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Self-Determination and Minority Rights

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Abstract

This Article tries to wend its way through the trail of human debris, the visions and the shattered dreams on both sides of the Israeli-Palestinian conflict, to a rational analysis of the applicability of international human rights norms, to the conflicting claims of two peoples to the same land. The right of both Jews and Palestinians to self-determination seems to be self-evident from the stories of the two peoples. Almost forty years after the Six Days War, the author turns to this issue in an attempt to analyze where this conflict now stands in terms of international human rights. This article will concentrate on structuring a basic analytical framework, incorporating both Israeli and Palestinian perspectives, and will try to show the symmetries and asymmetries between them. This involves discussion of the rights of two peoples to self-determination and the means by which such parallel rights can be implemented. It also involves discussing differences in the means of implementation of the right to self-determination for Palestinians in the West Bank and Gaza, and minority rights for Palestinian-Israelis living in Israel within the 1948 Armistice Lines.

ARTICLES

SELF-DETERMINATION AND MINORITY RIGHTS

*Frances Raday**

INTRODUCTION

This Article tries to wend its way through the trail of human debris, the visions and the shattered dreams on both sides of the Israeli-Palestinian conflict, to a rational analysis of the applicability of international human rights norms, to the conflicting claims of two peoples to the same land.¹ The right of both Jews and Palestinians to self-determination seems to be self-evident from the stories of the two peoples. Anecdotally, I was made vividly aware of this in 1967. I was, at the time, a lecturer at the University of East Africa at Dar-e-Salaam and part of an activist New Left group of University faculty members from prestigious Universities in both Western and Eastern Europe and the United States. In June 1967, on Day One of the Six Day War, the group unanimously mourned the probable destruction of “the only democracy in the Middle East” and the “wiping out of the small Jewish entity that had survived the Holocaust.” However, on Day Seven, after Israel’s victory, the majority reached a consensus that Israel is an imperialist outpost of America and “as long as Israel survives in the Middle East, the Arabs will never reach their full economic, social and cultural potential.”² I dissented, on the grounds that the Jews, not less than the Arabs, were the

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1. The reference is to the land between the Jordan River and the Mediterranean Sea, including pre-1967 Israel, the West Bank, and Gaza. Israel has occupied the entire area since the Six Day War, which was fought as a war of preemptive self-defence against the Egyptians, Syrians, and Jordanians after an amassing of troops on Israel’s borders and the illegal closure of Israeli rights of passage through the Straits of Tiran by Egypt.

2. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, Supp. No. 16, 15th Sess., 947th mtg., U.N. Doc. A/4684, art. 2 (1960) (stating that “. . . all peoples have the right to self-determination.

“wretched of the earth,” as Fanon had recently termed the third world colonized societies, and that this was a fight for survival and not for expansion. Walter Rodney, a history professor who later became the leader of the opposition in Guyana, was the only member of the group to join my dissent. He argued: “This is not a conflict between Left and Right, between imperialism and anti-imperialism, but a tragic struggle between two peoples, both deprived by fate of the right to a country, over one small patch of land.”

Now, almost forty years later, I return to the issue in an attempt to analyze where this conflict now stands in terms of international human rights. I will concentrate on structuring a basic analytical framework, incorporating both Israeli and Palestinian perspectives, and will try to show the symmetries and asymmetries between them. This involves discussion of the rights of two peoples to self-determination and the means by which such parallel rights can be implemented. It also involves discussing differences in the means of implementation of the right to self-determination for Palestinians in the West Bank and Gaza, and minority rights for Palestinian-Israelis living in Israel within the 1948 Armistice Lines.

I. SELF-DETERMINATION

A. *The Right to Self-Determination Under International Law*

The Charter of the United Nations listed, among its purposes, respect for the principle of self-determination of peoples.³ The 1966 Covenants gave this principle a prominent place in Article 1 of both, the International Covenant on Civil and Political Rights (“ICCPR”)⁴ and the International Covenant on Economic Social and Cultural Rights (“ICESCR”),⁵ as a right: “All

By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

3. U.N. CHARTER, art. 1, para. 2.

4. International Covenant on Civil and Political Rights (“ICCPR”), G.A. Res. 2000, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, art. 1, para. 1 (1966), *reprinted in* 6 I.L.M. 360, 369 (1967). The ICCPR was adopted on Dec. 19, 1966. It entered into force on Mar. 23, 1976.

5. International Covenant on Economic, Social and Cultural Rights (“ICESCR”), G.A. Res. 1514, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, art. 1, para. 1 (1966), *reprinted in* 6 I.L.M. 360 (1967). The ICESCR was adopted on Dec. 19, 1966. It entered into force on Mar. 23, 1976.

peoples have the right to self-determination. By virtue of that right they resolve to freely determine their political status and freely pursue their economic, social and cultural development.”⁶ Self-determination, thus, emerged as a legal right in the United Nations (“U.N.”) context as a result of the developments in treaty law. However, neither the conditions of eligibility for the right, nor the content of the right, are established in the treaties.

Three General Assembly Declarations have made a major contribution to the development of the “concept or right or ideal or vision of self-determination.”⁷ The first, the Declaration on the Granting of Independence to Colonial Countries and Peoples, restricted the right to self-determination to colonized peoples.⁸ The second, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (“Declaration of Friendly Relations”), extended the right beyond the previously accepted context of decolonization, defining it as the right of all peoples.⁹ The third, the 1993 Vienna Declaration, reinforced this right as a human right: “The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.”¹⁰

6. ICCPR, *supra* n.4, art. 1.

7. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1248 (2d ed. 2000) (referencing this concept).

8. See Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* n.2.

9. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, at 124-25, U.N. Doc. A/8082 (1970) [hereinafter Declaration on Friendly Relations].

10. World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF. 157/23, art. 2 (1993).

Article 2 reads:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

Under these General Assembly Declarations, the right of self-determination is not to be construed as authorizing impairment of territorial integrity of sovereign and independent States. Rather, this protection of sovereign integrity is subject to a proviso, making the right to protection of territorial integrity valid only for those States which “comply with the principle of equal rights” and whose governments “represent the whole people belonging to the territory without distinction of any kind.”¹¹ Under an amalgam of the three Declarations, it can be said that the right of self-determination is regarded as a right either of previously colonized peoples or of peoples tied by common ethnic, religious, or linguistic bonds in a State whose government fails to represent them without distinction of any kind. This right, stemming as it does from the three Declarations, is not a full-fledged international law right, but may be considered an *opinio juris* with persuasive force in establishing a rule of customary international law.

The establishment of the right of a people to self-determination is inchoate without a determination of the geo-political mode which that right will take. The Declaration on Friendly Relations sets out the various options for self-determination: “The establishment of a sovereign and independent State, the free association or integration with an independent State or the

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

Id.

11. See Declaration on Friendly Relations, *supra* n.9, at 124. The Declaration reads, in relevant part:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States, conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Id. See also Vienna Declaration, *supra* n.10, art. 1, Sec. 2 (stating that the proviso was limited to those governments that represented the whole people belonging to the territory “without distinction of any kind”).

emergence into any other political status freely determined by a people, constitute modes of implementing the right to self-determination.”¹² Kirgis, writing on the right to self-determination, on the basis of the Declaration on Friendly Relations and the 1993 Vienna Declaration, states:

One can . . . discern different degrees of self-determination, with the legitimacy of each tied to the degree of representative government in the [S]tate . . . If a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized. In this schema, a claim of right to secede from a representative democracy is not likely to be considered a legitimate exercise of the right of self-determination, but a claim of right by indigenous groups within the democracy to use their own languages and engage in their own non-coercive cultural practices is likely to be recognized — not always under the rubric of self-determination, but recognized nevertheless. Conversely, a claim of a right to secede from a repressive dictatorship may be regarded as legitimate. Not all secessionist claims are equally destabilizing. The degree to which a claimed right to secede will be destabilizing may depend on such things as the plausibility of the historical claim of the secessionist group to the territory it seeks to slice off.¹³

There are many possible modes of implementation and they include varying degrees of external and internal self-determination. They include the right to secede and form a State, to integrate within another State, or the right of limited autonomy for groups, which qualify as “peoples” and are defined by ethnic, religious, or linguistic bonds. Generally, discussion of the mode of implementing the right to self-determination subsumes within it, as modes of implementation, not only governmental autonomy, but also collective minority rights.¹⁴ In this spirit, Franck said: “the probable redefinition of self-determination does rec-

12. See Declaration on Friendly Relations, *supra* n.7.

13. Fredric L. Kirgis Jr., *The Degrees of Self Determination in the United Nations Era*, 88 AM. J. INT’L L. 304, 308 (1994).

14. See Catriona J. Drew, *Self-Determination and Population Transfer and the Middle East Accords*, in HUMAN RIGHTS, SELF-DETERMINATION AND POLITICAL CHANGE IN THE OCCUPIED PALESTINIAN TERRITORIES 119-20 (1997).

ognize an international legal right, but it is not to secession but to democracy."¹⁵

However, I develop my own analysis below with a rather different emphasis, drawing a distinction between self-determination and minority rights. The right to self-determination exists, to the extent that it exists, only for peoples who inhabit a territorial continuum within which secession or autonomy may be exercised.¹⁶ Under Article 27 of the ICCPR, minority rights exist independently of the right to self-determination. They exist not only for peoples who inhabit a territorial continuum, but also for minorities who do not qualify as such peoples.¹⁷ The importance of minority rights for the issue of self-determination as such, is that States, which fail to provide adequate minority rights, may lose their right to claim territorial integrity in response to a demand for self-determination. Thus, in my schema, preservation of equality principles, minority rights, and democratic representation, does not constitute the fulfillment of the demand for self-determination as much as it constitutes circumstances that preempt a claim for self-determination. Legitimate self-determination claims are claims made in the event of failure of minority rights and democratic representation. These claims include measures of external and internal self-determination, beyond the securing of minority rights and democratic representation.

The right of external self-determination has been well established in the context of the right to be free from alien control, in the sense of colonialist rule or foreign occupation.¹⁸ Beyond that context, it has been a controversial and ambiguous right. The idea of a right to external self-determination has been sub-

15. See T.M. Franck, *Post-Modern Tribalism and the Right to Secession*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 20 (1993).

16. See *id.* at 11. See also, Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation* 16 *YALE J. INT'L L.* 177, 189 (1991).

17. ICCPR, *supra* n.4, art. 27. Article 27 reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their language.

Id.

18. The General Assembly Resolutions also refer to the right of peoples and to the particular situation of peoples under colonial or alien control. The Declaration on Friendly Relations states that subjecting peoples to subjugation, discrimination, and exploitation, is a violation of their equal rights and self-determination.

jected to criticism, especially with regard to minority peoples. The applicability of the right to *peoples* has been said to make it inapplicable to *minorities*, a distinction which emerges from the ICCPR, which regulates the rights of minorities in Article 27 and reserves the right to self-determination to peoples in Article 1.¹⁹ Where a minority is part of an existing sovereign State, it has been said that “it is clear that international law does not specifically grant component parts of sovereign [S]tates the legal right to secede unilaterally from their ‘parent’ [S]tate.”²⁰ Indeed, Rosalyn Higgins described such a right of secession as “postmodern tribalism” and “profoundly illiberal.”²¹ Higgins also stated that:

[T]he perceived need of secession is understandable when minorities are denied their rights as minorities or when they cannot participate, as part of the entire peoples of a country, in the political and economic life of the country. But I am less sure . . . that even this entails a legal right to secession, in contra-distinction to a compelling political imperative.²²

Alan Buchanan claimed, differently, that secession may be regarded as a remedial right in cases of persistent and serious violations of human rights, past unredressed unjust seizure of territory or discriminatory retribution against the minority people.²³

19. ICCPR, *supra* n.4, art. 1. Article 1 reads:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the Present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. *Id.*

Id. Cf. *id.* art. 27, *supra* n.17. See also Rosalyn Higgins, *Postmodern Tribalism and the Right to Secession — Comments*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 30 (1993).

20. Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, para. 111.

21. See Higgins, *supra* n.19, at 31-32.

22. *Id.* at 33.

23. See Alan Buchanan, *Self-Determination, Secession and the Rule of Law*, in THE MORALITY OF NATIONALISM 310 (McKim & McMahon eds., 1997).

The controversy regarding the right of secession for minority peoples seems to also extend to some forms of internal self-determination, such as acquiring governmental autonomy. Autonomy may imply self-government — examples include Quebec and Scotland. It may be expressed in autonomy of a lesser degree, which involves allocation of territory and some form of internal self-government that has less than parliamentary expression — examples include the Indian tribal reservations in America and Canada. Autonomy seems to fall within the liberal critique of self-determination: liberals have disdained ethnic particularity as an organizing principle of political legitimacy, emphasizing instead liberal republican virtues of civil equality and arguing that pluralistic communities based on human rights standards are preferable.²⁴ The trend towards granting governmental autonomy has not yet been articulated in any U.N. document²⁵ and, *ex forte*, it has not achieved the status of an international legal right.²⁶ However, the recognition in the Declaration on Friendly Relations and in the Vienna Declaration of the right of all peoples to “determine their political status” seems to suggest that minority peoples may, under the conditions set out in the proviso, have a rightful claim to autonomous government, just as they may have a rightful claim to secede.

The right of self-determination in international law is “notoriously ill-defined”²⁷ and the substantive dimensions of the right are not delineated. Indeed, the mode of implementation of the right to self-determination is highly contextualized according to the socio-political realities of different cases. According to Franck: “Fortunately for world peace but unfortunately for legal

24. See Diane Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 *YALE J. INT'L L.* 1,3 (1998).

25. See Ilan Saban, *The Collective Rights of the Arab-Palestinian Minority in Israel: Do They or Do They Not Exist and the Extent of the Taboo*, 26 *IVUNEI MISHPAT* 241, 244-45 (2002) (author's trans.) (on file with author) (arguing that international discourse has changed over the past decade and now includes collective rights, like cultural autonomy). Saban also cites, in particular, the General Assembly Declaration on Minorities of 1992. Yet, he does not claim that a right to autonomous self-government has been developed; rather, he concentrates on collective rights of minorities to language, culture, education, religion, etc.

26. See RUTH LAPIDOTH, *AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS* 153 (1997) (stating that partial autonomy granted to Palestinians as a result of the Declaration of Principles on Interim Self-Government Arrangements of 1993 emphasized that it was to be a temporary, five-year stage on the way to final agreement).

27. See Drew, *supra* n.14, at 131-32.

clarity, most of the challenges of postmodern tribal secession . . . [are] being managed by a process of conflict resolution without recourse to the language and procedures of international law.”²⁸ This indeterminacy makes the claim of self-determination difficult to enforce as a legal right. Indeed, Rodolpho Stavenhagen questioned whether self-determination was “right or demon” and argued that the right of collective self-determination must be treated as “a myth in the Levi-Straussian sense (that is as a blue print for living); not an enforceable legal, political or moral right.”²⁹ Becker, discussing the right of self-determination in the context of the Palestinian case, said: “The parties involved in a self-determination claim are required to engage in good faith negotiations to reach an accommodation that is not predetermined by specific legal rules. International law does not guarantee [S]tatehood in such cases nor does it characterize the form in which relative self-determination will be implemented.”³⁰ On this somewhat shaky basis for the international human right to self-determination, I shall proceed to discuss the Israeli-Palestinian situation.

B. *Israeli and Palestinian Self-Determination*

The claim of the Israelis to self-determination has obviously been implemented in the State of Israel; nevertheless, the issue is not only of historical significance. The more accurate analysis of Israel as an expression of Jewish self-determination remains important for current and future policy and in any discussion of Palestinian rights. The claim of the Palestinians to self-determination is in the process of translation into Statehood, by most views, or into a self-governing autonomy, according to those who continue to oppose Statehood.

1. Symmetries and Asymmetries in the Claims to Self-Determination

The implemented claim to self-determination of the Israelis and the contingent claim of the Palestinians, have unique quali-

28. See Franck, *supra* n.15, at 15.

29. See Rodolfo Stavenhagen, *The Right of Indigenous Peoples to “Self Determination” in the Contemporary World Order*, in SELF-DETERMINATION: INTERNATIONAL PERSPECTIVE 2-3 (Clark & Williamson eds., 1996).

30. See Tal Becker, *Self-Determination in Perspective: Palestinian Claims to Statehood and the Relativity of the Right to Self-Determination*, 32 ISRAEL L. REV. 301, 346 (1998).

ties, as a strange interplay of asymmetries and symmetries. There is asymmetry between an anciently acquired claim to self-determination, since interrupted by the Diaspora, and one recently conceived. The Israeli claim to self-determination is based on the Jewish bond with the Land of Israel from the Kingdom of David and Solomon in 1000B.C., until the Roman expulsion of the Jews in 73A.D. It is based on the persistence of common ethnic, religious, and linguistic bonds during the Diaspora. The Palestinian claim to separate peoplehood, to be distinguished from that of the Arab Nation, first appeared in the twentieth century and was stimulated by the Zionist narrative.

The nature of indigenoussness is also asymmetrical. The Jewish claim is based on the connection with the land as a self-governing people two thousand years ago, maintaining a minority habitation and spiritual connection ever since. The Palestinian claim is based on the Muslim rule from the seventh century until the 1914 War and majority habitation until 1948.

The asymmetry is also between global and local self-determination. The Jewish claim to self-determination is based on the desperate need to correct historic wrongs on a global scale, resulting from persecution and discrimination by a majority of host States over nearly two thousand years of history and culminating in the Holocaust in Europe in the twentieth century. It is, arguably, the only case of a claim to self-determination *in rem*, as it might be termed, against the entire world. The Palestinian claim is apparently limited to its resistance to domination by Israel, as no Palestinian demands to self-determination were made prior to 1948. Furthermore, at the time of its establishment in 1964, before the Six Day War, the Palestine Liberation Organization (“PLO”) made no claims to external self-determination as against Egypt or Jordan.³¹ The focus of the claim in the 1964 Palestinian Covenant is Zionism — in the sense of calling for Zionism’s destruction.³² As for Palestinian self-determi-

31. See Palestinian National Covenant, 1964, art. 24 [hereinafter National Covenant 1964]. Article 24 states:

This Organization does not exercise any territorial sovereignty over the West Bank in the Hashemite Kingdom of Jordan, on the Gaza Strip, or in the Himmah Area. Its activities will be on the national popular level in the liberation, organizational, political and financial fields.

Id.

32. See *id.* Introduction. The Introduction reads:

nation within the Arab world, the document indicates merely that the Palestinian people wish to be a part of the larger Arab family.³³

Alongside the asymmetries, there are also symmetries. There is symmetry in the emotive and geo-political advocacy for self-determination. The Jewish claim to self-determination is based both on expulsion, dispersion, persecution, and the subsequent continuous, if minority, habitation in Palestine. As such, it includes Jews of the Diaspora and continues to regard the latter as having political rights, should they wish to return. The Palestinian claim is based on possession, as a result of Arab habitation, in Palestine prior to 1948. However, it also extends to the Palestinians displaced in 1948³⁴ and regards the Palestinian Diaspora — dispersed outside the Palestine since 1948 — as an integral part of the political entity of Palestine and as sharing the right to self-determination. Indeed, in this respect, the Palestinian demand for self-determination appears to have been consciously modeled on the Jewish case. There has, in the past, been symmetry in the denial by each of the two peoples of the other's status as a "people." Israeli governments did not initially accept the definition of the Palestinians as a "people" and, indeed, in 1977, Menachem Begin referred to them as "Arab residents." However, from the time of the Camp David Frameworks for Peace in 1978, a change took place and since the time of the 1993 Declaration of Principles on Interim Self-Government Arrangements in 1993 ("Declaration of Princi-

We, the Palestinian Arab people, who faced the forces of evil, injustice and aggression, against whom the forces of international Zionism and colonialism conspire and worked to displace it, dispossess it from its homeland and property, abused what is holy in it and who in spite of all this refused to weaken or submit.

We, the Palestinian Arab people, who believe in its Arabism and in its right to regain its homeland, to realize its freedom and dignity, and who have determined to amass its forces and mobilize its efforts and capabilities in order to continue its struggle and to move forward on the path of holy war (*al-jihad*) until complete and final victory has been attained . . .

Id.

33. *See id.* art. 1. Article 1 reads: "Palestine is an Arab homeland bound by strong Arab national ties to the rest of the Arab countries and which together form the great Arab homeland." *Id.*

34. In this context, I will not enter into the different narratives regarding the displacement of the Palestinian population in 1948.

ples”),³⁵ Israel has clearly recognized Palestinians as a people.³⁶

The Palestinian Covenants of both 1964 and 1968 – before and after the Six Day War and the Israeli conquest of the West Bank and Gaza — denied the existence of a Jewish people and denied Israel’s right to exist: “[t]he establishment of Israel is illegal and null and void.³⁷ Judaism . . . is not a nationality with independent existence . . . the Jews are not one people with an independent personality.”³⁸ This attitude was supported by the Arab States.³⁹ In 1993, in a letter to Yitzhak Rabin following the Oslo Accords,⁴⁰ Arafat, for the first time, acknowledged Israel’s

35. See Declaration of Principles on Interim Self-Government Arrangements (Sept. 13, 1993) [hereinafter Declaration of Principles].

36. See Becker, *supra* n.30, at 339-40 (noting that the Israeli Letter of Recognition of September 9, 1993, which preceded the signing of Declaration of Principles on Interim Self-Government Arrangements, referred to the Palestine Liberation Organization (“PLO”) as a “representative of the Palestinian people”).

37. See National Covenant 1964, *supra* n.31, art. 17. Article 17 reads:

The partitioning of Palestine which took place in 1947 and the establishment of Israel are illegal and null and void, regardless of the loss of time, because they were contrary to the will of the Palestinian people and its natural right to its homeland, and were in violation of the basic principles embodied in the Charter of the United Nations.

Id. This stand was repeated in Article 17 of the Palestinian Covenant of 1968.

38. See Palestinian National Covenant, 1968, art. 18 [hereinafter National Covenant 1968]. Article 18 reads:

The Balfour Declaration, the Palestine Mandate System, and all that has been based on them are considered null and void. The claims of historic and spiritual ties between the Jews and Palestine are not in agreement with the facts of history or with the true basis of sound [S]tatehood. Judaism, because it is a divine religion, is not a nationality with independent existence. Furthermore, the Jews are not one people with an independent personality because they are citizens to their [S]tates.

Id.

39. After the Six Day War, when Israel proposed to negotiate over the return of the whole area which had been conquered, the Arab States met in Khartoum and issued the Khartoum Declaration (Sept. 1, 1967), listing the three negatives: no recognition; no negotiation; no peace.

40. See 1993 Declaration of Principles (“Oslo Accords”) (Sept. 10, 1993). See also General Assembly/Security Council, *Report of the Secretary General on the Work of the Organization*, 48th Sess., Agenda Item 10, U.N. Doc. A/48/486 S/26560 (1993). The series of events that lead to the signing of the Oslo Accords on September 13, 1993, began in 1992, when Israel and the Palestine initiated a series of discussions focusing on relations between both peoples. Both sides to the conflict went through ten rounds of talks. At the conclusion of the tenth round, both sides stated that they had come to a provisional agreement, by way of secret talks, that allowed for partial autonomy in the occupied territories. The eleventh round of talks began in Oslo, Norway, and Israel announced an agreement that allowed for Palestinian self-rule in the Gaza Strip and Jericho. A week later, both Israel and the PLO agreed to formally recognize each other after forty-

right to exist.⁴¹ Accordingly, he undertook to submit to the Palestinian National Council⁴² a proposal to make the necessary changes in the Palestinian Covenant. However, although widely thought otherwise,⁴³ it is not clear that such a change was ever formally made. Despite the seeming recognition and confirmation of Israel's right to exist in Arafat's letters to Yitzhak Rabin, Shimon Peres, and Bill Clinton,⁴⁴ the failure of the Palestinians to enact and publish a formally amended version of the Covenant, leaves some ambiguity regarding the Palestinian recognition of Jews as a people and of the right of Israel to exist as a State within the pre-1967 borders.⁴⁵

five years of conflict. All of the agreements reached became known as the "Oslo Accords."

41. See Letter from Chairman Yasser Arafat to Israeli Prime Minister Yitzhak Rabin (Sept. 9, 1993) [hereinafter Arafat Letter] (providing that PLO recognizes Israel's right to exist in peace and security).

42. The Palestinian National Council is the legislative body of the PLO.

43. See Richard Falk, *Some International Law Implications of the Oslo/Cairo Framework for the PLO/Israel Peace Process*, in HUMAN RIGHTS, SELF-DETERMINATION AND POLITICAL CHANGE IN THE OCCUPIED PALESTINIAN TERRITORIES 14 (Bowen ed., 1997). See also Becker, *supra* n.30, at 336 (arguing that the letters and the subsequent agreements between the parties "suggest that PLO has publicly restricted its goal of external self-determination to 1967 territories").

44. See Arafat Letter, *supra* n.41; Letter From Palestinian Authority ("PA") President Yasser Arafat to Prime Minister Shimon Peres (May 4, 1996). The letter was written following the Palestinian National Council ("PNC") extraordinary session held in Gaza City on April 22-25, 1996. In this letter, Arafat states: "Palestine National Charter is hereby amended by canceling the articles that are contrary to the letters exchanged between the PLO and the government of Israel on 9/10 Sept. 1993". *Id.* See also Letter from Chairman Arafat to U.S. President William J. Clinton on the Amendments to the Palestine National Charter (Jan. 18, 1998). In this letter, Arafat states that the PLO is committed to recognizing "the right of the State of Israel to exist in peace and security" and that the "provisions of the Covenant which are inconsistent with the PLO commitment to recognize and live in peace side by side with Israel are no longer in effect." *Id.* Arafat also declares: "As a result, Articles 6-10, 15, 19-23 and 30 have been nullified, and the parts in Articles 1-5, 11-14, 16-18, 25-27 and 29 that are in consistent [sic] with the above mentioned commitments have also been nullified." *Id.*

45. The official Palestinian website contains no documentation of any PNC resolutions nullifying the provisions denying Israel's right to exist. Rather, the website contains only a 1996 decision of the PNC *mandating the drafting* of a new text. The website continues to carry only the 1964 and the 1968 versions of the Covenant. Additionally, it includes a reference to Arafat's 1998 letter outlining "the implications" of the 1996 PNC decision and the 1998 reaffirmations of all of the above by both, the Executive Committee (the Central Council of the PLO) and by show of hands of the participants at a meeting with the former President Clinton held in Gaza City on December 14, 1998. There also appears to be no amended version of the Covenant to be found. This does little to clear the impression of ambivalence or evasion.

2. The Present Status

The Jewish claim to self-determination was recognized in the U.N. General Assembly Resolution 181 (the "Partition Plan") in 1947,⁴⁶ and was confirmed in Israel's admittance to the U.N. as a Member State.⁴⁷ Implementation of this right has been achieved within Israel's 1949 Armistice Line.⁴⁸ Therefore, the Jewish people's right to self-determination has been fully implemented in the State of Israel and the 1949 Armistice Line has wide recognition as its international border.

The Palestinian claim to self-determination, expressed in the Palestinian National Charter of 1964, was not recognized by the U.N. prior to the Six Day War. The Security Council Resolution 242 of November 22, 1967, passed immediately after the War, made no mention of it. Nor was the right addressed after the Yom Kippur War⁴⁹ in the Security Council Resolution 338 of October 22, 1973. On the other hand, the right was recognized in a number of General Assembly Resolutions passed after 1969.⁵⁰ In its Resolution 3236 of 1974, the General Assembly affirmed the Palestinians' "right to self-determination without external interference"⁵¹ and to "national independence and sovereignty."⁵² General Assembly Resolutions are not, as such,

46. The Partition Plan called for partitioning of the British-ruled Palestine Mandate into a Jewish State and an Arab State. It was approved on November 29, 1947.

47. See United Nations, *List of Member States*, available at <http://www.un.org/Overview/unmember.html> (listing Israel's admission as Member State as of May 11, 1949).

48. See Frederic C. Hof, *The Line of June 4, 1967*, JEWISH VIRTUAL LIBRARY, available at <http://www.us-israel.org/jsource/Peace/67line.html> (explaining that under the terms of the armistice, Syrian forces were to withdraw east of former Palestine-Syria boundary and Israeli forces were not to enter evacuated areas, which would become demilitarized zone, where both Israeli and Syrian forces would be prohibited from entering and carrying on any military or paramilitary activity).

49. Egypt and Syria, in an effort to cause Israel's surrender of the captured lands, attacked Israel on October 5, 1973, Yom Kippur. After a cease-fire was declared, the war ended on October 22, 1973, but fighting continued on the Egyptian-Israeli front. On that same day, the Security Council adopted Resolution 338 calling on all parties to implement Security Council Resolution 242.

50. See e.g., Becker, *supra* n.30, at 342 (noting that U.N. organs initially referred to Palestinians as "refugees" and the Security Council Resolution 242 of 1967 and the Resolutions preceding it made no reference to the Palestinian right to self-determination).

51. G.A. Res. 3236, U.N. GAOR, 29th Sess. Supp. No. 21, U.N. Doc. A/Res/3236, art. 2(a) (1974).

52. *Id.* See also Falk, *supra* n. 43, at 15 (stating that even before the Oslo peace process, the PLO was recognized as the government of the State of Palestine by more than one hundred countries). The PLO has been a permanent observer in the U.N.

binding as general international law. Nevertheless, they may have status as authoritative *interpretations* of international law. It must be remarked that in the Declaration of Principles, the parties agreed to be bound by Resolutions 242 and 338, which did not address the Palestinian right to self-determination.⁵³ At the same time, the parties made no mention of the Resolution 3236, which did reference this right.⁵⁴

The Declaration of Principles declared that the aim of the negotiations was to “establish a Palestinian Interim Self-Government Authority, the elected Council (the “Council”) for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent status settlement based on Security Council Resolutions 242 and 338.”⁵⁵ The final status settlement remained to be determined in negotiations. In the Declaration of Principles, Israel and the Palestinian people agreed to “recognize their mutual legitimate and political rights.”⁵⁶ However, the precise limits of these rights were defined no further than they had been in the Security Council Resolution 242. The most convincing analysis of the Declaration’s impact on the self-determination issue was that of Antonio Cassese, who stated in 1993: “[F]irstly, . . . the path suggested by international norms, i.e. a peaceful process of negotiation between the parties, has been taken; secondly, that as an initial measure, provision has been made for the exercise of *internal* self-determination by the Palestinians is a stepping stone to

since November 22, 1974, and Yasser Arafat was the first representative of an entity other than a Member State to address the General Assembly (excluding the Pope) on November 13, 1974. *Id.*

53. Declaration of Principles, *supra* n.35.

54. *Id.*

55. *Id.* art. 1. Article 1 of the Declaration of Principles (“Aim of the Negotiations”) reads:

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

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

Id. See also Becker, *supra* n.30 at 347.

56. Declaration of Principles, *supra* n.53, Preamble.

external self-determination.”⁵⁷ In the aftermath of the Oslo Accords, measures were taken transferring a significant degree of self-government to the Palestinian Authority (“PA”).⁵⁸

In March 2002, in its Resolution 1397, the Security Council, for the first time, addressed the issue of Palestinian right to self-determination and affirmed its “vision of a region where two [S]tates, Israel and Palestine, live side by side within secure and recognized borders.”⁵⁹ Security Council Resolutions are binding where they impose State obligations. However, there is some debate whether Resolutions accepted outside Chapter 7 are binding and, furthermore, the language of Resolution 1397 is ambiguous: on the one hand, it dictates a vision of symmetrical Statehood for Israel and Palestine; on the other, it leaves this dictate in the form of “a vision”.

3. The Right to Self-Determination

Whether on the basis of the general right to self-determination under international law, as a consequence of State-specific references to this right in the General Assembly and the Security Council Resolutions, or by virtue of the recognition of the right by the peoples themselves, it seems clear that Jews in Israel and Palestinians in the West Bank and Gaza are both peoples with the right to self-determination, to the extent that such a right exists in international law.

a. Modes of Implementation of Israeli and Palestinian Rights of Self-Determination

Starting with the assumption that both peoples have the right to self-determination, what, then, is the *proper* mode of self-determination for Israelis and Palestinians? Israel’s right to self-determination was a right of the Jewish people and has been satisfied by Statehood. Indeed, in 1948, it could only be solved by Statehood because the Jewish people, as populations belonging to other States or living under other governments,⁶⁰ had been

57. See Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT’L L. 564, 571 (1993).

58. However, after the start of the Second Intifada in the year 2000, this self-government has been undermined by the intermittent military re-occupation by Israel of areas under the control of the PA.

59. U.N. SCOR, 4489th mtg., U.N. Doc. S/RES/1397 (2002).

60. See generally MARTIN GILBERT, *JEWISH HISTORY ATLAS* (1976) (chronicling the

persistently exposed to threats of persecution and in the Second World War had been subjected to near annihilation in the Holocaust, a situation, which clearly eliminated any possibility of implementation of the Jewish right to self-determination in the absence of a State.

The position taken in the Palestinian Covenant, claiming Palestinian Statehood from Jordan to the Mediterranean, cannot be regarded as having any legitimacy under the precepts of international law of self-determination. Under that law, Palestinian entitlement cannot extend beyond entitlement to a separate State alongside the existing State of Israel. As Alan Gerson wrote: "Palestinians are entitled to self-determination . . . but self-determination is not the ultimate value. Self-determination must be exercised in a context where the rights of other people to self-determination are respected also, and where the right of a people to live in peace is respected."⁶¹ It seems that since the Declaration of Principles, the Palestinians have undertaken to accept this geo-political limit on their right of self-determination but, as stated, there is evidence that this undertaking has not been constitutionally internalized.⁶²

What is the proper mode for expression of the Palestinian right to self-determination? By international law standards, either external self-determination via the establishment of a State or via integration with Jordan, internal self-determination via the creation of a self-governing territory in confederation with Jordan or Israel, or the enjoyment of full democratic representation and minority rights in either Jordan or Israel, are all legitimate options. By process of elimination, only external self-determination is, as of now, a feasible option. The reasons for this are contextual. The "Jordanian option," as it has been called,⁶³ has

persecution of Jews in both Christian and Muslim societies from the time of the Roman Empire).

61. See Alan Gerson, *Self Determination: The Case of Palestine*, 82 AM. J. INT'L L. 349 (1988). See also Becker, *supra* n.30, at 344 (stating that in order for Palestinian self-determination to exist, there must be mutual recognition of other people's rights).

62. While for the Palestinians there are nationalist, religious, and ideological motives for seeking the Greater Palestine, there are, unlike in the Israeli case, no demographic constraints that make the vision of a Greater Palestine incompatible with Palestinian self-determination.

63. See Yossi Klein Halevi, *Israel Should Enlist Jordan in the Cause*, WASH. POST, Apr. 28, 2002, available at <http://www.washingtonpost.com> (describing the Jordanian option as ceding most of the territories to Hashemites, who governed the West Bank and East Jerusalem before 1967). See also Danny Rubinstein, *Soon, They Will be Gossiping About*

disappeared into the mists of history. It could have satisfied international law requirements but it is no longer under consideration. As for the Israeli alternatives of granting internal self-determination or full democratic representation, neither is feasible. There is no way that Israel can provide Palestinians in the West Bank and Gaza with internal self-determination. The Israeli government is not and cannot become sovereign over the entire Palestinian population of the West Bank and Gaza without forfeiting the expression of its own self-determination. The basis for Israeli Statehood has been and continues to be the right of the Jewish people to self-determination. For this to be feasible, the State of Israel must have a majority of Jews in the population and hence, the government. Indeed, this was a determining factor in Ben Gurion's decision to accept the Partition Plan, although it provided Israel with a very reduced area of land for its Statehood — 19,750 square miles — separated in the Tel Aviv and Haifa areas. Ben-Gurion stated: "I'm for a State and against partition. But when I must choose between a non-State with no partition and a State with partition, I choose partition."⁶⁴ This policy is not compatible with internal self-determination for the Palestinians in the West Bank and Gaza: the pattern of Jewish-Palestinian population growth is such, that inclusion of the West Bank and Gaza under Israeli government would inevitably produce a Palestinian majority between Jordan and the Mediterranean Sea by 2005.⁶⁵ The possibility of retention of a non-Jewish population under Israeli control without voting rights for the central government of Israel, not only would be contrary to the right of self-determination, but would result in an absolute contravention of Israel's Basic Laws, which have constitutional force and mandate that Israel be a Jewish and democratic State.⁶⁶

Financial Irregularities, HA'ARETZ, May 27, 1994, at 3B (author's trans.) (on file with author) (discussing the Jordanian option).

64. Yaffa Nakar, *U.N. Resolution 181: The Partition Plan, November 29th 1947* (Knesset Info. Ctr., Nov. 2000) (on file with author).

65. See Israeli Central Bureau of Statistics, *Projections of Israel's Population Until 2020* (2002), available at http://www.cbs.gov.il/mifkad/popil00_00_e.htm (assuming population growth rate of 2.1% for Jews (natural growth and immigration); 3.2% growth rate for Arab Israelis; and 3.5% growth rate for Palestinians, and concluding that Arabs between Jordan and the Mediterranean will outnumber Jews by 2005).

66. See Knesset, *Basic Laws — Introduction*, available at <http://www.knesset.gov.il>. See also text of Basic Law: Human Dignity and Liberty, 1992, available at <http://www.knesset.gov>. Article 1A of this Law reads: "Human Dignity and Liberty, states that the

It follows that, in light of international law and Israel's own constitutional law principles, the only feasible way for Palestinians to solidify their right to self-determination is, as stated, through external self-determination. In practice, Israel did indeed recognize the right to Palestinian Statehood at Camp David in 2000.⁶⁷ This offer was rejected by Arafat and prompted the Second Intifada.⁶⁸

b. Terror, Security Needs and Settlements

There is a tragic gap between the Security Council's "vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders" and the current reality of the Second Intifada and intermittent reoccupation of areas under the self-government of the PA by the Israel Defense Forces ("IDF").⁶⁹ It is beyond the scope of this Article to do more than indicate some of the reasons for this gap. From the Israeli side, there is a serious concern over security or geo-strategic vulnerability, which would be the result of the creation of a Palestinian State, a large percentage of whose population is hostile to the very concept of Israel's right to exist and which is contiguous to a hostile Arab hinterland. Terrorist violence has in-

purpose of the law is to anchor in a fundamental law the values of Israel as a Jewish and democratic [S]tate." *Id.*

67. See Mideast Web, *The Israeli Camp David II Proposals for Final Settlement July 2000*, available at <http://www.mideastweb.org/campdavid2.htm>. See also Moshe Maoz, *Why did the Oslo Accord Crash?*, 7TH DAY (Jul. 2001), available at <http://www.7th-day.co.il/mehumot/madua.htm>; Palestinian Ministry of Information (2001), available at <http://www.minfo.gov.ps/main.htm> (stating that 90% of West Bank and Gaza Strip, and another few percent of Israeli land swapped for Israeli settlement blocs). The idea of a land swap was accepted at Camp David already, although the percentage discussed varies (according to the observers) between 1%-5%. According to the Palestinian Ministry of Information, the information published on July 26, 2001 on its official website, Israel sought to annex almost 9% of the Occupied Palestinian Territories and in exchange, offered only 1% of Israel's own territory. In addition, Israel sought control over an additional 10% of the Occupied Palestinian Territories in the form of a "long-term lease."

68. This is not the place to enter the controversy surrounding the substance of the Israeli offer. What is interesting in terms of symmetry and asymmetry is that if the offer were inadequate in the eyes of the Palestinians because it granted only 91% of the territory of the West Bank and Gaza, the rejection of the Palestinians stands in contrast to Ben Gurion's acceptance of the Partition Plan, with its greater drawbacks, in 1948.

69. See Israel Defense Forces ("IDF"), *Doctrine*, available at <http://www.idf.il/english/doctrine/doctrine.stm> (stating that the organization's mission is to defend existence, territory, and sovereignty of the State of Israel, and to protect citizens of Israel and to combat all forms of terrorism).

creased dramatically since the Second Intifada started in 2000. The failure of the Camp David negotiations resulted in 472 deaths and 3,425 injuries of Israeli civilians,⁷⁰ and 209 deaths and 1,398 injuries of Israeli soldiers.⁷¹ In 2002, in the wake of these intensely violent two years, the large majority of Israeli Jews — about 60% — have continued to take the view, which they had during the Barak period, that Israel must separate from the West Bank and Gaza and that settlements should be removed.⁷² However, there is also a Jewish ultra-nationalist — and in some cases messianic — minority, which opposes the surrender of the former Jewish Biblical sites in the West Bank. This minority supports civil disobedience against army orders to vacate settlements. Isolated individuals from these groups have committed acts of terrorism against Palestinian civilians and assassinated Yitzhak Rabin. Their activities are subject to prosecution and punishment by the Israeli legal system, although enforcement has become increasingly sparse.

On the Palestinian side, Israeli settlements in the West Bank and Gaza pose an obstacle for implementation of Palestinian self-determination. Israeli settlement activity stretches back to the 1970s.⁷³ In addition, Palestinians have great difficulty in surrendering their claim to the right of return to the territory, which was lost in 1948, in the very creation of the State of Israel. Any form of compromise with the State of Israel is vehemently

70. See Israeli Information Center for Human Rights in the Occupied Territories, *Statistics*, available at http://www.btselem.org/Hebrew/Statistics/Al_Aqsa_Fatalities.asp [hereinafter *Btselem*] (reporting that as of February 7, 2003, 173 Israeli civilians were killed in the Territories and 287 Israeli civilians were killed in Israel).

71. See *id.* (reporting that as of February 7, 2003, 146 Israeli soldiers were killed in the Territories and sixty-five Israeli soldiers were killed in Israel).

72. See Professor Ephraim Yaar & Dr. Tamar Hermann, *Peace Index — November 2002*, available at http://www.tau.ac.il/peace/Peace_Index/2002/English/p_nov_02_e.html (stating that 58% of the Jewish population would approve a Palestinian State; 58% would agree to remove all settlements from the Gaza Strip; 52% are willing to remove part of the settlements in the West Bank; and 20% are willing to remove all settlements in the West Bank).

73. See Alon Carmel, *Criminal Negligence? Settler Violence and State Inaction During the Al-Aqsa Intifada*, 5(2) PALESTINIAN HUMAN RIGHTS MONITORING GROUP REPORT (2001), available at <http://www.phrmg.org/monitor2001/apr2001.htm> (reporting that settlements began to be established by Israel in the Occupied Territories directly after the 1967 War). However, it was during Menachem Begin's right-wing Likud government in 1977, that the settlement drive really took off. *Id.* Between 1977 and 1979, the settler population more than doubled, from some 4,000 to around 10,000 people. *Id.*

and violently opposed by the Hamas,⁷⁴ which has the support of about 20% of the Palestinian population in those territories.⁷⁵ Since 1991, the Hamas has openly and consistently claimed credit for terrorist acts against Israeli civilians in Israel and in the Territories, and against Palestinians suspected of cooperation with Israel, in order to obstruct progress towards any kind of peace settlement with Israel.⁷⁶ The PLO, which has the support of 28.1% of the population,⁷⁷ has approved or tolerated terrorist action by the Tanzim, its own armed-wing.⁷⁸ These terrorist activities have effectively gone unpunished. The escalation of violence in the Second Intifada has resulted in 1,772 Palestinian deaths caused in confrontations with the Israeli army.⁷⁹ This number includes a large proportion of militants in armed con-

74. See generally International Policy Institute for Counter-Terrorism, *Hamas (Islamic Resistance Movement)*, available at http://www.ict.org.il/inter_ter/orgdet.cfm?orgid=13 (discussing the history of Hamas).

75. See Jerusalem Media & Communication Centre ("JMCC"), *JMCC Public Opinion Poll No. 47 On Palestinian Attitudes Towards The Palestinian Situation in General* (Dec. 2002), <http://www.jmcc.org/publicpoll/results/2002/no47.htm> [hereinafter *Public Opinion Poll*].

76. See *Hamas*, *supra* n.74. The organizational and ideological sources of Hamas can be found in the movement of the Muslim Brotherhood ("MB"), which was set up in the 1920s in Egypt and renewed and strengthened its activity in the 1960s and the 1970s in the Arab world, mainly Jordan and Egypt. *Id.* The Hamas movement was legally registered in Israel in 1978 by Sheikh Ahmed Yassin. *Id.* Hamas defines the transition to the stage of *jihad* "for the liberation of all of Palestine" as a personal religious duty incumbent upon every Muslim. *Id.* At the same time, Hamas rejects any political arrangement that would consider the relinquishment of any part of Palestine. *Id.* Various Hamas elements have used both political and violent means, including terrorism, to pursue their goal of establishing an Islamic Palestinian State in place of Israel. *Id.*

77. See *Public Opinion Poll*, *supra* n.75.

78. See International Policy Institute for Counter-Terrorism, *Fatah Tanzim*, available at <http://www.ict.org.il> (discussing formation and history of Fatah Tanzim). The Tanzim is the armed wing of the Fatah, the largest faction of the PLO. *Id.* It is the paramilitary counter-balance to the military wings of Hamas and the Palestinian Islamic Jihad. *Id.* Tanzim also serves as an informal unofficial "Palestinian army," which attacks Israeli security forces and Jewish civilians without officially breaking signed agreements with Israel. *Id.* The Tanzim have played a prominent role in carrying out the activities of the al-Aqsa Intifada, including ambushes of civilian vehicles and bus bombings in Israeli cities. *Id.*

79. See Btselem, *supra* n.70 (citing statistical information available as of February 7, 2003). The reported number of Palestinian deaths includes a large proportion of militants in armed confrontation with Israeli forces. *Id.* See also Don Radfleuer, *An Engineered Tragedy, Statistical Analysis of Casualties in the Palestinian-Israeli Conflict, September 2000-September 2002*, available at <http://www.ict.org/il/articles> (stating that since September 2000, Palestinian fatalities have consisted of more combatants than non-combatants).

frontation with Israeli forces.⁸⁰ 80.7% of the Palestinians support the continuation of the al-Aqsa Intifada⁸¹ in the West Bank and the Gaza Strip, and 62.7% of Palestinians support terrorist activity against Israel.⁸² However, 46.5% of Palestinians believe that the preferred solution to the conflict is a two-State solution: an Israeli State and a Palestinian State.⁸³

Jewish settlement under Israeli sovereignty in the heart of the land area required for the expression of the Palestinian right to self-determination is clearly incompatible with the two-State vision. As Amos Elon said: “The vast settlement project after 1967, aside from being grossly unjust, has been self-defeating and politically ruinous.”⁸⁴ It is not because Palestine is entitled to be free of Jews — any more than Israel is entitled to be free of Arabs — that this project has been such a disaster. It is because Palestine does not merely demand the right of Jews to be admitted as a minority to a future Palestinian State, but rather, holds on to the concept of the settlers’ right to Israeli sovereignty and the protection of the IDF. This demand undermines the feasibility of external self-determination for the Palestinians and, in turn, compromises the achievement of self-determination for Jews in Israel.

The issues of settlements, terrorism, and counter-violence form a vicious circle, which must be broken. It is those very factors that obstruct the implementation of the vision of two States, Israel and Palestine, side by side, which make the realization of that vision so urgently necessary.

80. See Btselem, *supra* n.70 (citing statistical information available as of December 28, 2002).

81. See Shaul Shay & Yoram Schweitzer, *The Al-Aqsa Intifada: Palestinian-Israeli Confrontation*, available <http://www.ict.org.il/articles> (discussing Al-Aqsa Intifada). Israel and the PA have engaged in a violent confrontation, which is viewed differently by each of the parties. *Id.* Israel describes the situation as “a limited confrontation that threatens to escalate into a limited war or even a regional war.” *Id.* The PA defines it as a popular uprising — “the Al-Aqsa Intifada” or the “Intifada for Independence.” *Id.* For the PA, the Intifada is a “well-organized popular uprising, whose goal is to further establishment of the Palestinian [S]tate.” *Id.* See also *The Mitchell Report on the Al-Aqsa Intifadeh* (Apr. 2001), available at http://www.mideastweb.org/mitchell_report.htm (detailing immediate and long-term roots of conflict).

82. See *Public Opinion Poll*, *supra* n.75.

83. *Id.*

84. See Amos Elon, *Israelis and Palestinians: What Went Wrong?*, N.Y. REV. OF BOOKS (Dec. 19, 2002), available at <http://www.nybooks.com/articles/15935>.

II. MINORITY RIGHTS

The discussion of self-determination is limited to Jews within Israel's 1948 Armistice Line and Palestinians in the West Bank and Gaza. These categories do not include the Israeli-Palestinians⁸⁵ living within the Israeli territory or the Jews living in the West Bank and Gaza. The purpose of this section of my Article is to examine minority rights. This will involve only the situation of the Israeli-Palestinian minority in Israel. The issue of Jews living in the West Bank and Gaza is not an issue of minority rights — it is an issue of ongoing occupation after a defensive war and settlement in the occupied areas. As such, it raises questions, which go far beyond the scope of this Article — regarding the initial illegality of settlement, the individual rights of settlers, the future sovereign powers and democratic obligations of a Palestinian State, and the nature of the political solution to the Israeli-Palestinian conflict.⁸⁶

A. *International Law*

The rights of minorities are, as stated above, connected to the issue of self-determination in a negative correlation. Where minority rights are severely violated, the right of minorities — who qualify as peoples — to self-determination, may materialize. Justification for a right of secession or governmental autonomy rests largely on the existence of serious violations of minority rights and hence, the issue of self-determination revolves around the question of minority rights. The following section of this Article will not enter into discussion of the possibilities of secession or autonomy as political feasibilities for Israeli-Palestinians, but will concentrate on elucidating their minority rights in Israel. It should, in any case, be noted that polls taken in Israel on this issue show that although 52.4% of the Jewish population would be willing, if a Palestinian State were established, to exchange large territorial blocs of Israeli-Palestinian population for Israeli settlement blocs in the West Bank, the large majority of Israeli-

85. I use this expression on the one hand, to distinguish this population from the Palestinian population living in the West Bank and Gaza, and on the other hand, to respect the preference of the Israeli-Palestinians to be referred to as Palestinians and not, as they were until recently, the "Arab minority."

86. See Drew, *supra* n.14, at 120 (discussing that the solution to this question is in a state of flux). This is evident from the fact that, in the Camp David negotiations, the Barak government offered to withdraw settlements. *Id.*

Palestinians oppose this idea.⁸⁷

Minority rights are established in Article 27 of the ICCPR, which provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."⁸⁸ Furthermore, pertinent to the rights of ethnic and religious minorities are the provisions according to which all rights under the ICCPR⁸⁹ and the ICESCR⁹⁰ must be ensured without discrimination of any kind as to race, language, religion, or national origin. Under the ICCPR, minorities are entitled, without discrimination, to the rights to:

1. life;
2. protection against torture or cruel, inhuman, or degrading treatment;
3. protection against slavery;
4. protection against arbitrary expulsion;
5. liberty and freedom from arbitrary arrest or detention;
6. liberty of movement;
7. a fair and public hearing and protection from retroactive criminal liability;
8. privacy, freedom of thought and conscience;
9. enjoyment of own culture;
10. freedom of religion;
11. use of own language and freedom of expression;
12. peaceful assembly and freedom of association;
13. marriage and the founding of a family; and
14. protection of minors and equal protection of the law without discrimination.⁹¹

Under the ICESCR, minorities are entitled to the exercise, without discrimination, of the rights to:

1. work and enjoyment of just and favorable working conditions;
2. formation of trade unions;

87. See Tel Aviv University, *Peace Index* (Mar. 2002), available at http://www.tau.ac.il/Peace_Index/2002/English. It should be noted that the support for the idea was considerably higher among Jewish left-wing voters than those of the right.

88. See ICCPR, *supra* n.4, art. 27.

89. See *id.*, art. 2(1).

90. See ICESCR, *supra* n.5, art. 2(2).

91. See *generally id.*

3. social security;
4. protection of the family;
5. an adequate standard of living; and
6. the highest attainable standard of health and education.⁹²

These are the basic minority rights that States Parties to the ICCPR and the ICESCR are obligated to provide to any minority, whether under their treaty obligations or under customary international human rights law. Israel has ratified both the ICCPR and the ICESCR and hence, is obligated to provide the minority rights enconced therein.⁹³

The ICCPR has a clause which permits derogation in time of a public emergency “which threatens the life of the [N]ation and whose existence is officially proclaimed.”⁹⁴ This allows States to take measures derogating from their obligations under the Covenant to “the extent strictly required by the exigencies of the situation”⁹⁵ and provided that such measures are not discriminatory on, among other grounds, race, language, or religion. There can be no derogation from certain obligations, like the right to life; protection against torture or cruel, inhuman or degrading treatment, or slavery; protection from retroactive criminal liability; and rights to freedom of thought, conscience,

92. See generally ICESCR, *supra* n.5.

93. Israel submitted a reservation to Article 23 of the ICCPR relating to the establishment of gender equality in the area of Family law. The reservation states: “[W]ith reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned. To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law.” See Uri Regev, *Unholy Alliance of Religion and State*, JERUSALEM POST (Jul. 3, 1998), available at <http://www.jpost.com/com/Archive/03.Jul.1998/Opinion/Article-3.html> (discussing Israel’s reservation to Article 23 of the ICCPR). Israel entered a reservation on matters of personal status. This reservation is designed to shield Israel from criticism for imposing religious law in this area, mainly in marriage and divorce matters. *Id.*

94. See ICCPR, *supra* n.4, art. 4(1). Article 4(1) reads:

In time of public emergency which threatens the life of the [N]ation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Id.

95. *Id.*

and religion.⁹⁶

Minority rights have been the subject of particular protection under the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992),⁹⁷ which states that it was “inspired” by Article 27 of the ICCPR and hence, by definition, goes beyond a mere interpretation of that Section.⁹⁸ The Declaration is persuasive rather than authoritative.⁹⁹ It has wide-sweeping provisions, requiring States to provide protection for the ethnic, cultural, religious, and linguistic identities of minorities and for the cultural, religious, and linguistic freedoms of their members.¹⁰⁰ The Declaration also provides that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic, and public life;¹⁰¹ decisions concerning the minority to which they belong;¹⁰² and the economic progress and development in their

96. *Id.* art. 4(2). Article 4(2) reads: “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” *Id.*

97. *See* Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., U.N. Doc. A/Res/47/135 (1992) [hereinafter Declaration on Minorities 1992].

98. *Id.* Preamble.

99. *See e.g.* OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 85 (1991).

100. *See* Declaration on Minorities 1992, *supra* n.97, art. 1. Article 1 reads:

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

2. States shall adopt appropriate legislative and other measures to achieve those ends.

Id. *See also id.* art. 4. Article 4 reads, in relevant part:

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

Id.

101. *See id.* art. 2(2). Article 2(2) reads: “Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.” *Id.*

102. *See id.* art. 2(3). Article 2(3) reads:

Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

Id.

country.¹⁰³

B. *The Israeli-Palestinian Minority in Israel*

Israeli-Palestinians lived for generations in the area of Israel before the State was founded; they stayed in or moved into the area while it was under the colonial rule of a series of foreign conquerors, ending with the Ottoman Empire and the British Mandate. Thus, within the State of Israel, Israeli-Palestinians constitute an indigenous minority¹⁰⁴ and as such, they have clear and strong minority claims. The size of the minority is almost 20% of the population. It has been said, that the dominant preference of the Israeli-Palestinian minority is that Israel become a bi-national State.¹⁰⁵ However, there have been signs that the current mood of the Israeli-Palestinian minority is to make even more radical claims. Mohammed Dahle, a lawyer who clerked in the Supreme Court and set up Adalah, the Legal Center for Arab Minority Rights in Israel, said:

I know that it is not our fate to be beaten back and downward. And I know that, in fact, we are not a minority. The whole idea of a minority is foreign to Islam. It is appropriate to Judaism but foreign to Islam. When you look around you see that we are really not a minority: that in this country there is a majority that is actually a minority and a minority that is actually a majority . . . If you open the atlas and look at the map for a minute, this is what you will see: 300 million Arabs all around, a billion and a half Muslims. So do you really think you can go on hiding in this crooked structure of a Jewish democracy? . . . At the end of the day, it is the natives, not the immigrants, who have a supreme right to the country.¹⁰⁶

Thus, the question of minority rights in the Israeli situation is played out in the context of a deep ideological rift as to the very classification of the Israeli-Palestinians as a minority at all and in the context of a desire of an influential part of that minority to end Israel's character as a Jewish State. This, indeed, was the sentiment expressed by almost all the Israeli-Palestinian

103. *Id.* art. 2(2).

104. Examination of the status of Palestinians who left Israel in 1948 is beyond the scope of this Article.

105. See Saban, *supra* n.25.

106. See Ari Shavit, *Interview: Travels with Mohammed*, HA'ARETZ MAG., Jan. 3 2003 (author's trans.) (on file with author).

academics at a recent conference held at the Hebrew University in May 2002. They argued that a two-State solution is at best temporary and that the only solution is one bi-national State between Jordan and the Mediterranean Sea.

I shall examine the framework of rights for the Israeli-Palestinians in Israel in four spheres:

1. the right to equal citizenship;
2. the right to non-discrimination and equality of opportunity in economic and social activities;
3. the right to enjoy own culture and practice own religion; and
4. the rights to political representation and participation.

In this survey of rights, I shall attempt to include all rights, which have been or might be in dispute, and shall not discuss rights which are clearly accorded, without distinction, to Israeli-Palestinians as they are to Jews, such as the rights to freedom of expression and association; protection against torture or cruel, inhuman or degrading treatment, or against slavery; the right to marry and found a family; the rights to form trade unions, to have social security, to enjoy protection of the family, and the highest attainable standard of health.

1. Equal Citizenship

The character of Israel as a Jewish State and the right of all inhabitants of the State to equal citizenship is guaranteed in Israel's Declaration of Independence, which states:

[Israel] will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.¹⁰⁷

The Basic Laws on human rights, introduced in 1992, base the regime of human rights protection on Israel's values as a "Jewish and democratic State."¹⁰⁸ Implicit in this formula is an

107. See Declaration of the Establishment of the State of Israel (May 14, 1948), available at <http://www.mfa.gov.il/mfa>.

108. See e.g. Basic Law: Freedom of Occupation, 1994, and Basic Law: Human Dignity and Liberty, 1992, available at <http://www.knesset.gov.il>. The Laws also expressly

apparent tension between the concept of Israel as a democratic State and Israel as a Jewish State. This tension has been the subject of intense debate in Israel, not only in the context of the rights of the Israeli-Palestinian minority, but also with regard to the various issues of religion and secularism. In the present context, I shall only discuss the implications of the formula as regards ethnic or religious minority rights.

The significance of the formula as a constitutional imperative is, from the Jewish perspective, the very *raison d'être* of the State. Israel was established in order to allow the Jewish people to implement the right of self-determination. The fact that this is expressly declared and constitutionally guaranteed, rather than assumed as a demographic fact, results from the traumatic history of denial of self-determination and even survival rights to the Jewish people — the history which underlies the creation of the Jewish State. Perhaps, it is this ongoing denial of legitimacy, which is expressed so vividly in the words of Mohammed Dahle.¹⁰⁹ In this respect, the formula can be justified as at least a temporary measure in the process of implementing the right to self-determination or, alternatively, as a kind of affirmative action for the Jewish people. Furthermore, the placing of the requirements of the Jewish and democratic nature of the State on the same level, may allow for a synthesis into the constitutional system of only those aspects of the Jewish cultural heritage, which are consistent with democratic principles. This has, indeed, been the view of Justice Barak, the President of the Israeli Supreme Court, although former Justice Elon, opposed this view.¹¹⁰

incorporate the principles laid down in the Declaration of the Establishment of the State of Israel, *supra* n.107.

109. See Shavit, *supra* n.106 and accompanying text.

110. See Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT U'MIMSHAL 30 (1992/1993) (author's trans.) (on file with author). According to Justice Barak:

Reference to [the basic values of Judaism] is on the universal level of abstraction, which suits Israel's democratic character; thus, one should not identify the values of the State of Israel as a Jewish [S]tate with the traditional Jewish civil law. It should not be forgotten that in Israel, there is a considerable non-Jewish minority. Indeed, the values of the State of Israel as a Jewish [S]tate are those universal values common to members of a democratic society, which grew from Jewish tradition and history.

Id.; See also H.C. 506/88, Shefer v. the State of Israel, P.D 48(1), 87, at 168, sec. 57 (author's trans.) (on file with author). According to Justice Elon: "[T]he synthesis be-

The identification of Israel with Jews as an ethnic or culturally identifiable people, is in no way unique in the history of self-determination and characterizes, most recently, the break up of the Soviet Union into ethnic States and the division of Yugoslavia. Furthermore, the designation of Israel as a State associated with a particular religious denomination is not unique among democracies. The highly democratic Scandinavian countries maintain the Scandinavian Church as a national church and England gives official status to the Church of England. The formula of a Jewish and democratic State is not, in essence, any more problematic for human rights of the non-Jewish minority than for minorities in these other countries. In *Kaadan*, Justice Barak, President of the Supreme Court, said:

[T]he values for the State of Israel as a Jewish and democratic State, amongst other things, provide the basis for the right of the Jewish people to be autonomous in its own sovereign country . . . From these values . . . a number of conclusions should be derived: Hebrew will be the main language of the State and its main holidays will reflect the national revival of the Jewish people; it is clear that Israel's heritage will be a central component of the State's religious and cultural heritage . . . But, from the values of the State of Israel as a Jewish and democratic State, it can in no way be derived that the State will discriminate between its citizens. Jews and non-Jews are citizens with equal rights and obligations in the State of Israel.¹¹¹

Nevertheless, even for some of those, and I am among them, who regard Israel as an expression of the Jewish right of self-determination, it is questionable whether the best way of implementing this goal is by enacting the formula of a Jewish and democratic State as a constitutional value, rather than by relying on it as an empirical fact. Although the constitutional formula may not be used to derogate from concrete citizenship rights of minorities and indeed has not been so used by the courts up

tween the terms 'Jewish and democratic [S]tate,' requires preferring the result deriving from Jewish values, and construing according to them the term 'values of a democratic [S]tate.'" *Id.*; Menachem Elon, *Constitutional Values of the State of Israel as a Jewish and Democratic State in Light of Basic Law: Human Dignity and Liberty*, 17 *IYUNEI MISHPAT* 667-68 (1993) (author's trans.) (on file with author). For a further discussion of this issue see Sec.II.B.4.

111. H.C. 6698/95, *Kaadan v. ILA*, P.D 54(1), 258 (author's trans.) (on file with author).

until the time of the writing of this Article, its very posing of a distinction between majority and minority identities is problematic. As a matter of constitutional human rights, the State should be considered a State for all its citizens. This, indeed, corresponds to the concept of the General Assembly and Vienna Conference Declarations regarding self-determination — a government should represent the whole people belonging to its territory, without distinction. Furthermore, as a utilitarian matter, the constitutional statement that Israel is a Jewish State has little to offer: Israel will remain Jewish and democratic — a State for Jewish self-determination — only so long as a critical mass majority of the population is of Jewish ethnicity and culture. I would venture that the maintenance of “the right of the Jewish people to be autonomous in its own sovereign country”¹¹² can be achieved by less symbolically problematic means.¹¹³

112. *Id.*

113. The rights of citizenship refer to rights of those who are already citizens. However, it is also claimed that Israel’s immigration policy discriminates against Israeli-Palestinians and violates their right to become citizens. Israel’s law of return indeed does give Jews an automatic right to immigrate and acquire citizenship. This is in line with the policy of self-determination and affirmative action for the Jewish people to which I have referred previously. See Ann Dummett, *Ministerial Statements — the Immigration Exception in the Race Relations (Amendment) Act 2000 — Introduction*, IMMIGRATION LAW PRACTITIONERS’ ASSOCIATION (“ILPA”) (Apr. 2001), available at <http://www.ilpa.org.uk/publications/rractintro.html> (stating:

All immigration laws are of necessity discriminatory on grounds of nationality, since they must distinguish between nationals of the legislating [S]tate and non-nationals. Whether, or in what circumstances, such discrimination is justifiable on moral, social, or economic grounds, is outside the scope of this publication, but legally there can be no doubt that international law permits [S]tates to control the entry and stay of non-nationals. At the same time, international law requires [S]tates to admit their own nationals. And it has certain norms which [S]tates are expected to observe, one of which is that there should in general be no discrimination on racial grounds.

Id. See generally, Ryszard Cholewinski, *Borders and Discrimination in the European Union*, ILPA (Jan. 2002), available at <http://www.migpolgroup.com/publications> (expressing criticism of the narrowness of this rule of international law, prohibiting only racist discrimination in immigration and not other forms of discrimination on the basis of ethnicity or nationality).

Indeed, there is also criticism of Israel’s law of return as regards the automatic right of Jews to immigrate and the limits of immigration of other groups. However, claims regarding the right of return of Palestinians who left Israel in 1948 are beyond the scope of this Article. For more on the right of return see Stig Jagerskiold, *The Freedom of Movement*, in THE INTERNATIONAL BILL OF RIGHTS 180 (Louis Henkin ed., 1981) (noting that the right of return, or the right to enter one’s country in the 1966 International Covenant

. . . is intended to apply to individuals asserting an individual right. There was

Army service is commonly considered a duty of citizenship, although, in current feminist discourse, it is more generally regarded as a right. The Israeli-Palestinian population, other than the Druze¹¹⁴ and the Circassians,¹¹⁵ is exempted from the compulsory conscription to army service imposed on all Jews other than the Ultra-Orthodox Yeshiva students.¹¹⁶ Bedouins and Christians may volunteer for service. Ilan Saban describes this exemption as an important collective right for the Israeli-Palestinian population.¹¹⁷ He acknowledges that the blanket exemption of Muslim Israeli-Palestinians is also clearly based on Israel's security needs, but nevertheless, regards it as a right. I would tend to agree with Saban's view regarding the exemption and this in spite of the fact that Muslims are not merely exempted, but prohibited from volunteering. The view that the regulation is an advantage for the Israeli-Palestinian population is indeed supported by empirical evidence. First, the argument was made by a Druze conscript who petitioned the High Court of Justice, that his conscription was discriminatory vis-à-vis the Israeli-Palestinians, who were exempted; this argument was rejected by the

no intention here to address the claims of masses of people who have been displaced as a by-product of war or by political transfers of territory or population, such as the relocation of ethnic Germans from Eastern Europe during and after the Second World War, the flight of the Palestinians from what became Israel, or the movement of Jews from the Arab countries.

Id.

114. The Druze community in Israel receives official recognition as an independent religious entity, with separate courts and spiritual leadership. The Druze have a special standing among other minority groups in Israel and hold respectable positions in the military, public, and political spheres. The Druze culture is Arab and the language is Arabic, but the Druze do not follow mainstream Arab nationalism and serve in the IDF and the Border Police. There are approximately 104,000 Druze living in Israel, while they number close to one million worldwide.

115. The Circassians in Israel make up a population of about 3,000 people. They are Sunni Muslims who participate in Israel's economic and national affairs without relinquishing their separate ethnic identity either to the Jewish society or to the Muslim community.

116. The exemptions for both Israeli-Palestinians and Ultra-Orthodox Yeshiva students were given under regulations issued by the Minister of Defense. However, the Supreme Court ruled that the issue of exemption should be regulated by the Knesset and hence, the continuing policy in this respect must be determined through legislation. *See* H.C. 3267/97, Rubinstein and Others v. Minister of Defense, 52(5) P.D. 481 (author's trans.) (on file with author). *See also* Service Deferral for Yeshiva Students Act (2002), also known as the "Tal Bill." In principle, the exemption for Arabs too should, by the same Supreme Court ruling, be regulated in legislation, but this has not yet been brought up as a political issue.

117. *See* Saban, *supra* n.25, at 276-77.

Court.¹¹⁸ Second, the Israeli-Palestinian population has consistently opposed establishing non-military national service in lieu of military service because of the population's refusal to be identified in this manner with the State of Israel. Third, other groups in Israel, such as Ultra-Orthodox Jewish Yeshiva students, fight for group exemption as a collective right.¹¹⁹

2. Non-Discrimination and Equality of Opportunity in Economic and Social Activities

The legislature and courts, as a matter of principle, automatically bestow civil and political rights on Israeli-Palestinians in the same way as they do on Jewish Israelis.¹²⁰ Hence, a discussion of rights to non-discrimination and equality of opportunity

118. See H.C. 53/56, Hasuna v. Prime Minister, 10(1) P.D. 710 (author's trans.) (on file with author).

119. It should be noted that traditionally, army service granted various veterans' benefits (e.g. receipt of government housing loans or specialized child care benefits). Most of these benefits were removed over the years. However, in Israel's 2002-2003 budget, as a result of a clearly stated policy of preference for veterans, the government decided to reintroduce the special child care benefits for veterans' families, and to grant veterans a preferred status in eligibility for unemployment compensation. See Ministry of Finance, *Economic Policy for 2002-2003: Adjustments in the 2002-2003 Budget* 12-13 (Apr. 2002) (on file with author). These benefits disadvantage all non-veterans, including Israeli-Palestinian Muslims, Yeshiva students, and those who do not serve for reasons of physical or mental fitness.

120. For an unusual exception see Press Release, Adalah, The Legal Center for Arab Minority Rights in Israel, Minister of Interior Revokes Citizenship of an Arab Citizen of Israel (Sept. 10, 2002), available at http://www.adalah.org/pressrelease/02_09_10-2.htm (commenting that the Minister of the Interior signed a special decree officially revoking the citizenship of Mr. Nihad Abu Kishik, an Arab citizen of Israel). Mr. Kishik was accused of planning a suicide attack in Kfar Saba in April 2002, and of plotting another suicide attack in Netanya. *Id.* This decision makes Abu Kishik stateless, since he does not hold any other citizenship. *Id.* Under Article 11(b) of the Citizenship Law of 1952, the Minister of Interior may revoke citizenship of an Israeli citizen for "breach of allegiance to the State of Israel." *Id.* The Minister may not exercise his discretion, however, if his decision contravenes Israel's international legal obligation to ensure that it does not make its own citizens stateless. *Id.* Notably, the Government of Israel wrote, in its 1998 Report to the U.N. Human Rights Committee, that in reality, citizenship is never revoked for "breach of allegiance." See also Suzanne Goldenberg, *Hated and Feted*, GUARDIAN (Mar. 23, 2002), reprinted in INTERNATIONAL COMMITTEE FOR THE DEFENSE OF AZMI BISHARA, available at http://www.amzibishara.info/interviews/tg_20020323.html [hereinafter Azmi Bishara] (commenting on allegations of unequal police behavior when, at the start of the Second Intifada, the police allegedly opened fire against Israeli-Palestinian demonstrators or rioters (depending on the version of the story) and thirteen were killed). An Enquiry Committee was established under the chairmanship of a Supreme Court Justice; the Committee's decision is currently pending.

is relevant in particular with regard to social and economic rights — including employment, public appointments, budgetary allocations, land and housing, health and education. In the case of social and economic rights, in order to achieve equal opportunity, the State has to take a more proactive policy to prevent *de facto* discrimination in administrative or private sector bodies, which are instrumental in determining the implementation of these rights. In the context of this Article, I systematically discuss the mechanisms in place for the prevention of *de facto* discrimination and do not undertake to systematically investigate the sociological aspects of the *de facto* disadvantage for the Israeli-Palestinian population. However, I cannot but point out that much of the legal progress, which was made recently in recognizing the Israeli-Palestinian population's right to social and economic equality, was made against a backdrop of governmental neglect of its administrative responsibility to do so.

The current anti-discrimination legislation in Israel is an outgrowth of earlier legislation aimed at preventing discrimination on the grounds of sex or parenthood. That legislation gave way to laws aimed at preventing discrimination based on a wide set of group characteristics, including race, religion, nationality, and country of origin. The protection against discrimination is now the same for all disadvantaged groups, including Israeli-Palestinians. The protection against discrimination under the Equal Employment Opportunities Law¹²¹ and Equal Pay for Male and Female Workers Law¹²² provides improved definitions, procedures, and remedies for employment discrimination. Although women have brought some tens of cases to the Labour Courts under these Laws, Israeli-Palestinians have not yet been active in attempts to implement their rights under the Laws.

In 1992 and 1996, legislative amendments were made to ensure women fair representation in the directorates of government companies¹²³ and civil service promotions.¹²⁴ In 2000,

121. See Equal Employment Opportunities Law, 1988, S.H. 5748 (author's trans.) (on file with author).

122. See Equal Pay for Male and Female Workers Law, 1996, S.H. 5756 (author's trans.) (on file with author).

123. See Governmental Companies Law, 1975, S.H. 770, art. 18(a) (author's trans.) (on file with author).

124. See Civil Service (Appointments) Law, 1954, as amended in 1995, art. 15(a) (author's trans.) (on file with author).

both of these provisions were amended in order to extend the requirement of fair representation to the Arab population.¹²⁵ Until adequate representation is achieved, government ministers are obligated to appoint, as far as circumstances allow, Arab directors,¹²⁶ and the Civil Service Commissioner is to promote Arab employees in the civil service.¹²⁷ In July 2001, the High Court of Justice ruled that Arabs should be given more adequate representation in the Israel Land Council, which determines the policy of land ownership in Israel.¹²⁸ The Court held that the right to fair representation of the Israeli-Palestinian population in the public sector is a general right based on the principle of equality and is not confined to statutory affirmative action programs.

Although the legal mechanisms are in place to prevent discrimination against Israeli-Palestinians in both, private employment and public appointments, the results have been disappointing. In terms of the civil service, only 5% of employees are Israeli-Palestinians, although they constitute almost 20% of the population. In terms of government companies, there has been a far more significant impact on women's promotion than on the promotion of Israeli-Palestinians.¹²⁹ It should not be forgotten, however, that the gains made by women were only subsequent to the successful petition to the High Court of Justice by the Israel Women's Network¹³⁰ and no such petition has yet been presented on behalf of Israeli-Palestinians.

One of the main areas of contention for the Israeli-Palestinian minority is that of land and housing. I shall not discuss here

125. It is interesting to note that of the many groups in the highly fragmented and segregated Israeli society (such as Sephardi Jews or Ethiopian Jews) who are considered vulnerable to *de facto* discrimination, it is only the Israeli-Palestinians who have been included in the fair representation measures.

126. See Governmental Companies Law, *supra* n.123, art. 18(a)(1) (author's trans.) (on file with author).

127. See Civil Service (Appointments) Law, *supra* n.124, art. 15(a) (author's trans.) (on file with author).

128. H.C. 6924/98, Israel Human Rights League v. the Government of Israel, 54(5) P.D. 15 (author's trans.) (on file with author).

129. See Association for the Advancement of Civil Equality, *Sikkuy's Report on Equality & Integration of the Arab Citizens in Israel 2000-2001*, available at <http://www.sikkuy.org.il/english/report2001/eng.htm> [hereinafter *Sikkuy Report*].

130. See H.C. 453/94, IWN v. Minister of Transportation, 48(5) P.D. 501 (author's trans.) (on file with author); H.C. 2671/98, IWN v. Minister of Labor, 52(3) P.D. 630 (author's trans.) (on file with author).

the land purchase, division, and expropriation, which were carried out in the establishment of the State of Israel, although this issue is regarded by Israeli-Palestinians as perhaps the most serious political issue concerning their status in Israel and is commemorated by an annual national day of protest, the Land Day.¹³¹ Kretzmer writes: "Some of the laws . . . are no longer in force, or even if still in force, are no longer applied. In some respects, the expropriation issue is therefore mainly one of historic importance that has no place in a study on the current legal status of Arabs in Israel."¹³² Most of the land in Israel is owned by the government or the Jewish National Fund ("JNF").¹³³ In actual practice, Israel Land Authority ("ILA") lands are leased and both Arab and Jewish citizens of Israel theoretically have equal access. However, most of the development of residential housing is divided into sectors for the Jewish and Israeli-Palestinian communities, and there are allegations of discrimination in the implementation of zoning and planning laws, and of inadequate provision for expansion of housing schemes in Israeli-Palestinian towns and villages.

Three allegations of discrimination in housing have reached the High Court of Justice. The first allegation was the unusual case in the Old City in Jerusalem.¹³⁴ In that case, the government undertook the reconstruction of the Jewish Quarter in the Old City, which had been destroyed when the Arab Legion conquered it in 1948, expelling its long-time Jewish residents. Residence in the reconstructed Jewish Quarter was restricted to army veterans and new immigrants, and excluded Israeli-Palestinians. A petition by an Israeli-Palestinian to live in the Quarter was rejected by the High Court of Justice on various

131. See DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 51 (1990).

132. *Id.* at 51.

133. In 1960, under Basic Law: Israel Lands, the Jewish National Fund ("JNF")-owned and government-owned lands were together defined as "Israel lands," and the principle was laid down that such lands would be leased rather than sold. The JNF retained ownership of its land, but administrative responsibility for the JNF land, and also for government-owned land, passed to a newly created agency called the "Israel Land Administration" ("ILA"). Of the total land in Israel in 1997, the Israel Government Press Office statistics show that 79.5% is owned by the government; 14% is privately owned by the JNF; and the rest, around 6.5%, is evenly divided between private Arab and Jewish owners. Thus, the ILA administers 93.5% of the land in Israel. (Statistics on file with author).

134. See H.C. 114/78, *Burkhan v. Minister of Finance*, 32(2) P.D. 800 (author's trans.) (on file with author).

grounds. Among these, was the justification of the right to reestablish, within the walls of the Old City, a Jewish Quarter alongside the Muslim, Christian, and Armenian Quarters, and the argument that Muslims, by religious and administrative edict, refuse to sell any land to Jews and therefore, do not come with clean hands in demanding equal access to land sold by Jews.¹³⁵

The second allegation involved the introduction of a highly subsidized land program for Bedouin purchasers.¹³⁶ The Civil Rights Association of Israel represented a Jewish petitioner who wanted to purchase land on the same terms. The High Court of Justice rejected the petition on the grounds that the selectivity of the program was justified as a compensatory measure, providing resettlement for Bedouin nomadic tribal groups, who had been moved off nomadic land areas.¹³⁷

The third case, *Kaadan v. ILA*, was decided in 2000.¹³⁸ In this case, an Israeli-Palestinian family submitted its candidacy to reside as a member in Katzir, a residential community, which accepted residents according to criteria of suitability applied by a Residents Committee. The High Court of Justice held that the residents of Katzir could not refuse to accept membership applications merely because the applicants were not Jews: "The [S]tate may not discriminate, directly . . . or indirectly, on the basis of nationality or religion, in allocation of [S]tate land resources."¹³⁹ This ruling applied to the Katzir community because it indirectly benefited from State funding. It is not clear that the same ruling would apply to entirely private residential schemes.

Basic health and education services are provided to the Israeli-Palestinian population on the same basis as to the Jewish population. However, in education, there is an acknowledged need for proactive measures since there is a significant gap between the achievements of Israeli-Palestinian and Jewish school children — only 35% of the former acquire matriculation certifi-

135. *Id.*

136. See H.C. 528/88, *Avitan v. ILA*, 33(4) P.D. 297 (author's trans.) (on file with author).

137. *Id.*

138. See H.C. 6698/95, *Kaadan v. ILA*, 54(1) P.D. 258 (author's trans.) (on file with author).

139. *Id.* at 238.

cates, as compared to 46% of the latter.¹⁴⁰ Beginning in 2000, in order to ameliorate the situation, a Five-Year Plan for investing US\$10,000,000 a year was adopted, but it was only partially implemented.¹⁴¹

The *Adalah II* case, a recent decision of the Israeli High Court of Justice, introduced the principle of egalitarian proportionality in the distribution of resources.¹⁴² In that case, Adalah, a non-governmental organization (“NGO”) for Israeli-Palestinian minority rights, claimed that Muslim burial grounds were being financed from the State budget at a lower level than were Jewish burial grounds. The High Court of Justice accepted the petition and ordered the State to provide proportionally equal budgets to the different religious groups in relation to their population size. Justice Zamir held: “[T]here is a need to determine priorities in the distribution of budgets. However, these priorities must be based on material considerations which conform to the principle of equality and not invalid considerations, such as religion or nationality.”¹⁴³ This decision is an important precedent, legitimizing the application of equality to collective and individual rights of the Israeli-Palestinian minority.¹⁴⁴ The decision opens the way to equality discourse and legal argument on budgetary allocations.

In July 2000, the High Court of Justice ruled that the Ministry of Education’s Department of Education and Welfare for Assistance to Weaker Pupils should provide the Arab sector with a budget proportionate to its part in the population — indeed, by the time the appeal was brought before the Court, the department had already amended its budget plans to allocate 20% of its budget to the Arab and Druze sector.¹⁴⁵ In December 2001, the Supreme Court held that the budget allocated to reconstruction of Arab villages and towns in the Suburb Rehabilitation Plan should comply with the Arab sector’s needs, and anyhow, should not be any smaller than the relative size of the sector’s popula-

140. See *Sikkuy Report*, *supra* n.129.

141. See Wadi’a Awauda, *The Five Year Plan for Improving Arab Education: How It’s Holding Up in Reality*, in *Sikkuy Report*, *supra* n.129.

142. See H.C. 1113/99, *Adalah Legal Center v. Ministry of Religion*, 54(2) P.D. 164 (author’s trans.) (on file with author) [hereinafter *Adalah II*].

143. *Id.*

144. See *Saban*, *supra* n.25, at 292.

145. H.C. 2814/97, *Follow-up Committee on Arab Education in Israel v. Ministry of Education*, 54(3) P.D. 233 (author’s trans.) (on file with author).

tion.¹⁴⁶

3. Right to Enjoy One's Own Culture and Practice One's Own Religion

The most central issues of cultural and religious autonomy for Israeli-Palestinians in Israel are language, education, and religion. Arabic is one of the two official languages of Israel, and informally, it is the second official language.¹⁴⁷ The significance of this is that there is an obligation to publish all official State documents in Arabic as well as Hebrew, and, in addition, individuals have the right of access to State institutions in Arabic. Ilan Saban remarked that the extent of the right is remarkable and radical, requiring, as it does, investment of considerable resources and giving, as it does, considerable symbolic recognition to the centrality of the Israeli-Palestinian collective culture.¹⁴⁸ However, he also points out that a dissonance has developed between the legal and socio-political status of the Arabic language and the fact that Hebrew is, in practice, the sole language used in State institutions, other than in Arab localities. In a recent decision, the High Court of Justice held that it is the obligation of Israel to respect Arabic as the language of the Israeli-Palestinian minority: "Israel is a Jewish and democratic [S]tate and, as such, it is obligated to respect the minority within it: the person, his culture and the person's language."¹⁴⁹ The Court held that all official signs must be in Arabic as well as Hebrew, whether they are in Arab or non-Arab localities.

The education system, public and private, is divided into Arabic-speaking and Hebrew-speaking education. Public education is funded by the State and private education is almost completely subsidized.¹⁵⁰ Israeli-Palestinians may register their children in Hebrew-speaking education, if they choose.¹⁵¹ Thus, in terms of the right to choose education in the minority's own language, the rights of Israeli-Palestinians are fully protected but

146. Council of Heads of Arab Local Authorities and others v. Minister of Construction, Dec. 2001 (not yet published) (author's trans.) (on file with author).

147. See KRETZMER, *supra* n.131, at 165-66.

148. See Saban, *supra* n.25, at 261.

149. C.A. 12/99, Jamel v. Sabek, 53(2) P.D. 128 (author's trans.) (on file with author).

150. See Saban *supra* n.25 at n.45.

151. See H.C. 4091/96, Abu Shamis v. City of Tel Aviv (1997) (not published) (author's trans.) (on file with author).

not exclusionary. Regarding the cultural content of education, the aims of education were set out in the State Education Law of 1953 and included love of Jewish culture and values and memory of the Holocaust.¹⁵² There is no doubt that the curriculum and the matriculation requirements, determined by the Ministry of Education, have emphasized Hebrew education, Jewish history and literature, and have not been adapted to meet the educational demands of a national collective Arabic culture. However, an amendment to the State Education Law, passed in February 2000, while restating the declared purposes of public education in Israel and its general aims — “to love humankind . . . to instill the values of Israel as a Jewish and democratic State and to respect human rights and freedoms . . . peace and tolerance”¹⁵³ — also includes an important new clause: “to know the language, culture, history, heritage and unique tradition of the Arab population and of other population groups in Israel, and to recognise the equal rights of all the citizens of Israel.”¹⁵⁴

The right to freedom of religion is fully protected for Jews, Muslims, and Christians. Israel does not have a separation of State and religion, but rather, promotes the three monotheistic religions in a religiously pluralistic way. The personal law of citizens of Israel is determined according to the religious community into which they are born. This arrangement is the heritage of the Millet system, introduced under the Ottoman rule and maintained under the British Mandate and by Israel after it attained independence. Matters of personal status in marriage and divorce are determined in accordance with religious laws by the religious courts of different communities. The Jewish, Muslim, and Druze religious courts are regulated by statute and the judges’ salaries are paid by the State. The decision of the High Court of Justice in the *Adalah II* case discussed above, reconfirms the principle of the obligation of the State to provide proportionately equal budgeting for the various religions.¹⁵⁵ The problem for all communities is less that of freedom of religion, than

152. See State Education Law, 1953. For background information on Israel’s education laws, see generally State of Israel Ministry of Education, *Facts and Figures* (July, 2001), available at www.education.gov.il.

153. State Education Law, 1953, *supra* n.152, as amended on Feb. 2000 (author’s trans.) (on file with author).

154. *Id.* art 2(11).

155. See *Adalah II*, *supra* n.142 and accompanying text.

freedom from religion. There is no alternative to civil marriage and divorce for the secular populations of all communities. The pluralism of religious freedom is also recognized in the holiday regulations: although the national rest day and festivals are Jewish, employers are obliged by law to observe the rest days and festivals of other religions as holidays from work for members of these communities.

4. Political Representation and Participation

The right of political representation of the Israeli-Palestinian population has centered on the issue of the admissibility of advocating the demise of Israel as a Jewish State. The long saga of the High Court of Justice decisions makes it impossible to entertain the full complexities of judicial reasoning.¹⁵⁶ However, the basic rulings and the statutory framework can be analyzed. I include brief references to the decisions of the Court regarding other issues of disqualification in order to allow a fuller understanding of the significance of the Court's decisions on the Israeli-Palestinian issue.

In 1965, the Supreme Court disqualified the election candidacy of the el-Ard list, an Arab political movement, on the dual grounds that the movement was opposed to the Jewish character of the State, and that it identified with enemies of Israel, who were pursuing its physical destruction.¹⁵⁷ This decision was given under the Ottoman Law on Associations, which did not allow the registration of unlawful organizations, but did not provide any express grounds for disqualifying the candidacy of a political list.¹⁵⁸

In 1984, in the *Neiman I* case, the Supreme Court overruled the decision of the Elections Committee to disqualify the candidacy of the Progressive List for Peace ("PLP"), a political party started in 1984 and which advocated the establishment of a Palestinian State alongside the State of Israel, as well as that Israel

156. See KRETZMER, *supra* n.131, at 22-31 (summarizing key legal decisions in Israel until 1990).

157. E.A. 1/65, *Yardor v. Elections Committee for the 6th Knesset*, 19(3) P.D. 365.

158. See Ottoman Law on Associations, 1909. The Law was based on the French Law on Associations of 1901 and remained in force in Israel until 1981. This law regulated the registration and administration of not-for-profit organizations.

be a State of all its citizens, Jews and Arabs alike.¹⁵⁹ This list advocated that Israel become a bi-national State. The Court held that there had been no evidence before the Elections Committee on which to base a finding that the list denied “the very existence of the State of Israel or its integrity.”¹⁶⁰ David Kretzmer regards the judgment in *Neiman I* as implying that a list, which advocates that the State of Israel become a bi-national State, rather than remain a Jewish State, will not be disqualified, unless it is actually committed to the physical destruction of Israel.¹⁶¹ It is notable that in the same decision, the Supreme Court also overruled the Elections Committee’s decision to disqualify the Kach¹⁶² list on the grounds of its anti-Arab manifest.

An amendment to the Basic Law: the Knesset was passed after *Neiman I*. The amended law provided that a list of candidates may not participate in the elections to the Knesset if the list, in its purposes or its actions, denies the existence of Israel as the State of the Jewish people, undermines the democratic nature of the State, or incites to racism.¹⁶³ This new statutory provision was applied by the Supreme Court in the 1988 elections in its decision to uphold the Elections Committee’s disqualification of the Kach political list on the grounds that Kach denied the democratic character of the State and was racist.¹⁶⁴ At the same time, the Court upheld a decision of the Elections Committee not to disqualify the PLP.¹⁶⁵ The majority of the Justices were of the opinion that although the amended law allowed for disqualification of a list on the grounds that it opposed the Jewish character of the State and even if it did not threaten Israel’s security, there was no sufficiently convincing evidence to disqualify the PLP on these grounds.¹⁶⁶

In 1992, once again the Supreme Court upheld the disquali-

159. See E.A. 2/84, *Neiman v. Chairman of the Elections Committee for the 11th Knesset*, 39(2) P.D. 225 (author’s trans.) (on file with author).

160. *Id.*

161. See KRETZMER, *supra* n.131, at 27.

162. Kach was founded by a radical Israeli-American Rabbi, Meir Kahane, and after his assassination, his son founded Kahane Chai, or “Kahane Lives.”

163. See Basic Law: the Knesset, 1958, as amended in 1985. Text of the law is available at <http://www.knesset.gov.il>.

164. E.A. 1/88, *Neiman v. Chairman of the Elections Committee for the 12th Knesset*, 42(4) P.D. 177.

165. See E.A. 2/88, *Ben Shalom v. C.E.C for 12th Knesset*, 42(4) P.D. 749; 43(4) P.D. 221.

166. *Id.*

fication of Kach and of Kahana Lives, a party that was continuing the Kach platform.¹⁶⁷ In 1999, in the elections for the fifteenth Knesset, the High Court of Justice rejected a petition to disqualify the Balad Party of Azmi Bishara although the Justices commented, in their ruling, that some of Bishara's statements appeared to challenge the existence of the State of Israel as the State of the Jewish people and verged on illegitimacy.¹⁶⁸

An additional statutory amendment was made in 2001. This amendment, Section 7(a), added a further disqualifying criterion: a list of candidates may not participate in elections if the list supports an armed struggle of an enemy State or a terrorist organization against the State of Israel. This amendment was passed shortly after Azmi Bishara was deprived of his immunity as a Member of Knesset, so that he could be charged with supporting a terrorist organization, the Hezbollah, and with organizing illegal delegations to Syria, a State with which Israel is officially at war.¹⁶⁹

Several applications were made to the Elections Committee to disqualify parties and candidates from participating in the 2003 elections. For our purposes here, the four relevant applications were those to disqualify Azmi Bishara, his Balad Party, and Ahmed Tibi,¹⁷⁰ on the one hand, and Baruch Marzel,¹⁷¹ on the

167. E.A. 2858/92, *Movshovitz v. Chairman of the Elections Committee*, 46(3) P.D. 541 (author's trans.) (on file with author).

168. At the time of the writing of this Article, the High Court of Justice has taken the unprecedented step of effectively deleting the factual part of the ruling it made in 1999, which attributed to Bishara the denial of the existence of Israel as a Jewish State, on the grounds that he had not been called to give evidence and had not had an opportunity to respond to the allegations.

169. See Arab Association of Human Rights, *Weekly Review of the Arab Press in Israel*, No.55/4 (Nov. 10, 2001), available at <http://www.arabhra.org/wrap/wrap55.htm> [hereinafter Arab Human Rights] (remarking that Azmi Bishara was charged in November 2001 with violation of the Prevention of Terror Ordinance of 1948, or, in other words, the support of a terrorist organization). Azmi Bishara is alleged to have publicly stated: "The Hizballah has won, and for the first time since 1967 we have tasted the taste of victory. It is the Hizballah's right to be proud of its achievement and to humiliate Israel." *Id.* Azmi Bishara is also charged with the violation of Regulation 18(d) of the Emergency Regulations (Foreign Travel) (Extension of Validity) Ordinance, 1948, I.R. 33. *Id.* He is alleged to have organized an illegal delegation to visit Syria, which is officially at war with Israel. See also Azmi Bishara, *supra* n.120. See generally Gad Barzilai, *The Case of Azmi Bishara: Political Immunity and Freedom in Israel*, MIDDLE EAST REP. ONLINE (Jan 9, 2001), available at <http://www.merip.org/mero/mero010902.html>.

170. See Gideon Alon & Yair Ettinger, *AG Against Banning Tibi, Dehamshe from Competing in Elections*, VIRTUAL JERUSALEM, available at http://www.virtualjerusalem.com/news/lateststories/?disp_feature=ER9I8h (stating that Attorney General, Elyakim Ru-

other. The applications against Bishara, Balad, and Tibi were based on allegations that they negated the existence of the State of Israel and supported an armed struggle of an enemy State or a terrorist organization against the State of Israel. The Elections Committee accepted the allegations and disqualified these candidates and the political party. The Supreme Court reversed all three decisions on the ground that there was not enough evidence to justify limiting the freedom to participate in the political process and allowed Bishara, the Balad Party, and Tibi to participate in the upcoming elections. The allegations against Marzel were based on his having been the former number two on the Kach list, which had been disqualified in 1988, as well as the alleged leader of the movement today. The Elections Committee refused to disqualify Marzel on the basis of his historical role without evidence of current incitement to racism, and the Supreme Court confirmed the Elections Committee's decision. The reasons for the decisions have not been published at the time of the writing of this Article, but, as was observed by a legal commentator, it seems clear that the standard of evidence required for disqualification is so high that, in spite of the language of Section 7(a), the right to stand for the Knesset is upheld as a sacred constitutional right.¹⁷²

It is notable that since 1965, in spite of amendments to the legislation allowing the disqualification of lists which deny the existence of Israel as the State of the Jewish people, and in spite of political controversy surrounding the platforms of some of the Israeli-Palestinian lists, the only lists which have been disqualified are Jewish anti-Arab lists.¹⁷³

binstein, was recommending to the Elections Committee to refrain from banning Ahmed Tibi from running in elections). The call to ban Tibi and his Party, Hadash-Ta'al, was based on allegations that Tibi advocated, or at least supported, suicide terror attacks against Israelis. *Id.* See also Israeli Ministry of Foreign Affairs, *Candidates for the 16th Knesset* (Jan. 9, 2002), available at <http://www.mfa.gov.il/mfa/go.asp?MFAH0mv80> (stating that Elections Committee ruled to disqualify Ahmed Tibi from running in the January 28 election).

171. See *Arab Radical Banned from Israel Poll*, BBC NEWS (Dec. 30, 2002), available at http://news.bbc.co.uk/2/hi/middle_east/2616307.stm (stating that Baruch Marzel is the former leader of the banned Kach group which has called for expulsion of Arabs from the West Bank and Gaza). He is a Jewish nationalist and a member of the right-wing Herut Party.

172. See Ze'ev Segal, *Democracy on the Defensive*, HA'ARETZ, Nov. 1, 2003 (author's trans.) (on file with author).

173. See Arab Association for Human Rights in Israel, *Weekly Review of Arab Press in*

III. THE STATUS OF ISRAELI-PALESTINIANS

This survey shows that the Israeli-Palestinian minority rights are legally protected on both the individual and collective levels. There is a pluralistic regime of religious promotion, which includes Islam and Christianity as well as Judaism, and the Arabic language is the second official language after Hebrew. In some recent legislation and in all recent Supreme Court jurisprudence, there has been recognition of the rights of the Israeli-Palestinians to non-discrimination; equal opportunity; fair representation in the public sector; and equitable distribution of budgetary support for services. The socio-economic facts still remain the facts of disadvantage accumulated through years of governmental neglect; however, the recent legal activism of the Israeli-Palestinian NGOs, especially Adalah, and the directives of the Supreme Court which have been obtained in response, have created a legal infrastructure for full equality in the socio-economic spheres. Although the State is constitutionally classified as "Jewish and democratic," and although the right to stand for election on a platform of denying the existence of the State of Israel as the State of the Jewish people is restricted by legislation, this has not resulted, since 1965, in disqualification of any Israeli-Palestinian candidate for election, even in the case of radical political platforms seeking to replace the Jewish State with a bi-national State.

CONCLUSION

From the Palestinian point of view, the creation of the State of Israel in 1948, the conquest of territories in the pre-emptive war of 1967, and the Israeli settlements in the West Bank and Gaza, which have consistently grown since the 1970s, are apparently regarded as justifying violence and terrorism.¹⁷⁴ In the Is-

Israel, No. 104/1 (Jan. 7, 2003), available at <http://www.arabhra.org/wrap/wrap104.htm> (commenting that in light of the Bishara and the Tibi scandals in the election of the 16th Knesset, the Israeli Supreme Court ruled only once to disqualify an Arab political party from running in the Knesset elections). The ruling was delivered in 1965 against the el-Ard movement, prior to the enactment of Section 7(A), which is entitled "Prevention of Participation in the Elections." *Id.*

174. Such attempts to justify terrorist attacks on civilians have been rejected by the U.N. Secretary General in the JENIN REPORT (see REPORT OF THE SECRETARY-GENERAL PREPARED PURSUANT TO GENERAL ASSEMBLY RESOLUTION ES-10/10, available at <http://www.un.org/peace/jenin/>) and by the Human Rights Watch, which regarded such at-

raeli view, the ongoing Palestinian terrorism since the 1920s, which has dramatically increased since 2000, continuing threats to Israel's existence by some of the Arab States, and the airing of vicious anti-Semitic propaganda,¹⁷⁵ combine to create an aggressively defensive strategy to protect the hard-won right of Jews to self-determination.¹⁷⁶ That being said, the only way to create a meaningful human rights regime of self-determination for Israeli-Jews and Palestinians is by peaceful separation into two States — one for Israeli-Jews and Israeli-Palestinians, and the other for Palestinians — and by preferably ensuring cooperation between them. This was basically what was on offer, between 1992 to 2000, in the Oslo, Camp David, and Taba Agreements. Improvement and implementation of agreements like these, rather than violence and violation, is the only way forward.

Minority rights of Israeli-Palestinians are being developed and applied in a period of constant proclaimed emergency. The ICCPR does not forbid derogation from the State's obligation to guarantee the right to freedom of expression and freedom of association "in time of public emergency, which threatens the life of the [N]ation and the existence of which is officially proclaimed," provided that it does not discriminate "solely on the ground of race, colour, sex, language, religion or social origin."¹⁷⁷ It is a matter of controversy whether the derogation clause can be applied to situations of ongoing hostilities rather than brief acute situations of crisis. In any case, in spite of the ongoing state of proclaimed emergency in Israel, neither freedom of expression nor freedom of association have been curtailed in a discriminatory way and, beyond that, both in legislation and judicial decisions, headway has been made in mandating equality of opportunity in the socio-economic sphere.

tacks as crimes against humanity in its 2003 WORLD REPORT, available at <http://hrw.org/wr2k3/>.

175. Of which the current Egyptian series of the *Protocols of Zion* being broadcast on al Jazeera television throughout the Muslim world is but an example.

176. Israel's military response to terrorist attacks has, in some instances, been considered disproportionate by the U.N. Secretary General. See JENIN REPORT, *supra* n.174. The Human Rights Watch viewed them in a similar light in its 2002 REPORT, available at <http://www.hrw.org/wr2k2/>.

177. See ICCPR, *supra* n.4, art.4(1). See also *supra* n.94 for full text of this Article. This Article applies only within the constitutional Boundary of the State. As regards human rights under Israeli occupation of the West Bank and Gaza, see DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES (2002) (on file with author).

Although Israeli-Palestinian minority rights are guaranteed at the normative declaratory level of Israeli law, they have not yet been satisfactorily implemented *de facto*, as regards socio-economic distribution of resources.

An analysis of the right of self-determination and minority rights in the light of international human rights principles gives pointers for a rational solution of the Israeli-Palestinian conflict. Indeed, contrary to Cicero's well-known adage, international human rights law is not and should not be silent at times of war. Although the implementation of a rational, human rights-oriented solution becomes extraordinarily difficult in the atmosphere of terrorism and counter-violence, which has taken over the terms of the discourse in the Israeli-Palestinian conflict, there is no other acceptable way out of the cycle of violence.