecil cabled to Colonel House the following day: ‘We are being pressed here for a declaration of sympathy with the Zionist movement and I should be very grateful if you felt able to ascertain unofficially if the President favours such a declaration.’”); *see also* Bulov, *Why...Germany...Lost...WWI? Ask No More!*, WAR IN IRAQ (Dec. 11, 2008, 2:37 AM), <http://iraqwar.mirror-world.ru/article/180819> (According to Benjamin Freedman, a Jewish American who worked in the highest levels of the Zionists organizations and the U.S. government, the Balfour Declaration was employed as a *quid pro quo* for using American Zionists' influence to get the U.S. and President Wilson into the war against Germany and on the side of the Allies. According to Freedman the Zionist community “saw the possibility of getting Palestine, went to England and they made this deal. At that time, everything changed, like a traffic light that changes from red to green. Where the newspapers had been all pro-German, where they had been discussing the difficulties that Germany was having fighting Great Britain commercially and in other respects, all of a sudden the Germans were no good. They were villains. They were Huns. They were shooting Red Cross nurses. They were cutting off babies' hands. They were no good. Shortly after that, Mr. Wilson declared war on Germany.

The Zionists in London had sent cables to the U.S., to Justice Brandeis, saying ‘Go to work on President Wilson. We're getting from England what we want. Now you go to work on President Wilson and get the U.S. into the war.’ That's how the U.S. got into the war. We had no more interest in it; we had no more right to be in it than we have to be on the moon tonight instead of in this room. There was absolutely no reason for World War I to be our war. We were railroaded into — if I can be vulgar, we were suckered into — that war merely so that the Zionists of the world could obtain Palestine. That is something that the people of the U.S. have never been told. They never knew why we went into World War I.”).

settlement in Palestine.<sup>49</sup> This fact was to shape the future in important ways.<sup>50</sup>

In recent history, the United Kingdom's broader lack of support for self-determination of Palestinians continues to remain a salient issue.<sup>51</sup> Palestine was, originally, a Class A Mandate.<sup>52</sup> This Class A Mandate would remain somewhat distinctive in the sense that it contained a cláusula that was not expressed in Article 22 of the League Covenant. This cláusula involved the encouragement of Jewish immigration for the establishment of a natural home for Jewish people, who were a minority in Palestine at that time.<sup>53</sup> Even at the time the Covenant was ratified, there was an ostensible incompatibility between the British Balfour Declaration for promoting immigration to Palestine and the requirements of Article 22.<sup>54</sup>

Balfour was very explicit about the problem of assuming mandate responsibility and the British commitment regarding Jewish immigration. In correspondence with Prime Minister David Lloyd George, Balfour wrote in 1919 that "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."<sup>55</sup> 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.<sup>56</sup> Thus, the Palestinian mandate was originally administered by Great Britain with equivocal objectives; unfortunately, the conflict between these objectives would never clearly be rationally reconciled with the precise terms of the original mandate.

There is evidence that under the original mandate Palestine was treated as a constitutional proto-state because Britain, the mandatory power, was

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<sup>49</sup> See generally SCHNEER, *supra* note 15.

<sup>50</sup> See generally Shlaim, *supra* note 13.

<sup>51</sup> See generally EDWARD W. SAID, *THE POLITICS OF DISPOSSESSION: STRUGGLE FOR PALESTINIAN SELF-DETERMINATION, 1969-94* (1995).

<sup>52</sup> See Matz, *supra* note 6, at 72-74; see also Anghie, *supra* note 7, at 571-72. See generally Eli E. Hertz, *Mandate for Palestine: The Legal Aspects of Jewish Rights, MYTHS AND FACTS* (2007).

<sup>53</sup> Mark Rosenblit, *International Law and the Jewish People's Collective Rights of Settlement and Self-Determination in the Land of Israel* (2006), <http://www.rosenblit.com/Law.htm>.

<sup>54</sup> QUIGLEY, *THE STATEHOOD OF PALESTINE*, *supra* note 22, at 75 ("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.").

<sup>55</sup> ISAAH FRIEDMAN, *THE QUESTION OF PALESTINE: BRITISH-JEWISH-ARAB RELATIONS, 1914-1918*, at 325 (2d ed., 1992).

<sup>56</sup> *Id.*

never recognized as exercising sovereign authority over Palestine.<sup>57</sup> Indeed, for a multitude of purposes, Palestine was viewed as a State.<sup>58</sup> For example, the Permanent Court of International Justice in the *Mavrommatis Palestine Concession's Case*<sup>59</sup> clearly regarded Palestine as a State.<sup>60</sup> As a result, there is a strong view among jurists that the locus of authority in Class A Mandate Territories was vested in the population of the territories themselves.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> Attributes of sovereignty resided in the body politic and the Mandate administration.<sup>64</sup> The fact that statehood was not achieved for the Palestinians could be found in 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 therefore found itself in a profound decisional dilemma: fulfilling the Mandate's obligations required a repudiation of Balfour – and the Balfour Declaration's promise repudiated the Mandate. This was a dilemma that was never resolved.

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<sup>57</sup> QUIGLEY, THE STATEHOOD OF PALESTINE, *supra* note 22, at 75.

<sup>58</sup> John Quigley, *Palestine Statehood: A Rejoinder to Professor Robert Weston Ash*, 36 RUTGERS L. REC. 257, 262 (2010) (“Those who deny Palestine statehood base their position on abstract concepts relating to the [\*263] definition of statehood. They ignore the practice of the international community in relation to Palestine. As indicated in my piece to which Professor Ash has responded, Palestine has been regarded as a state since it was set up as a Class A mandate under the supervision of the League of Nations. That statehood was never extinguished, despite a variety of control arrangements that have intervened in regard to segments of its territory, and despite the fact that independence remains elusive.”).

<sup>59</sup> *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30).

<sup>60</sup> QUIGLEY, THE STATEHOOD OF PALESTINE, *supra* note 22, at 75.

<sup>61</sup> See generally 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).

<sup>62</sup> Tomas Hopkins Primeau & Jeff J. Cortassel, *Indigenous “Sovereignty” and International Law: Revised Strategies for Pursuing “Self-Determination”*, 17 HUMAN RIGHTS Q. 343, 348 (1995).

<sup>63</sup> Committee on the Exercise of the Inalienable Rights of the Palestinian People, *The International Status of the Palestinian People* (Jan. 1, 1980), available at <http://unispal.un.org/UNISPAL.NSF/0/548E6E5758E89588852575A0004F1054>.

<sup>64</sup> *Id.*

*B. Israel: A Successful Unilateral Declaration of Independence*

When Britain requested, in 1947, that the UN consider the future dispensation of the territory defined within the Palestinian Mandate, the UNGA created a special committee to investigate the international legal status of the Palestinian territory.<sup>65</sup> The committee determined that the British Mandate should be terminated and that independence should be granted to Palestine at the earliest possible time.<sup>66</sup> Despite the recommendation of “independence,” the Committee, of which a majority was committed to a partition of the Palestine territory with a Jewish state and an Arab state, stipulated that the relinquishment of the territory to its populations was nevertheless to be linked in an economic association.<sup>67</sup> The status of Jerusalem, it was recommended, should be a separate entity under international supervision.<sup>68</sup>

Of particular interest are the terms of Resolution 181(I)(A) which indicate that two states “shall” come into existence after the termination of the Mandate.<sup>69</sup> This seems to suggest that, by decision of the UNGA, there is a legal expectation that the two communities within the territorial space of Palestine, which are the Palestinian people and Israel, shall, according to the boundary delimitations of partition, establish sovereign states under the authority of the UN Charter. This is an unusual approach to either the creation or recognition of an entity with sovereign status under international law.<sup>70</sup>

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<sup>65</sup> G.A. Res. 106, *supra* note 17.

<sup>66</sup> *Id.*

<sup>67</sup> Special Committee on Palestine Recommendations, *supra* note 17.

<sup>68</sup> *Id.*; see also G.A. Res. 181 (II), *supra* note 4, at Plan of Partition with Economic Union, Part 1 (The UNGA., after lengthy debate, decided with more than 2/3 of a majority to accept the partition recommendations. Of particular importance is paragraph 3 of Resolution 181, which provides: “...3. 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.”).

<sup>69</sup> G.A. Res. 181 (II), *supra* note 4; Special Committee on Palestine Recommendations, *supra* note 17.

<sup>70</sup> See generally JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2006) (Discussing the relation between statehood and recognition and the criteria for statehood in view of evolving standards of democracy and human rights, as well as the application of such criteria in international organizations and between states; clarifying the mechanisms by which states may be created, including devolution and secession, international disposition by major powers or international organizations, and the institutions established for Mandated, Trust, and Non-Self-Governing Territories.).

When we come to the question of the recognition of statehood, we can see how the international system functions on two parallel tracks.<sup>71</sup> First, recognition is decentralized and remains a matter of state sovereign discretion.<sup>72</sup> That is, other states may or may not recognize the entity, regardless as to whether the entity meets the minimal indicia of statehood. There are circumstances in which there is an obligation at international law not to recognize a state that has met the minimum criteria, if that state seeks to establish itself in violation of the UN Charter.<sup>73</sup> Second, a state may be recognized as a member of an international body where membership is restricted to sovereign states only.<sup>74</sup> Such recognition does not require that the sovereign formally recognize the government of another state, although the system provides for de facto recognition of a state that acknowledges that a government and a state exist.<sup>75</sup> Such recognition could be targeted as recognizing a *state*, but not necessarily recognizing *the current government*.<sup>76</sup>

Recognition by an organization like the UN is also influenced by the fact that UN recognition of a state is premised on the state's ability to uphold UN Charter values, including its commitment to peace. These principles are more explicitly expressed in The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See also Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51, 82 (1988-1989); Anthony Carroll & Balakrishnan Rajagopal, *The Case for the Independent Statehood of Somaliland*, 8 AM. U. J. INT'L L. & POL'Y 653, 679 (1992-1993); David O. Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U. J. INT'L L. & POL. 761, 764, 793-94 (1994) (suggesting that only the first two criteria for statehood should be met ((1) having the traditional characteristics of a state; and, (2) expressing the willingness to abide by the Charter; discussing traditional decolonization processes and declarations of independence under the UN Charter); Musa Mazzawi, *Self-Determination in International Law - A study of the Rhodesian Case*, 1 POL'Y L. REV. 15, 20-21 (1975). See generally Parris Chang & Kok-ui Lim, *Taiwan's Case for United Nations Membership*, 1 UCLA J. INT'L L. & FOREIGN AFF. 393, 398-402 (1996-1997).

<sup>74</sup> Yuen-Li Liang, *Recognition by the UN of the Representation of a Member State: Criteria and Procedure*, 45 AM. J. OF INT'L L. 689, 689-707 (1951). See generally Crawford, *supra* note 70.

<sup>75</sup> See generally discussion *supra* note 74.

<sup>76</sup> See, e.g., Herbert W. Briggs, *Non-Recognition in the Courts: The Ships of the Baltic Republics*, 37 AM. J. INT'L L. 585 (1943) (regarding the non-recognition by the United States of the Soviet Union's absorption of Estonia, Latvia, and Lithuania); Stefan Talmon, *The Cyprus Question before the European Court of Justice*, 2001 EUR. J. INT'L L. 727, 734 (2001) (regarding the Cyprus question); Gregory H. Stanton, Address at Yale Law School: The Cambodian Genocide and International Law (Feb. 22, 1992) (regarding the search for a recognized human rights or legal group to sponsor an investigation of the Cambodian Genocide).

Accordance with the Charter of the United Nations.<sup>77</sup> 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; and,
- (7) states shall fulfill in good faith their obligations under the UN Charter.<sup>78</sup>

With these principles in mind, we review the claim of the Palestinians to the recognition of statehood in international law.

In this sense, and according to the Montevideo Convention, the conventional approach to achieving statehood would begin with a community, acting as a people, with discernible leadership and representation, expressing a claim to self-determination and independence.<sup>79</sup> The claim for recognition of sovereignty and statehood may then be further supported by facts relating to the expression of territorial control, or some dimensions thereof, as well as an organized political authority, sufficient to give coherence to the claim for self-determination and independence.<sup>80</sup> This claim would typically 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 become discernible.<sup>81</sup> 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 for a declaration of independent statehood.

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.<sup>82</sup> This declaration was followed by other sovereign states bilaterally recognizing the state of Israel as a sovereign nation-state.<sup>83</sup> This indicates that the declaration not only met certain factual preconditions but also that those preconditions proceeded from the expectation in Resolution

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<sup>77</sup> G.A. Res. 2625 (XXV), at 121, U.N. Doc. A/8082 (Oct. 24, 1970).

<sup>78</sup> *Id.*

<sup>79</sup> See Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Declaration of the Establishment of Israel, *supra* note 19.

<sup>83</sup> See generally *Bureau of Near Eastern Affairs: Background Notes: Israel*, U.S. DEP'T OF STATE (Feb. 22, 2012), <http://www.state.gov/r/pa/ei/bgn/3581.htm>.

181 that each community would establish the preconditions for a declaration of statehood. In this case, the Israeli declaration came after the UNGA decision, which established the territorial contours of the state of Israel under the terms of a partition resolution.

Moreover, the Resolution gave a quasi-judicial imprimatur that the international community expected communities within the partitioned territories to seize the opportunity to declare statehood. It would seem rare that the creation of a state and a declaration by its people would be preceded by a legal fact setting out certain preconditions and suggesting that there is an expectation that, from these factual preconditions, the community will seize upon the legal “green light” of statehood. Usually the entity that has itself established core minimum facts substantiating a claim to statehood will seek recognition from an organization, like the UN, to enjoy recognition as a sovereign state.<sup>84</sup>

*C. The Partition Resolution, the Emergence of the Conflict, and the International Response*

As previously discussed, by 1948, Britain had lost patience, because of the internal unrest and acts of terrorism directed at British forces by Zionist militias in Palestine, and ceded to the UN the Palestinian mandate and attendant responsibilities.<sup>85</sup> As a result, the UN generated a resolution that provided for a partition of Palestine in order to establish a Jewish state (fifty-seven percent of the land) and an Arab state (forty-three percent of the land).<sup>86</sup> Generally, UNGA resolutions are not legally binding, although they suggest that they are – as a matter of good faith – politically binding.<sup>87</sup> It was the expectation of the international community, specifically of the parties involved, that the partition lines constituted a legally-binding definition of respective territorial claims. In addition, the Resolution did 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.<sup>88</sup> This critical junction theoretically permitted

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<sup>84</sup> Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 412 (1999).

<sup>85</sup> See generally sources cited *supra* note 51.

<sup>86</sup> G.A. Res. 181 (II), *supra* note 4 (thirty-three votes in favor, thirteen against, ten abstentions and one absent).

<sup>87</sup> DAKAS C.J. DAKAS, *THE JURIDICAL CHARACTER OF UN GENERAL ASSEMBLY RESOLUTIONS ON PERMANENT SOVEREIGNTY OVER NATURAL WEALTH AND RESOURCES* (1996).

<sup>88</sup> G.A. Res. 181 (II), *supra* note 4, Part I(A)(3) (“Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem, set forth in Part III of this Plan, 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

the removal of the colonial power and ostensibly transferred control to the UN, which sanctioned the occupancy of Palestinian territories by growing numbers of Jewish immigrants.<sup>89</sup>

To a large extent, the new Jewish settlers were refugees from elsewhere<sup>90</sup>; but the Jewish settlers also staked their claim to Palestinian lands based on a “right of return” to what is considered by many Jews to be their religious and historical birthright.<sup>91</sup> For the resident Palestinians, it was overwhelming and threatening to see such an influx of outsiders claiming the best pieces of land; it was equally overwhelming for Palestinian residents to experience limited access to development of the immigration, taxation, and property policies, which gave preference to the Jewish settlers.<sup>92</sup> 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,” ancient ancestral heritage to the land.<sup>93</sup> 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.<sup>94</sup> 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.

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boundaries of the Arab State, the Jewish State, and the City of Jerusalem shall be as described in Parts II and III below.”)

<sup>89</sup> VICTOR KATTAN, *THE PALESTINE QUESTION IN INTERNATIONAL LAW*, at xxix-xxxi (Victor Kattan ed. 2008); *see also* Rashid Khalidi, *International Law and Legitimacy and the Palestine Question*, 30 *HASTINGS INT’L & COMP. L. REV.* 173, 174 (2006-2007).

<sup>90</sup> Sari Hanafi, *Targeting space through bio-politics: The Israeli colonial project*, 10 *PALESTINE REP.* 1 (Feb. 18, 2004). *Compare* Gideon Bohak, *Ethnic continuity in the Jewish diaspora in antiquity*, in *JEWS IN THE HELLENISTIC AND ROMAN CITIES* (John R. Bartlett ed., May 15, 2002), with Press Release, U.N. Dep’t of Pub. Info., *Ten Countries Reply to the U.N. on Jewish Immigration into Palestine*, U.N. Press Release PAL/39 (June 19, 1947).

<sup>91</sup> *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, 297 (2006). *See generally* NUR MASALHA, *THE BIBLE AND ZIONISM: INVENTED TRADITIONS, ARCHEOLOGY AND POST-COLONIALISM IN ISRAEL-PALESTINE* (2007).

<sup>92</sup> John Quigley, *Living in Legal Limbo: Israel’s Settlers in Occupied Palestinian Territory*, 10 *PACE INT’L L. REV.* 1, 5-6 (1998); *see also* Stacy Howlett, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 *VAND. J. TRANSNAT’L L.* 117, 123 (2001); Assaf Likhovski, *Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandatory Palestine*, 11 *THEORETICAL INQ. L.* 725, 745-46 (2010).

<sup>93</sup> Kathryn Westcott, *Settlers: Claiming the ‘Promised Land’*, *BBC NEWS* (Feb. 18, 2003), [http://news.bbc.co.uk/2/hi/middle\\_east/981554.stm](http://news.bbc.co.uk/2/hi/middle_east/981554.stm).

<sup>94</sup> William Safran, *The Jewish Diaspora in a Comparative and Theoretical Perspective*, 10 *ISRAEL STUD.* 36 (2005).

The Partition Resolution prescribed the creation of two states, each guaranteeing certain (new) standards of normative state behavior; however, the Partition Resolution was only partially carried out. The partition expectation requires each community to create a constituent assembly of each “state” for the purpose of drafting “a democratic constitution for its state.”<sup>95</sup> 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.”<sup>96</sup>

Israel unilaterally declared itself a sovereign state in 1948 without having drafted or adopted a constitution consistent with the expectations of Resolution 181 and therefore becoming officially a Jewish state with no constitution.<sup>97</sup> Although there was a Declaration of the Establishment of the State of Israel, which announced that the new state “will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, or sex,”<sup>98</sup> this declaration was not passed by the Knesset and therefore has no legal efficacy within Israel.<sup>99</sup> In short, one state was created – although it failed to adhere to the prescribed state behavior required by the Partition Resolution – and one state failed to be born.

Armed conflict broke out between the newly-born Jewish state and surrounding Arab states. To the historians of Israel, the resulting conflict became the War of Independence.<sup>100</sup> To the Palestinians’ historians, these events were catastrophic and the “Nakba Day,” or the displacement that accompanied the creation of the State of Israel, symbolized them.<sup>101</sup> The

<sup>95</sup> G.A. Res. 181 (II), *supra* note 4, Part 1(B)(10).

<sup>96</sup> *Id.*

<sup>97</sup> Justice Dalia Dornier, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325, 1325-26 (1999). See generally DAFNAH SHARFMAN, *LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL* (1993) (Tracing the historical evolution of civil rights in Israel as a consequence of the lack of a constitution and demonstrates the connection between the collective of the Zionist founding fathers and the relative lack of Israeli consensus sensitive to the issue of civil rights; describing the reluctance of Israeli politicians to give up power and authority for the abstract notion of civil rights and accounts for the unique role of religion in Israeli public life.).

<sup>98</sup> Declaration of the Establishment of Israel, *supra* note 19.

<sup>99</sup> See generally Ruth Gavison, *Legislatures and the Quest for a Constitution: The Case of Israel*, 11 REV. CONST. STUD. 345 (2006).

<sup>100</sup> See generally CHAIM HERZOG & SHLOMO GAZIT, *THE ARAB-ISRAELI WARS: WAR AND PEACE IN THE MIDDLE EAST FROM THE 1948 WAR OF INDEPENDENCE TO THE PRESENT* (2005).

<sup>101</sup> See also DAVID W. LESCH & BENJAMIN FRANKEL, *HISTORY IN DISPUTE: THE MIDDLE EAST SINCE 1945*, at 102 (2004) (“The Palestinian recalled their “Nakba Day”, their “catastrophe” — the displacement that accompanied the creation of the State of Israel — in

official Israeli state view is that the Arab initiation of conflict was, in effect, a violation of international law; however, Israeli armed forces repelled Arab attacks and occupied territories beyond the partition line.<sup>102</sup> The question that emerged is whether or not, since official Israel state historical narratives tend to view Israelis as victims, and since Israel was somewhat victorious, there was a feeling that such victims were entitled to the territorial ground gains from the conflict.<sup>103</sup> Unfortunately for Israel, modern international law is not as generous regarding the acquisition of territory through the use of force.<sup>104</sup> Thus, there was – and remains – a concern about the extension of Israeli sovereignty beyond its lawfully declared partition borders.<sup>105</sup>

These new borders were somewhat stabilized by the Armistice Agreements – a set of agreements signed during 1949 between Israel and neighbor Arab States, such as Egypt, Lebanon, Jordan, and Syria, to put an end to the official hostilities of the 1948 Arab-Israeli War and to establish Armistice Demarcation Lines, also known as the Green Line, between Israeli forces and the forces in the West Bank held by Jordan.<sup>106</sup> The U.S.

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1948.”). *See generally* AHMAD H. SA’DI & LILA ABU-LUGHOD, *NAKBA: PALESTINE, 1948, AND THE CLAIMS OF MEMORY* 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.”); Ronit Lentin, *The Contested Memory of Dispossession: Commemorizing the Palestinian Nakba in Israel*, in *THINKING PALESTINE* 206 (2008).

<sup>102</sup> Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISRAEL L. REV.* 286, 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. 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.”).

<sup>103</sup> Daniel Bar-Tal, *Societal Beliefs in Times of Intractable Conflict*, 9 *INT’L J. CONFLICT MGMT.* 22, 29 (1998).

<sup>104</sup> *See generally* HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* (2007) (providing an analysis to the study of human rights within its wider social and cultural context by presenting a diverse range of carefully edited primary and secondary materials alongside extensive text, editorial commentary and study questions).

<sup>105</sup> *See generally* JOE CLEARY, *LITERATURE, PARTITION AND THE NATION-STATE* (2002).

<sup>106</sup> *See* U.N. Doc. S/1353 (July 20, 1949); U.N. Doc. S/1302/Rev.1 (Apr. 3, 1949); U.N. Doc. S/1296 (Mar. 23, 1949); U.N. Doc. S/1264/Corr.1 (Feb. 23, 1949). *See generally* Louis

delegation to the UN was instructed to support Israel's request to keep the Negev, which is a desert and semidesert region of southern Israel.<sup>107</sup> The U.S. considered that, as a matter of practical reality, the Israeli borders were now a non-issue.

After 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, the most recent War in Lebanon in 2006, and "Operation Cast Lead" in Gaza during the winter of 2008-2009.<sup>108</sup> On May 28, 1964, in response to the emerging conflicts, the first Palestinian National Council ("PNC") convened in Jerusalem with 422 representatives. At the conclusion of this meeting, on June 2, 1964, the Palestine Liberation Organization ("PLO") was founded with a Statement of Proclamation of the Organization and the adoption of a Palestinian National Covenant.<sup>109</sup> Their Statement of Proclamation of the Organization declared:

. . . the right of the Palestinian Arab people to its sacred homeland Palestine and affirming the inevitability of the battle to liberate the usurped part from it, and its determination to bring out its effective revolutionary entity and the mobilization of the capabilities and potentialities and its material, military and spiritual forces.<sup>110</sup>

The original 1964 PLO Charter stated in short that, "Palestine with its boundaries that existed at the time of the British mandate is an integral

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Rene Beres, *After the Scud Attacks: Israel, Palestine, and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 90 (1992); Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880 (1956).

<sup>107</sup> See generally STEVEN L. SPIEGEL, *THE OTHER ARAB-ISRAELI CONFLICT: MAKING AMERICA'S MIDDLE EAST POLICY, FROM TRUMAN TO REAGAN* (1986) (discussing the controversial course of U.S.-Middle East relations, challenging the belief that U.S. policy in the Middle East is primarily a relation to events in the region, motivated by bureaucratic constraints or the pressures of domestic politics).

<sup>108</sup> *Rulers of Palestine*, supra note 19 (Some historians including the Israeli historian Ilan Pappé hold that the war was more than simply a matter of Israeli independence; some note that a specific strategy existed to drive out the indigenous Palestinian population, seize the land, and create the conditions for a Jewish majority state.); see ILAN PAPPE, *A HISTORY OF MODERN PALESTINE: ONE LAND, TWO PEOPLES* (2003); ILAN PAPPE, *BRITAIN AND THE ARAB-ISRAELI CONFLICT: 1948-51* (1988); ILAN PAPPE, *THE ETHNIC CLEANSING OF PALESTINE* (2006); ILAN PAPPE, *THE MODERN MIDDLE EAST* (2005).

<sup>109</sup> Moshe Shemesh, *The founding of the PLO 1964*, 20 MIDDLE E. STUD. 105, 123 (1984); see also MOSHE SHEMESH, *ARAB POLITICS, PALESTINIAN NATIONALISM AND THE SIX DAY WAR* (2008); David Th. Schiller, *A Battlegroup Divided: The Palestinian Fedayeen*, 10 J. STRATEGIC STUD. 90 (1987).

<sup>110</sup> *Statement of Proclamation of the Organization*, PALESTINE LIBERATION ORGANIZATION (May 28, 1964), available at [www.crethiplethi.com/download/Palestine\\_national\\_charter\\_1964.pdf](http://www.crethiplethi.com/download/Palestine_national_charter_1964.pdf).

regional unit,” and sought to “prohibit . . . the existence and activity” of Zionism.<sup>111</sup> Although the original Covenant did not expressly mention “statehood,” it called for a right of return and self-determination for Palestinians. In 1968, the Covenant was amended to stipulate more clearly the Palestinians’ intentions that (1) Israel be removed from its role as the de facto occupying power in the West Bank and Gaza; (2) that a Palestinian self-governing entity be established in the West Bank and Gaza; and (3) that the state of Israel be dismantled.<sup>112</sup> Later, in 1974, the PLO adopted a program that clarified the intention to declare an independent state in the territory of the Palestinian Mandate.<sup>113</sup> That program, in the search for other strategies to advance its interests, sought to secure maximum diplomatic recognition,<sup>114</sup> stressing that the foundations of Palestinian claims to statehood were founded on the principle of self-determination; there was substantial international commitment to this goal at the time.<sup>115</sup>

The PLO also secured recognition of its role as representative of the Palestinian people in their quest for self-determination<sup>116</sup> by gaining recognition from the Arab League and the majority of UN Members.<sup>117</sup> In short, this process resulted in more than 122 states recognizing the PLO and

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<sup>111</sup> *The Palestinian National Charter: Resolutions of the Palestine National Council: Articles 2 and 23*, PALESTINIAN LIBERATION ORGANIZATION (signed May 28, 1964 and amended July 1-17, 1968), available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Palestinian+National+Charter.htm> (“Article 2: Palestine, with the boundaries it had during the British Mandate, is an indivisible territorial unit.” “Article 23: The demand of security and peace, as well as the demand of right and justice, require all states to consider Zionism an illegitimate movement, to outlaw its existence, and to ban its operations, in order that friendly relations among peoples may be preserved, and the loyalty of citizens to their respective homelands safeguarded”); see also Freedom for Palestine, *Palestine Liberation Organization* (Mar. 5, 2011), available at <http://www.palfreedom.ps/?page=details&newsID=8&cat=12>.

<sup>112</sup> See generally discussion *id.*; YEHOASHAFAT HARKABI, *THE PALESTINIAN COVENANT AND ITS MEANING* (1979).

<sup>113</sup> Israel Ministry of Foreign Affairs, 3 12th Palestinian National Council Political Programme, June 9, 1974, available at <http://www.mfa.gov.il/MFA/Foreign%20Relations/Israels%20Foreign%20Relations%20since%201947/1974-1977/3%2012th%20Palestinian%20National%20Council%20Political%20Prog>.

<sup>114</sup> See generally ARYEH YODFAT & YUVAL ARNON-OHANNA, *P.L.O. STRATEGY AND TACTICS* (1981).

<sup>115</sup> Vereté, *supra* note 13, at 55-56.

<sup>116</sup> MADIHA RASHID AL MADFAI, *JORDAN, THE U.S. AND THE MIDDLE EAST PEACE PROCESS, 1974-1991*, at 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.”).

<sup>117</sup> Sanford R. Silverburg, *The Palestine Liberation Organization in the U.N.: Implications for International Law and Relations*, 12 *ISR. L. REV.* 365, 367 (1977).

over sixty states providing it with full diplomatic status.<sup>118</sup> Additionally, fifty states recognized the PLO but had not authorized the establishment of PLO embassies, although some permit PLO offices to function under the name of the Arab League.<sup>119</sup> These developments did not indicate the existence of a Palestinian state or government in exile, but instead focused on the PLO as the sole representative of Palestinian self-determination rights.<sup>120</sup>

As early as 1969, the UNGA began adopting Resolutions that recognized the Palestinian right to self-determination as well as the recognition of the PLO as the representative of the Palestinian people.<sup>121</sup> The PLO secured an invitation to participate in UN deliberations and conferences organized under the authority of the UNGA as well as the United Nations Security Council (“UNSC”).<sup>122</sup> The PLO has thus far had observer status at the UN<sup>123</sup> Israel, however, has resisted the idea of “creeping” – increment steps toward international recognition with multilateral and bilateral degrees of diplomatic recognition<sup>124</sup> – recognition of Palestinian institutions because they suggest a “creeping” validation of their claims.<sup>125</sup>

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<sup>118</sup> *Recognizing the Palestinian State on the 1967 border & Admission of Palestine as a Full Member of the U.N.*, P.L.O. NEGOTIATIONS OFFICE (2011) (up to this moment 122 UN Member States recognized Palestine).

<sup>119</sup> *Palestine Liberation Organization (PLO) (structure)*, KONRAD ADENAUER STIFTUNG (2010); see also James Crawford, *Israel (1948-1949) and Palestine (1998-1999) Two Studies in the Creation of States*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 95, 95–100, 110–15 (Guy S. Goodwin-Gilland & Stefan Talmon eds., 1998) (“Declaration [of the PLO] was quite widely recognized by states, although often in equivocal terms . . . It is of interest to note that most States that have recognized the ‘State of Palestine’ after its proclamation on 15 Nov. 1988 have elevated the PLO office in their country to the status of embassy.”).

<sup>120</sup> See also Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT’L L. 564, 570 (1993); Santiago González Vallejo, *Recognition of the State of Palestine and the hypocrisy*, ARAB CAUSE SOLIDARITY COMMITTEE (2011), <http://www.nodo50.org/csca/agenda11/palestina/arti42.html>. See generally STEPHEN D. KRASNER, *PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES* (2001) (Attempts to answer some of the most pressing issues in the contemporary international order, which revolve around the frequently invoked but highly contested concept of sovereignty. To answer those and multiple other questions the book takes into account the numerous and sometimes contradictory components of the concept of sovereignty and provide a case law to illustrate how the disaggregation of sovereignty has enabled political actors to create entities that are semiautonomous, semi-independent, and/or semi-legal in order to solve specific problems stemming from competing claims to authority.).

<sup>121</sup> Vereté, *supra* note 13, at 55-56.

<sup>122</sup> G.A. Res. 3375 (XXX), U.N. Doc. A/2399 (Nov. 10, 1975).

<sup>123</sup> G.A. Res. 3237 (XXIX), U.N. Doc. A/2296 (Nov. 22, 1974).

<sup>124</sup> By “creeping” we mean incremental steps toward international recognition with multilateral and bilateral degrees of diplomatic recognition. See Wasim I. Al-Habil, *Occupations, a Diaspora, and the Design of Local Governments for a Palestinian State* (July

Two of the critical UNSC decisions concerning the Palestinian-Israeli conflict are Resolution 242 of November 22, 1967,<sup>126</sup> and Resolution 338 of October 22, 1973.<sup>127</sup> Pursuant to Resolution 242, there is the recognition of the “inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in the Middle East in which every State in the area can live in security.”<sup>128</sup> 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. The Resolution also stipulates that the Charter require a “just peace,” which includes some of the following principles: (1) that the Israeli armed forces withdraw from occupied territories; (2) an end to the claim of belligerency; and (3) a respect for the sovereignty, territorial integrity, and political independence of all states in the area.<sup>129</sup> The Resolution also stipulates, for example, that freedom of navigation in international waters be respected and refers to a just settlement of the refugee problem.<sup>130</sup> In Resolution 338, the Security Council called upon all relevant parties to implement UNSC Resolution 242 after a cease-fire.<sup>131</sup> These Resolutions imply that the right to self-

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1996) (unpublished Ph.D. dissertation, Al-Aqsa University), available at [http://etd.ohiolink.edu/view.cgi?acc\\_num=csu1226688053](http://etd.ohiolink.edu/view.cgi?acc_num=csu1226688053).

<sup>125</sup> Denis J. Sullivan, *NGOs in Palestine: Agents of Development and Foundation of Civil Society*, 25(3) J. PALESTINE STUD. 93, 93-100 (1996).

<sup>126</sup> S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967) (Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area. Calls on Israel’s neighbors to end the state of belligerency and calls upon Israel to reciprocate by withdraw its forces from land claimed by other parties in 1967 war. Interpreted commonly today as calling for the Land for peace principle as a way to resolve Arab-Israeli conflict.)

<sup>127</sup> S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973) (“‘calls’ for a cease fire” in Yom Kippur War and “the implementation of Security Council Resolution 242 (1967) in all of its parts”, and “decides that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East”).

<sup>128</sup> See S.C. Res. 242, *supra* note 126 (The third line of the Preamble states the following: “*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...”).

<sup>129</sup> See *id.* Article (1) and (2).

<sup>130</sup> *Id.* at 2(a)(b)(c) (affirming further the necessity (a) for guaranteeing freedom of navigation through international waterways in the area; (b) for achieving a just settlement of the refugee problem; and (c) for guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones).

<sup>131</sup> S.C. Res. 338, *supra* note 127 (“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; Calls upon all parties concerned to start immediately after the cease-fire the implementation of Security Council Resolution 242 (1967)

determination implicates rights that accrue, at a minimum, to a de facto state regarding claims to sovereignty, territorial integrity, and independence—all of which necessarily call for an end to Israeli occupation.<sup>132</sup>

#### D. U.S. Influence and Role in the Conflict

The U.S., which has been a strong supporter of Israel,<sup>133</sup> has been reluctant to recognize Palestinian identity in the international arena.<sup>134</sup> The Sinai Agreement of September 4, 1975, bespeaks this position.<sup>135</sup> In this Agreement, the U.S. pledged not to negotiate with the PLO or to recognize it so long as it refused to recognize the right of Israel to exist and so long as the PLO refused to accept Resolutions 242 and 338.<sup>136</sup> Additionally, the U.S. Congress added a further element to the U.S. commitment – namely, that the PLO must renounce terrorism.<sup>137</sup> In short, the U.S. position has been that, once the PLO publicly accepted these Resolutions, recognized Israel as a sovereign state, was prepared to negotiate peace with Israel, and renounced terrorism, the U.S. would have a certain degree of negotiating flexibility with the PLO.

It should be noted that the U.S. has also refused to recognize Palestinian claims to self-determination because it would lead to the creation of a separate state, which the U.S. has historically opposed. In November 1998, 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.”<sup>138</sup> The Palestinian communiqué implicitly recognized Israel’s right to exist.<sup>139</sup> Later, President Yasser Arafat, representing the PLO, explicitly accepted Israel’s right to exist, accepted UN Resolutions 242

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in all of its parts; 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.”).

<sup>132</sup> Winston Nagan & Aitza Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT’L L.J. 429 (2012).

<sup>133</sup> CAROL MIGDALOVITZ, CONG. RESEARCH SERV., ISRAEL: BACKGROUND AND RELATIONS WITH THE U.S. 24 (2009).

<sup>134</sup> JIM ZANOTTI, CONG. RESEARCH SERV., THE PALESTINIANS: BACKGROUND AND U.S. RELATIONS 3-4 (2010).

<sup>135</sup> *Interim Agreement between Israel and Egypt*, Sept. 4, 1975, available at [http://www.knesset.gov.il/process/docs/egypt\\_interim\\_eng.htm](http://www.knesset.gov.il/process/docs/egypt_interim_eng.htm).

<sup>136</sup> MARK CLYDE, CONG. RESEARCH SERV., PALESTINIANS AND MIDDLE EAST PEACE: ISSUES FOR THE UNITED STATES 3 (2002), available at <http://www.fas.org/sgp/crs/Mideast/IB92052.pdf>.

<sup>137</sup> *Id.*

<sup>138</sup> Palestinian National Council Declaration of Independence, 27 I.L.M. 161 (Nov. 14, 1988).

<sup>139</sup> *Id.*

and 338, and renounced all forms of terrorism.<sup>140</sup> In the meantime, as Palestinians sought recognition before the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) and the World Health Organization (“WHO”), President George H. W. Bush declared that any UN agency recognizing the PLO would face a threat of a cut-off in U.S. funding.<sup>141</sup>

The 1993 Oslo Accords initially generated promising signals that a peaceful settlement was achievable. The principal understanding that emerged from this process was the creation of a Palestinian National Authority (“PA”), which would administer the territory under its control, and the withdrawal of Israeli defense forces from the West Bank and parts of Gaza Strip.<sup>142</sup> This arrangement was envisioned to last for five years, with the understanding that further negotiations would cover the issues of Jerusalem, refugees, settlements, security, and borders. 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.

The not-quite-obvious subtext of Oslo was the concession that a PA without an ostensible claim to sovereignty would, in effect, concede that the 1988 declaration of Palestinian independence was premature.<sup>143</sup> On the other hand, the PA’s future would be tied to a final status settlement agreement. Having structured the legal expectations in terms of Israel and the PA, the Oslo Accords ultimately provided Israeli negotiators a practical veto over Palestinian claims to self-determination, independence, and sovereignty. Therefore, so long as Israel was reluctant to settle these issues, there could be no final settlement and no hope of an independent state. It thus became apparent to the Palestinians that the new governing authorities in Israel, led by ultranationalist Prime Minister Netanyahu, were not committed to advancing the peace process because they opposed the creation of a Palestinian state.<sup>144</sup>

We now turn to the U.S. role in the question of a possible recognition of an independent sovereign status for the Palestinian people and the current impediments. The status of Palestine draws sustenance from recent developments in international law; it is also influenced by its rather unique

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<sup>140</sup> BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 450 (1991).

<sup>141</sup> *Id.*

<sup>142</sup> NATHAN J. BROWN, *PALESTINIAN POLITICS AFTER THE OSLO ACCORDS: RESUMING ARAB PALESTINE* 12-13 (2003); *see also* JOHN G. HALL, *THE PALESTINIAN NATIONAL AUTHORITY (CREATION OF THE MODERN MIDDLE EAST)* 96 (2d ed. 2008).

<sup>143</sup> James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 *STAN. J. INT’L L.* 681 (1988-1989).

<sup>144</sup> Ira Chernus, *Israel and the Palestinians through the looking glass*, CBS NEWS (May 27, 2011), [www.cbsnews.com/2100-215\\_162-20066760.html](http://www.cbsnews.com/2100-215_162-20066760.html).

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; it was considered a state on a pathway to independence. We explored these issues earlier by first setting out the basic law as it currently clarifies the definition of statehood and the process of recognition. The definition of a state at international law it is still influenced by Article I of the Montevideo Convention on the Rights and Duties of States.<sup>145</sup> In this view, and as already discussed, a state is a territorially defined or definable entity, which engages, or has the competence to engage, in formal and diplomatic relations with other states and entities in the international environment, with a relatively stable population; that is, a population and territory under the control of its own government.<sup>146</sup> An aspect implicit in the criteria of statehood is that the entity should make outward claims that it is, indeed, a state.

*E. The League of Nations Mandate and the Process for  
Palestinian Statehood*

We now come to the clarification and application of international law criteria relating to statehood and recognition. The criteria of statehood have special effects and implications for different aspects of recognition. These are complex matters in international law. This complexity has been compounded since WWII, when, under the UN Charter, statehood and recognition became tied to a broader framework of issues and values.<sup>147</sup> Among these issues is the question of an entry into the International Constitutional System,<sup>148</sup> as well as any exclusion from it. This issue is tied to the emergence of self-determination as a preemptory norm of international law<sup>149</sup> and the strength accorded to traditional principles of *uti*

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<sup>145</sup> *Montevideo Convention*, *supra* note 79. *See generally* Crawford, *supra* note 70; Grant, *supra* note 84.

<sup>146</sup> *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

<sup>147</sup> *See generally* Crawford, *supra* note 70.

<sup>148</sup> Marc Weller, *The reality of the emerging universal constitutional order: Putting the pieces of the puzzle together*, 10 CAMBRIDGE REV. INT'L AFF. 40, 47 (1997); *see also* Susan C. Breau, *The Constitutionalization of the International Legal Order*, 2008 LEIDEN J. INT'L L., 545, 548, 557 (2008) ("In spite of this minor point these norms certainly seem to be essential elements of the international legal order and thus values of an emerging constitution. It must represent the first element of the international constitution: that these norms are values that are considered binding on the international community as a whole.").

<sup>149</sup> Ediberto Roman, *Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. MIAMI L. REV. 943, 943 (1998); *see also* UNESCO, Rep. of the Int'l Conference of Experts held in Barcelona, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, Nov. 21-27, 1998 (Michael C. van Walt van Praag & Onno Seroo eds. 2008). *See generally* ANTONIO CASSESE,

*possidetis*, a Latin term which means “as you possess” and which generally discourages secession from a sovereign state.<sup>150</sup>

The criterion of statehood that requires a definable body politic has been more generally referred to as a permanent population.<sup>151</sup> There is a permanent Palestinian population in the West Bank and Gaza.<sup>152</sup> However, the population issue in Palestine has been contentious since the initiation of the Class A Mandate. The mandate recognized a population of Palestinians under Article 22 of the League Mandate.<sup>153</sup> This recognition was influenced by the Mandate’s purpose: to secure the population’s right to self-determination.<sup>154</sup> However, Britain, as the mandatory power, prior to assuming mandate responsibilities, had announced a policy for Palestine to

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SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1997); John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997); Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178 (1992); Gerry Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT’L L. 255 (1996).

<sup>150</sup> See also J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT’L L. REV. 9, 34-35 (1991). See generally SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS (2002) (Examining the origins of the *uti possidetis* principle, its evolution and colonial roots as well as more recent applications, to determine whether it merits the overriding importance now attributed to it; this expression is a principle in international law that establishes that territory and other property remains with its possessor at the end of a conflict, unless otherwise provided for by treaty and if such a treaty does not include conditions regarding the possession of property and territory taken during the war the principle of *uti possidetis* will prevail -- in short, this principle enables a belligerent party to claim territory that it has been acquired by war).

<sup>151</sup> See generally Crawford, *supra* note 70.

<sup>152</sup> See also Sulayman S. Al-Qudsi, *Profiles of Refugee and Non-Refugee Palestinians from the West Bank and Gaza*, 38 INT’L MIGRATION 79, 79-80 (2000); Nadim N. Rouhana & Daniel Bar-Tal, *Psychological Dynamics of Intractable Ethnonational Conflicts: The Israeli-Palestinian Case*, 53 AM. PSYCHOLOGIST 761, 762 n. 1 (1998) (“At the end of 1996, Israel’s citizens numbered 5,759,400, 80% of whom were Jewish; the rest were mainly Arabs (Israel, Central Bureau of Statistics, 1997). The Arab citizens in Israel mostly call themselves “Palestinians in Israel” (Rouhana, 1997). The Palestinian population in the West Bank (including East Jerusalem) and Gaza is estimated at 2,390,000 (Zureik, 1996)”; Kavitha Giridhar, *Legal Status of Palestine*, DRAKE UNDERGRADUATE SOC. SCI. J. (2006), available at <http://escholarshare.drake.edu/bitstream/handle/2092/379/giridhar.pdf?sequence=1>. See generally Gwyn Rowley, *Palestinian refugees: empirical and qualitative considerations*, 27 GEOJOURNAL 217, 218 (1992); Bennett Zimmerman, Roberta Seid & Michael L. Wise, *The Million Person Gap: The Arab Population in the West Bank and Gaza*, BEGIN-SADAT CENTER FOR STRATEGIC STUDIES 9 (2006).

<sup>153</sup> Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT’L L. 301, 301 (1990).

<sup>154</sup> Quigley, *Palestine’s Declaration of Independence*, *supra* note 32, at 9.

secure a homeland in Eretz Israel for the Jewish people in the Jewish Diaspora.<sup>155</sup> This was expressed in the Balfour Declaration.<sup>156</sup>

Foreign Secretary Balfour, in confidential correspondence, expressed the view to the British Prime Minister, Lloyd George, that the major purpose of Article 22, namely self-determination for Palestinian inhabitants, could not be implemented because of the political undertaking to promote a Jewish homeland in Palestinian territory.<sup>157</sup> As it turned out, Britain was never able to emerge with a successful solution to this problem and passed the matter on to the UNGA.<sup>158</sup> Article 22, which juridically established a right of self-determination for the Palestinians then, was left unimplemented.<sup>159</sup> 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.

One factor that has influenced the development of extreme ultranationalist perspectives is the claim that the Palestinians are not “people” for the purpose of the population requirement of statehood.<sup>160</sup> Careful research, however, demonstrates a continuity of Palestinian national identity.<sup>161</sup> Ultra-conservative nationalist factions in political power and

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<sup>155</sup> Nils Butenschon, *Accommodating Conflicting Claims to National Self-Determination, the Intractable Case of Israel/Palestine*, 13 INT’L J. MINORITY & GROUP RTS. 285, 295 (2006).

<sup>156</sup> See generally Zeitlin, *supra* note 21.

<sup>157</sup> QUIGLEY, THE STATEHOOD OF PALESTINE, *supra* note 22, at 75. See generally JEAN ALLAIN, INTERNATIONAL LAW IN THE MIDDLE EAST: CLOSER TO POWER THAN JUSTICE (2004) (examining international law through the lens of the Middle East and demonstrating the qualitatively different manner in which international law is applied in this region of the world because law, although it is intended to produce a just society, is ultimately a social construct that has travelled through a political process and cannot be divorced from its relationship to power).

<sup>158</sup> See also FRIEDMAN, *supra* note 55, at 325. See generally Eugene V. Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. WORLD PUB. ORD. 147 (1978).

<sup>159</sup> See generally Boyle, *supra* note 153.

<sup>160</sup> See also *In the Reference RE Secession of Quebec Case*, [1998] 2 S.C.R. 217 (Can.) (the Court in § I, ¶¶ 123, 124 & 125, explores and clarifies the problem of defining peoples in international law. The Court further clarifies the notion of colonial or oppressed people in § III, ¶¶ 131, 133-37.); AVI SHLAIM, THE IRON WALL, 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.” - former Israeli prime minister Golda Meir”). See generally Committee on the Exercise of the Inalienable Rights of the Palestinian People, *The International Status of the Palestinian People* (Jan. 1, 1980), available at <http://unispal.un.org/UNISPAL.NSF/0/548E6E5758E89588852575A0004F1054>); generally I.M. Kane, *Palestinians are not the Indigenous People of Palestine*, MILLSTONE DIARIES (Aug. 8, 2011).

<sup>161</sup> See generally RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS (2009) (Suggesting that the best way to approach the

leadership of the current Israeli state have promoted the argument that Palestinians are “simply Arabs” and therefore indistinguishable from other Arab peoples in surrounding states.<sup>162</sup> Some Arab nationalists in fact supported this view in the early efforts to create a Pan-Arab Union.<sup>163</sup> However, the strength of nation-state national identity proved too strong for this innovation.<sup>164</sup> What makes a final settlement complex is that there are now some 6.3 million (absentee) Palestinians whose citizenship rights were abrogated by internal Israeli legislative and administrative measures.<sup>165</sup> 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.<sup>166</sup> We therefore submit that Palestinians do comprise a national body politic, with a strong, defined national identity—and one that is historically continuous, particularly during the period of the League Mandate as well as under the UN Charter framework.

We now come to the next important criterion of statehood: the body politic must be territorially determined or determinable.<sup>167</sup> In general, we would suggest that boundaries indicated in relevant UNSC Resolutions established conditions that are determined or determinable.<sup>168</sup> Factors exist in this context, which suggest that Israel, a key negotiator, may have broader territorial ambitions, and this may emerge at the expense of Palestinian statehood.<sup>169</sup> One pressing issue is the dynamism of territories and the requirement under the traditional Montevideo state qualifications<sup>170</sup> that, if

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current Palestine-Israel conflict is by devising a way to reverse the powerful current dynamic in Palestine; predicting that the situation will become more and more untenable and more violently unstable as time goes on -- the author considers the future, expressing cautious optimism toward Israel's recognition of a Palestinian political entity yet wondering whether such acknowledgement will lead to Palestinian statehood and independence.).

<sup>162</sup> Talia Einhorn, *The Arab-Israeli Peace Process: The Law Reform Perspective*, 3 EUR. J.L. REFORM 149, 153 (2001).

<sup>163</sup> C. Ernest Dawn, *The Formation of Pan-Arab Ideology in the Interwar Years*, 20 INT'L J. MIDDLE E. STUD. 67, 81 (1988).

<sup>164</sup> See generally KHALIDI, *supra* note 161.

<sup>165</sup> Stephen Lendman, *Israel's Proposed Counterterrorism Law*, PEOPLE'S VOICE (Sept. 3, 2011), <http://www.thepeoplesvoice.org/TPV3/Voices.php/2011/09/03/israel-s-proposed-counterterrorism-law>.

<sup>166</sup> Zimmerman, et al., *supra* note 152, at 3.

<sup>167</sup> Crawford, *supra* note 70; see also Lloyd, *supra* note 73; J.D. Van der Vyver, *Statehood in International Law*, 5 EMORY INT'L REV. 9 (1991).

<sup>168</sup> See sources cited *supra* note 167.

<sup>169</sup> See generally DANIEL J. CASTELLANO, *A BRIEF HISTORY OF THE ARAB-ISRAELI CONFLICT* (2007).

<sup>170</sup> *Montevideo Convention*, *supra* note 79.

there is to be a Palestinian state, this state must have agreed-upon boundaries which provide a viable territorial base for a state.<sup>171</sup>

The apparently interminable negotiations also form a basis by which Israel can change the facts regarding the appropriate reach of territory that may fall within any settlement. One of the ways that the territorial question can be effectually predetermined prior to negotiation is by a continuation and expansion of the Israeli settlement program. Politically, the expansion of settlements is a cornerstone of an ultranationalist program and policy advocated by extreme right-wing conservative factions, which currently constitute the governing majority of the Knesset in Israel.<sup>172</sup> This policy goes hand in glove with an ultraconservative propaganda campaign which insists that only the Israelis make concessions and that the Palestinians “take and take.”<sup>173</sup> It is worth remembering that the Oslo Accords, in which Foreign Minister Peres was a key player, involved President Yasser Arafat giving up on the 1947 UN boundaries to accept the territorial boundaries as defined in 1967.<sup>174</sup> In so doing, Arafat gave up twenty-two percent of the Historic Palestine and Israel enlarged its territory by fifty-six percent to annex seventy-eight percent of the territorial landmass of Historic Palestine.<sup>175</sup>

The Obama Administration had insisted that there be a freeze on settlement building projects on Palestinian land.<sup>176</sup> Prime Minister Netanyahu agreed to a ten-month freeze in order to encourage the initiation of talks.<sup>177</sup> However, the Israeli media maintains that, during these ten months, construction continued at the same pace as in the previous ten

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<sup>171</sup> See generally Justus Reid Weiner & Diane Morrison, *Legal Implications of Safe Passage Reconciling a Viable Palestinian State with Israel's Security Requirements*, 22 CONN. J. INT'L L. 233 (2007).

<sup>172</sup> See generally NUR MASALHA, *IMPERIAL ISRAEL AND THE PALESTINIANS: THE POLITICS OF EXPANSION* (2000).

<sup>173</sup> Allan C. Brownfeld, *Finally, Israel's Settlements Policy, Turn Toward Extremism Making Impact on Jewish Opinion*, WASHINGTON REP. (Mar. 2011), <http://www.wrmea.com/component/content/article/364-2011-march/10322-israel-and-judaism-finally-israels-settlements-policy-turn-toward-extremism-making-impact-on-jewish-opinion.html>.

<sup>174</sup> Henry Siegman, *Netanyahu's Freeze Scam*, HUFF. POST (Oct. 1, 2011), available at [http://www.huffingtonpost.com/henry-siegman/netanyahus-freeze-scam\\_b\\_747292.html](http://www.huffingtonpost.com/henry-siegman/netanyahus-freeze-scam_b_747292.html).

<sup>175</sup> MJ Rosenberg, *Remember these Digits: 78-22*, COMMON GROUND NEWS SERVICES (Apr. 17, 2008), <http://www.commongroundnews.org/article.php?id=22974&lan=en&sp=0>.

<sup>176</sup> Elise Labott, *Obama Drops Demand that Israel Freeze Settlements*, CNN STATE (Sept. 22, 2009), [http://articles.cnn.com/2009-09-22/politics/us.mideast\\_1\\_palestinian-president-mahmoud-abbas-settlement-freeze-netanyahu?\\_s=PM:POLITICS](http://articles.cnn.com/2009-09-22/politics/us.mideast_1_palestinian-president-mahmoud-abbas-settlement-freeze-netanyahu?_s=PM:POLITICS).

<sup>177</sup> Barak Ravid & Agencies, *Netanyahu Declares 10-Month Settlement freeze to Restart Peace Talks*, HAARETZ (Nov. 25 2009), <http://www.haaretz.com/news/netanyahu-declares-10-month-settlement-freeze-to-restart-peace-talks-1.3435>.

months.<sup>178</sup> The Obama Administration has pressed Netanyahu to give another two months for the freeze.<sup>179</sup> The U.S. administration has, thus far then, had no influence on Netanyahu's current settlement policies. Moreover, pressure on the White House by the ultraconservative Israeli nationalist and expansionist lobby in Washington, D.C. has weakened the U.S. administration's position.<sup>180</sup>

The question is, therefore, 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 indicate to U.S. diplomats that he is in support of a settlement to the conflict, while his domestic political activities and policies all point to a political strategy designed to continue the conflict indefinitely with no final conclusion, except one that is created on the ground? The settlements are in fact creating the technical infrastructure which would restrict bilateral and multilateral capacity for negotiating the political boundaries, making it nearly impossible for future Israeli authorities to uproot the settlements and rewrite the territorial map. Netanyahu has further refused to give any assurance about the settlement freeze.<sup>181</sup>

Netanyahu rules with a complex coalition of ultranationalist interests. Indeed, Netanyahu himself is deeply committed, politically as well as intellectually, to two pillars of ultranationalist idealism. The first principle posits 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.<sup>182</sup> Balfour also stressed this point; the historical boundaries of Israel, therefore, include Ancient Sumeria and Judea.<sup>183</sup> In short, the only

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<sup>178</sup> Ethan Bronner, *Despite Settlement Freeze, Buildings Rise*, N.Y. TIMES (July 14, 2010), <http://www.nytimes.com/2010/07/15/world/middleeast/15settlements.html>.

<sup>179</sup> Barak Ravid, *Obama in Personal Appeal to Netanyahu: Extend Settlement Freeze for Two Months*, HAARETZ (Sept. 30, 2010), <http://www.haaretz.com/news/diplomacy-defense/obama-in-personal-appeal-to-netanyahu-extend-settlement-freeze-for-two-months-1.316450>.

<sup>180</sup> Jim Lobe, *Politics Throws Palestine Under the Bus*, INTER PRESS SERVICE (Sept. 24, 2011); see also Thomas McAdams Deford, *Mac Deford: Obama (and US strategic interests) vs. the Israel lobby*, THE FREE PRESS (Sept. 21, 2011).

<sup>181</sup> Al Aribiya with Agencies, *Netanyahu Freezes Settlement, Tells Officials to Stay Mum on Iran Ahead of U.S. Trip*, AL ARIBIYA (Feb. 24, 2012), <http://www.alarabiya.net/articles/2012/02/24/196721.html>.

<sup>182</sup> Huma Khan, *In Oval Office, Bibi Offers History Lessons to Obama*, ABC NEWS (May 20, 2011), <http://abcnews.go.com/blogs/politics/2011/05/in-oval-office-bibi-offers-history-lessons-to-obama>.

<sup>183</sup> See 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), [http://blog.nj.com/njv\\_george\\_berkin/2011/05/return\\_israel\\_to\\_pre-1967\\_bord.html](http://blog.nj.com/njv_george_berkin/2011/05/return_israel_to_pre-1967_bord.html).

boundaries acceptable to Netanyahu, according to this philosophical approach, are the boundaries of Eretz Israel (a greater Israel).<sup>184</sup> In this conceptualization of Israel, there is no room for Palestinians. The boundaries of greater Israel direct us to the second principle of ultranationalist idealism: the idea that there will never be a Palestinian state.<sup>185</sup> It has long been suggested by 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.<sup>186</sup>

We now come to the third criterion: the issue of governance.<sup>187</sup> This issue is somewhat more problematic because the PA was created as an interim entity and not a permanent governing authority.<sup>188</sup> The PA was established to serve as an interim governing entity for the Palestinian Territories under the Oslo Accords.<sup>189</sup> The agreement left final status issues as matters to be negotiated between Israel and the PA.<sup>190</sup> 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.<sup>191</sup> This understanding carries the assumption that the PA does not claim full sovereign independent status, since such status must be negotiated with Israel.

To establish a promising claim for statehood, the Palestinians would have to repudiate any understanding that statehood is conditioned by an Israeli veto. The strategy of now seeking to secure the recognition of statehood must address this question. Yet more must be done to strengthen

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<sup>184</sup> Nadav G. Shelef, *From "Both Banks of the Jordan" to the "Whole Land of Israel": Ideological Change in Revisionist Zionism*, 9 *ISR. STUD.* 1, 125-48 (2004).

<sup>185</sup> See generally Yossi Gurvitz, *Netanyahu Says "No" to the Two-States Solution*, +972 *MAGAZINE* (May 21 2011).

<sup>186</sup> *Gingrich Describes Palestinian People as "Invented"*, FOXNEWS.COM (Dec. 10, 2011), <http://www.foxnews.com/politics/2011/12/10/gingrich-describes-palestinian-people-as-invented/>; see also I.M. Kane, *Palestinians Are Not the Indigenous People of Palestine*, THE *MILLSTONE DIARIES* (Aug. 8, 2011), <http://imkane.wordpress.com/2011/08/08/palestinians-are-not-the-indigenous-people-of-palestine/>.

<sup>187</sup> *Montevideo Convention*, *supra* note 79. See generally Jill Allison Weiner, *Israel, Palestine, and the Oslo Accords*, 23 *FORDHAM INT'L L.J.* 230 (1999-2000)

<sup>188</sup> See also Lisa Hajjar, *Law against Order: Human Rights Organizations and (versus) the Palestinian National Authority*, 56 *U. MIAMI L. REV.* 59, 60 (2001-02). See generally BROWN, *supra* note 142.

<sup>189</sup> Hajjar, *supra* note 188.

<sup>190</sup> *Id.*

<sup>191</sup> *Declaration of Principles on Interim Self-Government Arrangements ("Oslo Agreement")* (Sept. 13, 1993), available at <http://www.unhcr.org/refworld/docid/3de5e96e4.html> (agreeing to commence negotiations on the permanent status of the disputed land in Gaza and Jericho).

the framework of governance by the PA, both internally and externally, to provide solid constitutional foundations for a future Palestinian State. Here, the Palestinians, by drafting a constitution and creating a government under that constitution, would unambiguously meet the third criteria of statehood. The PA does meet some of the criteria with regard to the capacity to enter into relations with other states; the PA has relations with other states that could qualify as meeting the minimum requirements of diplomacy. Additionally, the PA's observer status at the UN<sup>192</sup> and degree of participation in international organizations significantly enhances the claim that a future government has the capacity to enter into relations with other states and entities in the international environment.

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 discernible form of governance with clear lines of authority.<sup>193</sup> Yet it has been clearly understood that the PA was not really meant to be a governing body in an international sense.<sup>194</sup> 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 could be argued that Resolution 181 at least implies the idea that international law supports the notion of "an Arab state" of Palestine as part of the Partition Plan.<sup>195</sup> It could also be argued that the UNSC Resolutions recognizing the West Bank and Gaza as Palestinian territories is a *de jure* recognition that the boundaries of the Palestinian people are determinable and that the UNSC Resolutions provide the baseline for determining these boundaries. These resolutions form the foundation of the negotiations relating to the Oslo Accords, which essentially involved an acceptance by the parties of these boundaries. 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 state, Palestinian lands for a state are therefore determinable. Although Israel occupies those lands, occupancy vests no title

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<sup>192</sup> G.A. Res 3237 (XXIX), U.N. Doc. A/RES/3237 (Nov. 22, 1974).

<sup>193</sup> See *Montevideo Convention*, *supra* note 79.

<sup>194</sup> See Hajjar, *supra* note 188 ("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.'").

<sup>195</sup> *Montevideo Convention*, *supra* note 79.

in the occupier via adverse possession; the trumping legal principle is the legally binding UN Security Council Resolution.<sup>196</sup>

These are the criteria indicated in the Montevideo Convention on the Rights and Duties of States.<sup>197</sup> 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 a state.<sup>198</sup> That change additionally requires that a state, as a sovereign entity, is able and willing to accept the rights, as well as the obligations of a state, under UN Charter.<sup>199</sup> 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,”<sup>200</sup> fundamental human rights, global security and democracy. These latter criteria bring an element of international “authority” to the expression of sovereignty.

It could be argued that Israeli sovereignty is somewhat diminished by its unilateral declaration of independence and its parameters, its unwillingness to adopt the constitutional guidelines of Resolution 181, and its refusal to adopt its own declaration of independence as containing legally binding prescriptive norms.<sup>201</sup> 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 U.S. exercising a veto over the process in the UN Security Council. Therefore, the U.S.’s vote is something that the Palestinians must strategically seek to overcome or minimize.

Currently, more than 122 countries already recognize Palestinian statehood.<sup>202</sup> Such recognition is a matter of state sovereignty, exercised bilaterally. It would therefore be to the advantage of the Palestinians, should they secure an overwhelming bilateral commitment to the recognition of Palestinian sovereignty. Already, important Latin American states have given their commitments to recognition. Additionally, it would be

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<sup>196</sup> See S.C. Res. 242, *supra* note 126.

<sup>197</sup> *Montevideo Convention*, *supra* note 79.

<sup>198</sup> See generally Zohar Nevo & Tamar Megiddo, *Lessons From Kosovo: The Law of Statehood and Palestinian Unilateral Independence*, 5 J. INT’L L. & INT’L REL. 89 (2009).

<sup>199</sup> See generally CRAWFORD, *supra* note 70.

<sup>200</sup> Winston P. Nagan & Garry Jacobs, *New Paradigm for Global Rule of Law*, 1(4) CADMUS 130, 130-146 (2012); see also Amir N. Lichta, Chanan Goldschmidta & Shalom H. Schwartz, *Culture rules: The foundations of the rule of law and other norms of governance*, 35(4) J. OF COMP. ECON. 659, 659-88 (2007).

<sup>201</sup> Clovis Maksoud, *Diminished Sovereignty, Enhanced Sovereignty: United Nations-Arab League Relations at 50*, 49 MIDDLE E. J. 582, 582-94 (1995).

<sup>202</sup> See generally Boyle, *supra* note 153.

appropriate for the Palestinians to seek recognition of their statehood in regional international organizations such as the League of Arab States, the African Union, Organization of American States, European Union, and Asian Union. Regional recognition would be politically more feasible if the Palestinians are to develop their constitution to constitute their government. Under these circumstances, it may be vastly more difficult for the U.S. to exercise a veto in the face of an overwhelming international consensus.

It would seem clear that the recognition of Palestinian statehood must meet the Montevideo criteria of statehood under the UN Charter.<sup>203</sup> Montevideo is modified by post-WWII developments regarding the criteria of statehood in international law. UNGA Resolution 181 develops the partition of land.<sup>204</sup> The boundaries indicated in that Resolution were the boundaries adopted by Israel to define its territorial space; since the Palestinians were not organized into a formalized state entity at this time, they were not in a position either to adopt the UN partition scheme or even to repudiate it.<sup>205</sup>

Nevertheless, Israel's boundaries in part define Palestinian boundaries. Palestinian boundaries, in this sense, are determinable—and determinable boundaries would meet the criterion of territoriality for state recognition.<sup>206</sup> After the 1967 war, Israel occupied Gaza and the West Bank. It still, as a practical matter, functionally occupies those territories. However, Israel has agreed to Resolutions 242<sup>207</sup> and 338<sup>208</sup>; 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

<sup>203</sup> *Montevideo Convention*, *supra* note 79.

<sup>204</sup> *See generally* G.A. Res. 181 (II), *supra* note 4.

<sup>205</sup> *See generally* Boyle, *supra* note 153.

<sup>206</sup> *See generally* SUZANNE LALONDE, *supra* note 150; Gideon Biger, *The Boundaries of Israel--Palestine Past, Present, and Future: a Critical Geographical View*, 13 ISRAEL STUD. 1 (2008).

<sup>207</sup> *See* S.C. Res. 242, *supra* note 126 (“Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area . . .”). The resolution calls on Israel's neighbors to end the state of belligerency and to reciprocate by withdraw its forces from land claimed by other parties in 1967 war; it is interpreted commonly today as calling for the Land for peace principle as a way to resolve Arab-Israeli conflict. *Id.*

<sup>208</sup> S.C. Res. 338, *supra* note 127 (adopted at the 1747<sup>th</sup> meeting by 14 votes to none (22 October 1973): “. . . ‘calls’ for a cease fire” in Yom Kippur War and “the implementation of Security Council Resolution 242 (1967) in all of its parts,” and “decides that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.”).

Israel needs an agreement that will accommodate its settlement activity in Palestinian territory.

Yet this kind of settlement activity flies in the face of UN Resolutions 242 and 338, and is therefore unlawful. Here, the lawfulness of the boundaries under these resolutions is grounded in the UN Security Council's power to make binding international law.<sup>209</sup> The unlawfulness can be cured by an agreement between Israel and the Palestinians. However, an effective agreement or understanding would probably need to be sanctioned or approved by the UN Security Council.

#### *F. The UN Decision Process: Current Assertions of Interest*

Presently, both Palestinian and Israeli diplomats are active within the UN either arguing for or against the idea of a Palestine State.<sup>210</sup> The Israeli position seems to be that UN recognition of Palestinian statehood would undermine progress already achieved in the peace process.<sup>211</sup> Palestinians argue that the achievement of a two state solution to the peace process would accelerate that process.<sup>212</sup> Palestinian negotiators also claim that Israeli negotiating postures have been designed to avoid a settlement, and that recently, negotiations with the Israelis have been characterized by a lack of good faith.<sup>213</sup>

As a technical matter, the recognition of Palestinian statehood by the UNGA does not mean that a Palestinian State would now be a juridical member of the United Nations. For that to happen, the Resolution of the

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<sup>209</sup> See generally Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 4, 901 (2002).

<sup>210</sup> Mohammed Daraghme, *Palestinians Say They'll Go to U.N. for Recognition*, ASSOCIATED PRESS (Jan. 10, 2011), <http://www.utsandiego.com/news/2011/jan/10/palestinians-say-theyll-go-to-un-for-recognition>; see also *Palestinian Statehood: Leaders Set Date for U.N. Membership Bid*, AGENCE FRANCE-PRESSE, Aug. 13, 2011; Khaled Abu Toameh, *Palestinian National Authority: Israel's Reaction to U.N. Bid is "Hysterical"*, THE JERUSALEM POST, Sept. 11, 2011; *AP Interview: Israel Lobbying Foreign Governments to Oppose Palestinian U.N. Bid*, ASSOCIATED PRESS, Sept. 12, 2011.

<sup>211</sup> Joanne Hill, *PA National Authority Statehood Would Damage Peace Process: Jewish Parliamentarians*, JEWISH TRIBUNE (Sept. 13, 2011), <http://www.jewishtribune.ca/news/2011/09/13/pa-statehood-would-damage-peace-process-jewish-parliamentarians>.

<sup>212</sup> Natasha Mozgovaya, *Abbas: Palestinian Independence Bid Does Not Contradict Peace Process with Israel*, HAARETZ (Sept. 16, 2011), <http://www.haaretz.com/news/diplomacy-defense/abbas-palestinian-independence-bid-does-not-contradict-peace-process-with-israel-1.383118>.

<sup>213</sup> Press Release, Security Council, *Israel's Settlements, Intransigence, Lack of Good Faith Threatening Annapolis Process, Risking Middle East Peace, Saudi Arabia Tells Security Council*, U.N. Press Release SC/9457 (Sept. 26, 2008).

UNGA would have to be passed on to the UN Security Council. The UNSC would then have to pass a resolution which indicates legally that the Council approves the membership of a Palestinian State in the United Nations. The specific problem here is that the U.S., under pressure from the ultranationalist Israeli Lobby, has taken a position to support the non-recognition of a Palestinian State.<sup>214</sup> It could express that position by exercising its veto in the UN Security Council. That would mean that, while the UNGA has given general recognition to a Palestinian State, that state cannot become a member of the UN without the removal of the UN Security Council veto.<sup>215</sup>

There are two other possible strategies that Palestinians may invoke. First, Palestinians could promote a resolution before the UN as essentially a political, rather than legal, resolution. This would mean that the resolution itself, having the imprimatur of a political statement made in good faith by the Council, does not carry the quality of juridical enforceability because it is not legally binding. In short, such a Resolution would give additional credence to whatever juridical qualities repose in a UNGA Resolution, but it does not quite complete the process. It is unclear what such a posture would represent from the standpoint of continuing the peace negotiations. Given the asymmetrical nature of the respective bargaining positions of the parties, such a background would appear to strengthen the bargaining power of the Palestinians.

The Palestinians could press for a binding resolution, in full knowledge that the U.S. will veto the Resolution. It could then prepare a controversial standby strategy; it could invoke the little used procedure drawn from the U.S. initiative, "Uniting for Peace Resolution."<sup>216</sup> This Resolution was effectually a constitutional amendment to, or mutation of, the UN Charter. It was used when the Security Council, due to a veto, was incapable of performing its primary functions concerning the protection and promotion of international peace and security. This Resolution assumed that, since the problem relating to peace and security remained, there was a residual competence in the UNGA to pass a Resolution by a supermajority, permitting UN action to be taken in the protection of international peace and security.

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<sup>214</sup> Monica Lawrence, *U.S. says it will veto Palestinian statehood bid at the UN*, BNO NEWS (Sept. 8, 2011), [wireupdate.com/wires/19969/u-s-says-it-will-veto-palestinian-statehood-bid-at-the-un/](http://wireupdate.com/wires/19969/u-s-says-it-will-veto-palestinian-statehood-bid-at-the-un/).

<sup>215</sup> See generally BARDO FASSBENDER, *UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE* (1998); Michael Scharf, *Musical Chairs: The Dissolution of States and Membership in the UN*, 28 CORNELL INT'L L.J. 29 (1995); Louis B. Sohn, *Voting Procedures in UN Conferences for the Codification of International Law*, 69 AM. J. OF INT'L L. 2, 310 (1975).

<sup>216</sup> G.A. Res. 377 (V).

In this context, the PA's allies in the UNGA could certainly make the case that the recognition of Palestinian statehood is a major factor towards promoting international peace and security in the region. Moreover, the interminable state of occupancy, which Security Council Resolution 242 stipulates must end, gives additional recognition to the importance for peace and security and the 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 more than a supermajority to overcome a U.S. veto in the Security Council.

The legality of this initiative was challenged indirectly by an advisory opinion from the International Court of Justice ("ICJ") in the *Expenses Case*.<sup>217</sup> The case arose out of the expenses of the UN for operations in which a veto had been exercised in the Security Council. However, the problem before the Council continued, in the terms of a threat or breach of international security. The Uniting for Peace Resolution suggested that there was a residual competence in the UNGA if the Security Council was blocked from responding to a continuing problem by a veto.<sup>218</sup> The Resolution required a supermajority vote in the UNGA to overcome the veto, validate, and pay for UN intervention. At the time, the Soviet Union was a minority power in the UNGA and the U.S. had greater influence in that forum. Hence, the U.S. had confidence in its ability to prevail in the UN General Assembly.

Later, due to decolonization, the composition of the UNGA changed dramatically and, as a consequence, the U.S. was less confident in using this procedure before the General Assembly. The Soviet Union remained without confidence in the UNGA and was partial, albeit for different reasons, to the U.S. position of not continuing to utilize the Uniting for Peace procedure.<sup>219</sup> It remains somewhat unclear whether Palestinians will seek to invoke the Uniting for Peace Resolution to overcome a U.S. veto in the Security Council, and if so, what policy implications might emerge.

Currently the Palestinians share the support of approximately 120 UN Members in recognition of Palestinian statehood.<sup>220</sup> It would appear, therefore, that they could easily muster a super majority to secure a UNGA override of a U.S. veto. However, the U.S. is an important sponsor of funds and technical resources to the Palestinian Authority. As a result, it is unclear whether the cost of such a confrontation with the U.S. is a matter that the

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<sup>217</sup> U.N. Charter art. 17, para. 6.

<sup>218</sup> U.N. GAOR, 5th Sess., 299th plen. mtg. at 7, U.N. Doc. A/PV.299 (Nov. 1, 1950).

<sup>219</sup> Uniting for Peace, G.A. Res. 377 (V), U.N. Doc. A/RES/377 (Nov. 3, 1950).

<sup>220</sup> Gwynne Dyer, *Back Door to Palestinian Statehood*, LONDON FREE PRESS (Sept. 15, 2011), <http://www.lfpress.com/comment/columnists/2011/09/15/18688836.html>.

Palestinians are currently willing to engage. Yet it would be appropriate to clarify the juridical scope of a UNGA Resolution affirming sovereign statehood for the Palestinians.

In general, and with some exceptions, UNGA Resolutions have a binding character of political obligations made in good faith.<sup>221</sup> However, they are not generally legally binding obligations. UNGA Resolutions are not bereft of any juridical quality; the resolutions are, however, adopted by sovereign states voting publically and this would suggest that such resolutions could not impose affirmative obligations on the sovereign states that voted for them. Yet it has been urged that since the sovereign's expression of its good faith intentions are reflected in the resolution, there is a weak juridical expectation that the sovereign will not act to repudiate that for which it has voted. In short, there appears to be a negative expectation not to act, so as to repudiate the good faith public expression of the sovereign's vote.<sup>222</sup> Additionally, there is a more complex argument about the legal currency of UNGA Resolutions in the context of Palestinian claims to statehood.<sup>223</sup>

We have seen that under international law, as developed under the League of Nations System, the Palestinians had the status in international practice of a "proto-state."<sup>224</sup> An explicit legal obligation of the Mandate was the right of peoples within the Mandate to have their self-determination respected.<sup>225</sup> This issue was one acknowledged by the mandatory power that, while nominally respecting this claim also in virtue of its own unilateral Balfour Declaration, had commitments to support Jewish immigration and interests in the same mandated territory. These issues could not be resolved by Britain, the mandatory power, and the matter was transferred to the UN,

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<sup>221</sup> Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 892 (1983); see also *The General Assembly*, U.N. CYBERSCHOOL BUS, <http://www.un.org/cyberschoolbus/untour/subgen.htm> (last visited April 11, 2012) ("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.").

<sup>222</sup> Kerwin, *supra* note 221; *The General Assembly*, *supra* note 221; see also D. H. N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97 (1955-1956).

<sup>223</sup> JOHN B. QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* 53 (2005).

<sup>224</sup> See generally QUIGLEY, *THE STATEHOOD OF PALESTINE*, *supra* note 22

<sup>225</sup> Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship*, 9 MAX PLANCK Y.B. OF U.N. LAW 47, p. 85 (2005). See generally Anghie, *supra* note 7.

the successor institution to the League of Nations.<sup>226</sup> The UN process emerged with a Resolution, which ostensibly would not necessarily be a legally binding determination.

The UN had already inherited a preexisting set of legal expectations and its Resolution 181 was simply an interpretative clarification of preexisting legal expectations; in this sense, Resolution 181 was not an instrument with no juridical effects. The Resolution appears to be an accepted one, both multilaterally and bilaterally; Resolution 181 called for an Arab State and a Jewish State.<sup>227</sup> The Resolution also provided boundary demarcations. Israeli authorities characterized this Resolution as providing the legal imprimatur for the Declaration of the existence of the sovereign State of Israel.<sup>228</sup> The issue with regard to the Palestinians is more convoluted.

Nevertheless, Palestinians came to recognize the Resolution as providing them with a legal foundation to assert their claims to self-determination and independence. A resolution that supports the claim to sovereign independent state for the Palestinians would appear to be a declaratory statement of a preexisting juridical position taken, in perhaps atypical circumstances, by the UNGA in 1947. The Security Council was not involved in the precise determination of the call for the right to establish two states within mandatory territory of Palestine. The question is whether, with this historical and legal background, recourse to Security Council approval is necessary in the present circumstances.

## II. RECENT DEVELOPMENTS IN THE LAW OF SELF-DETERMINATION: INTERNATIONAL AND COMPARATIVE JURISPRUDENCE

The right of peoples to self-determination has evolved by virtue of a framework of complex international agreements and international practices. While there is not a clear-cut, formal definition of the idea of “peoples,” there is sufficient identity, coherence, and visible indicators of who may be a

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<sup>226</sup> See G.A. Res. 106 (S-1), *supra* note 17, ¶ 7.

<sup>227</sup> G.A. Res. 181 (II), *supra* note 4 (recommending a Partition Plan for Palestine: Plan of Partition with Economic Union, Part 1: Future constitution and Government of Palestine, Art. 10 – “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.”).

<sup>228</sup> Eli E. Hertz, *U.N. Resolution 181 – The Partition Plan: A “Green Light” for Jewish Statehood – A ‘Dead’ Blueprint for Peace, Myths and Facts* (2009), <http://mythsandfacts.org/conflict/10/resolution-181.pdf>.

Palestinian 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 to self-determination is expressed in a multitude of international instruments. For example, Article 1(2) of the Charter expresses the idea of respect for the principle of self-determination of peoples.<sup>229</sup> The principle is reiterated in Article 55<sup>230</sup> and two significant conventions – the International Covenant on Civil and Political Rights (ICCPR)<sup>231</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>232</sup> – both of which state that “all people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>233</sup>

The UN 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.<sup>234</sup> In 1993, the World Conference on Human Rights adopted the Vienna Declaration and Program of Action.<sup>235</sup> This document stresses its affirmation of the right of self-determination of all peoples. The Helsinki Final Act also stresses the salience of the right to self-determination.<sup>236</sup> It seems clear that the processes by which Israel exercises occupancy control over the

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<sup>229</sup> U.N. Charter art. 2, para. 2.

<sup>230</sup> U.N. Charter art. 55 (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 UN shall promote:

Higher standards of living, full employment, and conditions of economic and social progress and development;

Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.)

<sup>231</sup> International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 UNT.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

<sup>232</sup> International Covenant on Economics, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 UNT.S. 3, 6 I.L.M. 30 (1967) [hereinafter ICESCR] (“[a]ll people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”).

<sup>233</sup> *Id.*

<sup>234</sup> Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, Annex, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/5217, at 121 (Oct. 24, 1970).

<sup>235</sup> World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993).

<sup>236</sup> Conference on Security and Co-operation in Europe, Final Act, Helsinki 1974.

Palestinians undermines most of the central elements of the scope of the right of self-determination.<sup>237</sup>

The modern form of self-determination is tied to the emergence of the idea of the “nation” as a critical element in the establishment of sovereign independent statehood.<sup>238</sup> This reflects the influence of the settlement of the Peace of Westphalia in 1648, which established the idea that, in the European context, the state that coincided with its occupancy, a population that approximated the idea of a relatively homogenous nation, would be the legal sovereign representatives of that nation-state in the international legal arena.<sup>239</sup> Sometimes, however, the term “nation” is simply a synonym for the idea of a human aggregate defined in terms of ethnicity.<sup>240</sup>

Developments in the nineteenth century generated ideas that look at nationality in terms of race and racial identity.<sup>241</sup> Given that there is some uncertainty as to what a nation is for the purpose of self-determination, this uncertainty remains a factor that might constrain or limit the Palestinian claim to self-determined sovereignty. It should also be noted that the claim to self-determination by a people or nation does not require that the claim be for sovereign independent status. Instead, it could be a claim for a complex

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<sup>237</sup> THE HAGUE APPEAL FOR PEACE, THE HAGUE AGENDA FOR PEACE AND JUSTICE FOR THE 21<sup>ST</sup> CENTURY (2000), <http://www.haguepeace.org/resources/HagueAgendaPeace+Justice4The21stCentury.pdf> (“The denial of the right to self-determination has led to numerous long-term conflicts, most of which remain unresolved. It is important to recognize that it is not the right to self-determination which leads to conflict, but rather the denial of this right. It is therefore imperative that the recognized right to self-determination be actively promoted as a tool of conflict prevention and conflict resolution”); see also ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995); Rep. of Int’l Conf. of Experts, Nov. 21-27, 1998, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (“The concept of self-determination is a very powerful one. As Wolfgang Danspeckgruber put it: ‘No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination.’ It evokes emotions, expectations and fears which often lead to conflict and bloodshed. According to one participant to the conference, 50 conflicts in the world today are related to antagonism between claims to self-determination and to state sovereignty. Conference participants were convinced that in most cases it is not the assertion of claims by oppressed communities but the denial of self-determination by state authorities which cause armed conflicts.”).

<sup>238</sup> See generally Liang, *supra* note 74.

<sup>239</sup> Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT’L HIST. REV. 569, 569-91 (1999).

<sup>240</sup> J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 NAT’L ORG. 107, 116-17 (1994).

<sup>241</sup> *Id.*

political affiliation with a federation, confederation, or any relationship or affiliation that it freely chooses to establish and maintain.<sup>242</sup>

During the twentieth century, the political forces opposed to colonial and imperial rule drove the expansion of the international community of nation-states. This opposition was fueled by a strong commitment to making the principle of self-determination a positive rule of international law—a rule that had superior or preemptive status.<sup>243</sup> The Atlantic Charter, adopted initially by President Roosevelt and Prime Minister Churchill in 1941, was a statement about the war aims of the Allied Powers.<sup>244</sup> The principle of self-determination was included in this Charter.<sup>245</sup>

In January 1942, twenty-six states signed on to this Declaration and accepted the Atlantic Charter Principles, including the principle of self-determination.<sup>246</sup> In 1945, when the UN Charter was adopted, the principle of self-determination was given high importance in it as an “International Constitution,” becoming an important part of the post-war development of international law.<sup>247</sup> The principle of self-determination was also given

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<sup>242</sup> W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 866-76 (1990).

<sup>243</sup> Robert Ago, *Positive Law and International Law*, 51 AM. J. INT’L L. 691 (1957); see also Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT’L L. 523, 523-553 (2004) (“Finding customary law means knowing how the law is formed. Customary law is not written and has no ‘authoritative’ text, which has an inherent ‘thereness’ and whose meaning need only be ‘extracted.’ Therefore, the application of customary law involves a recreation of its genesis; one needs to show how it has come about and that the process has been consistent with the meta-law on custom.”); see also Philippe Nonet, *What is Positive Law?*, 100 YALE L. J. 667, 667-69 (1990) (“positive law (Nietzsche calls it Gesetz) is law that exists by virtue of being posited (gesetzt), laid down and set firmly, by a will empowered so to will. Such law ‘exists’ in the sense that it has validity (Geltung). It has validity if the will (Wille) from which it issues has the power (Macht) to impose it, to demand and secure obedience to its command. Issuing from such power, the law valet: it is itself powerful, strong, effective. It has causal efficacy.”).

<sup>244</sup> See generally DOUGLAS BRINKLEY & DAVID R. FACEY-CROWTHER, *THE ATLANTIC CHARTER* (1994).

<sup>245</sup> *Id.*

<sup>246</sup> BRINKLEY & FACEY-CROWTHER, *supra* note 244.

<sup>247</sup> See U.N. Charter art. 1, para. 2 (places self-determination among the important purposes of the UN system. Article I, Part II states the following: “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.”); *id.* art. 2.; see also Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998); LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS* 290–309 (3d ed. 1969) (for a discussion of the history of the Charter of the United Nations and justifications as to why the Security Council is imbued with such power).

textual human rights stature in the ICCPR and the ICESCR, both covenants sharing the same language and textual definition of the right.<sup>248</sup>

The international foundation of the right to Palestinian self-determination, which is based on the League of Nations Mandate, thus predates the UN Charter. Defining the term would require adding further criteria to the concept of self-determination. One of the central objections that Israeli leaders and their supporters have used, is the idea that the Palestinians are not a people or nation for the purpose of utilizing the right to self-determination to achieve their political objectives. When a group has been subject to a form of paternal administration, as indicated in the mandate system, and later subject to dispersal and foreign military occupation, the claim that there are sufficiently articulated symbols of loyalty to constitute a people may be problematic. Notwithstanding the deficits that Palestinians have experienced, there is a widespread recognition that Palestinians are a people and that they cohere in terms of symbols of community and solidarity.<sup>249</sup> Therefore, there is recognition that they constitute a people for the purpose of international law.<sup>250</sup>

Some contemporary decisions, emanating from both national and international courts, would appear to confirm the international legal validity of Palestinian claims to self-determination. These decisions provide good and specific illustrations, in terms of background and context, and may be of help in shaping the structure of any decision determining the validity of a claim to self-determination under the law.<sup>251</sup> However, the operational norms deployed by these decisions are complex because often these norms operate in latent conflict. International law protects the territorial integrity of the nation-state and does not generally favor claims for self-determination and independence that require the breakup of nation-states. The circumstances under which secession may succeed tend to be fairly situation-specific.<sup>252</sup>

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<sup>248</sup> *Supra* notes 230-231.

<sup>249</sup> See CENTER FOR ECONOMIC & SOCIAL RIGHTS, FACT SHEET #1 PALESTINE AND THE PALESTINIANS 1(1997), available at [http://www.rainwiz.com/share/WhereAml\\_handout.pdf](http://www.rainwiz.com/share/WhereAml_handout.pdf); Rupert Sherman, *Caught in Limbo: The Palestinian Authority and the Misunderstood State in International Law* (2005), available at [http://www.otago.ac.nz/law/oylr/2009/Rupert\\_Sherman.pdf](http://www.otago.ac.nz/law/oylr/2009/Rupert_Sherman.pdf); see also James Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L L. 681 (1988-1989).

<sup>250</sup> *Supra* note 249.

<sup>251</sup> See *In the Reference RE Secession of Quebec Case*, *supra* note 160. See generally 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).

<sup>252</sup> See generally Lloyd, *supra* note 73.

There seems to be a salient formula relevant to this context. This formula 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 extreme ostracization or persecution of the separatist group by the unified state, secession should not be permitted. A question might arise as to whether the claim to self-determination of the Palestinians is analogous to a claim of secession from a preexisting unified state. The Security Council Resolutions make clear that Israel, the power that militarily occupies the Gaza and the West Bank, has no legal claim to those territories as unified state. As a consequence, Palestinian claims to self-determination would resemble more of a claim against a colonizing power, a claim that has a strong recognition in post WWII practice.<sup>253</sup> It would be worth evaluating the Palestinian situation in comparison to the situation of the citizens of Quebec, Canada, who floated the idea of self-determination for the residents as a state separate from Canada.

A. *In Reference Secession of Quebec: Canadian Supreme Court*

The Supreme Court of Canada, in the case *Reference RE Secession of Quebec*,<sup>254</sup> analyzed the scope of the right to self-determination with regard to the province of Quebec.<sup>255</sup> The Court considered whether the legislature might, under international law, have the right to a unilateral secession from Canada. 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 had not experienced attacks on their physical integrity or the massive violation of fundamental rights.<sup>256</sup> The Court saw the international right of self-determination as being confined to situations of former colonies where there is oppression or situations which involve foreign military occupation. The Supreme Court of Canada rejected the possible unilateral secession claims advanced by the Quebecois, because the claims were not sustained by any sense of repression or disidentification by the state of Canada,<sup>257</sup> which is in fact a state governed by the rule of law.<sup>258</sup>

The decision of *In re Quebec* clarifies further the specific circumstances in which self-determination and secession are valid under international law.

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<sup>253</sup> See Anghie, *supra* note 7.

<sup>254</sup> See *In the Reference RE Secession of Quebec Case*, *supra* note 160.

<sup>255</sup> See generally Johan D. Van Der Vyver, *Self-determination of the Peoples of Quebec under International Law*, 10 J. TRANSNAT'L L. & POL'Y 1 (2000).

<sup>256</sup> See *In the Reference RE Secession of Quebec Case*, *supra* note 160.

<sup>257</sup> *Id.* at ¶¶ 135, 154.

<sup>258</sup> For a definition of the term "rule of law" see *supra* note 199.

This clarification of circumstances favors the recognition of Palestinian self-determination and potential statehood in its unique socio-historical context because it strengthens what constitutes a people for purposes of statehood recognition, the fact that Israel has no sovereign title to the territories it occupies and that the Palestinians are oppressed people that have experienced attacks on their physical integrity as well as massive violations of their fundamental rights.<sup>259</sup> The case of Kosovo and its unilateral declaration of independence share various similarities which also strengthen the claims of the Palestinians.

*B. In Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo: The International Court of Justice*

The ICJ, in developing its recent jurisprudence, has also provided an important clarification about the specific circumstances under which a claim to self-determination might be vindicated. One relevant case shares some features that are analogous to the situation of the Palestinians, and may hold important guidance for the prospect of their claim to self-determination. In a groundbreaking 2010 Advisory Opinion, the ICJ determined that Kosovo's unilateral claim for independence and statehood was valid under international law.<sup>260</sup> In this case, the 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.<sup>261</sup>

As the constitution became eroded, the Kosovo minority began to experience increasing repression and discrimination by the Serbs. In fact, international intervention was influenced by the prospect of a program of massive ethnic cleansing in the region.<sup>262</sup> This established a provisional form of governance under UN authority.<sup>263</sup> A further factor which supported the lawfulness of the declaration of independence for Kosovo was the fact that negotiations for an internal settlement toward a final status seemed to be carrying on interminably and aimlessly. It is possible that the reluctance of

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<sup>259</sup> See *In the Reference RE Secession of Quebec Case*, *supra* note 160.

<sup>260</sup> Dapo Akande, *ICJ finds that Kosovo's Declaration of Independence not in Violation of International Law*, EUR. J. INT'L L. BLOG (July 23, 2010).

<sup>261</sup> *Id.*; see Constitution of the Socialist Federal Republic of Yugoslavia, February 21, 1974.

<sup>262</sup> See also Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 828-34 (1999). See generally HEIKE KRIEGER, *THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974-1999* (July 12, 2001).

<sup>263</sup> S.C. Res. 1244, U.N. Doc S/RES/1244 (June 10, 1999); see also Daniel Fierstein, *Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 B.U. INT'L L.J. 417 (2008).

the Netanyahu regime to negotiate seriously, rather than interminably, and possibly aimlessly, makes the case of the Palestinians analogous to the case of the Kosovars.

The situation in Kosovo and Palestine share other similarities. In both places, the framework for continued negotiations toward a final settlement actually took place under the authority of UNSC Resolutions.<sup>264</sup> In Kosovo, the Security Council Resolution directly created the interim government mechanism. In the context of the occupied Palestinian territories, the Oslo Accords, which came under the broad authority of UNSC Resolutions, also created the PA as an interim governmental institution. In Kosovo, the ICJ held that the representatives of the Kosovar people were not limited in their residual claim to sovereignty and independence by the UNSC Resolutions. Similarly, UNGA Resolutions would seem to strengthen the residual competence of the Palestinian people to declare their sovereignty and independence. The Palestinian claim remains closer to the case of Kosovo than the case of Quebec because the claim does not involve an issue of secession of titled territory from Israel. In this case, the State of Israel has no real sovereign title to the territories it occupies.<sup>265</sup>

We would submit that the factual background of and reasoning of the Court in the Advisory Opinion on Kosovo provides support for Palestinian claims to statehood and independence under international law. In this case, the Court does not include a finding of Kosovo statehood. What makes the case relevant to the Palestinian situation is that the governance of Kosovo at the time of its declaration of independence was established under UN authority with provisional institutions of self-governance.<sup>266</sup> 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 external occupying entity.<sup>267</sup> It would therefore appear that the case law and advisory opinions of the ICJ and the Canadian Supreme Court point toward the lawfulness of the claim of representatives of the Palestinian people to the recognition of statehood, independence, and sovereignty.

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<sup>264</sup> Alexander Orakhelashvili, *Statehood, Recognition and the U.N. System: A Unilateral Declaration of Independence in Kosovo*, 12 MAX PLANCK Y.B. U.N. LAW 1, 35 (2008).

<sup>265</sup> See also Robert Home, *An 'Irreversible Conquest': Colonial and Postcolonial Land Law in Israel/Palestine*, 12 SOC. LEGAL STUD. 291, 291-310 (2003). See generally Jeremy Forman, *Israeli Supreme Court Doctrine and the Battle over Arab Land in Galilee: A Vertical Assessment*, 40(4) J. PALESTINE STUD. 24 (2011).

<sup>266</sup> See generally *supra* text accompanying note 198, 251, 260-64.

<sup>267</sup> See generally *supra* text accompanying note 198, 251, 260-64.

## III. THE PARTIES AND THEIR PERSPECTIVES OF REALITY

Both Israeli and Palestinian negotiators have differing perspectives about the nature and causes of the conflict, and the scope of possible resolution. For the purpose of finding a possible resolution to the conflict, it is imperative that both develop a mutual or shared narrative of the conflict, making sure to acknowledge the reality of the divergent perspectives of the parties. In creating this narrative, there are many balancing factors to consider.

One balancing factor to be considered is Palestine's relationship with Hamas. The ambiguous nature of this relationship undermines the authority of the PA, and the anti-Semitic posturing Hamas has expressed in its public relations challenges the willingness of other states to recognize a Palestinian state that works on friendly terms with such an organization.

Another balancing factor is the complexity of Israeli society, which includes a courageous community of human rights activists. This community, which supports the individual rights of Israelis as well as Palestinians, has gone mostly unheard in recent years as the forceful ultranationalist establishment came to power. Some fifty-two U.S.-based Jewish affinity groups, sometimes described as "The Lobby," have continued to offer uncritical support to the extreme right, ultranationalist Israeli establishment.<sup>268</sup> While these groups appear to support Israel, the reality is that they largely channel money to support the ambitions of an extremely militant right-wing political establishment in the country.<sup>269</sup> Such distribution of outside funding serves to marginalize moderate and center-

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<sup>268</sup> Some of the groups considered to be included within this larger policy lobby include the American Israel Public Affairs Committee (AIPAC), the Conference of Presidents of Major American Jewish Organizations, the National Association of Arab-Americans (NAAA) and the Arabian American Oil Company (ARAMCO). See also Robert C. Lieberman, *The Israel Lobby and American Politics*, 7 PERSP. ON POL. 235 (2009); Walter Russell Mead, *Jerusalem Syndrome - Decoding the Israel Lobby*, 86 FOREIGN AFF. 160 (2007); John Mearsheimer & Stephen Walt, *The Israel Lobby*, 28 LONDON REV. BOOKS 3 (2006); John Mearsheimer & Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy*, 13 MIDDLE E. POL'Y 29 (2006). See generally Mitchell Bard, *The Israeli and Arab Lobbies*, THE JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/US-Israel/lobby.html> (last visited Jan. 31, 2012).

<sup>269</sup> Christopher Bollyn, *The Real Cost Of U.S. Support For Israel - \$3 Trillion*, AM. FREE PRESS (Sept. 19, 2003); see also Jeffrey Blankfort, *The Influence of Israel and its American Lobby over US Middle East Policy Explained*, ISLAMIC HUM. RTS. COMM'N, available at [http://www.ihrc.org.uk/060702/papers/jeffrey\\_blankfort.pdf](http://www.ihrc.org.uk/060702/papers/jeffrey_blankfort.pdf) (last visited Apr. 17, 2012); Jeffrey Blankfort, *The Israel Lobby and the Left: Uneasy Questions*, LEFTCURVE.ORG (2003), available at <http://www.leftcurve.org/LC27WebPages/IsraelLobby.html> (last visited Apr. 17, 2012). See generally JONATHAN JEREMY GOLDBERG, *JEWISH POWER: INSIDE THE AMERICAN JEWISH ESTABLISHMENT* (1997).

left opinion in Israel.<sup>270</sup> The influence of these groups is astonishing and raises grave concerns about U.S. involvement in the Middle East negotiations.

The vastly ambitious “Clean Break” doctrine best reflects the influence of the ultranationalist political factions in Israel on American neo-conservative political interests.<sup>271</sup> The Clean Break Doctrine promoted the idea of regime changes for dictators in nations throughout the Middle East on the basis that one could not make peace with authoritarian despots,<sup>272</sup> instead replacing them with democratic governments. While events in Tunisia,<sup>273</sup> Egypt,<sup>274</sup> Libya,<sup>275</sup> Yemen<sup>276</sup> and Syria,<sup>277</sup> indicate strong

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<sup>270</sup> This position is a sensitive one among partisan supporters of the allegedly pro-Israeli ultraconservative nationalist lobby in the United States. For example, a former AIPAC functionary, Josh Block, has written to suggest that anyone in the United States who seeks to require a caution in getting into a war with Iran, which he believes violates Israel’s vital interests, is in effect an unreconstructed “anti-Semite.” This type of attack raises the delicate question of whether Mr. Block, who we presumed is an American citizen, considers the interests of a foreign state more important than those of his own country. According to Mr. Block, “no progressive Democrat should allow [any] room for... policy or political rhetoric that is hostile to Israel, or suggest that Iran has no nuclear weapons program.” He adds, “Progressive institutions have a responsibility not to tolerate such speech or arguments.” These statements are made in the face of the following facts: (1) the International Atomic Energy Association and the Director of the CIA are willing to sign on to the claim that Iran has certainly a nuclear weapons program. The Israeli press has reported, “Iran has not yet decided whether to make a nuclear bomb, according to the intelligence assessment of Israeli officials.” In the face of such facts, the claims that scholars and informed commentators want to clarify the situation in Iran and in doing so risk been labeled “racist” and “anti-Semitic”, may well have emerged from a conflation of politics and ethnic identity which serves to perpetuate a form of racism and extreme politics in and of themselves. See Eric Alterman, *Of Semites and ‘Anti-Semites’*, THE NATION, Feb. 13, 2012, at 9.

<sup>271</sup> A Clean Break: A New Strategy for Securing the Realm - prepared in 1996 by a study group led by Richard Perle for Benjamin Netanyahu, then the 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, A CLEAN BREAK: A NEW STRATEGY FOR SECURING THE REALM (2006).

<sup>272</sup> Piki Ish-Shalom, “*The Civilization of Clashes*”: *Misapplying the Democratic Peace in the Middle East*, 122 POL. SCI. Q. 533 (2007–2008); see also Gerard Huiskamp, *Minority report on the Bush doctrine*, 26 NEW POL. SCI. 389, 389–415 (2004); Robert Jervis, *Understanding the Bush Doctrine*, 118 POL. SCI. Q. 365 (2003); Robert Jervis, *Why the Bush Doctrine Cannot Be Sustained*, 120 POL. SCI. Q. 351 (2005).

<sup>273</sup> Rania Abouzeid, *Bouazizi: The Man Who Set Himself and Tunisia on Fire*, TIME (Jan. 21, 2011), available at <http://www.time.com/time/magazine/article/0,9171,2044723,00.html>; see also Brian Whitaker, *How a man setting fire to himself sparked an uprising in Tunisia*, GUARDIAN (Dec. 28, 2010), available at <http://www.guardian.co.uk/commentisfree/2010/dec/28/tunisia-ben-ali>.

<sup>274</sup> Joshua Stacher, *Egypt’s Democratic Mirage*, FOREIGN AFF. (Feb. 7, 2011), available at <http://www.foreignaffairs.com/articles/67351/joshua-stacher/egypts-democratic-mirage>; see

popular demands for democracy, it appears that as a matter of Machiavellian practical politics, Netanyahu may wish that they had not taken him so seriously on the democracy question.<sup>278</sup> Numerous political commentators have speculated as to whether Netanyahu now misses the stability of an authoritarian friend in power, like Mubarak in Egypt.<sup>279</sup>

Deeply rooted in the Israeli ultranationalist agenda is the idea of a return to an exclusively Jewish state, without Arabs, with the boundaries of Eretz Israel.<sup>280</sup> The current state of negotiations has floundered on the rock of Israeli settlement activity, which is primarily driven by this agenda. The U.S. has now admitted that it is incapable of generating inducements to Prime Minister Netanyahu for a settlement freeze.<sup>281</sup> However, the freeze is the essential precondition for Palestinian cooperation in the negotiation process.<sup>282</sup> It is unclear what further steps the U.S. can take short of putting the squeeze on “the Lobby”<sup>283</sup> – a squeeze that is beyond the capability of

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*also Popular Uprising in Egypt Topples Mubarak Regime*, WORLD GEOGRAPHY (2011), available at <http://hmcurrenthevents.com/popular-uprising-in-egypt-topples-mubarak-regime/>.

<sup>275</sup> See also *Libya's uprising; Time to leave*, ECONOMIST ONLINE (Feb. 22, 2011). See generally David Cutler & Maria Golovnina, *Timeline: Libya's uprising against Muammar Gaddafi*, REUTERS (Aug. 22, 2011), available at <http://www.reuters.com/article/2011/08/21/us-libya-events-idUSTRE77K2QH20110821>.

<sup>276</sup> Kareem Fahim, *Yemeni Uprising Opens a Door to Besieged Rebels in the North*, N.Y. TIMES (Dec. 16, 2011); see also Tom Finn, *Yemen uprising: Sana'a rocked by night of fierce fighting*, GUARDIAN (Oct. 17, 2011); Aryn Baker, *Yemen's Uprising: The Families on the Front Lines*, TIMES (Oct. 10, 2011).

<sup>277</sup> Martin Chulov, *Syria uprising is now a battle to the death*, GUARDIAN (Feb. 9, 2012); *Syrian forces renew bombardment in Homs*, USA TODAY (Feb. 9, 2012).

<sup>278</sup> Yossi Gurvitz, *How the Netanyahu government undermines the democratic level field* (Feb. 11, 2012); see also *Grand Hypocrisy: Netanyahu Slams 'Anti-liberal' Arab Spring*, PALESTINIAN CHRONICLE (Dec. 1, 2011); Gideon Levy, *Netanyahu is now the last hope for Israeli democracy*, HAARETZ.COM (Nov. 17, 2011); *Netanyahu: Democracy Crucial for Arab World*, ISR. PROJECT (May 24, 2011); Barak Ravid, *Netanyahu: Arab Spring pushing Mideast backward, not forward*, HAARETZ.COM (Nov. 24, 2011).

<sup>279</sup> Barak Ravid, *Israel urges world to curb criticism of Egypt's Mubarak*, HAARETZ.COM (Jan. 31, 2011); see also Ben Lynfield, *Israel worried as Mubarak teeters*, GLOBAL POST (Jan. 29, 2011).

<sup>280</sup> See generally Gideon Biger, *The boundaries of Israel--Palestine past, present, and future: a critical geographical view*, ISR. STUD. (Mar. 22, 2008).

<sup>281</sup> Jill Dougherty & Elise Labott, *U.S. ends bid for renewed Israeli settlement freeze*, CNN (Dec. 7, 2010).

<sup>282</sup> Ashraf Khalil, *Palestinians say full settlement freeze is precondition to new peace talks*, CHRISTIAN SCI. MONITOR (Aug. 27, 2009).

<sup>283</sup> See generally sources cited *supra* notes 188, and 268-270; Uri Avnery, *Israel Lobby Humiliates Obama Administration*, COUNTER CURRENTS (Mar. 16, 2009) <http://www.countercurrents.org/avnery160309.htm>; Thomas McAdams Deford, *Mac Deford: Obama (and U.S. strategic interests) vs. the Israel lobby*, FREE PRESS (Sept. 21, 2011) available at

the Obama Administration.<sup>284</sup> This has renewed the Palestinian interest in looking at alternative strategies to secure its claim to statehood.

A. *Current Discriminatory Policies and Practices of the State of Israel*

The Declaration of the Establishment of the State of Israel, which indicated that the new state “will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex,”<sup>285</sup> as promising as it was, was never adopted by the Knesset, and no efforts have been made to draft a constitution along those lines.<sup>286</sup> The Knesset delegated the task of drafting a constitution to its Constitution, Law, and Justice Committee, which, unfortunately, has never presented the Knesset with a draft constitution.<sup>287</sup> On the issue of whether a Palestinian state can effectively and shrewdly manage and navigate foreign relations, the degree of recognition that Palestinian entities have already received suggests that the Palestinian leadership is capable of discharging these obligations.

The state of Israel has unfortunately engaged in some forms of discriminatory treatment against Palestinians by enacting policies, which have the consequence of facilitating Palestinian refugee status. These policies accentuate Palestinian alienation – an alienation that fuels conflict. Unfortunately, the longer Palestinians remain stateless, the more difficult it will be to reach a settlement that might work. This section will provide a

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<http://freepressonline.com/main.asp?SectionID=50&SubSectionID=74&ArticleID=15074>; Jim Lobe, *Politics Throws Palestine Under the Bus*, INTERPRESS SERVICE (Sept. 24, 2011) available at <http://ipsnews.net/news.asp?idnews=105230>; Beau Miller, *Israel Lobby Drives America's Palestine Veto*, POLICYMIC (Sept. 26, 2011) available at <http://www.policymic.com/articles/israel-lobby-drives-america-s-palestine-veto>.

<sup>284</sup> Uri Avnery, *Israel Lobby Humiliates Obama Administration*, COUNTER CURRENTS (Mar. 16, 2009) <http://www.countercurrents.org/avnery160309.htm>.

<sup>285</sup> The Declaration of Israel's Independence 1948, 5708 (1948) (Isr.) (“THE STATE OF ISRAEL will be open to the immigration of Jews from all countries of their dispersion; will promote the development of the country for the benefit of all its inhabitants; will be based on the precepts of liberty, justice and peace taught by the Hebrew Prophets; will uphold the full social and political equality of all its citizens, without distinction of race, creed or sex; will guarantee full freedom of conscience, worship, education and culture; will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions; and will dedicate itself to the principles of the Charter of the U.N.”).

<sup>286</sup> See also 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, 674–75 (2003) (charting the rejection of a constitution and bill of rights from the First through the Tenth Knesset). See generally Ruth Gavison, *Legislatures and the Quest for a Constitution: The Case of Israel*, 11 REV. CONST. STUD. 345 (2006).

<sup>287</sup> See generally Jonathan Cook, *Israeli Constitutional Committee Faces Double Bind*, 34 MID. EAST REP. 231 (2004).

brief review of the discriminatory policies currently applied by Israeli authorities, and which appear on their face, to be a repudiation of the regime of humanitarian law that governs the conditions of belligerent occupancy.

The Partition Plan, or Resolution 181, established criteria for citizenship without regard to religion or ethnicity, as it read:<sup>288</sup> “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.”<sup>289</sup> Subsequent domestic Israeli legislation and practices have ignored the original citizenship requirement outlined in the Partition Plan, generating a huge Palestinian refugee crisis.<sup>290</sup> Most recently, Prime Minister Netanyahu sought to affirm the validity of internal Israeli practices on citizenship and statelessness by demanding that the PA agree that Israel is primarily an ethno-religious “Jewish state.”<sup>291</sup>

There are some—especially among Israeli ultranationalist political factions—who propagate the notion that there is no such thing as a “Palestinian.”<sup>292</sup> By refusing to recognize “Palestinian” as an ethnicity, the political propaganda is laying the groundwork for rejecting the Palestinians’ claim to be a “people” under international law for the purposes of self-determination.<sup>293</sup> As discussed *supra* Part I.E, ultra-conservative nationalist factions in political power in the current Israeli state have promoted the argument that Palestinians are “simply Arabs” and therefore indistinguishable from other Arab peoples in surrounding states.<sup>294</sup>

<sup>288</sup> G. A. Res. 181, Ch. 3 ¶ 1, U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

<sup>289</sup> G. A. Res. 181, Ch. 3 ¶ 1, U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

<sup>290</sup> See Kurt Rene Radley, *supra* note 27; see also Lisa H. Malkki, *Refugees and Exile: From “Refugee Studies” to the National Order of Things*, 24 ANNUAL REV. OF ANTHROPOLOGY 495 (1995); Elia Zureik, *Palestinian Refugees and Peace*, 24 J. PALESTINE STUD. 5 (Fall 1994). See generally *Analysis: The Middle East’s “invisible refugees”*, IRIN MIDDLE EAST: HUMANITARIAN NEWS AND ANALYSIS (Jan. 31, 2012); Yoav Peled & Nadim Rouhana, *Transitional Justice and the Right of Return of the Palestinian Refugees*, ISRAEL AND THE PALESTINIAN REFUGEES; 189(2) BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT, 141-157 (2007).

<sup>291</sup> Haaretz Service & Natasha Mozgovaya, *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*, HAARETZ.COM (Oct. 22, 2010), available at <http://www.haaretz.com/news/diplomacy-defense/netanyahu-only-when-palestinians-recognize-israel-as-a-jewish-state-will-they-be-ready-for-peace-1.320665>.

<sup>292</sup> See generally KHALIDI, *supra* note 161.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

The Law of Return of 1970<sup>295</sup> effectively defines who, by definition, is Jewish, and, by implication, who is not.<sup>296</sup> This law compounded the Absentee Property Law of 1950 by defining most Palestinian Arabs as “refugees” from territories that Israel conquered in the 1948 war.<sup>297</sup> The law denies Palestinian Arabs the citizenship rights envisioned in Resolution 181 and the rights to their private properties inside Israel. The status of “absentee” is inherited as well, meaning that children of Palestinian Arabs will also be considered “absentees.”<sup>298</sup>

In effect, then, the status of an absentee has become a status of statelessness.<sup>299</sup> In 1949, an estimated 711,000 Palestinians were expelled or fled from Israel.<sup>300</sup> The descendants of these refugees are registered with the UN as Palestinian refugees. In 2010, the total population of Palestinian refugees was about 4.7 million.<sup>301</sup> Approximately a third of the refugees live in refugee camps in states adjacent to Israel,<sup>302</sup> and the rest live on the peripheries of cities and towns of host countries.<sup>303</sup> Some Israeli scholars maintain that the exodus of refugees from Israel was largely a response to the threats posed by the Haganah,<sup>304</sup> Lehi<sup>305</sup> and Irgun.<sup>306</sup>

<sup>295</sup> Law of Return, amend. No. 2, 1970, amending the Law of Return of 1950, 5730-1970, 586 Sefer HaChukkim 34.

<sup>296</sup> See generally Savir Yehuda, *The Definition of a Jew under the Law of Return*, 17 SW. L.J. 123 (1963).

<sup>297</sup> Jeremy Forman & Alexandre Kedar, *From Arab Land to 'Israel lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948*, 22 ENV'T & PLANNING D: SOC'Y & SPACE 809, 816 (2004).

<sup>298</sup> BADIL RESOURCE CENTER, PALESTINIAN REFUGEE CHILDREN: INTERNATIONAL PROTECTION AND DURABLE SOLUTIONS (2006), available at [http://reliefweb.int/sites/reliefweb.int/files/resources/4347FD59F8965672C12572C700403604-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/4347FD59F8965672C12572C700403604-Full_Report.pdf).

<sup>299</sup> See also URI DAVIS, CITIZENSHIP AND THE STATE: A COMPARATIVE STUDY OF CITIZENSHIP LEGISLATION IN ISRAEL, JORDAN, PALESTINE, SYRIA AND LEBANON (1997); Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT'L L. 1141 (1998); Danielle C. Jefferis, *Institutionalizing Statelessness: The Revocation of Residency Rights of Palestinians of East Jerusalem*, 24 INT'L J. REFUGEE L. 202 (2012). See generally LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW (2008).

<sup>300</sup> DAVID MCDOWALL & CLAIRE PALLEY, THE PALESTINIANS 10 (1987).

<sup>301</sup> U.S. Contributes \$40 Million to U.N. Relief and Works Agency for Palestine Refugees in the Near East, U.S. DEPT. OF STATE (Feb. 4, 2010), <http://m.state.gov/md136510.htm>; see Press Release, The U.N. Refugee Agency, UNHCR annual report shows 42 million people uprooted worldwide (June 16, 2009).

<sup>302</sup> See generally Rene *supra* note 26; sources cited *supra* notes 27, 152, 290 and 298-301.

<sup>303</sup> See generally Rene *supra* note 26; sources cited *supra* notes 27, 152, 290 and 298-301.

<sup>304</sup> The underground military organization of the yishuv in Eretz Yisrael from 1920 to 1948. The Arab riots in 1920 and 1921 (q.v., see also Tel Hai) strengthened the view that it was impossible to depend upon the British authorities and that the yishuv needed to create an

The absentee status of Palestinians in Israel has had a major impact on the civil and socio-economic rights of Palestinians. One area particularly affected is that of land rights. Four cornerstones make up the legal basis of Israeli land policy;<sup>307</sup> the Basic Law establishing the Israel Land Administration;<sup>308</sup> the Israel Lands Law;<sup>309</sup> the Israel Land Administration;<sup>310</sup> and the Covenant between the State of Israel and the World Zionist Organization (Jewish National Fund) (1961).<sup>311</sup> Together, these laws operate to exclude non-Jews from 92.6 percent of the land of pre-1967 Israel.<sup>312</sup> These and other administrative measures have engendered a great Palestinian sensitivity towards Israeli settlement activity in Palestinian lands since 1948 and in greater measure after 1967.

The state of Israel has also discriminated against Palestinian civilians through a formidable array of defense regulations under a dual military-

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independent defense force completely free of foreign authority. In June 1920, the Haganah was founded. The Jewish Virtual Library (Extracted January 31, 2012).

<sup>305</sup> Also known as Stern Gang, a self-proclaimed "terror group" organized against the British powers. *See generally* JOSEPH HELLER, *THE STERN GANG: IDEOLOGY, POLITICS, AND TERROR, 1940-1949* (1995).

<sup>306</sup> Also known as Irgun Zevai Leumi, a Zionist paramilitary group that operated in Mandate Palestine between 1931 and 1948. It was originally the earlier and larger Jewish paramilitary organization haHaganah which was created when the group broke from the Haganah and it became known as the Haganah Bet, or alternatively as haHaganah haLeumit or Ha'ma'amad. Irgun members were absorbed into the Israeli Defense Forces at the start of the 1948 Arab-Israeli war. The Irgun is also referred to as Etzel, an acronym of the Hebrew initials, or by the abbreviation IZL. *See also* Seth J. Frantzman, *Review of the Ethnic Cleansing of Palestine by Ilan Pappé* (2006), *MIDDLE E.Q.*, 70-75 (2008). *See generally* J.B. BELL, *TERROR OUT OF ZION: IRGUN ZVAI LEUMI, LEHI, AND THE PALESTINE UNDERGROUND, 1929-1949* (1977); JAMES L. FIELDS, *IRGUN ZVAI LEUMI: THE JEWISH TERRORIST ELEMENT OF THE ARAB-ISRAELI CONFLICT* (1985); DAVID NIV, *A SHORT HISTORY OF THE IRGUN ZVAI LEUMI* (1980).

<sup>307</sup> *Basic Law: Israel Lands*, KNESSET (1960), [http://www.knesset.gov.il/laws/special/eng/basic13\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic13_eng.htm) (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 percent 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.).

<sup>308</sup> Basic Law: Israel Lands, 5720, 14 LSI 48 (1960) (Isr.).

<sup>309</sup> Israel Lands Law, 5720-1960, 14 LSI 49 (1960) (Isr.).

<sup>310</sup> Israel Land Administration Law, 5720-1960, 14 LSI 50 (1960) (Isr.).

<sup>311</sup> *Special Reports: The Jewish National Fund Basic Documents*, 2 PALESTINE Y.B. INT'L. L. 193, 214 (1985).

<sup>312</sup> Stephen Lendman, *Israel's Discriminatory Land Policies*, RENSE (July 31, 2009), available at <http://www.rense.com/general86/landpol.htm> (last visited Jan. 23, 2012).

civilian system that is applicable to Palestinians only.<sup>313</sup> The defense emergency regulations, which were inherited from Britain, include the power to detain, 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.<sup>314</sup> Additionally, the Foundation of Legislation Law of 1980 further strengthened the powers of the Israeli state and weakened the rights of Palestinians as people without a state.<sup>315</sup> As a result, a wide variety of goods are deemed to be “war goods,”<sup>316</sup> such as sewing machines, and perishable Palestinian exports are delayed so that they are destroyed.<sup>317</sup> Access to income for Palestinians is similarly restricted; Israeli law requires

<sup>313</sup> 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 235-57 (Sasson Sofer ed., 2001).

<sup>314</sup> David Kirshbaum, *Israeli Emergency Regulations & the Defense (Emergency) Regulations of 1945*, ISR. L. RES. CENTER (2007), <http://www.geocities.com/savepalestineno/emergencyregs/essays/emergencyregssessay.htm>.

<sup>315</sup> The Foundation of Law Act, 5740-1980, 34 LSI 181 (1980) (Isr.).

<sup>316</sup> See S. Res. 102, 78th Cong. (1944); H. Res. 408, 78th Cong. (1944) (creating special committees on post-war economic policy and planning) (“The term ‘surplus movable war goods’ means any movable equipment, machines, accessories, parts, assemblies, products, commodities, supplies, and materials (raw, semifinished, and finished), including shipyard facilities, owned or controlled by any Government agency, whether new or used, in use or in storage, which are in excess of the needs of such agency and are not required for the performance of the duties and functions of such agency and which are determined to be surplus to the function, activity, or project in connection with which the goods were acquired or accrued [...] However, That this term shall not apply to ships, water-borne craft, real estate, and permanent improvements to real estate.”).

<sup>317</sup> Erik Schechter, *Legal Scholars Weigh in on Gaza Blockade, Flotilla Deaths*, CARNEGIE COUNCIL (June 28, 2010), [http://www.carnegiecouncil.org/resources/articles\\_papers\\_reports/0055.html](http://www.carnegiecouncil.org/resources/articles_papers_reports/0055.html) (“Following the diplomatic fallout over the MV Mavi Marmara killings, the Israeli cabinet drew up a new, expanded list of humanitarian items allowed into Gaza via border terminals. Previously, however, Israel kept transfers to a bare minimum. Innocuous items like toys, livestock, sewing machines parts, musical instruments, chocolate, and coriander had all been barred entry into the enclave, contends Gisha, an Israeli NGO that supports the ‘freedom of movement of Palestinians, especially Gaza residents.’”). On May 30, 2010, while in international waters and en route to Gaza, Israeli Naval Forces communicated that a naval blockade over the Gaza area was in force and ordered the ships to follow them to Ashdod Port or to be boarded, the ships declined and were boarded in international waters. The boarding started at 2 a.m. on May 31, 2010 and was completed by 8 a.m. Reports from journalists on the ship and from the UN report on the incident concluded that the Israeli military opened fire with live rounds before boarding the ship. According to the U.N. Report, in the violent clash that followed, nine activists were killed, and several dozen activists were injured. See generally Hum. Rts. Council, U.N. Doc. A/HRC/15/21 (Sept. 27, 2010); Matti Friedman, *Details emerge of bloodshed aboard Gaza-bound ship*, SALON.COM (June 2, 2010) [http://www.salon.com/2010/06/02/ml\\_israel\\_raid\\_reconstruction/](http://www.salon.com/2010/06/02/ml_israel_raid_reconstruction/); Yaakov Katz, *Navy commandos: ‘They came for war’*, JERUSALEM POST (May 31, 2010) <http://www.jpost.com/Israel/Article.aspx?id=177040>.

Palestinian incomes to be twenty times less than that of Israelis.<sup>318</sup> Illegal Israeli settlements and occupying forces also utilize military law to limit economic and entrepreneurial activity that may compete with Israel.<sup>319</sup> For example, laws of military occupation disrupt Palestinian schooling,<sup>320</sup> and the strategic road system makes the communications system a nightmare.<sup>321</sup> Additionally, Israeli military policy with regard to targeted assassinations has historically eliminated several educated and moderate Palestinian leaders, making it difficult to create a competent government authority.<sup>322</sup> Israel's control over airspace and the waters further prevents consistent Palestinian fishing operations in the Mediterranean,<sup>323</sup> as it fails to protect the rights of Palestinians in the demolition of tens of thousands of homes in the Occupied Territories,<sup>324</sup> as well as the destruction of hundreds of thousands of fruit and nut trees.<sup>325</sup>

<sup>318</sup> Salem Ajluni, *The Palestinian Economy and the Second Intifada*, 32 J. PALESTINE STUD. 64, 64-73 (2003); see also JEWS FOR JUSTICE IN THE MIDDLE EAST, THE ORIGIN OF THE PALESTINE-ISRAEL CONFLICT (3d. ed.), available at [http://www.deiryassin.org/pdf/origin\\_booklet.pdf](http://www.deiryassin.org/pdf/origin_booklet.pdf) (Last visited on Apr. 17, 2012). See generally Nadim Kawach, *Real Per Capita Income of Palestine Plunges*, INT'L SOLIDARITY MOVEMENT (Jan. 17, 2010), available at <http://palsolidarity.org/2010/01/real-per-capita-income-of-palestine-plunges/>; Equal Rights for Palestinians: Apartheid and Occupation, SEATTLE MIDEAST AWARENESS CAMPAIGN, available at <http://www.seamac.org/equalrights.htm> (Last visited on Apr. 17, 2012).

<sup>319</sup> See generally discussion *supra* note 318.

<sup>320</sup> Ismael Abu-Saad, *State-Controlled Education and Identity Formation Among the Palestinian Arab Minority in Israel*, 49 AM. BEHAVIORAL SCIENTIST 8, 1085-1100 (2006).

<sup>321</sup> Tom Selwin, *Landscapes of Separation: Reflections on the Symbolism of By-pass Roads in Palestine*, in CONTESTED LANDSCAPES: MOVEMENT, EXILE AND PLACE" (2001); see also ANTHONY H. CORDESMAN, ISRAEL VERSUS THE PALESTINIANS: THE "SECOND INTIFADA" AND ASYMMETRIC WARFARE 66 (2002) ("The IDF began fighting the Second Intifada by focusing on a strategy of containment and isolation rather than reoccupation. It isolated key Palestinian population centers, secured access roads and lines of communication, and improved the security of the settlements and military installations in the West Bank. Israel attempted to combine military isolation with economic measures like freezing financial operations and transit between Palestinian areas, cutting off communications, and limiting the shipment of goods. Israeli forces emphasized the use of helicopters and standoff precision weapons, while seizing and destroying key Palestinian strong points or facilities that could be used to attack Israel.")

<sup>322</sup> Gal Luft, *The Logic of Israel's Targeted Killing*, 10 MIDDLE E. Q. 3 (2003).

<sup>323</sup> *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 (Sept. 27, 2010), [http://www.btselem.org/gaza\\_strip/control\\_on\\_air\\_space\\_and\\_territorial\\_waters](http://www.btselem.org/gaza_strip/control_on_air_space_and_territorial_waters).

<sup>324</sup> Brian Farrell, *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).

<sup>325</sup> Atyaf Alwazir, *Uprooting Olive Trees in Palestine*, INVENTORY OF CONFLICT & ENVIR. (Nov. 2002), <http://www1.american.edu/ted/ice/olive-tree.htm>; see also M. Kehat,

Under the authority of this arsenal of complex military laws, the critical question is the status of Palestinians in the territories that came under Israeli control after the 1967 war. In 1967, Israel launched an offensive attack against Syria and occupied the Golan Heights.<sup>326</sup> It also occupied the West Bank in Gaza and the Sinai Peninsula to the Suez Canal.<sup>327</sup> Technically, since WWII, international law does not validate the acquisition of territory by the use of force.<sup>328</sup> However, the occupancy of such territory over time may generate new expectations if the legal status of the occupancy is not appropriately clarified. The Palestinians have reasserted their claim to statehood covering the territories now occupied by Israel—namely, Gaza and the West Bank. It is possible that some extremely conservative political interests in Israel may wish to change the facts on the ground by increasing settlement activity and strategically placing access routes for exclusive Israeli use, all while limiting Palestinian social, economic, political development in the process.

Notwithstanding political positioning in domestic Israeli politics, the political and economic marginalization of Palestinians, however, is further exacerbated by the problem of racism. 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.”<sup>329</sup> The charge that Israel generates strong racist constituencies is both serious and a matter of extreme concern to the Israeli authorities. Racism is, in large part, however, linked to the Israeli occupation of Palestinian territory. For evidence of this, one need only look to the actual practices utilized by occupying IDF forces. According to Avnery’s work analyzing and summarizing testimonies of ordinary Israeli soldiers dealing with the daily and nightly life of occupation:

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

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*Threat to Date Palms in Israel, Jordan and the Palestinian Authority by the Red Palm Weevil, Rhynchophorus ferrugineus*, 27(3) PHYTOPARASITICA, 241-42, (1999).

<sup>326</sup> WILLIAM W. HARRIS, TAKING ROOT: ISRAELI SETTLEMENT IN THE WEST BANK, THE GOLAN, AND GAZA-SINAI, 1967-1980, at 223 (1980).

<sup>327</sup> *Id.*

<sup>328</sup> See generally SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE (1996).

<sup>329</sup> Uri Avnery, *The Darkness to Expel!*, GUSH SHALOM (Dec. 25, 2010), <http://zope.gush-shalom.org/home/en/channels/avnery/1293276148/>.

testimony is meticulously documented: time, place, unit.<sup>330</sup>

According to Avnery, the matter-of-factness and the effort to avoid outrageous incidents strengthen the credibility of his most recent book compiling the experiences of IDF soldiers:

The intention 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.<sup>331</sup>

These reports should also be understood in the context of right-wing political elements in Israel seeking to depreciate the civic status and engagement of Arab citizens within Israel. 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 all contribute to increasing racial tension.<sup>332</sup> Right-wing organizations, for example, often engage in what in other contexts would be classified as racist rhetoric, attempting to legitimize such rhetoric by claiming that the words are based upon the Hebrew Bible.<sup>333</sup> Jews share a history as millennial victims of racism, and there is a great sensitivity within Israel and the Jewish Diaspora to the concern that some right-wing political elements in Israel seek to promote such a racist agenda.<sup>334</sup> Our sense is that the occupation is a major contributor to the disturbing emergence of right-wing inspired racism in

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<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* However, according to Avnery: "[T]he Hebrew Bible is also a book of unequalled humanity. It starts with the description of the creation of man and woman, stressing that all human beings are created in the image of God - and therefore equal. 'So God created man in his own image, in the image of God created he him, male and female created he him.' The Bible repeatedly demands the treatment of 'Gerim' (foreigners living among the Israelites) as Israelites, 'because you were foreigners in the land of Egypt.'" *Id.*

<sup>334</sup> Wasim I. Al-Habil, *Occupations, a Diaspora, and the Design of Local Governments for a Palestinian State* (Nov. 5, 2008) (unpublished Ph.D. dissertation, Cleveland State University), available at <http://etd.ohiolink.edu/send-pdf.cgi/AlHabil%20Wasim.pdf?csu1226688053>; see also William Safran, *The Jewish Diaspora in a Comparative and Theoretical Perspective*, 10(1) *ISR. STUD.* 36 (2005); Michel Wieviorka, *Racism and Diasporas*, 52 *THESIS ELEVEN* 69 (1998). See generally JASMIN HABIB, *ISRAEL, DIASPORA, AND THE ROUTES OF NATIONAL BELONGING* (2004) (discussing the Israeli Diaspora community).

Israel. Israelis would benefit, then, just as much as Palestinians would, from a just and peaceful settlement.<sup>335</sup>

Viewed in the aggregate, discriminatory practices targeting the Palestinians may even suggest that the occupying power is purposely making life an impossible struggle for the residents of the West Bank and Gaza and further polarize both Palestinians and Israelis. Palestinian resistance is often equated both within Israel and the U.S. with terrorism; if Palestinians resist with non-violence, however, they are arguably not considered to be a serious negotiating party.<sup>336</sup> A forthright recognition, awareness, and the will to change this underlying reality on the part of Israeli diplomats and negotiators will dictate success or failure for future negotiations and understandings.

### B. *International Relations Concerning the Israeli-Palestinian Conflict*

To some extent, Israel achieved statehood by first gaining support in the international community as a proto-state using formal legal tools, such as treaties, and then acting unilaterally to realize its sovereignty and recognition as a state.<sup>337</sup> Israel was able to do this by throwing off the paternalistic yoke of the UN requirements for statehood and by going to war with the neighboring militants, unilaterally seeking to militarily assert the new state's borders and existence.<sup>338</sup> The ruling authority of Israel was able to do this at the time because it had the force of global opinion behind it.<sup>339</sup> What seems to threaten the present leadership of the Israeli state, who oppose the creation of a Palestinian state, is the wave of global support for the emerging state of Palestine.<sup>340</sup> Like Israel before it, the proto-state of Palestine must achieve

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<sup>335</sup> See generally ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (2003).

<sup>336</sup> Assaf Moghadam, *Palestinian Suicide Terrorism in the Second Intifada: Motivations and Organizational Aspects*, 26 *STUD. IN CONFLICT & TERRORISM*, 65 (2003); see also Tomis Kapitan, *The Terrorism of 'Terrorism'*, in *TERRORISM & INT'L JUSTICE* 47 (James Sterba ed., 2003); Ariel Merari, *Terrorism as a Strategy of Insurgency*, 5 *TERRORISM AND POL. VIOLENCE*, 213 (1993).

<sup>337</sup> See generally JONATHAN ADELMAN, *THE RISE OF ISRAEL: A HISTORY OF A REVOLUTIONARY STATE* (2008).

<sup>338</sup> *Id.*

<sup>339</sup> See generally Davis Bobrow, *International Public Opinion: Incentives and Options to Comply and Challenge*, in *HEGEMONY CONSTRAINED: EVASION, MODIFICATION, AND RESISTANCE TO AMERICAN FOREIGN POLICY* 222 (David Bobrow ed., 2008) Frank L. Rusciano, *Global Opinion and the English School of International Relations*, 4 *NEW GLOBAL STUD.* 1 (2010).

<sup>340</sup> See generally Paul Chamberlin, *The Struggle Against Oppression Everywhere: The Global Politics of Palestinian Liberation*, 47 *MIDDLE E. STUD.* 25 (2011).

sufficient independence to earn the appellation “self-determined,” even as it remains vulnerable to international opinion.

On the assumption that the UNGA will vote to approve Palestinian statehood, the critical question is what next steps Palestinians might pursue in reaching a settlement with Israel. A vote overwhelmingly in favor of Palestinian statehood in the UNGA would diminish the legitimacy of Israel’s stance against the creation of a Palestinian state. From the Palestinian point of view, such a development would place it in a considerably stronger bargaining position and advance the process of reaching a settlement with Israel.

Clearly, these scenarios are hard to predict. On the one hand, centrist politicians within Israel will undoubtedly see this development as an incentive to secure speedy settlement. On the other hand, right wing politicians are less likely to negotiate from a weakened position and may become even more inflexible. Recently, for example, there was serious discussion within Israel that, should the Palestinians receive a positive vote, Israel would essentially call off what remains of the Oslo Accords.<sup>341</sup> In fact, ordinary Israeli voters are divided on this issue. Those who favor a denunciation of the Oslo Accords argue that the Oslo Accords implicitly require Israel to consent to Palestinian statehood and that the Palestinian’s unilateral initiative is effectually a repudiation of a major condition of the Oslo Accords.<sup>342</sup>

In our view, it would be excessive for Israel to repudiate the entire Oslo Accords package. First, there are other international actors, such as the European Union, Russia, U.S., and the UN, involved in the facilitation of the peace process; these actors are vested in the important elements of the Oslo

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<sup>341</sup> Barak Ravid, *Israel Looking Into Revoking Oslo Accords In Response To Palestinian U.N. Bid*, HAARETZ.COM (Jul. 25, 2011), <http://www.haaretz.com/print-edition/news/israel-looking-into-revoking-oslo-accords-in-response-to-palestinian-un-bid-1.375060>; see also Saud Abu Ramadan & Emad Drimly, *Palestinians Say Israel’s Threats to Call Off Oslo Peace Accords “Not Surprising,”* ENGLISH.NEWS.CN (Jul. 25, 2011), [http://news.xinhuanet.com/english2010/world/2011-07/25/c\\_131008501.htm](http://news.xinhuanet.com/english2010/world/2011-07/25/c_131008501.htm); Saed Bannoura, *Netanyahu’s Office Denies Reports Regarding Voiding Oslo Deals*, IMEMC & AGENCIES (Jul. 26, 2011), <http://www.imemc.org/article/61743>.

<sup>342</sup> See also Sonja Karkar, *Is Palestine’s Bid for Statehood a Wise Move?*, SIDNEY MORNING HERALD (Sept. 3, 2011), available at <http://www.smh.com.au/opinion/the-question-is-palestines-bid-for-statehood-a-wise-move-20110902-ljq0s.html>. See generally Brett Schaefer, *What Palestinian Membership Means for UNESCO and the Rest of the United Nations*, HERITAGE FOUND. (Dec. 13, 2011), <http://www.heritage.org/research/reports/2011/12/what-palestine-membership-means-for-unesco-and-the-rest-of-the-united-nations>.

Accords.<sup>343</sup> Although Israeli Foreign Minister Avigdor Lieberman has suggested that he is thinking about doing away with Oslo Accords, there is considerable opinion in the Israeli foreign policy establishment that this is counterproductive.

In the United States, Congress passed a resolution requiring the President to oppose Palestinian statehood.<sup>344</sup> The United States Congress, in this resolution, is essentially stating that the statehood initiatives would be ineffective and that those initiatives are no shortcut to thawing the frozen negotiation process.<sup>345</sup>

Another approach that does not involve international recognition of a Palestinian state would be to follow the South African model and reform the Israeli legal system to ensure the equality of all citizens.<sup>346</sup> South Africa was a unified state in which the white descendants of Dutch colonists ruled the black pre-colonial population in a manner that violated the inherent dignity and self-determination of the pre-colonial citizens.<sup>347</sup> In the end, although the state remained a united entity, the constitutional laws were reformed to ensure the equality of all citizens.<sup>348</sup>

However, there are distinct differences between former apartheid South Africa and the Occupied Palestinian Territories. First, Jewish settlers have effectively ousted the former natives from the most valuable lands with historical monuments, urban development, and access to significant

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<sup>343</sup> See generally MICHAËL EMERSON & NATHALIE TOCCI, *THE RUBIK CUBE OF THE WIDER MIDDLE EAST* (2003), available at <http://www.ceps.be/book/rubik-cube-wider-middle-east>.

<sup>344</sup> Concerning the Palestinian State, Unity Government and the Peace Process, S. Res. 185, 112th Cong. (2011); see also *Congress Opposes Palestinian Statehood Outside Negotiations, Calls on Palestinian National Authority to Return to Talks*, NEAR EAST REPORT (Jul. 18, 2011); *Congressional Resolutions Oppose Unilateral Palestinian State*, JEWISH REPORTER (Jul. 8, 2011), <http://thejewishreporter.com/2011/07/08/congressional-resolution-opposes-unilateral-palestinian-state/>; Jennifer Rubin, *Is J Street Still Relevant?*, WASH. POST, Dec. 16, 2010, [http://voices.washingtonpost.com/right-turn/2010/12/house\\_opposes\\_unilateral\\_decla.html](http://voices.washingtonpost.com/right-turn/2010/12/house_opposes_unilateral_decla.html).

<sup>345</sup> Lawrence, *supra* note 214; see also Steve Clemons, *Obama Tells Palestinians to Stay in the Back of the Bus*, THE ATLANTIC (Sept. 22, 2011) (“The fact is that the status quo of frozen negotiations is benefiting the dominant, settlement-expanding Israel – and the U.S., in promising to veto at the United Nations Security Council Palestine’s bid for official state recognition, is playing guarantor to one side, undermining the aspirations of others on the other side of the equation.”), available at <http://www.theatlantic.com/international/print/2011/09/.../245487/>.

<sup>346</sup> See Winston P. Nagan, *African Human Rights Process: A Contextual Policy-Oriented Approach*, 21 SW. U. L. REV. 63 (1992); see also Winston P. Nagan, *South Africa in Transition: Human Rights, Ethnicity and Law in the 1990s*, 35 VILL. L. REV. 1139 (1990); Winston P. Nagan, *Law and Post-Apartheid South Africa*, 12 FORDHAM INT’L L.J. 399 (1988)

<sup>347</sup> See generally discussion *supra* note 346.

<sup>348</sup> See generally discussion *supra* note 346.

resources like water.<sup>349</sup> Moreover, the leadership of Israel seems intractably set against welcoming Palestinians into a secular state of Israel as citizens and equals.<sup>350</sup> Furthermore, it is the sovereign right of a state, under international law, to determine who may become a citizen, who may be a resident, and what types of laws will govern the people within its borders. Unless the Israeli polity itself changes these standards in constitutive acts or international intervention becomes justified by egregious human rights violations, external forces cannot transform Israel into a unified, secular, equal rights-based state.

Israel's use of military force to acquire Palestinian lands 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. 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. If they claim such a right, they risk being characterized as terrorists.<sup>351</sup> This places Palestinians in a difficult, if not impossible, situation.

#### IV. PALESTINE AND THE PROCESS FOR SECURING STATEHOOD RECOGNITION

In the interest of achieving a just and sustainable peace in the contested lands under de facto Israeli control, we make a few suggestions on policy matters. Most of these suggestions require action by the Palestinian governing bodies. Nevertheless, transparency is crucial because all members of the world community – including Israel, members of the UNSC,

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<sup>349</sup> Izhak Schnell & Shaal Mishal, *Place as a Source of Identity in Colonizing Societies: Israeli Settlements in Gaza*, 98 GEO. REV. 242 (2008).

<sup>350</sup> D. Newman, *The Geopolitics of Peacemaking in Israel–Palestine*, 21 POL. GEO. 629 (2002); see also Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923).

<sup>351</sup> See generally MARWAN BISHARA, *PALESTINE/ISRAEL: PEACE OR APARTHEID: OCCUPATION, TERRORISM AND THE FUTURE* (2002); MICHAEL STOHL, *THE POLITICS OF TERRORISM*, (1988); MC Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98(3) J. CRIM. L. & CRIMINOLOGY 711 (2008); D. Black, *The Geometry of Terrorism*, 22 SOC. THEORY, 14 (2004); Ronald E. Hall, *Beyond the Stereotypical Implications of Terrorism: A Sociological Investigation of Arab Immigrants*, 20(2) INT'L REV. SOC. 243 (2010); Kevin Siqueira, *Participation in Organized and Unorganized Protests and Rebellions*, 19(4) EURO. J. POL. ECON., 861 (2003); Tuğçe Öztürk, *Terrorism and the Israeli-Palestinian Peace Process* (Dec. 2010) (unpublished M.S. thesis, Middle East Technical University) available at <http://etd.lib.metu.edu.tr/upload/12612774/index.pdf>.

individual states, and members of state associations – have important parts to play in the process of achieving a viable Palestinian state.

One of the two paths to Palestinian statehood requires the help and guidance of the Israeli state, to create the type of Palestinian state indicated in the UN 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.<sup>352</sup> However, the longer Israel delays this process while simultaneously refusing the Palestinian people real inclusion in a unified society, and as long as Israel defies agreements to remain within established borders with settlement activities, it risks isolating itself from the external powers that have thus far refused to support any “unilateral” recognition to a state of Palestine.

The negotiations process overseen by the Obama Administration has completely broken down in recent months.<sup>353</sup> This is due, in large part, to extraordinary contingencies that Israeli representatives have placed upon negotiation. For one, Israeli negotiators have demanded Palestinian recognition of Israel as an ethnically exclusive state, and have required acceptance of the premise that Jerusalem belongs to Israel, asking for the elimination of all restraints on settlement construction and expansion in East Jerusalem.<sup>354</sup> Yet, precisely because Israelis continued to engage in settlement activity, Palestinians have refused to participate in ongoing negotiations as well.<sup>355</sup> Both President Obama and Secretary of State Clinton have condemned these contingencies and the continuing settlements, explaining that they were unhelpful to the negotiations process.<sup>356</sup>

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<sup>352</sup> See generally NOAM CHOMSKY, *FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL, AND THE PALESTINIANS* (1999); TRITA PARSİ, *TREACHEROUS ALLIANCE: THE SECRET DEALINGS OF ISRAEL, IRAN, AND THE UNITED STATES* (2007).

<sup>353</sup> Iyad Barghouti, *Palestinian–Israeli Negotiations: An Objective in Themselves*, 46(1) INT’L SPECTATOR 15 (2011); see also CAROL MIGDALOVITZ, *ISRAELI-ARAB NEGOTIATIONS: BACKGROUND, CONFLICTS, AND U. S. POLICY*, (2010); Joel Beinin & Lisa Hajjar, *Palestine, Israel and the Arab-Israeli Conflict: A Primer*, MIDDLE E. RESEARCH & INFO. PROJECT, [http://merip.org/Palestine-israel\\_primer/intro-pal-isr-primer.html](http://merip.org/Palestine-israel_primer/intro-pal-isr-primer.html) (last visited Sept. 4, 2012).

<sup>354</sup> See generally MIGDALOVITZ, *supra* note 353 Document3 and Beinin & Hajjar, *supra* note 353.

<sup>355</sup> Karin Laub, *Peace Talks Stalled: Israeli Settlers Keep Building, So Palestinians Refuse Negotiations*, HUFF. POST (Oct. 2, 2010 7:07 PM), [http://www.huffingtonpost.com/2010/10/03/peace-talks-stalled-israel\\_n\\_748235.html](http://www.huffingtonpost.com/2010/10/03/peace-talks-stalled-israel_n_748235.html).

<sup>356</sup> Jamie Weinstein, *The DC Analysis: Three Takeaways from Obama Admin’s Willingness to Support Israel Condemnation at the United Nations*, DAILY CALLER (Feb. 21, 2011), <http://dailycaller.com/2011/02/21/thedc-analysis-three-takeaways-from-obama-admin%E2%80%99s-willingness-to-support-israel-condemnation-at-the-united-nations/>; see also Hillary Clinton: *Israeli Settlements ‘Illegitimate’*, ABC NEWS (Feb. 18, 2011), [http://abcnews.go.com/Politics/hillary-clinton-israeli-settlements-illegitimate/story?id=12952834#.T1J\\_63JSTns](http://abcnews.go.com/Politics/hillary-clinton-israeli-settlements-illegitimate/story?id=12952834#.T1J_63JSTns); *Hillary Clinton Tells Israel to Stop ‘Settlement Activity’ and Provoking Palestine*, TELEGRAPH (April 16, 2010), available at

A more skeptical view is that these activities are “deal breakers” and the Israeli government *intends* to disappoint by recklessly approving settlement activity, thus undermining legitimate expectations that the Israel state is engaged in good faith negotiations with the Palestinian people to bring about a resolution to the problem. If such an assessment is correct, then current Israeli leaders may be actively blocking Palestinians’ efforts to achieve statehood. If this is the case, then the body governing the Palestinian people in the West Bank and Gaza may consider moving forward “unilaterally”.<sup>357</sup> As long as the PA acts in compliance with contemporary standards of human rights and rule-of-law norms, the international community has an ethical obligation to support the Palestinians’ efforts.

A. *The Creation of a Palestinian Constitution and a Democratic Parliamentary Government*

The PA could create a model government to replace itself, because as it presently stands, the PA does not have sufficient control over Palestine – its authority is subordinate to Israel’s sovereign control under the Oslo Accords, and the Interim Agreement expressly prohibits the PA from conducting foreign relations.<sup>358</sup> The PA should hold elections to form a newly parliamentary authority, and this parliament should act to create a constituent assembly for the purpose of drafting a constitution of the State of Palestine. We are uncertain whether the documents generated by the PA amount to a constitution, but we would suggest that, in preparation for recognition, the historic documents be integrated into a formal constitution of the State of Palestine.

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<http://www.telegraph.co.uk/news/worldnews/middleeast/israel/7598527/Hillary-Clinton-tells-Israel-to-stop-settlement-activity-and-provoking-Palestine.html>.

<sup>357</sup> See generally Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971(2004); *Unilateralism at the UN*, AIPAC Synagogue Initiative (2011), available at <http://www.aipac.org/~media/Publications/Policy%20and%20Politics/AIPAC%20Periodicals/Middle%20East%20Spotlight/2011/08/MESAUG11.pdf>.

<sup>358</sup> The Interim Agreement stipulates that: “In accordance with the DOP, the [Palestinian National Authority] 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, Isr.-P.L.O., Sept. 28 1995, 36 I.L.M. 551, 561, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>. 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 Palestinian National Authority. See *id.* art. IX(b), 36 I.L.M. at 561. Nevertheless, these limited activities “shall not be considered foreign relations.” *Id.*

We recommend that the constitution meet contemporary normative standards. In other words, the form of governance should be democratic, transparent, accountable, responsible, and founded upon the rule of law.<sup>359</sup> 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.<sup>360</sup> The Badinter Commission carefully reviewed the constitutions of these new states for the purpose of recognition by the European Union and, later, the United Nations. These states obtained recognition because they created constituent assemblies that debated over and adopted constitutions which made the rights and duties of individuals dependent upon their national citizenship, rather than solely upon their ethnicity or religious identity.<sup>361</sup>

Additionally, recognition by the UN is dependent on a showing that the entity claiming sovereignty has the willingness and capability to uphold the principles of the UN Charter.<sup>362</sup> The PA should reaffirm the 1988 Declaration of Independence in light of the creation of a new government and a new constitution. This would both stress the consistent, continuing demand to recognize the right of the Palestinian people to self-determination and independence and strengthen the perception of the coherence and continuity in the development of Palestinian national identity.

#### B. *International Recognition*

The PA should secure international recognition of both the new government and the existence of a Palestinian state. The actual process of recognition is clearly complex. At one level, states usually claim as a function of their sovereignty that they have complete discretion to decide whether to recognize the existence of another state.<sup>363</sup> However, recognition by regional associations of states tends to be less politicized and governed by a greater sense of obligation to conform to regional standards of international peace, security, and human rights. Thus, the PA should encourage regional organizations to recognize a new, more democratic Palestinian government and state similarly committed to these international

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<sup>359</sup> *Supra* note 199.

<sup>360</sup> See generally Peter Radan, *The Badinter Arbitration Commission and the Partition of Yugoslavia*, 25(3) NATIONALITIES PAPERS 537 (1997).

<sup>361</sup> Winston P. Nagan, *International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia*, 6 Duke J. Comp. & Int'l L. 127 (1995); see also Winston P. Nagan, Stevan Lilić, Petar Šarčević & Nebojša Vujović, *U.S. Security Interests and the War in Former Yugoslavia*, 87 AM. SOC'Y INT'L L.: PROCEEDINGS 205 (1993).

<sup>362</sup> See Orakhelashvili *supra* note 264.

<sup>363</sup> See generally Montevideo Convention, *supra* note 79; STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); Crawford, *supra* note 70.

obligations. These would include organizations such as the Arab League,<sup>364</sup> the Arab League Educational, Cultural and Scientific Organization (ALESCO), and the Economic and Social Council of the Arab League's Council of Arab Economic Unity (CAEU).<sup>365</sup> We would also 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 that, if a sizable number of individual states recognize Palestinian statehood, it would ease recognition in regional associations, and this would strengthen the momentum of the sovereignty process before the United Nations.

We would also recommend that the PA present its case to states that clearly would recognize it as a state on a bilateral basis – that is, as both a government and a state. At present, some 122 states in the UN General Assembly recognize Palestine as a state,<sup>366</sup> therefore, it is possible that Palestinians could receive as much as 90 percent of the world's countries support towards the recognition of Palestinian statehood.

Finally, the PA should seek to secure a UN General Assembly Resolution recognizing the declaration of independence, constitution, and government of the newly independent Palestinian state. However, the PA should first seek the approval of the Security Council, which essentially makes a recommendation to the General Assembly regarding whether a state should be recognized. However, this may prove difficult because any one of the permanent members on the UN Security Council can exercise the veto power.<sup>367</sup>

Even without the prior approval of the UN Security Council, it may still be of some value to have the UN General Assembly give a recommendation

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<sup>364</sup> 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.

<sup>365</sup> 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.

<sup>366</sup> See generally PLO NEGOTIATIONS OFFICE, RECOGNIZING THE PALESTINIAN STATE ON THE 1967 BORDER & ADMISSION OF PALESTINE AS A FULL MEMBER OF THE U.N. (2011); discussion *supra* note 112.

<sup>367</sup> See Bardo Fassbender, *supra* note 215.

to the Security Council presenting findings of fact and conclusions of law that the Palestinian claim to statehood is well founded. Generally, UNGA resolutions are nonbinding.<sup>368</sup> However, the Israelis utilized Resolution 181 to declare their independent status and treated Resolution 181 as a legally binding instrument.<sup>369</sup> When the Palestinians present their case for statehood, they are simply asking for a reaffirmation of Resolution 181, which stipulated that Partition envisioned the creation of an "Arab State."<sup>370</sup> It is possible that the issue could be referred for confirmation to the UN Security Council and, should this happen, it would be important for the PA to seek advance support of the permanent members of the Council.

The PA faces an uphill battle to secure UNSC support. Because the Israeli lobby will remain active in working to secure a veto, Palestinians and their allies will have to expend enormous resources to reach out to the U.S. government and, if possible, to liberal Jewish groups in the U.S. to have a place at the table that has historically been dominated by interest groups like the American Israel Public Affairs Committee (AIPAC) and others.<sup>371</sup> To this end, it would help Palestinians if they were to secure the support of the

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<sup>368</sup> See Kerwin *supra*, note 221.

<sup>369</sup> JOHN B. QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* 53 (2005).

<sup>370</sup> G.A. Res. 181, *supra* note 4.

<sup>371</sup> The American-Israel Public Affairs Committee (AIPAC) is a registered Lobby in the United States. As Bard notes in his article:

The organization that directly lobbies the U.S. government on behalf of the Israeli lobby is AIPAC. The lobby, originally called the American Zionist Committee for Public Affairs, was founded in 1951 by I.L. (Sy) Kenen to appeal directly to Congress for legislation to provide aid to Israel to circumvent State Department opposition. As recently as the late 1960s, the organization now considered the most powerful foreign policy lobby in Washington was essentially a one-man operation run by Kenen. In the late 1970s, AIPAC still had only a handful of staff based in Washington. Today, it has more than 100 employees with seven regional offices and a budget of more than \$40 million and lobbies the Executive Branch as well as the Legislative. Because of its name, AIPAC is sometimes mistakenly thought to be a political action committee (PAC), but the organization does not rate, endorse or finance candidates.

Bard, *supra* note 269. See also Youssef M. Ibrahim, *Israeli Spying On U.S. Unravels - Franklin Sings Like Canary*, WASH. TIMES (Dec. 24, 2004); Stephen Lendman, *AIPAC's Ugly Agenda*, WARISACRIME.ORG (Sept. 25, 2011); Memorandum from AIPAC, *With Israel Threatened, U.S. Must Stand Strongly By Ally* (Sept. 15, 2011), available at <http://www.aipac.org/~media/Publications/Policy%20and%20Politics/AIPAC%20Analyses/Issue%20Memos/2011/09/AIPAC%20Memo%20With%20Israel%20Threatened%20Strong%20US%20Support%20Needed.pdf>. See generally discussion *supra* notes 180, 211, 268, 270, 283, 284, 371, 372, 410 and 415 (describing AIPAC's influence).

very powerful peace lobby in Israel.<sup>372</sup> Their support will be critical. There is also a vigorous and courageous human rights constituency in Israel and their voices would carry weight within the U.S. and with some Jewish lobby groups in the United States as well.<sup>373</sup> The PA should also seek the support of liberal and labor elements in the Knesset; this would be useful in terms of solidifying public opinion behind their cause.

One of the Likud-supporting lobby groups in the U.S. has already been aggressively working to get the U.S. government to exercise its veto power in the UNSC over Palestinian statehood.<sup>374</sup> This suggests that an enormous amount of political work must be done to ensure that the U.S. does not exercise the veto and, at a minimum, remains neutral. In order to achieve this goal, the PA needs to generate some support inside the U.S. for the recognition of the Palestinian state. We believe the PA should argue that it is not for the Netanyahu government to decide to block Palestinian statehood, but rather it is a matter for the international community to resolve in consensus. Given the furious lobby activity by ultranationalist Israeli interests and the promises that the U.S. has made, there is a strong possibility that the U.S. will veto any resolution before the UNSC providing statehood for the Palestinian people.

In general, a veto normally means that the matter is concluded before the United Nations. However, there is a procedure which was invented by the United States to get around the exercise of a UNSC veto, if that veto undermines the importance of protecting international peace and security. As mentioned *supra* Part I.F, this procedure is known as the “Uniting for Peace Resolution.”<sup>375</sup> If it is clear that there is already a supermajority to support

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<sup>372</sup> See *Sharon Tells Arafat to End Violence, Palestinian Leadership Denounces Settlements Expansion*, ALBAWABA NEWS (Apr. 8, 2001), <http://www.albawaba.com/news/sharon-tells-arafat-end-violence-palestinian-leadership-denounces-settlements-expansion>. It should be noted that the driving force behind the Israeli peace lobby and human rights groups has a profound connection to the sacred literature of Judaism which stresses that justice is integral to every form of human relationship.

<sup>373</sup> See Stephen Lendman, *State of Human Rights in Israel*, THEPEOPLE'SVOICE.ORG (Jan. 3, 2012), <http://www.thepeoplesvoice.org/TPV3/Voices.php/2012/01/03/state-of-human-rights-in-israel>; see also DPA, *Human Rights Watch Reports “Serious Violations” in Israel, Palestinian Territories*, HAARETZ.COM (Jan. 22, 2012).

<sup>374</sup> Rebecca Weiner, *The Likud Party*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Politics/LikudParty.html>, (last visited Feb. 1, 2012); see also Gideon Levy, *With Settlement Resolution Veto, Obama has Joined Likud*, HAARETZ.COM (Feb. 20, 2011) (“An America that understands that the settlements are the obstacle should have joined in condemning them”); CARTA MAIOR *U.S. Promises to Block Palestinian State; Europe Is Divided*, CORREIO DO BRASIL (Sept. 17, 2011), available at <http://watchingamerica.com/News/122155/united-states-promises-to-block-palestinian-state-europe-is-divided/>.

<sup>375</sup> G.A. Res. 377 (V), U.N. GAOR, 5th Sess., U.N. Doc. A/RES/377(V) (1950).

the use of the “Uniting for Peace Resolution” to overcome a U.S. veto, the U.S. administration may be less enthusiastic about exercising the veto. Under that hypothetical scenario, the U.S. may simply abstain from the Security Council vote.

Palestinian President Mahmoud Abbas’s initiative to be admitted to the UN as an independent state was initially scheduled for consideration in September 2011.<sup>376</sup> However, the U.S. was spared the headache of a veto in September 2011 because the Palestinians failed to gain a nine-vote majority in the Security Council.<sup>377</sup> Some diplomats have stated that, at the present time, Palestinians would only get eight votes in favor of independence and that other countries would vote either against Palestinian independence or abstain.<sup>378</sup> However, on October 31, 2011, Palestine became the 195<sup>th</sup> full member of the United Nations Educational, Scientific and Cultural Organization (UNESCO) after a vote of 107 to 14, with 52 abstentions.<sup>379</sup> After that step was taken, the United States cut off its funds to UNESCO as a punitive action, calling the vote “premature”; as a result, the organization lost almost one-quarter of its yearly budget – which included 22 percent contributed by the United States plus another 3 percent contributed by Israel.<sup>380</sup>

Notwithstanding the accomplishment of legitimate acceptance as a full member of UNESCO, the Palestinians decided to put their UN bid on hold in order to participate in informal Jordanian-sponsored talks with Israel at the beginning of 2012 in Amman.<sup>381</sup> In light of these talks and with the goal of reaching an agreement, the Middle East “Quartet” – which includes the U.S., the European Union, the UN and Russia, along with the Former Prime Minister of the UK, Tony Blair, as the Quartet’s envoy to the region – urged

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<sup>376</sup> Matthew Fisher, *UN to Hear Palestinian Bid for Statehood*, NAT’L POST (Sept. 16, 2011), <http://news.nationalpost.com/2011/09/16/un-to-hear-palestinian-bid-for-statehood/>.

<sup>377</sup> Ben Birnbaum, *Palestinians to Renew Efforts for Bid to UN; Talks with Israel Delayed Attempt*, WASH. TIMES (Jan. 19, 2012), <http://www.washingtontimes.com/news/2012/jan/19/palestinians-to-renew-efforts-for-bid-to-un/?page=all>. In the absence of a veto, a council resolution still needs nine votes to pass.

<sup>378</sup> Patrick Worsnip, *New UN Council No More Favorable to Palestinians: U.S.*, REUTERS (Jan. 23, 2012).

<sup>379</sup> Steven Erlanger & Scott Sayare, *UNESCO Accepts Palestinians as Full Members*, N.Y. TIMES (Oct. 31, 2011), <http://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html?pagewanted=all>; *General Conference Admits Palestine as UNESCO Member*, UNESCO.ORG (Oct. 31, 2011), [http://www.unesco.org/new/en/media-services/single-view/news/general\\_conference\\_admits\\_palestine\\_as\\_unesco\\_member\\_state/](http://www.unesco.org/new/en/media-services/single-view/news/general_conference_admits_palestine_as_unesco_member_state/).

<sup>380</sup> Erlanger & Sayare, *supra* note 379; Harriet Sherwood, *US Pulls UNESCO Funding after Palestine is Granted Full Membership*, GUARDIAN (Oct. 31, 2011), <http://www.guardian.co.uk/world/2011/oct/31/unesco-backs-palestinian-membership>.

<sup>381</sup> See Birnbaum, *supra* note 377.

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the parties to submit proposals on borders and security by January 26, 2012.<sup>382</sup>

In January 2012, U.S. and European players brought Palestinians and Israelis to five rounds of so-called exploratory talks in Amman. The talks were scheduled in the hope of resuming the peace negotiations that had been stalled in September 2010, after Israel insisted on continuing settlement activities on Occupied Palestinian Territories, including Arab East Jerusalem and the West Bank.<sup>383</sup> However, on January 26, 2012, during a session at the World Economic Forum (WEF) in Davos, with Palestinian Prime Minister Salam Fayyad and Israel's President Shimon Peres, Israel laid out a vision "that would closely follow the line of Israel's controversial security barrier leaving all of Jerusalem inside Israel"<sup>384</sup> and basically proposed the current Gaza barrier as an international border between Israel and Palestine.<sup>385</sup>

Although Palestinian officials seem to be ready to accept minor adjustments, they described the proposed border as "impossible" and Israel's position as "less than what was offered by Netanyahu's predecessors, Ehud Barak and Ehud Olmert, who were willing to discuss a partition of Jerusalem as well."<sup>386</sup> In this sense, although Netanyahu is still firm in his position of continuing "Israeli presence on the eastern border of a future Palestinian state as part of any peace deal," Israeli officials have said that "any presence in the Jordan Valley could be reviewed over time."<sup>387</sup> Both sides continue to blame each other for the failure of the talks. Recently, Palestinian President Mahmoud Abbas accused Israel of spoiling the low-level talks by failing to

<sup>382</sup> *Id.*

<sup>383</sup> *This Week in Palestine: Week 4, 2012*, IMEMC.ORG (Jan. 27, 2012), <http://www.imemc.org/article/62913>.

<sup>384</sup> Agence France Presse, *Israel Proposed "Impossible" Borders: Palestinians*, VANCOUVER SUN (Jan. 29, 2012), <http://www.vancouversun.com/news/Israel+proposed+impossible+borders+Palestinians/6068890/story.html> ("They said to us, Jerusalem is out of the question. Large numbers of settlers will stay in the West Bank. They were talking about impossible borders,' the official said. 'They didn't specifically mention the wall, but the details can be interpreted as them using the wall for the border,' he added. The Palestinians have long complained that Israel built the barrier with the intention of eventually turning it into an international border. Israel says the barrier is designed to prevent attacks and cites a decrease in the number of deadly bombings since construction began in 2002. When the 709-kilometre (435-mile) barrier is complete, 85 per cent of it will have been built inside the occupied West Bank.. The official said that the Israeli presentations, made during a final round of talks on January 24 and 25, revealed wide gaps between the two sides.").

<sup>385</sup> *Id.* See also Mohammed Daraghmeh & Dan Perry, *Israel Proposes West Bank Barrier as Border*, BOSTON.COM (Jan. 27, 2012), [http://www.boston.com/news/world/middleeast/articles/2012/01/27/ap\\_exclusive\\_barrier\\_proposed\\_as\\_israel\\_border/?page=full](http://www.boston.com/news/world/middleeast/articles/2012/01/27/ap_exclusive_barrier_proposed_as_israel_border/?page=full)

<sup>386</sup> Agence, *supra* note 384; Daraghmeh & Perry, *supra* note 385.

<sup>387</sup> Daraghmeh & Perry, *supra* note 385.

present detailed proposals for borders and security requested by international mediators, while Israeli Prime Minister, Benjamin Netanyahu, has stated that the “Palestinians ‘refused to even discuss’ Israeli security needs.”<sup>388</sup>

The Quartet asked both sides to continue the talks and to present detailed proposals on borders and security arrangements. However, the Palestinian negotiators argue that the period set aside for the contacts ended on January 26, 2012, and Israeli negotiators argue that the original intention was to have three months of talks and therefore meetings should continue.<sup>389</sup> Palestinian President Mahmoud Abbas, who is certainly unlikely to consider a proposal that keeps East Jerusalem under Israeli control, stated that he would consult with senior officials from the PLO, the Arab League, and his Fatah movement on whether or not to continue the talks.<sup>390</sup> However, the Palestinian negotiators have already expressed that “they will not hold talks while Israel builds on land they want for a future state, and they want negotiations on borders to be based on the lines that existed before the 1967 war.”<sup>391</sup> As a result, the Palestinians decided to step up their diplomatic campaign at the United Nations, sidelining Israel.<sup>392</sup>

## V. INTERESTS OF THE MAJOR PARTIES

We would like to suggest that respect for the international rule of law, and especially human rights norms is the best alternative for all the parties involved and the international community as a whole. We address the particular interests of the parties individually, in turn.

### A. U.S. Interests and Ultra-Nationalist Politics in Israel

A useful starting point for an appraisal of U.S. policy and interests in the Middle East is the Camp David Accords, which were originally negotiated by President Jimmy Carter.<sup>393</sup> The Accords, which included

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<sup>388</sup> Agence, *supra* note 384. See also *Palestinian President Abbas Says Israel Spoiled Latest Round of Talks on Border, Security*, WASH. POST (Jan. 29, 2012), [http://www.washingtonpost.com/world/middle-east/palestinian-president-abbas-says-israel-spoiled-latest-round-of-talks-on-border-security/2012/01/29/gIQAXschZQ\\_story.html](http://www.washingtonpost.com/world/middle-east/palestinian-president-abbas-says-israel-spoiled-latest-round-of-talks-on-border-security/2012/01/29/gIQAXschZQ_story.html).

<sup>389</sup> *Id.*; see also Agence *supra* note 384; Daraghmeh & Perry, *supra* note 385.

<sup>390</sup> Daraghmeh & Perry, *supra* note 385.

<sup>391</sup> *Id.*

<sup>392</sup> *Palestinians Blame Israel for Failure of Amman Talks*, TIMES LIVE (Jan. 31, 2012), [http://news.monstersandcritics.com/middleeast/news/article\\_1688245.php/Palestinians-blame-Israel-for-failure-of-Amman-talks](http://news.monstersandcritics.com/middleeast/news/article_1688245.php/Palestinians-blame-Israel-for-failure-of-Amman-talks)

<sup>393</sup> *Camp David Accords* (Sept. 17, 1978), ISRAELI MINISTRY OF FOREIGN AFFAIRS, *available at*

secret negotiations between the parties, resulted in two framework agreements. The first dealt with the status of the Palestinians and their territorial rights under international law.<sup>394</sup> The second, which was a separate agreement, was a framework for the conclusion of a peace treaty between Israel and Egypt.<sup>395</sup>

The first of these two framework agreements made at Camp David put U.S. foreign policy squarely behind the international law stipulations and provisions of UN Security Council Resolutions 242 and 338, which were particularly relevant as a foundation for the U.S. to align its foreign policy with international law with regard to the international status of the Palestinians.<sup>396</sup> The U.S. has a clear foreign relations interest in settling the Israeli-Palestinian conflict, and those interests also implicate sensitive and vital national security interests. The U.S., as a member of the Middle East “Quartet,” is involved with other major international players whose interests are not necessarily the same.<sup>397</sup> However, the U.S. has also had to formulate its foreign policy objectives to ensure that they reconcilable with the positions of the other three members of the Quartet.

Additionally, the continuing Israeli-Palestinian conflict has now become a much more immediate national security concern, after the attacks on the World Trade Center by Al Qaeda operatives on September 11, 2001. One of the purported justifications for the attack was the unconditional support of the U.S. government for Israel and its policies *vis-à-vis* the Palestinians.<sup>398</sup> The U.S. response to 9/11 involved the nation in high intensity conflict in Iraq and Afghanistan. The belief that Israel and its policies of occupation represent simply an extension of U.S. policy has been

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<http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Camp%20David%20Accords> .

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> A Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978, 17 I.L.M. 1466, 1467. See generally Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L. L. J. 129 (1991).

<sup>397</sup> See, e.g., David Singer, *Quartet Quartered, Road Map Thwarted, Palestine Aborted*, AM. THINKER (July 18, 2007), [http://www.americanthinker.com/2007/07/quartet\\_quartered\\_road\\_map\\_thw.html](http://www.americanthinker.com/2007/07/quartet_quartered_road_map_thw.html); see also KRISTIN ARCHICK, CONGRESSIONAL RESEARCH, EUROPEAN VIEWS AND POLICIES TOWARD THE MIDDLE EAST (Mar. 9, 2009), available at <http://fpc.state.gov/documents/organization/44134.pdf>.

<sup>398</sup> See Douglas Kellner, *Globalization, Terrorism, and Democracy: 9/11 and Its Aftermath*, in FRONTIERS OF GLOBALIZATION RESEARCH 243 (Ino Rossi ed., 2007). See generally DAVID JONATHAN ALBERT, THE ROLE OF AMERICAN POLITICAL CULTURE IN THE DEVELOPMENT OF THE U.S.-ISRAEL “SPECIAL RELATIONSHIP” AND THE LOST OPPORTUNITIES FOR ACHIEVING MIDDLE EAST PEACE (2007).

a central motivating tool for the alienation of radical Muslims, and their deployment as terrorists.<sup>399</sup> Unquestioning support of Israeli military policies continue to fuel a dangerous ostensible justification for anti-Americanism and a collapsed assumption that U.S. policy itself is anti-Muslim.<sup>400</sup> Given that there is a global population of close to two billion Muslims, the Israeli-Palestinian occupation continues to be a dangerous touchstone which can catalyze a move from alienation to extremist terrorist activity.<sup>401</sup>

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 that the continuing Israeli-Palestinian conflict served as a recruiting tool for alienated jihadist extremists and terrorists.<sup>402</sup> In response, the Obama administration brought a team of talented negotiators to press for the restart of negotiations toward a settlement. The President even went to Cairo to address the billions of Muslims who may have experienced some alienation due to the polarizing nature of the international Israeli-Palestinian debate.<sup>403</sup>

However, the over twenty-five ultranationalist pro-Israeli lobby groups in Washington, D.C. continue to hold tremendous influence in the development of U.S. foreign policy regarding Israel.<sup>404</sup> These groups are attentive to the needs of Israel's ultranationalist political interests. For example, for several months, domestic Israeli lobby groups pressured the U.S. government and Congress to block the recognition of a Palestinian state by ensuring the U.S. would veto any Resolution to that effect which would come before the UN Security Council.

The influence of "The Lobby"<sup>405</sup> in the United States can be seen in the recent House Resolution No. 1765, which reaffirmed "strong opposition to any attempt to establish or seek recognition of a Palestinian state outside of

<sup>399</sup> See generally Kellner, *supra* note 398.

<sup>400</sup> *Id.* See generally JAMES F. PETRAS, *THE POWER OF ISRAEL IN THE UNITED STATES* (2006); Barry Rubin, *The Real Roots of Arab Anti-Americanism*, 81(6) FOREIGN AFF. 73 (2002).

<sup>401</sup> See generally *Catalyst for Great American Tragedies: Pandering U.S. Politicians and Militant Zionists*, DEFRAUDINGAMERICA.COM, [http://www.defraudingamerica.com/israel\\_palestine\\_index.html](http://www.defraudingamerica.com/israel_palestine_index.html) (last visited April 17, 2012); Nathan W. Toronto, *Forty Years of COIN: The Israeli Occupation of the Palestinian Territories*, 50 JOINT FORCES Q. 79 (2008).

<sup>402</sup> Alan Elsner, *Hamas, Islamic Jihad Reject Obama's AIPAC Address*, ISRAEL PROJECT (Jan. 29, 2012); see also Ahmed M. Soliman, *President Obama: A New Hope for Israel/Palestine?*, STRATEGIC FORESIGHT GROUP (Dec. 2008), [http://www.strategicforesight.com/President\\_Obama.htm](http://www.strategicforesight.com/President_Obama.htm).

<sup>403</sup> *Obama Egypt Speech: Video, Full Text*, HUFF. POST (June 4, 2009), [http://www.huffingtonpost.com/2009/06/04/obama-egypt-speech-video\\_n\\_211216.html](http://www.huffingtonpost.com/2009/06/04/obama-egypt-speech-video_n_211216.html).

<sup>404</sup> See *supra*, notes 179, 210, 269, 270 & 284.

<sup>405</sup> See *supra* notes 180, 211, 268, 270, 283, 284, 371, 372, 410 & 415.

an agreement negotiated between Israel and the Palestinians.”<sup>406</sup> This resolution emphasized the principle that a lasting peaceful solution will only come about through the negotiations of both parties, i.e., the state of Israel and the representatives of the Palestinian people. What the resolution does not address is the inability of the Palestinian representatives to negotiate any solution with Israel where the parties bear such inequality in political and economic status. 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 U.S. treaty obligations to support the achievement of Palestinian self-determination, independence and statehood.<sup>407</sup>

This successful lobbying effort on behalf of the state of Israel reveals two characteristic aspects of the ultraconservative U.S. Israeli Lobby. First, it can powerfully refocus the attention of the U.S., even during holidays with a “lame duck” Congress—and even when the PA has committed no indiscretion to justify the U.S. behaving contrary to its international law obligations and its own national interests.<sup>408</sup> Second, “The Lobby” does not have in mind the best interests of the United States, but rather, those of Israel; this arguably works to the detriment of U.S. foreign relations and security interests.<sup>409</sup> Here, the simplistic idea, which some U.S. Congressional Representatives have uncritically accepted, is that Israeli and U.S. interests are one and the same. A more discriminating view would see that Israel, as an independent state, has unique and discreet interests.<sup>410</sup> It has been reported that well-placed neoconservative political appointees and elected officials pass on sensitive information to Israeli officials on the

<sup>406</sup> H. Res. 1765, 111th Cong. (2010).

<sup>407</sup> S. Res. 185, 112th Cong. (2012).

<sup>408</sup> See *supra* text and sources accompanying notes 180, 211, 268, 270, 283, 284, 371, 372, 410 and 415..

<sup>409</sup> See, e.g., Max Blumenthal, *The Bibi Connection*, AL-AKHBAR.COM (Jan. 12, 2012), <http://english.al-akhbar.com/content/bibi-connection>. See generally text and sources accompanying notes 32, 210-212, 214, 284, 345, 348, 376-80, 412, 417 and 440.

<sup>410</sup> See, e.g., Robert C. Lieberman, *The “Israel Lobby” and American Politics*, 7 EXCHANGE 235 (2009); see also Robert D. Blackwill & Walter B. Slocombe, *Israel: A True Ally in the Middle East*, L.A. TIMES (Oct. 31, 2011), <http://articles.latimes.com/2011/oct/31/opinion/la-oe-blackwill-israel-20111031> (“Israeli contributions to U.S. national interests, underappreciated by many, include enhanced counter-terrorism, intelligence and technology useful in urban warfare.”); Ilan Pappé, *Clusters of History: US Involvement in the Palestine Question*, 48 RACE CLASS 1 (2007); cf. Gli Cohen, *Top U.S. General: We Have Many Joint Interests with Israel in Middle East*, HAARETZ.COM (Jan. 20, 2012), <http://www.haaretz.com/news/diplomacy-defense/top-u-s-general-we-have-many-joint-interests-with-israel-in-middle-east-1.408342>. See generally James F. Petras *supra* note 403.

assumption that, since there is no difference between Israel and the U.S., by definition they are not really passing on state secrets.<sup>411</sup>

Finally, the breakdown in talks between the Palestinian and Israeli negotiators and the effort to undermine U.S. mediation efforts have also prompted some of the United States' most distinguished public servants to issue a widely publicized document under the title "*A letter to President Obama*."<sup>412</sup> The authors of this letter are extremely disquieted by the failure of U.S. diplomacy in the Middle East – they see the current situation as exacerbating Israeli isolationism, undermining moderation and the prospects for peace with an Israeli state among Palestinians. They also warn that the political vacuum is dangerous for all parties, and urge for a renewed effort to revive a dynamic role for the U.S. in Middle East diplomacy.<sup>413</sup>

The letter provides a profoundly realistic summation of the central problems that confront the concerned parties and recommends a framework for a permanent status accord. These principles provide a promising starting point for the Palestinians; yet present issues that may be anathema to the current right-wing policies of President Netanyahu and his acolytes.<sup>414</sup> One of the issues highlighted in the letter is the vexing problem of borders:

But it is not the State of Israel within its 1967 borders that is being challenged. It is Israel[i] 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

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<sup>411</sup> See, e.g., NOAM KOCHAVI, NIXON AND ISRAEL: FORGING A CONSERVATIVE PARTNERSHIP (2009); Sami E. Baroudi, *Arab Intellectuals and the Bush Administration's Campaign for Democracy: The Case of the Greater Middle East Initiative*, 61(3) MIDDLE E. J., 390 (2007); *Obama Secretly Sold Israel Bunker-Busting Bombs (VIDEO)*, JSPACE (Sept. 26, 2011); see also Youssef M. Ibrahim, *Israeli Spying On US Unravels - Franklin Sings Like Canary*, WASH. TIMES (Dec. 24, 2004).

<sup>412</sup> Letter from Lee H. Hamilton et al. to Barack Obama, U.S. President (Jan. 24, 2011) (hereinafter "Hamilton Letter"), available at <http://www.nybooks.com/articles/archives/2011/jun/23/letter-president-obama/?pagination=false>.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*; see also Natasha Mozgovaya, *Netanyahu: Palestinians Making 'Terrible Mistake' By Not Resuming Peace Talks*, HAARETZ.COM (Sept. 27, 2011), <http://www.haaretz.com/news/diplomacy-defense/netanyahu-palestinians-making-terrible-mistake-by-not-resuming-peace-talks-1.386955>; Barak Ravid, *Netanyahu: Palestinian Statehood Bid at UN Bound to Fail*, HAARETZ.COM (Sept. 18, 2011), <http://www.haaretz.com/news/diplomacy-defense/netanyahu-palestinian-statehood-bid-at-un-bound-to-fail-1.385131>; *Netanyahu: Palestinians Want State Without Peace*, YNETNEWS.COM (Sept. 23, 2011), <http://www.ynetnews.com/articles/0,7340,L-4126626,00.html>

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target if international anger and condemnation.<sup>415</sup>

Israeli peace scholar Uri Avnery, holds a pessimistic view of the current Israeli leadership in this regard:

Netanyahu, of course, has no peace plan. His declared position is that the Palestinians must return to direct negotiations without prior conditions, but only after they officially recognize Israel as “the state of the Jewish people” (or, in another version, as a “Jewish and democratic state”.) It is clear that the Palestinians cannot be expected to agree to any such prior condition.<sup>416</sup>

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<sup>415</sup> See Hamilton Letter, *supra* note 412. A summary of what is proposed in the letter includes recommendations that:

The U.S. staunchly defend the legitimacy of Israel, as qualified by the phrase “within internationally recognized borders.”

The U.S. 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.

The U.S. will work towards adjust a fair solution to the refugee problem. U.S. commitment is based on the realism of the unlimited flow of refugees, which would dramatically affect the demographics of Israel.

The U.S. will have a crucial role to play in appropriate security policy for both Israel and Palestine. Here, the U.S. supports a demilitarized 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.

The policy on the emotive issue of Jerusalem, recommending a form of complex shared control and unimpeded access to holy places.

The U.S. supports the reconciliation of Fatah and Hamas on terms compatible with the above principles and United Nations Security Council Resolutions 242 and 338.

*Id.* These writers concluded their letter with a strong paragraph and a recommended framework for a permanent status accord:

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 U.S. 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. *Id.*

<sup>416</sup> Uri Avnery, *Interim Forever*, GUSH SHALOM (Jan. 03, 2011), <http://zope.gush-shalom.org/home/en/channels/avnery/1293896699>

According to Avnery, the Palestinians would never agree to accept Israel as an exclusively ethnic Jewish state when there are over a million Israeli Arab citizens living there.<sup>417</sup> The Israeli demand for the recognition of Israel as a Jewish State has no coherent intellectual cohesion, and is used by Netanyahu “as a trick to obstruct the establishment of the Palestinian State”.<sup>418</sup> Avnery adds that to deny “the Jewish character” of the state is tantamount to the worst of all political felonies, according to the to the right wing doctrines, in claiming that Israel is a “State of all its citizens”.<sup>419</sup>

Avnery also explains how Netanyahu’s Foreign Minister Lieberman amplifies his position to excess.<sup>420</sup> If Lieberman sees no final agreement, Netanyahu would likely hold out for an interim agreement which may be of indefinite duration. The idea of an interim agreement simply means, as a practical matter, that settlement expansion will occur and East Jerusalem will ultimately be incorporated into Israel.<sup>421</sup> Most recently, Netanyahu had a telephone conversation with Angela Merkel, the German Chancellor, to rebuke her for Germany’s vote in favor of the Security Council resolution condemning the settlements – a resolution blocked by U.S. veto.”<sup>422</sup>

In 2010, Lieberman spoke before the UN General Assembly and indicated that, contrary to Netanyahu’s statements in Washington D.C., there was no chance for a peace treaty, not within a year or several generations. This statement implied a multigenerational interim agreement and an Israeli occupation without end in sight.<sup>423</sup> Because of the importance of Israel’s

<sup>417</sup> See generally Kurt Rene *supra* note 26.

<sup>418</sup> Uri Avnery, *Deny! Deny!*, GUSH SHALOM (Jun. 18, 2011), <http://zope.gush-shalom.org/home/en/channels/avnery/1308345669/>

<sup>419</sup> Uri Avnery, *The Dwarfs*, GUSH SHALOM (Mar. 12, 2011), <http://zope.gush-shalom.org/home/en/channels/avnery/1299886464/> (indicating that the radical move to the extreme right under Netanyahu has accelerated).

<sup>420</sup> Avnery, *supra* note 419 (noting that Israeli Foreign Minister Avigdor Lieberman holds out even less hope for a settlement as it is his belief that Palestinians cannot be a peace partner because they do not want peace); see also Jonathan Kay, *Avigdor Lieberman: Palestinian Statehood Would Set a Dangerous Precedent*, NAT’L POST (Sept. 20, 2011), <http://fullcomment.nationalpost.com/2011/09/20/avigdor-lieberman-palestinian-statehood-would-set-a-dangerous-recedent>; Barak Rabid, *Lieberman: Palestinians Want to Take Over Israel from Within*, HAARETZ.COM (Aug. 27, 2011), <http://www.haaretz.com/news/diplomacy-defense/lieberman-palestinians-want-to-take-over-israel-from-within-1.381011>. See generally Jonathan Lis, *Lieberman: Palestinians Were Dragged into Negotiations, Breakthrough Impossible*, HAARETZ.COM (Jan. 9, 2012), <http://www.haaretz.com/news/diplomacy-defense/lieberman-palestinians-were-dragged-into-negotiations-breakthrough-impossible-1.406302>.

<sup>421</sup> See sources cited *supra* note 361.

<sup>422</sup> Uri Avnery, *Wrong Side*, GUSH-SHALOM (Mar. 5, 2011), <http://zope.gush-shalom.org/home/en/channels/avnery/1293896699>.

<sup>423</sup> Israel Ministry of Foreign Affairs, *Foreign Minister Lieberman Addresses the U.N. General Assembly* (Sept. 28, 2010),

Foreign Minister, Lieberman, in influencing Israeli foreign policy, and particularly over the promise of negotiating a settlement, it is unclear whether Lieberman's solution to radically press for an Israeli state free from Arabs, implies an illegal policy of ethnic cleansing with regard to non-Jews.<sup>424</sup> Recently, he summoned Israel's 107 senior diplomats to provide them with a firsthand account of his thinking.

Lieberman holds to a view that is arguably more concrete and more radically right-wing than Netanyahu; he firmly believes that the Palestinians do not want peace. According to Lieberman, "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."<sup>425</sup> Finally, Lieberman stressed that moving purposefully with peace negotiations would split the right-wing coalition such that the conservative coalition government in the Knesset would not survive.<sup>426</sup>

It seems to us that only sufficiently strong pressure would compel him to shift his position. A significant number of U.S. Congressional Representatives would need to support the Obama Administration, and secure the critical support of the major Jewish religious, social, and political organizations in the U.S., towards a realistic peace process, because a sustainable peaceful resolution is in the national pragmatic interests of both the U.S. and of Israel. So long as pro-Israeli support groups in the U.S. provide support only to narrow ultranationalist Israeli political factions and

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[http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/FM\\_Lieberman\\_Addresses\\_UN\\_General\\_Assembly\\_28-Sep-2010.htm](http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/FM_Lieberman_Addresses_UN_General_Assembly_28-Sep-2010.htm).

<sup>424</sup> Ian Deitch, *Avigdor Lieberman: Cut Ties With Palestinians*, HUFF. POST (Aug. 7, 2011), [http://www.huffingtonpost.com/2011/08/07/avigdor-lieberman-west-bank\\_n\\_920429.html](http://www.huffingtonpost.com/2011/08/07/avigdor-lieberman-west-bank_n_920429.html).

<sup>425</sup> See sources cited *supra* notes 423-427. Mr. Netanyahu's visit to the U.S. was arguably designed to lay a political foundation for a complete rejection of the two-state solution which represents broadly the official U.S. perspective. Consider the following words from Dr. Erekat:

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.

Press Release, Negotiations Affairs Department, Palestine Liberation Organization, Dr. Erekat on Ma'ale Hazetim Settlement (May 26, 2011), *available at* <http://www.nad-plo.org/print.php?id=292>. Dr. Erekat 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." *Id.* See also Kevin Clarke, *Mr. Netanyahu Goes to Washington*, AMERICA MAGAZINE (May 26, 2011) *available at* [http://www.americamagazine.org/blog/entry.cfm?blog\\_id=2&entry\\_id=4255](http://www.americamagazine.org/blog/entry.cfm?blog_id=2&entry_id=4255)

<sup>426</sup> See sources cited *supra* notes 423-427, 368.

policies, the greater the intransigence of these entrenched ultranationalist political interests against a realistic peace settlement. This is not to say that ultranationalist Israeli political advocacy is the exclusive stumbling block to a final resolution; but as it stands today, it certainly is a crucial threshold barrier.

A continuation of conflict may favor the ultranationalist political factions in Israel in the long haul, however; 400 lethal nuclear arsenals remain at the ready, in the custody of the IDF.<sup>427</sup> These arsenals are themselves a destabilizing force, and become even more dangerous when the levels of conflict sporadically spiral out of control.<sup>428</sup> They also create an incentive for the states surrounding Israel to acquire nuclear weapons capabilities. Thus, the conflict has both regional and global implications. Our sense is that a majority of Israeli citizens would opt for a reasonable settlement with a reasonable adjustment of territorial interests.<sup>429</sup> We therefore do not believe that a majority of Israelis are opposed to a Palestinian state living in peace with Israel. While it is currently in a position of power, unfortunately, like most ultranationalist groups, the Israeli ultranationalist contingent is engaged, energized, and occasionally fanatical.<sup>430</sup>

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 unfortunately allied itself with Israeli interests in the Middle East and ultimately ended up embroiled in military interventions and wars both of questionable benefit to U.S. interests and of questionable legal right under international law.<sup>431</sup> U.S. policy leaders at the time invested in extravagant security ideas, many of which were originally generated by the Likud, such as the “Clean Break” doctrine.<sup>432</sup> This doctrine was ultimately mutated after 9/11 into the “Bush Doctrine,”<sup>433</sup> a claim to preemptive military intervention.<sup>434</sup>

<sup>427</sup> See sources cited *supra* notes 438 and 442.

<sup>428</sup> See sources cited *supra* notes 438 and 442.

<sup>429</sup> Dov Waxman, *Israel's Palestinian Minority in the Two-State Solution: The Missing Dimension*, 18 MIDDLE E. POL'Y 68 (2011) available at <http://www.mepc.org/journal/middle-east-policy-archives/israels-palestinian-minority-two-state-solution-missing-dimension>; see also Dr. Moises Salinas-Fleitman & Theodore Bikel, *Buy Israel – Don't Buy Settlements (They're not the Same)*, MERETZ USA (February 15, 2011), <http://meretzusa.org/buy-israel-%E2%80%93-don%E2%80%99t-buy-settlements-they%E2%80%99re-not-same>.

<sup>430</sup> SASSON SOFER, PEACEMAKING IN A DIVIDED SOCIETY: ISRAEL AFTER RABIN, (2001); see also NADAV G. SHELEF, EVOLVING NATIONALISM: HOMELAND, IDENTITY, AND RELIGION IN ISRAEL, 1925-2005 (2010),

<sup>431</sup> Mitchell Plitnick, *Did Israel Lead the U.S. into the War on Iraq?*, JEWISH VOICE FOR PEACE (Dec. 20, 2011), <http://jewishvoiceforpeace.org/content/did-israel-lead-us-war-iraq>.

<sup>432</sup> RICHARD PERLE ET AL., A CLEAN BREAK: A NEW STRATEGY FOR SECURING THE REALM (1996), available at <http://www.israeleconomy.org/strat1.htm> (Prepared in 1996 by a

Nevertheless, the roots of the desire to attack Iraq came from the Likud's Clean Break Doctrine, and the Likud's interest in regime change emerged from a view of Saddam Hussein as a serious security challenge to Israel. With Saddam gone, there has been a relentless campaign for regime change Iran.<sup>435</sup> We would submit that it is actually not in the national security interest of the United States at this time to start a new war in the Middle East. Notwithstanding the unpopular attitude of the Iranian regime, it is not probable that the majority of the American people would support a new neoconservative adventure, given the outcome of the last two military interventions in Iraq and Afghanistan.<sup>436</sup> In this sense, it would be of value for the Obama Administration to repudiate those aspects of the Bush Doctrine that are controversial and that challenge international law.

The U.S. supplies Israel with the best military technology; but in the future, such support may not be in the best interest of the United States. Despite the history of good relations in the past, Israel and the U.S. have been on rocky footing in recent years.<sup>437</sup> The U.S. could not influence the

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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); *see also* ADAM SHAPIRO ET AL., NEOCON MIDDLE EAST POLICY: THE "CLEAN BREAK" PLAN DAMAGE ASSESSMENT (2005).

<sup>433</sup> *See* discussion *supra* note 432. *See generally* MARK GERARD MANTHO, THE BUSH DOCTRINE: ORIGINS, EVOLUTION, ALTERNATIVES (2004), *available at* <http://www.comw.org/pda/fulltext/0404mantho.pdf>.

<sup>434</sup> Mantho, *supra* note 432. *See generally* Hichem Karoui, "Conservative Revolution" *Against America: The Bush Legacy: Debate About a Doctrine and its Tributaries*, 1 SOC. SCI. & HUMAN. 3 (2010), *available at* <http://www.social-sciences-and-humanities.com/journal/?p=3569>; W. Patrick Lang, *Drinking the Kool-Aid*, 11 MIDDLE E. POL'Y 39 (2004), *available at* <http://onlinelibrary.wiley.com/doi/10.1111/j.1061-1924.2004.00152.x/abstract>.

<sup>435</sup> *See generally* ROGER HOWARD, IRAN IN CRISIS?: NUCLEAR AMBITIONS AND THE AMERICAN RESPONSE (2004); Gawdat Bahgat, *Iran and the United States: The Emerging Security Paradigm in the Middle East*, 37 PARAMETERS 5 (2007), *available at* <http://www.carlisle.army.mil/usawc/parameters/Articles/07summer/bahgat.pdf>; Patrick J. Buchanan, *Whose War?*, THE AM. CONSERVATIVE (2003); Sukumar Muralidharan, *Israel: An Equal Partner in Occupation of Iraq*, 39 ECON. & POL. WEEKLY 4517 (2004), *available at* <http://www.jstor.org/discover/10.2307/4415643?uid=3739560&uid=2129&uid=2&uid=70&uid=4&uid=3739256&sid=56001684803>.

<sup>436</sup> *See, e.g.*, JOHN R. KRISMER, OUR PUPPET GOVERNMENT (2008); JUSTIN VAISSE, BROOKINGS INSTITUTE, WHY NEOCONSERVATISM STILL MATTERS (2010), *available at* [http://www.brookings.edu/~media/Files/rc/papers/2010/05\\_neoconservatism\\_vaisse/05\\_neoconservatism\\_vaisse.pdf](http://www.brookings.edu/~media/Files/rc/papers/2010/05_neoconservatism_vaisse/05_neoconservatism_vaisse.pdf). *See generally* discussion *supra* note 435.

<sup>437</sup> Rennert, *supra* note 33; *see also* Casey L. Addis, *Israel: Background and U.S. Relations; Analyst in Middle Eastern Affairs*, CONG. RESEARCH SERVICE (Feb. 14, 2011); Blumenthal, *supra* note 409; Max Blumenthal, *Netanyahu's war against Obama* (Jan. 12,

Israeli government to halt settlements, for example, no matter how many highest-grade fighter planes the U.S. offered the state of Israel.<sup>438</sup> Nor could the U.S. induce Israel to behave with transparency in conformity with international standards regarding the proliferation of nuclear weapons.<sup>439</sup> Indeed, Israel has a significant trade market selling weapons.<sup>440</sup> There is a potential possibility that, should the U.S. break politically with the ultranationalist project, that Israeli weapons technologies could be deployed against U.S. troops in the future.

The state of high-security crisis in Israel, regarding Jerusalem and the West Bank, is funded, in large part, by U.S. assistance.<sup>441</sup> In addition to sources of funding from private U.S. individuals and organizations, there is enormous pressure on the U.S. government to increase economic aid to Israel from 10 billion to at least 20 billion a year.<sup>442</sup> It is estimated that Israel

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2012), <http://warincontext.org/2012/01/12/netanyahu-war-against-obama/>; Helene Cooper & Mark Landler, *U.S. Trying to Balance Israel's Needs in the Face of Egyptian Reform*, N.Y. TIMES (Feb. 4, 2011); *U.S.-Israeli Relations and the Drastically Changing Middle East*, ISRAEL POLITIK (Mar. 10, 2011), <http://www.israelpolitik.org/2011/03/10/u-s-israeli-relations-and-the-drastically-changing-middle-east/>.

<sup>438</sup> See generally Barak Ravid & Natasha Mozgovaya, *U.S. offers Israel warplanes in return for new settlement freeze*, HAARETZ (Nov. 13, 2011), <http://www.haaretz.com/news/diplomacy-defense/u-s-offers-israel-warplanes-in-return-for-new-settlement-freeze-1.324496>; *Israel buys more fighter planes to USA*, COMUNICAS (Oct. 8, 2010), <http://en.comunicas.org/2010/10/08/israel-buys-more-fighter-planes-to-usa/#axzz1rGzxZSqW>; *Time To Tell The Truth About Israel ..Without Fear Of The Mind Police*, DAVID ICKE (Jan. 2, 2009), <http://www.davidicke.com/headlines/18750-time-to-tell-the-truth-about-israel-without-fear-of-the-mind-police-> (2009).

<sup>439</sup> See sources cited *supra* notes 271 & 438. See generally WARNER D. FARR, *THE THIRD TEMPLE'S HOLY OF HOLIES: ISRAEL'S NUCLEAR WEAPONS* (Sept. 1999), available at <http://www.au.af.mil/au/awc/awcgate/cpc-pubs/farr.htm>; Louis Rene Beres, *Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment*, 17 DICK. J. INT'L L. 229 (1998-1999); Ivo Daalder & Jan Lodal, *Logic of Zero - Toward a World without Nuclear Weapons*, 87 FOREIGN AFF. 80 (2008); *Israel's Nuclear Weapons Program*, NUCLEAR WEAPON ARCHIVE (Dec. 10, 1997), <http://nuclearweaponarchive.org/Israel/index.html>; *Israel - Nuclear Weapons*, FEDERATION OF AMERICAN SCIENTISTS (2007), <https://www.fas.org/nuke/guide/israel/nuke/>.

<sup>440</sup> See generally *The Dangers of a US Sponsored Nuclear War*, YOUTUBE (Dec. 2005), <http://www.youtube.com/watch?v=OPhDRI44dTI>.

<sup>441</sup> See generally JEREMY M. SHARP, CONGRESSIONAL RESEARCH SERVICE, *U.S. Foreign Aid to Israel*, Congressional Research Service (Mar. 12, 2012), available at <http://www.fas.org/sgp/crs/mideast/RL33222.pdf>; Mitchell Bard, *U.S. Aid To Israel*, JEWISH VIRTUAL LIBRARY (last updated Jan. 2012), [http://www.jewishvirtuallibrary.org/jsourc/US-Israel/foreign\\_aid.html](http://www.jewishvirtuallibrary.org/jsourc/US-Israel/foreign_aid.html).

<sup>442</sup> *Israel may ask U.S. for \$20 billion more in security aid, Barak says*, HAARETZ (Mar. 8, 2011), <http://www.haaretz.com/news/diplomacy-defense/israel-may-ask-u-s-for-20-billion-more-in-security-aid-barak-says-1.347866>.

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has received some 2 trillion from the American taxpayers since 1967.<sup>443</sup> As vast billions of U.S. dollars are being borrowed to fund the security needs of the state of Israel, this debt is being passed on to future generations in the U.S., along with mounting unrest in a region under occupancy, in large part, through U.S. financial assistance.<sup>444</sup> A dramatic move toward the recognition of Palestinian statehood as a step toward an accelerated peaceful settlement would reduce Israel's security anxieties and the need for near economically dependent assistance from U.S. taxpayers.<sup>445</sup>

U.S. policy and the interest groups involved in the Middle East should be very discriminating about which groups they decide to support in Israel, to ensure that no one political party or group, including the ultranationalist political interests, do not hold the U.S. interest in peace and security hostage. In terms of contemporary international relations, Israeli ultra-nationalism has proven to be an ongoing danger to regional peace and security. It is quite possible that greater Israeli interests and U.S. interests share much in common, but the interests of the current Israeli leaders are distinctively different. The critical challenge for pro-Israel individuals, communities, and lobby groups in the U.S. is to undertake to determine which of their activities actually support U.S. interests – particularly national security interests, and longstanding peace in the region – and which activities, in fact, undermine them.

*B. Israeli Interests in the Recognition of Palestinian Statehood and the “Arab Spring”*

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 precisely the danger of undermining the political development of appropriate democratic, transparent institutions of good governance in the Palestinian Territories. It is therefore in Israel's interest that to recognize a Palestinian state because it will diminish the prospect of any precarious governing authority fomenting instability if controlled by third party forces. This type of government will provide the Israelis with the highest level of security, something most Israelis, including Prime Minister Netanyahu, agree is as an

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<sup>443</sup> Bollyn, *supra* note 269; see also Thomas R. Stauffer, *The Costs to American Taxpayers of the Israeli-Palestinian Conflict: \$3 Trillion* (June 2003), <http://www.ifamericansknew.org/stats/stauffer.html>.

<sup>444</sup> Mitchell Bard, *U.S. Aid To Israel*, JEWISH VIRTUAL LIBRARY (updated Jan. 2012)

<sup>445</sup> Bollyn, *supra* note 269.

important part of settlement.<sup>446</sup> In short, constitutional good governance for the Palestinians with the prospect of enterprising freedoms could produce a stable and important political entity, which would significantly stabilize the prospects for peace and security in the region.<sup>447</sup> The alternative is simply to deny any right to self-determination, which will most certainly carry destructive consequences in the long term.<sup>448</sup>

There are two fundamental Israeli interests in the success of a negotiated settlement with Palestinian leadership. The first is Israeli security interests, an interest that is still dependent on U.S. support and could be in jeopardy if U.S. efforts at mediation are sabotaged by the extreme right wing political forces in power within Israel. Failure in this regard would compromise both U.S. and Israeli security interests. The second major interest of Israel is the Israeli Defense Forces (IDF) and promotion of the legitimacy of the state of Israel. This is an issue that is extremely sensitive to the current Israeli leadership and their supporters in the Diaspora community. The issue of legitimacy emerged in part by the effort on the part of Israeli 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 in South Africa.<sup>449</sup>

Opponents expressed that Israeli policy and practices with regard to the Palestinians had vulnerabilities ominously close to the policies and practices of South African apartheid.<sup>450</sup> For example, Israel vigorously opposed efforts to create a boycott of Israeli trade and cultural changes.<sup>451</sup> However, the problems of legitimacy seem now to be tied to the beliefs, the ideology, and the policies of the extreme right wing political factions in Israel. These policies, which carry significant racial overtones, are committed to the idea

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<sup>446</sup> Full Israeli Prime Minister Netanyahu Address to UN General Assembly, YOUTUBE (Sept. 23, 2011), <http://www.youtube.com/watch?v=ebOsg9CCj6c>; see also Natasha Mozgovaya, *supra* note 212.

<sup>447</sup> John Graham et al., *Principles for Good Governance in the 21<sup>st</sup> Century* (2003), available at [http://iog.ca/sites/iog/files/policybrief15\\_0.pdf](http://iog.ca/sites/iog/files/policybrief15_0.pdf).

<sup>448</sup> Cf. *The Hague Agenda for Peace and Justice for the 21<sup>st</sup> Century*, *supra* note 236.

<sup>449</sup> Abigail B. Bakan & Yasmeeen Abu-Laban, *Israel/Palestine, South Africa and the "One-State Solution": The Case for an Apartheid Analysis*, 37 POLITIKON 331 (2010); see also MARWAN BISHARAH, *PALESTINE/ISRAEL: PEACE OR APARTHEID: OCCUPATION, TERRORISM AND THE FUTURE* (2002); JIMMY CARTER, *PALESTINE: PEACE NOT APARTHEID* (2006); D. Glaser, *Zionism and Apartheid: a Moral Comparison*, 26 ETHNIC & RACIAL STUD. 403, 403-21 (2003); Mark Marshall, *Rethinking the Palestine Question: The Apartheid Paradigm*, 25 J. PALESTINE STUD. 15, 15-22 (1995).

<sup>450</sup> See Bakan & Abu-Laban, *supra* note 450.

<sup>451</sup> *Id.* at 346; see also Abbie Bakan, *Israeli Apartheid: A Socialist View*, BULLET (Mar. 7 2011), <http://www.socialistproject.ca/bullet/477.php>; *Israeli anti-boycott bill approved for vote by Knesset plenary*, J NEWS (Feb. 16, 2011), <http://www.jnews.org.uk/news/israeli-anti-boycott-bill-approved-for-vote-by-knesset-plenary>.

of an Eretz Israel, an idea which, as discussed *supra* Part I.A, seems to be wedded to a repudiation of the boundaries supported by international law<sup>452</sup> and to a repudiation of the idea that sovereigns cannot acquire territory as a consequence of conquest, because these only exacerbate the problems of legitimacy.<sup>453</sup>

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 Palestinian Territories gives it a right to self-defense to respond to such attacks.<sup>454</sup> However, this claim has not met with an approval that carries global consensus. The technical argument against Israel's claim to assert the right of self-defense is necessarily based on the principle that the Occupied Palestinian Territories under PA control are not recognized as a nation state.<sup>455</sup> It is maintained, however that Israel cannot assert its right of self-defense against an entity that is not a sovereign state in international law. The U.S. Congress has enacted legislation, however, to suggest that Israel does have a right of self-defense under these circumstances.<sup>456</sup>

The U.S. Congress may of course declare international law; but the currency of its declaration (which is essentially unilateral) would seem to require more multilateral acceptance for it to be seen as a reflection of positive international law. If the Palestinians were granted status as citizens of a sovereign nation, there would be no ambiguity regarding the assertion of

<sup>452</sup> G.A. Res. 181(II), *supra* note 4.

<sup>453</sup> See generally discussion *supra* notes 265, 328 and 454. In 1919, the Versailles Convention outlawed the notion of "By right of conquest" and that notion was affirmed by the League of Nations in 1935 and later reaffirmed by the UN after WWII. In this regard, the Israeli presence in the West Bank and Gaza is illegal under international laws going back to 1919. See generally KORMAN, *supra* note 328.

<sup>454</sup> Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. OF INT'L L. 62, 62-76 (2005).

<sup>455</sup> INT'L COURT OF JUSTICE, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Summary of the Advisory Opinion*, at 12 (July 9, 2004), available at <http://www.icj-cij.org/docket/files/131/1677.pdf>. ("Under the terms of Article 51 of the Charter of the UN:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security.

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. ... Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.").

<sup>456</sup> *Congress Affirms Israel's Right to Self-Defense*, NEAR E. REP. (July 12, 2010), <http://www.aipac.org/NearEastReport/20100712/SelfDefenseLetters.html>.

the right of self-defense.<sup>457</sup> At the same time, the right to self-defense in international law telegraphs clearly the corresponding obligations, of proportionality and others, on the Palestinian state, as well as the consequences to follow if those obligations were unmet.<sup>458</sup> To the extent that the right of self-defense is clarified by Palestinian sovereignty, the mutual security interests of each body politic are significantly enhanced.<sup>459</sup>

One of the arising concerns in Israel is the emergence of racism in official Israeli policies, which is fueled by the extremist right wing political factions.<sup>460</sup> The first point here is that this embarrasses Israeli intellectuals and human rights campaigners because the Jews in the Diaspora had been millennial victims of vicious racism, which has expressed itself as an ideological structure of “anti-Semitism.”<sup>461</sup>

The practices against Jews fueled by the banner of anti-Semitism culminated in the worst racist disaster the international community has ever experienced. That disaster, in which Jews were the primary victims, was the Holocaust of the Nazis. It is therefore a great embarrassment, to many Jews, that some extremist groups in Israel feel free to exhibit and perpetuate the worst forms of pathological racism.<sup>462</sup> The non-settlement of matters with the Palestinians fuels this level of insecurity. It therefore seems 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 right wing fanaticism. The two state solution seems to be one of the most achievable objectives in a

<sup>457</sup> See *supra* discussion notes 106, 455, 452, 459-460.

<sup>458</sup> See William J. Fenrick, *The Rule of Proportionality and Protocol in Conventional Warfare*, 98 MIL. L. REV. 91 (1982); Michael Franck, *The Future of Judicial Internationalism: Charming Betsy, Medellín v. Dretke, and the Consular Right Dispute*, 86 B.U. L. REV. 515 (2006); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. OF INT'L L. 715 (2008); Mikael, Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 771 (2003). See generally *Murray v. The Charming Betsy*, 6 U.S. 64 (1804) (The *Charming Betsy* doctrine is a canon of statutory interpretation, stating that, absent clear congressional intent to the contrary, or where fairly possible, courts should construe statutes in order to avoid violations of international law).

<sup>459</sup> Yaroslav Shiryayev, *Circumstances Surrounding the Separation Barrier and the Wall Case and their Relevance for the Israeli Right to Self-Defense*, 14 GONZ. J. INT'L L. 1 (2011)

<sup>460</sup> See generally Edy Kaufman, *The Intifadah and the Peace Camp in Israel: A Critical Introspective*, 17(4) J. PALESTINE STUD. 66, 66-80 (1988)

<sup>461</sup> See Michel Wieviorka, *Racism and Diasporas*, 52 THESIS ELEVEN 69, 69-81 (1998); see also JOHN G. GAGER, *THE ORIGINS OF ANTI-SEMITISM: ATTITUDES TOWARD JUDAISM IN PAGAN AND CHRISTIAN ANTIQUITY*, (1985); Daniel Boyarin & Jonathan Boyarin, *Diaspora: Generation and the Ground of Jewish Identity*, 19 CRITICAL INQUIRY 693, 693-725 (1993).

<sup>462</sup> See generally NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* (2003).

settlement and therefore is a matter of important national interest for the state of Israel.<sup>463</sup>

This past summer, Israel was wracked with internal social justice protests. Commentators suggested that Israeli protests were, at least in part, inspired from the lessons generated in the “Arab Awakening.”<sup>464</sup> These protests have caused apprehension on the part of the government coalition in Israel. Israel’s alliance with the Mubarak regime in Egypt significantly buttressed its strategic influence in the Middle East,<sup>465</sup> and the collapse of Mubarak removed a core pillar that supported its strategic posture.<sup>466</sup> The rise of a populist democratic movement in Egypt, which sees the Mubarak legacy as decrepit and corrupt, and its fledgling government are therefore cautious about Israeli overtures. Additionally, Israel’s northern border with Lebanon is still recovering from the recent Israeli attack on Lebanon.<sup>467</sup> And Israel’s long time ally in the region, Turkey, has now largely rejected Israeli ties after the Israeli attack on a Turkish humanitarian mission.<sup>468</sup>

In an odd twist of fate, Netanyahu, the primary author of the Clean Break Doctrine, which argues for regime replacement and the imposition of democracy as a pathway to peace, has now seen his objective close to realization, but without using the methods of regime replacement that he may have originally had in mind.<sup>469</sup> The emergence of a popular democratic

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<sup>463</sup> See generally Richard Falk, *International Law and the Peace Process*, 28 HASTINGS INT’L & COMP. L. REV. 331 (2004-2005)

<sup>464</sup> See generally KENNETH M. POLLACK ET AL., *THE ARAB AWAKENING: AMERICA AND THE TRANSFORMATION OF THE MIDDLE EAST* (2011); Antony Lerman, ‘*The people want social justice? On ‘people’ and ‘justice’ in the Israeli protests*, INDEPENDENT JEWISH VOICES (Aug. 30, 2011), <http://ijv.org.uk/2011/08/30/the-people-want-social-justice-on-people-and-justice-in-the-israeli-protests/>.

<sup>465</sup> See Barak Ravid, *Israel urges world to curb criticism of Egypt’s Mubarak* (Jan. 31, 2011), [http://www.cpgb.org.uk/article.php?article\\_id=1004520](http://www.cpgb.org.uk/article.php?article_id=1004520); see also Ben Lynfield, *Israel worried as Mubarak teeters*, GLOBAL POST (Jan. 29, 2011), <http://www.globalpost.com/dispatch/israel/110129/egypt-mubarak-netanyahu>.

<sup>466</sup> ROBERT SPRINGBORG, *MUBARAK’S EGYPT: FRAGMENTATION OF THE POLITICAL ORDER* (1989); see also MAHA AZZAM, *EGYPT: THE ISLAMISTS AND THE STATE UNDER MUBARAK, ISLAMIC FUNDAMENTALISM* (1996).

<sup>467</sup> See, e.g., Efraim Inbar, *How Israel Bungled the Second Lebanon War*, 14 MIDDLE E. Q. 57, 57-65 (2007), available at <http://www.meforum.org/1686/how-israel-bungled-the-second-lebanon-war>.

<sup>468</sup> See discussion *supra* note 317; see, e.g., *The Palmer Report into the Gaza Flotilla*, AUSTRALIA/ISRAEL & JEWISH AFFAIRS COUNCIL (Sept. 7, 2011), <http://aijac.org.au/news/article/the-palmer-report-into-the-gaza-flotilla>.

<sup>469</sup> P. David Hornik, *Netanyahu’s One-Year Report Card - Government rebuilding Israel’s strength on many fronts*, FRONTPAGE MAGAZINE (Feb. 28, 2011), available at [http://bibireport.blogspot.com/2010\\_02\\_01\\_archive.html](http://bibireport.blogspot.com/2010_02_01_archive.html); see also Anthony Lewis, *Israel can no longer act alone*, STAR NEWS (Oct. 22, 1996) available at <http://news.google.com/newspapers?nid=1454&dat=19961002&id=C6osAAAAIBAJ&sjid=>

movement within Israel will make it difficult for Israel to resist the Palestinian push for self-determination. There is a perspective emerging that the current elite will simply not have the vision, the tools, or the will to help Israel confront with the changing environment in the Middle East.<sup>470</sup> In sum, the greater the success of the democratic “Arab Spring,” the more diminished Israel’s strategic options for avoiding a settlement with the Palestinians. The essential reality is a radically new regional political environment, which values basic human rights and dignity. Israel therefore must adjust its position or risk becoming characterized as a regime that is a throwback leftover from the debris of the dictators of Egypt, Tunisia, and Libya.<sup>471</sup>

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QxUEAAAAAIBAJ&pg=4634,321957; Carlo Strenger, *Israel’s right have eyes but do not see, have ears but do not hear*, HAARETZ.COM (Jan. 10, 2011), available at <http://www.haaretz.com/blogs/strenger-than-fiction/israel-s-right-have-eyes-but-do-not-see-have-ears-but-do-not-hear-1.336224>.

<sup>470</sup> See Kathleen Christison, “*The Insane Brutality of the State of Israel*” *Atrocities in the Promised Land*, RADIO ISLAM (2006), available at <http://www.godlikeproductions.com/forum1/message263751/pg1> (“A nation that mandates the primacy of one ethnicity or religion over all others will eventually become psychologically dysfunctional. Narcissistically obsessed with its own image, it must strive to maintain its racial superiority at all costs and will inevitably come to view any resistance to this imagined superiority as an existential threat. Indeed, any other people automatically becomes an existential threat simply by virtue of its own existence. As it seeks to protect itself against phantom threats, the racist state becomes increasingly paranoid, its society closed and insular, intellectually limited”); *What Are You Willing to Die For?* (Feb. 18, 2010), <http://shrinkwrapped.blogs.com/blog/2010/02/what-are-you-willing-to-die-for.html>.

<sup>471</sup> Daniel Levy, *Israel and the Arab Uprisings: Challenges in a Changing Middle East*; NEW AMERICA FOUNDATION (Jan. 20, 2012), [http://newamerica.net/publications/resources/2012/israel\\_and\\_the\\_arab\\_uprisings\\_challenges\\_in\\_a\\_changing\\_middle\\_east](http://newamerica.net/publications/resources/2012/israel_and_the_arab_uprisings_challenges_in_a_changing_middle_east); see also Daniel Levy, *Israeli Democracy in Peril: Why Daniel Levy thinks Israel’s policy toward the Palestinians is poisoning the Jewish state from within* (Jan. 6, 2012), [http://www.slate.com/articles/news\\_and\\_politics/intelligence\\_squared/2012/01/why\\_daniel\\_levy\\_will\\_argue\\_for\\_palestine\\_s\\_admission\\_as\\_a\\_un\\_member\\_state\\_at\\_the\\_slate\\_intelligence\\_squared\\_debate\\_on\\_jan\\_10\\_html](http://www.slate.com/articles/news_and_politics/intelligence_squared/2012/01/why_daniel_levy_will_argue_for_palestine_s_admission_as_a_un_member_state_at_the_slate_intelligence_squared_debate_on_jan_10_html); Daniel Levy, *Same Netanyahu, Different Israel; The Demographic Challenges to Peace* (Mar. 24, 2011), <http://www.foreignaffairs.com/articles/67863/daniel-levy/same-netanyahu-different-israel>. In these pieces, scholar Daniel Levy lists some central challenges for Israeli policy in light of the new Middle East environment. First, he addresses the context of cooperation with leaders from popular democracy is not going to be founded on cooperation as in the past with strong authoritarian personalities like Mubarak. Working in cooperation with the changing political culture of the Palestinians will also be more complex. What would be required is a change, not only in policy, but in the psychological orientation of Israeli’s leadership which is often seen itself as superior and condescending in its communications with Palestinians. Second, the new arena of action makes it extremely difficult for Israel’s reliable allies to support it uncritically in the new environment. Since the dominant opinion of the West is to support democracy for the Arabs it is impossible not to support it for the Palestinians too. The future will not be a settlement of terrorists, but with nonviolent democratic social activists. Third, the security with

It would be of special importance that the supporters of Israel in the Jewish Diaspora be heard as a constructive force in shaping a new, more democratic, multilateral strategic outlook, one that is consistent with the values the Israelis themselves expressed in their Declaration of Independence.<sup>472</sup> Additionally, it would be of great value if the U.S. could step back and encourage a freer and less ideological discourse in Israel to emerge as a constructive response to the new challenges of a new environment. It is our belief that, in the long run, Israel will be better off embracing the values of democratic entitlement expressed in the Arab Spring rather than engaging in cynical backdoor alliances for the purpose of undermining the democratic moment.

### *C. Palestine's Role and Interests in Democratic Statehood*

One of the foremost advantages of a recognized Palestinian state is 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 violation of UN Charter Article 2(4).<sup>473</sup> Thus, Resolution 242,<sup>474</sup> which calls

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regard to contiguous borders will not be as stable and reliable as they were under Mubarak. The choice for the Israeli authorities is massively more military spending and a massive depreciation of spending on social justice issues, or, alternatively, a change of outlook in a progressive direction that will involve less defense expenditures, more social expenditures and more flexibility on the fundamental rights of Palestinians. These are serious policy questions that all Israelis must now consider. Fourth, the Israeli authorities must also consider how they would respond to increased nonviolence social activism and whether the use of unlimited force is simply a strategy that is no longer of value in a changed environment. The Middle East always generates a wild card which can undermine the most fundamental of secular values. Democratic values will of course require a tolerance of religious Islamic movements into the fabric of the Arab Spring. However, such tolerance might well be required at a time when the intolerance of Israel's extremist religious fundamentalists are most vocal on Israel's political stage. The use of religious rhetoric can be a deal-breaker and a harbinger of tragedy. Clearly one of the most important tasks of the public opinion and media in Israel is to better prepare the community for a significant and important change in the way it structures its new strategic outlook.

<sup>472</sup> Israeli Declaration of Independence, *supra* note 19.

<sup>473</sup> See U.N. Charter, art. 2, para. 4 ("Chapter I: Purposes and Principles, Article 2: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles... (4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations").

<sup>474</sup> See S.C. Res. 242, *supra* note 126. 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,

for the end of occupation, in light of legally recognized statehood, would bring into focus the illegality of occupation under the assumption that the IDF's occupancy is now that of an aggressor. A fully recognized state would therefore make it difficult for Israel to negotiate or discuss matters, which is a matter of state responsibility, as violations of international law.

The creation of a democratically elected, regularly constituted parliament, administrative agencies, and courts, as well as the organization of the professions with state regulation and backing and the organization of education and social services would bring untold advantages in official recognition of Palestinian statehood. Hopefully, these would progress with the security of established and definable democratic institutions.<sup>475</sup> Most importantly for the Palestinians, the structures of good governance require transparency, responsibility, and accountability, and respect for the rule of law.<sup>476</sup>

To the extent that authority is relatively informal at present, third party forces exercise easy influence over the government, likely contributing to coercion and violence. Thus, transparent, democratic and good governance principles, practically applied in the context of an independent Palestinian state, could usher in greater peace and security in the region. It is usually in the period before formal institutionalization, where governance is unformulated and loosely organized, that there is an opportunity for penetration by terrorist operatives. A state's constitutional ideology could stress the respect for human rights and fundamental freedoms. All Palestinians would benefit from this.<sup>477</sup>

The recognition of a sovereign Palestinian state would improve the negotiating stature of Palestinian negotiators<sup>478</sup> regarding the complex map

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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.

<sup>475</sup> See generally MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 161 (1980); McDougal et al., *The World Constitutive Process of Authoritative Decision*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73-154 (1969).

<sup>476</sup> See Lichta et al., *supra* note 200; see also Graham et al., *supra* note 448.

<sup>477</sup> 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." *Negotiations Office Press Release*, PALESTINE LIBERATION ORGANIZATION (June 4, 2011), <http://www.nad-plo.org/print.php?id=293>.

<sup>478</sup> *The Status of Negotiations: Looking Forward and Looking Back*, CHURCHES FOR MIDDLE EAST PEACE (Oct. 28, 2011), <http://www.cmep.org/content/status-negotiations->

of Israel and Palestine, including, settlements, the “wall” in Jerusalem<sup>479</sup> and other issues of geographic complexity.<sup>480</sup> They would also have to work to complete a peaceful settlement with the state of Israel, which raises issues involving Jerusalem, settlements, borders, and related issues, water, refugees, political prisoners, missing persons and the remains of fallen persons, economic and trade relations, monetary affairs, and claims resolution.<sup>481</sup>

Water resources are a major sought-after asset in the Middle East. The Israeli occupation of the West Bank reinforces a strange incentive for Israel to continue to attempt to control water resources in the West Bank. The importance of water to the viability of a Palestinian state is critical, and an important aspect of Palestinian political competence would be the ability to control and regulate a vital resource, critical to the survival and well-being of a new state. If Palestine gains competent control over the distribution of these resources, there would have to be a separate agreement or understating for the channeling of water resources to the settlements. Below are a map and a table that illustrate the distribution of water, which underline its importance to both the Israeli occupying forces and illegal Israeli settlement outposts as well as the occupied Palestinian people who live in the West Bank.

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looking-forward-and-looking-back. The main Palestinian negotiators include Palestinian President Mahmoud Abbas, Prime Minister Salam Fayyad and Chief Negotiator Dr. Saeb Erekat.

<sup>479</sup> See *supra* discussion notes 28-31, 53, 173, 176, 177-179, 181, 213, 281, 321, 325, 349, 356, 372, 374, 429, 438 and 477.

<sup>480</sup> Press Release, PLO Negotiations Affairs Department, Israeli Human Rights Violations Within The Occupied Palestinian Territory (June 2011), [http://www.nad-plo.org/userfiles/file/fact%20sheet/Israeli%20violations%20within%20the%20occupied%20Palestinian%20territory%20\(oPt\)%20January%20%20May%202011.pdf](http://www.nad-plo.org/userfiles/file/fact%20sheet/Israeli%20violations%20within%20the%20occupied%20Palestinian%20territory%20(oPt)%20January%20%20May%202011.pdf); Press Release, PLO Negotiations Affairs Department, *Israeli Policies in Occupied East Jerusalem: Colonizing the Land and the People* (June 2011), <http://www.nad-plo.org/userfiles/file/media%20brief/Jerusalem%20Media%20Brief%20May%202011.pdf>.

<sup>481</sup> G.A. Res. 62/75, U.N. Doc. A/RES/62/75-E/RES/2007/13 (May 3, 2007); see also TANYA REINHART, *THE ROAD MAP TO NOWHERE: ISRAEL/PALESTINE SINCE 2003* (2006); Eyal Benvenisti & Haim Gvirtzman, *Harnessing International Law to Determine Israeli-Palestinian Water Rights: The Mountain Aquifer*, 33 NAT. RESOURCES J. 543 (1993) .

**Map of the water resources of Israel/Palestine, and water utilization along the Jordan River. From the Palestinian Academic Society for the study of International Affairs (PASSIA) 2002<sup>482</sup>**



<sup>482</sup> Map of the water resources of Israel/Palestine, and water utilization along the Jordan River. From the Palestinian Academic Society for the study of International Affairs (PASSIA) 2002 ([www.passia.org](http://www.passia.org))

**Abstraction from the three shared aquifers within West Bank and Israel 1999 (MCM)<sup>483</sup>**

Aquifer	"Estimated potential"	Abstractions			Excess over Article 40 allocation		
		Total Palestinian	Total Israeli	Total Abstracted	Palestinian <sup>26</sup>	Israeli	Total over-extraction
Western	362.0	29.4	591.6	621.0	7.4	251.6	259.0
North Eastern	145.0	36.9	147.1	184.0	(5.1)	44.1	39.0
Eastern	172.0	71.9	132.9	204.8	(2.6)	92.9	90.3
Total	679.0	138.2	871.6	1,009.8	(0.3)	388.6	388.3

The above diagram and table must be understood in the current geopolitical context: that water resources are a major political issue in the Middle East.<sup>484</sup> Indeed, Israel receives most of its water from two aquifers which are underground and which extend into Palestinian territory.<sup>485</sup> This generates conflict which remains unresolved. The West Bank aquifer is considered a major water resource.<sup>486</sup> While Israelis use approximately 800 liters of water per day, Palestinians are allowed to use only an approximate of 200 liters per day.<sup>487</sup> Besides that, Israel prohibits Palestinians from drilling into the West Bank aquifer without permits and likewise prohibits Palestinians from constructing catchment basins to collect rainwater.<sup>488</sup>

In Part III.A of this article we addressed a significant number of deprivations experienced by Palestinians. These include deprivations relating to land ownership and rights, deprivations from defense emergency regulations, military abuses from occupation policy, limits on movement, on doing business and trade and the prohibition of access to goods and other

<sup>483</sup> WORLD BANK REP., ASSESSMENT OF RESTRICTIONS ON PALESTINIAN WATER SECTOR DEVELOPMENT 11 (2009), available at <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/WaterRestrictionsReportJuly2009.pdf>.

<sup>484</sup> See generally Gamal Abouali, *Natural Resources Under Occupation: The Status of Palestine Water Under International Law*, 10 PACE INT'L L. REV. 411 (1998).

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*; see also Miriam R. Lowi, *Bridging the Divide: Transboundary Resource Disputes and the Case of West Bank Water*, 18 INT'L SEC. 113, 138 (1993).

<sup>487</sup> See Abouali, *supra* note 484; see also WORLD BANK REP. *supra* note 483; see also WORLD BANK REP., WEST BANK AND GAZA - GAZA WATER SUPPLY REHAB AND EXPANSION PROJECT (2007); U.S. NAT'L ACADEMY OF SCIENCES ET AL., WATER FOR THE FUTURE: THE WEST BANK AND GAZA STRIP, ISRAEL, AND JORDAN (1999); Dan Izenberg & Ehud Zion Waldoks, *Mekorot: Water Supply to West Bank is High*, JERUSALEM POST (June 30, 2008), <http://www.jpost.com/MiddleEast/Article.aspx?id=106052>.

<sup>488</sup> See *World Report 2012: Israel/Occupied Palestinian Territories Events of 2011*, HUM. RTS. WATCH (Jan. 2012), <http://www.hrw.org/world-report-2012/world-report-2012-israeloccupied-palestinian-territories>.

deprivations relating to settlement activities in Palestinian lands.<sup>489</sup> Palestinian state sovereignty will certainly increase Palestinian negotiating power to effectively redress these disabilities and deprivations in negotiations with the Israeli state. The promise of equitable distribution of land and water resources also represents an important incentive for Palestinians to secure recognition for statehood.

*D. The Impact of Popular Democratic Movements in the Middle East and North Africa on The Development of Palestinian Statehood*

Finally, the assertion of Palestinian interests in self-determination, independence, and statehood comes at a time when there is a remarkably progressive, democratically-inspired movement in the Arab world loosely called the “Arab Spring”.<sup>490</sup> The ideals of human rights, democratic independence, and essential human dignity have inspired every day people living in traditional Arab nationalist states to shed the vestiges of authoritarian dictatorship. In a nutshell, the Palestinian territories under occupancy fall within elements of “emergency rule” that are analogous to the permanent states of emergency that sustained autocratic leaders in several countries throughout the Middle East and North Africa.<sup>491</sup> In many ways, the claim to self-determination and independence of the Palestinians is functionally equivalent to the claims that had emerged in the Middle East for the replacement of autocracy with democracy. The current political climate favors the progressive development of democratic, self-determined independence for the Palestinians under the rule of law.

It would be useful to examine the elements that fueled the Egyptian “Arab Spring” or Political Revolution. Egyptian society is complex and segmented. The very conservative Muslim community known as the Salafis, which is influenced by the Muslim Brotherhood and shares some sympathies with Al Qaeda – is the largest group claiming to represent conservative Islamic values in the country.<sup>492</sup> Egyptian society is also composed of Muslims who are politically and religiously moderate, as well as Muslims

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<sup>489</sup> See *supra* Part III.A.

<sup>490</sup> See generally Vincent Cannistraro, *Arab Spring: A Partial Awakening*, 22 MEDITERRANEAN Q. 36, 36-45 (2011).

<sup>491</sup> *Id.*; Noura Erakat, *Emergency laws and the Arab Spring* (July 5, 2011), <http://www.jadaliyya.com/pages/index/2051/emergency-laws-the-arab-spring-and-the-struggle-ag>; see also Bruce Maddy-Weitzman, *Tunisia: Exemplar or Exception?*, FOREIGN POL’Y RES. INST. (Jan. 2011), <http://www.fpri.org/enotes/201101.maddy-weitzman.tunisia.html>.

<sup>492</sup> See generally QUINTAN WIKTOROWICZ, *THE MANAGEMENT OF ISLAMIC ACTIVISM: SALAFIS, THE MUSLIM BROTHERHOOD, AND STATE POWER IN JORDAN* (2001).

who maintain a secular outlook.<sup>493</sup> There is also a significant Christian minority of Coptic Christians.<sup>494</sup> The intellectual and scientific elite also comprise a distinct segment of Egyptian society.<sup>495</sup> Further, there are those who work as functionaries in the Egyptian bureaucracy, in the legal profession, or with military and security.<sup>496</sup> A very strong and efficient dictator, Hosni Mubarak, controlled the Egyptian state for over thirty years.<sup>497</sup> Under Mubarak, the rigor with which the regime maintained its level of control and dominance kept in check the identifiable segments of Egyptian society.<sup>498</sup> The regime was skilled at insulating itself from the larger Egyptian social process while at the same time maintaining effective security and control.<sup>499</sup> Its insulation meant that it was out of touch with a vast number of its polity. The government provided only nominal services to the lower classes, and in many instances, none at all.<sup>500</sup>

For those Egyptians able to acquire higher education and professional skills under Mubarak, increased access and economic opportunity was limited, resulting in intellectual and professional frustration and waste.<sup>501</sup> The deal the government struck with Israel and U.S. provided the regime with sufficient financial lubrication to ensure that those within the circle of privilege and power were cared for.<sup>502</sup> The regime remained very insensitive to the frustrations of its skilled and intellectual class and to the suffering of

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<sup>493</sup> See generally SANA HASSAN, *CHRISTIANS VERSUS MUSLIMS IN MODERN EGYPT: THE CENTURY-LONG STRUGGLE FOR COPTIC EQUALITY* (2003).

<sup>494</sup> *Id.*

<sup>495</sup> See generally NAZIH N.M. AYUBI, *BUREAUCRACY & POLITICS IN CONTEMPORARY EGYPT* (1980).

<sup>496</sup> *Id.*

<sup>497</sup> See generally ROBERT SPRINGBORG, *MUBARAK'S EGYPT: FRAGMENTATION OF THE POLITICAL ORDER*, (1989); MAHA AZZAM, *EGYPT: THE ISLAMISTS AND THE STATE UNDER MUBARAK* (1996).

<sup>498</sup> Jason Brownlee, *The Decline of Pluralism in Mubarak's Egypt*, 13 J. OF DEMOCRACY 1, 6-14 (2002), available at <https://webpace.utexas.edu/jmb334/www/documents/article.JOD.2002.pdf>.

<sup>499</sup> *Id.*

<sup>500</sup> See generally Stephen Maher, *The Political Economy of the Egyptian Uprising* (Nov. 1, 2011), <http://monthlyreview.org/2011/11/01/the-political-economy-of-the-egyptian-uprising>; Solava Ibrahim, *A Tale of Two Egypts: contrasting state-reported macro-trends with micro-voices of the poor*, 32 THIRD WORLD QUARTERLY 1347 (2011); *Thesis: Neoliberal policies, urban segregation and the Egyptian revolution*, ANTROPOLOGI.INFO (July 29, 2011, 1:16 AM), <http://www.antropologi.info/blog/anthropology/2011/gated-communities>; *Tales of Arab Democracy from Egypt*, ZEN DIPLOMAT (Feb. 28, 2011), [http://zendiplomat.blogspot.com/2011\\_02\\_01\\_archive.html](http://zendiplomat.blogspot.com/2011_02_01_archive.html).

<sup>501</sup> See generally *discussion id.*

<sup>502</sup> Duncan L. Clarke, *U.S. Security Assistance to Egypt and Israel: Politically Untouchable?*, 51 MIDDLE E. J. 200 (1997).

the underclass.<sup>503</sup> It could maintain this posture because it had an extremely efficient security apparatus,<sup>504</sup> which had adequate resources to police dissidents inside Egypt.<sup>505</sup>

The events in Tunisia, which rapidly led to the exodus of its dictator, Zine El Abidine Ben Ali, as a result of a popular democratic uprising among every day people, resonated with Egyptians and helped spark the Egyptian “Arab Spring”, or Democratic Revolution.<sup>506</sup> This ultimately led to Mubarak’s resignation and began an investigation into his conduct, for which he is now on trial.<sup>507</sup> Given the segmentation and divisions inside Egypt, it is not clear how these interests will be reconciled or moderated to provide the foundations of a new constitutional democracy. There appears to be a critical mass of Egyptians who want a real democratic revolutionary transformation. However, it is not clear how developed the procedures are that touch on transitional justice.

What is clear is that the outcome – whether it be religiously moderate and secular leaning in the direction of the Egyptian professional, intellectual, and skills community or whether it leans in the direction of the Salafis – is still an open question. It is additionally clear that the emergent governing elite from both sides will not seek to replicate the rigid understandings of Mubarak with Israel and the U.S. regarding the democratic, universal aspirations of Palestinians with respect to human rights. It is indeed very likely that Egypt play a major role in promoting the cause of Palestinian Statehood, or at least, that it will not work to impede its progress.

One of the most important issues concerning Palestinian interests is an appraisal of the extent to which Palestinian perspectives and operations have stimulated the events in the Middle East that are collectively called the Arab Spring. An Egyptian activist, Hossam-el Hamalawy, maintains that the seeds of the Arab Spring in Egypt emerged in September 2000 in an expression of solidarity with the second Palestinian Intifada.<sup>508</sup> The Intifada mobilized

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<sup>503</sup> See generally Fouad Ajami, *The Sorrows of Egypt*, 74 FOREIGN AFF. 72 (1995); Mamoun Fandy, *The Tensions Behind the Violence in Egypt*, 2 MIDDLE E. POL’Y 1, 25-34 (1993).

<sup>504</sup> See Jack Shenker, *Inside Mubarak’s security apparatus: Eyewitness account of arrests and beatings* (Jan. 27, 2011), <http://www.jackshenker.net/egypt/inside-mubaraks-security-apparatus-eyewitness-account-of-arr.html>.

<sup>505</sup> See Virginia N. Sherry, *Commentary: Security forces practices in Egypt*, 12 CRIM. JUSTICE ETHICS 2 (1993).

<sup>506</sup> See generally Kirsten Saloomey, *First Tunisia, Then Egypt, Next Palestine?* (June 2, 2011), <http://blogs.aljazeera.net/middle-east/2011/06/02/first-tunisia-then-egypt-next-palestine>.

<sup>507</sup> Maggie Michael, *Egypt: Hosni Mubarak Trial Resumes*, HUFF. POST (Sept. 5, 2011), [http://www.huffingtonpost.com/2011/09/05/egypt-hosni-mubarak-trial\\_n\\_949099.html](http://www.huffingtonpost.com/2011/09/05/egypt-hosni-mubarak-trial_n_949099.html).

<sup>508</sup> Intifada refers to the uprising of the Palestinian Arabs of the Gaza Strip and West Bank in protest against continued Israeli occupation of these territories beginning in late 1987 and

thousands of Egyptians in street demonstrations in Egypt; these demonstrations in support of Palestinian interests “soon gained an anti-regime dimension.”<sup>509</sup> In addition to the Intifada, other Egyptians point to the U.S. invasion of Iraq in 2003.<sup>510</sup> Protests against the U.S. presence in Iraq also implicated the Egyptian regime, which was a strong U.S. ally.<sup>511</sup> The central importance, however, of the Palestinian struggle for statehood was that it created an activist space, which the Egyptian government tolerated so long as it was directed at Israel.<sup>512</sup> The Palestinian solidarity movement in Egypt also learned organizational techniques of protestant resistance from Palestinians.<sup>513</sup> The level of political awareness of Palestinian exiles and their demonstrations abroad against Israel provided further stimuli to the growth of protest movements inside the different Arab States.<sup>514</sup>

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continuing sporadically into the early 1990s. See generally DON PERETZ, *INTIFADA: THE PALESTINIAN UPRISING* (1990).

<sup>509</sup> Nadia Hijab, *The Rise of the Intifada Generation*, NATION (Aug. 25, 2011).

<sup>510</sup> *Id.* See also Patrick J. Buchanan, *Whose War?*, AM. CONSERVATIVE (Mar. 24, 2003); Sukumar Muralidharan, *Israel: An Equal Partner in Occupation of Iraq*, 39 ECON. & POL. WEEKLY 4517, 4517-20 (Oct. 9, 2004); Mitchell Plitnick et al., *Did Israel Lead the U.S. into the War on Iraq?*, JEWISH VOICE FOR PEACE (Dec. 20, 2011), <http://jewishvoiceforpeace.org/content/did-israel-lead-us-war-iraq>.

<sup>511</sup> See generally Patrick J. Buchanan, *Whose War?*, AM. CONSERVATIVE (Mar. 24, 2003); Sukumar Muralidharan, *Israel: An Equal Partner in Occupation of Iraq*, 39 ECON. & POL. WEEKLY 4517, 4517-20 (Oct. 9, 2004); Mitchell Plitnick et al., *Did Israel Lead the U.S. into the War on Iraq?*, JEWISH VOICE FOR PEACE (Dec. 20, 2011), <http://jewishvoiceforpeace.org/content/did-israel-lead-us-war-iraq>.

<sup>512</sup> David D. Kirkpatrick, *Islamist Victors in Egypt Seeking Shift by Hamas*, N.Y. TIMES (Mar. 24, 2012), available at <http://www.nytimes.com/2012/03/24/world/middleeast/egypts-election-victors-seek-shift-by-hamas-to-press-israel.html?pagewanted=all>; see also Harriet Sherwood, *Israel faces worst crisis with Egypt for 30 years as diplomats flee*, GUARDIAN (Sept. 10, 2011), available at <http://www.guardian.co.uk/world/2011/sep/10/israel-egypt-embassy-crisis>; *Egypt supports recognition of independent Palestinian state*, MIDDLE E. MONITOR (Aug. 16, 2011), available at <http://www.middleeastmonitor.org.uk/news/middle-east/2726-egypt-supports-recognition-of-independent-palestinian-state>.

<sup>513</sup> See Kristen Sall, *First Tunisia, then Egypt, next Palestine?*, AL JAZEERA (Jun. 2, 2011); see also Joshua Stacher, *Egypt's Democratic Mirage*, FOREIGN AFFAIRS (Feb. 7, 2011); *Popular Uprising in Egypt Topples Mubarak Regime*, WORLD GEOGRAPHY (2011).

<sup>514</sup> See sources cited *supra* notes 31, 106, 135, 274, 279, 333, 364, 396, 437, 466, 467, 494, 496, 498, 499, 501, 504, 504, 506-508 and 513; Rania Abouzeid, *Bouazizi: The Man Who Set Himself and Tunisia on Fire*, TIME (Jan. 21, 2011); Aryn Baker, *Yemen's Uprising: The Families on the Front Lines*, TIME (Oct. 10, 2011); Kareem Fahim, *Yemeni Uprising Opens a Door to Besieged Rebels in the North*, N.Y. TIMES (Dec. 16, 2011); Tom Finn, *Yemen uprising: Sana'a rocked by night of fierce fighting*, GUARDIAN (Oct. 17, 2011); *Libya's uprising: Time to leave*, ECONOMIST (Feb. 22, 2011); *Timeline: Libya's uprising against Muammar Gaddafi*, REUTERS (Aug. 22, 2011); Brian Whitaker, *How a man setting fire to himself sparked an uprising in Tunisia*, GUARDIAN (Dec. 28, 2010).

It is clear that a new generation of Palestinian and Arab activists are mutually influenced and inspired by the vibrant exchange of ideas and strategies for democratic change.<sup>515</sup> In turn, Egyptian activists began to organize learning sessions for Palestinian activists examining different strategies and tactics of resistance.<sup>516</sup> This has also increased the expectations within the PA for more transparent, democratic ways of doing business.<sup>517</sup>

Palestinians may employ the nonviolent and democratic transformations of the Arab Spring as a pathway to assuming a higher moral status in negotiating a settlement with the Israelis. The popular democratic movements that characterize the Arab Spring have also reduced the credibility of the ultranationalist right-wing Israeli propaganda machine to demonize the expectations of freedom and self-determination for Palestinians—particularly because those expectations are built on the foundations of nonviolence and a deep commitment to popular democratic values.<sup>518</sup> These developments coalesce at a time when the Palestinian leadership is making a serious effort to secure the international recognition of Palestinian sovereignty and statehood.<sup>519</sup>

The peace constituencies inside Israel whose stand in opposition to the extremist right wing agenda of the Netanyahu's ultraconservative

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<sup>515</sup> See MARC LYNCH, VOICES OF THE NEW ARAB PUBLIC: IRAQ, AL-JAZEERA, AND MIDDLE EAST POLITICS TODAY (2006). See generally Marina Ottaway & Julia Choucair-Vizoso, *Beyond the Façade: Political Reform in the Arab World*, CARNEGIE ENDOWMENT FOR INT'L PEACE (2008).

<sup>516</sup> Hijab, *supra* note 510, at 34-35 (“The Egyptians advised the Palestinians to study the work of people like Gene Sharp, the American theorist of the nonviolent insurrection. Palestinian youth are also thinking about ways to adapt and expand the tactics of the six-year popular struggle of West Bank villages against Israel’s separation wall, and they are devoting renewed study to the massive, overwhelmingly nonviolent civil resistance of the first intifada (1987-1993). ‘We focus on nonviolence because we studied Palestinian history since 1936 and saw that the biggest successes were achieved through nonviolence,’ explains Fadi Quran. Indeed, the Arab Awakening has helped revalidate nonviolent resistance not only for many Palestinians but throughout the Arab world.”).

<sup>517</sup> Noura Erakat, *Roundtable on Occupation Law: Part of the Conflict or the Solution?*, JADALIYYA.COM (Sep. 22, 2011), [http://www.jadaliyya.com/pages/index/2705/roundtable-on-occupation-law\\_part-of-the-conflict-](http://www.jadaliyya.com/pages/index/2705/roundtable-on-occupation-law_part-of-the-conflict-).

<sup>518</sup> See *supra* notes 161 and 173.

<sup>519</sup> See *supra* notes 161 and 173; see also Paul Flesher, *Palestinian Statehood and the Arab Spring*, *Religion Today* (Sept. 20, 2011), <http://religion-today.blogspot.com/2011/09/palestinian-statehood-and-arab-spring.html>; Awrad Saleh, *Waging Peace: Palestinian Statehood: Sovereignty And a New Reality at the UN* (Oct. 2011), <http://www.wrmea.com/component/content/article/372-2011-september-october/10680-waging-peace-palestinian-statehood-sovereignty-and-a-new-reality-at-the-un.html>; *Palestine statehood: A strategic mistake by everyone*, *ECONOMIST* (Sept. 14, 2011), <http://www.economist.com/blogs/democracyinamerica/2011/09/palestine-statehood-0?page=4>.

government will doubtless welcome the developments of the Arab Spring.<sup>520</sup> Nadia Hijab concludes that “the greatest promise of the Arab Awakening is that Arabs will reclaim the vision of a larger body within which they can operate, an Arab region built not on ethnic or religious purity but bond by a common strident for human rights and fundamental freedoms.”<sup>521</sup> Arab opinion leaders also believe that democracy in a number of Arab States will energize the Palestinian struggle for freedom because there is a strong foundation of support amongst people who identify as Arab themselves.<sup>522</sup>

Netanyahu had early on expressed his desire for regime replacement in the Arab world, because he felt that peace would be sustainable when Arab States are truly democratic.<sup>523</sup> While his wishes appear to be on the horizon, Netanyahu does not seem to have responded strategically, intelligently or constructively, at least on a practical level, to these changes.<sup>524</sup> The greatest challenge for the Palestinians is to remain true to the core policies and values which continue to animate the struggle for democracy: self-determination, rights of refugees, and the vindication of freedom and equality.

## VI. CONCLUSION

The global community only stands to gain from the establishment of a Palestinian state that could coexist peacefully with the state of Israel.<sup>525</sup> However, current international law frameworks regarding stateless individuals have proved unable to deal effectively with the current problem

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<sup>520</sup> See also Harriet Sherwood, *Binyamin Netanyahu attacks Arab spring uprisings* (Nov. 24, 2011), <http://www.guardian.co.uk/world/2011/nov/24/israel-netanyahu-attacks-arab-spring>; Yossi Verter, *The Arab Spring turned Netanyahu into the national fearmonger*, (Dec. 16, 2011), <http://www.haaretz.com/weekend/week-s-end/the-arab-spring-turned-netanyahu-into-the-national-fearmonger-1.401760> (“In the last year, Middle Eastern leaders have been ousted and denounced, have been slaughtered or have engaged in slaughter. The response of Israel’s premier has been to become more entrenched in his own views”).

<sup>521</sup> Hijab, *supra* note 510, at 35.

<sup>522</sup> *Id.*

<sup>523</sup> Aron Heller, *Netanyahu Al Arabiya Interview: Israeli Prime Minister Tells Arab World He Wants To Negotiate*, HUFF. POST (July 21, 2011), [http://www.huffingtonpost.com/2011/07/21/netanyahu-al-arabiya-interview\\_n\\_905672.html](http://www.huffingtonpost.com/2011/07/21/netanyahu-al-arabiya-interview_n_905672.html) (“If there’s genuine democracy in the Arab world, in the Arab countries, then there will be genuine peace. Because a genuine democracy reflects the desires of the people, and most people Arabs, Jews, anyone they don’t want their sons and daughters dying on battlefields”).

<sup>524</sup> See generally discussion and sources cited, *supra* notes 24, 27, 174, 177, 179, 181, 185, 287, 291, 414, 425, 437, 447, 470, 472, 521 and 524.

<sup>525</sup> *The Israeli-Palestinian Initiative: Framework for a Public Peace Process; Toward a Peaceful Israeli-Palestinian Relationship*, <http://globalcommunity.org/ipi/>; see also *Establishing a peaceful Palestinian State next to Israel long overdue*, UN NEWS CENTRE (Nov. 29, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40550&Cr=palestin&Cr1=>

of Palestinian statelessness. While treaties attempt to redress some the problems faced by stateless individuals, the reality is that customary international law affords little protection to stateless people who suffer continuing abuses by other states.<sup>526</sup> Moreover, the UNSC veto system has been used to undermine the efforts to establish a Palestinian state, against widely held global opinion.<sup>527</sup> It would strengthen the force of the UN—and, consequently international law—to reinstitute the UNSC bypass mechanism yet again to give practical power to the voice of the UN General Assembly.<sup>528</sup>

The united “nations” ought to include a Palestinians state; the Palestinian people possess all, or nearly all, the traditional Montevideo characteristics of a traditional state, yet still have not been recognized.<sup>529</sup> The Israeli right wing and its conservative political allies have in fact been waging a relentless war against the UN as an institution.<sup>530</sup> This is not good for Israel, the U.S., or the UN as governing bodies, nor is it good for a long-term, sustainable global peace. The recognition of the Palestinian state holds within it the promise of moving all parties past this period of international acrimony and impasse.<sup>531</sup>

To conclude, we wish to reassert our firm belief in human rights and essential justice for all. As scholars, jurists, and human rights practitioners, our 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. Our 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 for the people of the United States. It is possible that there are other paths Israel and Palestine

<sup>526</sup> See sources cited *supra* notes 26, 151, 291, 299-302.

<sup>527</sup> See generally discussion *supra* notes 214, 215, 283 and 277.

<sup>528</sup> Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445 (1981); see also Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

<sup>529</sup> See generally discussion *supra* notes 79, 84 and 145.

<sup>530</sup> Tzvi Ben Gedalyahu, *Muslim Student Attacks UN Rights Council for Anti-Israel Bias* (Apr. 5, 2011), <http://www.israelnationalnews.com/News/News.aspx/143367> (“Why is Israel condemned while Arab violators are ignored?”); see also Mitchell Bard, *The United Nations and Israel* (last updated Feb. 2012), [http://www.jewishvirtuallibrary.org/jsource/UN/israel\\_un.html](http://www.jewishvirtuallibrary.org/jsource/UN/israel_un.html); *Israel at the UN: Progress Amid A History of Bias*, HUMAN RIGHTS COUNCIL ANTI-DEFAMATORY LEAGUE (Sept. 2010), <http://www.adl.org/international/Israel-UN-1-introduction.asp>; *A biased UN “finding” on Gaza could also apply to Afghanistan*, WALL STREET J. (Sept. 23, 2009), <http://online.wsj.com/article/SB10001424052970204518504574423652321177372.html>.

<sup>531</sup> See, e.g., Iain Scobbie et al., *Recognizing Palestinian Statehood* (Aug. 25, 2011), <http://yalejournal.org/2011/08/recognizing-palestinian-statehood/>.

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could take in the quest for peace. However, we hope that our analysis offers a shared backdrop against which the deliberations of Palestinians and Israelis – and the global community – may continue toward the universal goals of achieving self-determination, independent stability, widespread peace, and essential dignity.