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Recognition of Palestinian Statehood: A Clarification of the Interests of the Concerned Parties

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

Winston P. Nagan* & Aitza M. Haddad**

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“The Egyptian people
Are fighting valiantly
For human rights.

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

I. INTRODUCTION

The recognition of Palestinian statehood has now become an important issue in the evolution of the conflict between the state of Israel and the Palestinian people. The issue has been made more interesting by decisions of the Canadian Supreme Court and the International Court of Justice (ICJ).² In particular, this Article refers to the judgment of the ICJ concerning the Unilateral Declaration of Independence of Kosovo.³ This judgment adds insights to the prospect of a Palestinian claim to statehood and independence from an international law perspective. More generally, 2010 culminated in the widespread perception that Israel’s leaders seek to maintain the status quo indefinitely, leaving Palestinians as an occupied people, which ostensibly secures Israeli interests.⁴ If true, such a position is contrary to Israel’s international legal obligations and places Palestinian aspirations at heightened risk.⁵ As the Palestinians’ representatives began seeking support for international recognition for the state of Palestine, Israel reached out to other countries—most significantly, the United States—to block such a move.⁶ On December 15, 2010 the United States Congress passed a resolution condemning acts by the Palestinians to seek unilateral (meaning

¹ Uri Avnery, *There and Here*, HAARETZ GUSH SHALOM, Feb. 18, 2011.

² See Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.) (ruling on Quebec’s attempt to secede under international law); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (July 22) (ruling on the legality of the Declaration of Independence issued by Kosovo).

³ Dapo Akande, *ICJ Finds that Kosovo’s Declaration of Independence Not in Violation of International Law*, EUROPEAN J. INT’L L. BLOG (July 23, 2010), <http://www.ejiltalk.org/icj-finds-that-kosovos-declaration-of-independence-not-in-violation-of-international-law>.

⁴ Lexington, *Israel and America Obama in the Middle*, ECONOMIST (May 25, 2011), http://www.economist.com/blogs/Lexington/2011/05/isreal_and_america.

⁵ Andrew Hammond, *Israel Must Meet International Obligations: Fayyad*, REUTERS (Feb. 11, 2009), <http://www.reuters.com/article/2009/02/11/us-israel-elections-fayyad-sb-idUSTRE51A2RT20090211>.

⁶ Mark Perry & Ali Abunimah, *The US Role as Israel’s Enabler*, AL JAZEERA (Jan. 26, 2011), <http://www.aljazeera.com/palestinepapers/2011/01/201112614122782761.html%3E>.

without the permission of Israel) recognition of the state of Palestine.⁷ Recent developments in the Israeli-Palestinian conflict suggest that a clarification of international law standards regarding new states, as well the issue of recognition of Palestinian statehood, is ripe for analysis.

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

Many more international law issues other than mere state recognition are implicated in an effort to establish a sustainable solution to this longstanding conflict. The international law jurisdiction over the Israeli-Palestinian conflict is exceedingly complex.¹⁰ Frequently, there is a contest between apparently settled international law standards and the brute facts of either denial or noncompliance—a challenge to the role of international law to effectively provide appropriate normative guidance to the parties.¹¹ Moreover, the Israeli-Palestinian conflict is one that generates dynamism of facts. Since new facts are generated continuously, those facts redefine contextual reality and, as changed contexts emerge, the contextual background itself is redefined. This implies that new facts reshape the legal framework and the relevant discourse. Nevertheless, the complexity attending the normative salience of international law and the context of brute power relations can be unpacked through configurative legal analysis, which uses the legal process as a tool for clarifying problems (rather than narrowly demanding prescriptive outcomes). Using configurative analysis, this presentation envelops the necessary contextual background within which

⁷ H.R. Res. 1765, 111th Cong. (2010) (enacted).

⁸ Philip Marshall Brown, Editorial Comment, *The Legal Effects of Recognition*, 44 AM. J. INT'L L. 617, 617 (1950).

⁹ Bridget L. Coggins, *Secession, Recognition & the International Politics of Statehood*, at 44 (2006) (unpublished Ph.D. dissertation, Ohio State University) (available at http://etd.ohiolink.edu/view.cgi/Coggins%20Bridget%20L.pdf?acc_num=osu1154013298).

¹⁰ See Weizmann-Feisal Agreement, World Zionist Org.-Arab Kingdom of Hedjaz, Jan. 3, 1919 (agreeing to look into the possibilities of an Arab state, later repudiated); Declaration of Principles on Interim Self-Government Arrangements ("Oslo Agreement"), Sept. 13, 1993 (agreeing to commence negotiations on the permanent status of the disputed land in Gaza and Jericho).

¹¹ HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 393–94 (Robert Tucker ed., 2d ed. 1966).

the contestations of international law norms and the search for satisfactory conclusions are important.

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

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

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

The plan of this Article is to provide the background facts important to the respective claims of both the Israelis and the Palestinians. In particular, the Palestinian claim rests on the boundaries recognized by the Security Council. Israeli claims, which are not clearly delineated, are probably

¹² See Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 CAN. J.L. & JURIS. 475 (2007) (describing Third World Approaches to International Law as an epistemological study).

influenced by the historical claim to Israeli boundaries reflected in the Eretz Israel idea. The Article reviews Israeli statehood recognition and places the Palestinian issue in the context of the League of Nations Mandate System and the United Nations. The Article traces the conflict following partition and reviews the issue of Palestinian statehood in terms of mandate expectations as well as contemporary expectations of international law. Guidance is sought from recent case law concerning the claims relating to Quebec and Kosovo. The Article also reviews the problems of Israeli occupancy and their effect on Palestinian rights and international relations. The Article also seeks to clarify, as objectively as possible, the United States' national interests in an expeditious solution to the conflict between the Israelis and the Palestinians. On the basis of the policy clarifications of the respective interests, we provide a provisional conclusion which favors the recognition of Palestinian self-determination, statehood, and sovereignty. The penultimate part of the Article examines the interests of the Palestinians in the achievement of a two-State solution to advance peace in the region. The Article also seeks to clarify the possible Israeli interests in securing a two-State solution to advance the settlement of problems in the region. Finally, the last part of the Article reviews the strategic options that the Palestinians might employ in seeking to advance the claims to sovereignty, self-determination and statehood.

II. BACKGROUND FACTS RELEVANT TO THE CLAIMS FOR PALESTINIAN STATEHOOD

A. *The Land and People of Palestine and Eretz Israel*

Prior to the British conquest and the assumption of the Palestine Mandate responsibilities, the territory was part of the Ottoman Empire. That Empire (although multiethnic) incorporated territories and populations of the Middle East that were largely—from a cultural point of view—Arabic.¹³ Recent history of Palestine shows how Palestine has been under the control of various external forces; first subject to the force of invading conquerors and then the paternalistic caprice of colonial rule.¹⁴ Prior to WWII, the Palestinian territories were an international mandate under the authority of the League of Nations.¹⁵ Britain, which had conquered an occupied territory

¹³ Mim Kemal Oke, *The Ottoman Empire, Zionism and the Question of Palestine*, 14 INT'L J. MIDDLE EAST STUD. 329, 330 (1982).

¹⁴ See NICHOLAS BETHELL, *THE PALESTINE TRIANGLE: THE STRUGGLE BETWEEN THE BRITISH, THE JEWS, AND THE ARABS*, 1935-48 (1979) (discussing the recent occupiers of the territory).

¹⁵ See Council of the League of Nations, *League of Nations Mandate for Palestine*, July 24,

and displaced the Ottoman Empire, was granted the mandate to administer Palestine.¹⁶ This reflected the political reality that conquerors could retain their conquests subject to a weak form of international concern under the League's mandate system. One of the obligations of the mandatory power was to secure the well-being and interests of the people under its control and authority. Making this international obligation more complex, Great Britain's Balfour Declaration—articulated in 1917 prior to the end of the war—asserted British sympathies for Zionist ambitions in the Palestinian territories for Jewish immigration and settlement.¹⁷ In this sense, the Declaration was probably not consistent with the mandatory obligations of a Class A Mandate. British practices, which allowed significant Jewish immigration, had the consequence of creating a critical Jewish presence in Palestine, which eventually shaped future events.¹⁸ What is most salient during this period of recent history is the lack of promotion of self-determination for the Palestinian residents by the UK.¹⁹

The defeat of the Ottoman Empire during the WWI meant that the conquering power had acquired temporary dominium over Palestine by conquest. The peace process created a new international institution, the League of Nations.²⁰ Under the Charter of the League a dispensation was made that the territories conquered by the conquerors would remain under their control, subject to a legal regime called the League of Nations Mandate System.²¹ The conquerors could keep the conquests, but mandate obligations required them to administer these territories in the interest of the inhabitants.²² Palestine was a Class A mandate.²³ This Class A mandate was somewhat

1922, http://cojs.org/cojswiki/League_of_Nations_Mandate_for_Palestine%2C_July_24%2C_1922 (entrusting the administration of the territory of Palestine to Great Britain).

¹⁶ Stefan Brooks, *British Mandate for Palestine*, in 3 THE ENCYCLOPEDIA OF THE ARAB-ISRAELI CONFLICT: A POLITICAL, SOCIAL, AND MILITARY HISTORY 770 (Spencer C. Tucker ed., 2008).

¹⁷ See generally JONATHAN SCHNEER, THE BALFOUR DECLARATION: THE ORIGINS OF THE ARAB ISRAELI CONFLICT (2010) (explaining the history of Britain's Balfour Declaration).

¹⁸ See Avi Shlaim, *The Balfour Declaration And its consequences*, in YET MORE ADVENTURES WITH BRITANNIA: PERSONALITIES, POLITICS AND CULTURE IN BRITAIN 251–70 (Wm. Roger Louis ed., 2005).

¹⁹ See EDWARD W. SAID, THE POLITICS OF DISPOSSESSION: THE STRUGGLE FOR PALESTINIAN SELF-DETERMINATION, 1969–1994 (1995) (explaining the Palestinians struggle for statehood through twenty-five years of exile).

²⁰ See generally F.S. NORTHEGE, THE LEAGUE OF NATIONS: ITS LIFE AND TIMES, 1920–1946 (1986) (describing the history of League of Nations and the United Nations).

²¹ See Nele Matz, *Civilization and the Mandate System under the League of Nations as Origin of Trusteeship*, 9 MAX PLANCK Y.B. UNITED NATIONS L. 47, 47–95 (2005).

²² *Id.* at 72.

²³ But see Eli E. Hertz, "Mandate for Palestine": The Legal Aspects of Jewish Right, http://www.mythsandfacts.org/conflict/mandate_for_palestine/mandate_for_palestine.htm (last visited Mar. 19, 2012) (arguing that Palestine was never a Class A mandate).

distinctive in the sense that it contained a cláusula that was not expressed in Article 22 of the League Covenant. This cláusula involved the encouragement of Jewish immigration for the establishment of a natural home for the Jews who were a minority in Palestine.²⁴ There was an ostensible incompatibility between the British Balfour Declaration for promoting immigration to Palestine and the requirements of Article 22. According to Balfour:

The contradiction between the letters of the Covenant and the policy of the Allies is even more flagrant in the case of the "independent nation" of Palestine than in that of "independent nation" of Syria. For in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country²⁵

Balfour was very explicit about the problem of assuming mandate responsibility and the British commitment regarding Jewish immigration. Corresponding with Prime Minister Lloyd in 1919, George Balfour wrote "[t]he weak point of their mutually agreed position was that in Palestine we deliberately and rightly declined to accept the principal of self-determination."²⁶ He stressed that the position of Jews outside of Palestine was a matter of global importance and added that he believed that Jews had a historic claim to a home in their ancient land.²⁷ Thus, there was the mandate of Palestine administered by Great Britain, which had incompatible objectives that were never clearly put on the table so as to rationally reconcile them with the precise terms of the mandate's international obligations. The mandate's central normative obligation was to exercise the mandate in the interest of the local inhabitants.²⁸ There is abundant evidence that the constitutional position of Palestine was as a proto-state.²⁹ In short, Britain, the mandatory power, was never recognized as exercising sovereign authority over Palestine. There is a strong view among *juris consults* that the locus of authority in 'Class A' mandate Territories was vested in the population of the territories themselves.³⁰ Indeed, for a multitude of

²⁴ Mark Rosenblit, *International Law and the Jewish People's Collective Rights of Settlement and Self-Determination in the Land of Israel*, <http://www.rosenblit.com/Law.htm> (last visited Mar. 19, 2012).

²⁵ JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 75 (2010).

²⁶ A.P. THORNTON, *IMPERIALISM IN THE TWENTIETH CENTURY* 123 (1977).

²⁷ QUIGLEY, *supra* note 25, at 75.

²⁸ Hertz, *supra* note 23.

²⁹ QUIGLEY, *supra* note 25, at 75.

³⁰ See Yoram Rabin & Roy Peled, *Transfer of Sovereignty Over Populated Territories From*

purposes Palestine was viewed as a State. A Permanent Court of International Justice in the *Mavrommatis Palestine Concession's Case*³¹ clearly regarded Palestine as a State.³²

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

B. The Recognition of the State of Israel

When Britain, the mandatory power, requested in 1947 that the United Nations consider the future dispensation for the territory defined within the Palestinian Mandate, the U.N. General Assembly created a special committee to investigate the international legal status of the Palestinian territory.³⁷ The committee determined that the British Mandate should be terminated and that independence should be granted to Palestine at the

Israel to a Palestinian State: The International Law Perspective, 17 MINN. J. INT'L L. 59 (2008) (exploring the concept of the transfer of sovereignty over territories from Israel to Palestine in the context of International law).

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

³² QUIGLEY, *supra* note 25, at 59.

³³ See Jeff J. Comtassel & Tomas Hopkins Primeau, *Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination,"* 17 HUMAN RTS. Q. 343 (1995) (arguing that efforts towards indigenous sovereignty merely increase tensions between indigenous peoples and states).

³⁴ Comm. on the Exercise of the Inalienable Rights of the Palestinian People, Rep. on the International Status of the Palestinian People (Jan. 1, 1980).

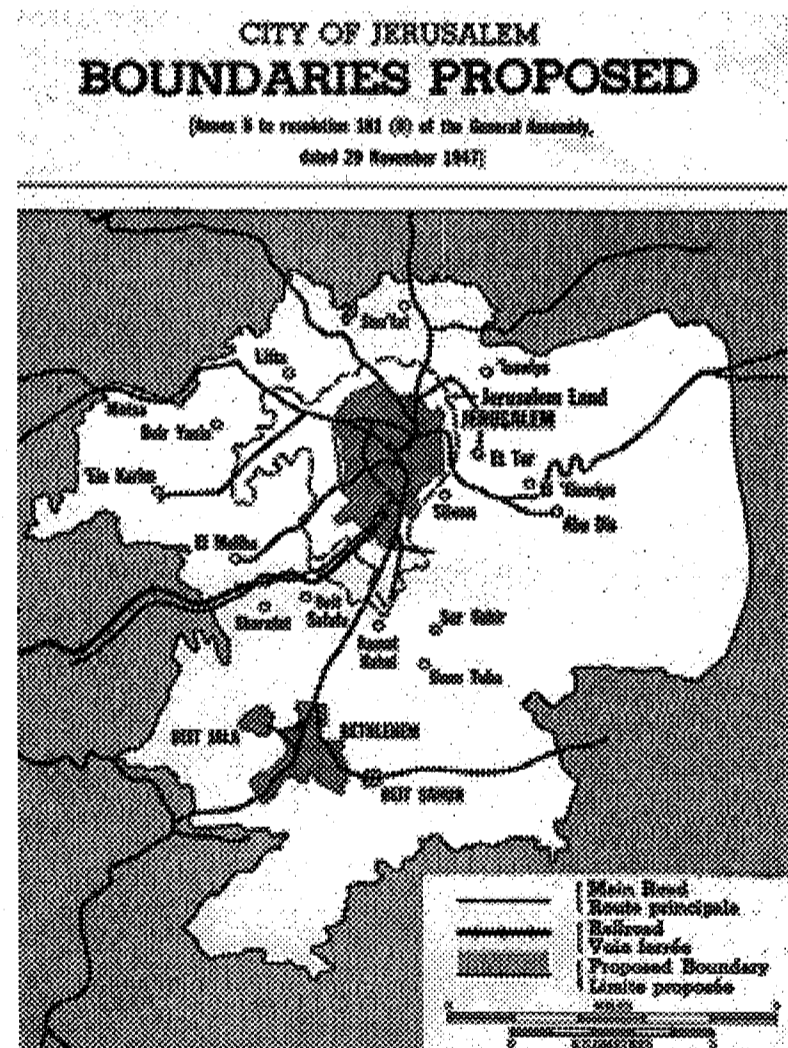
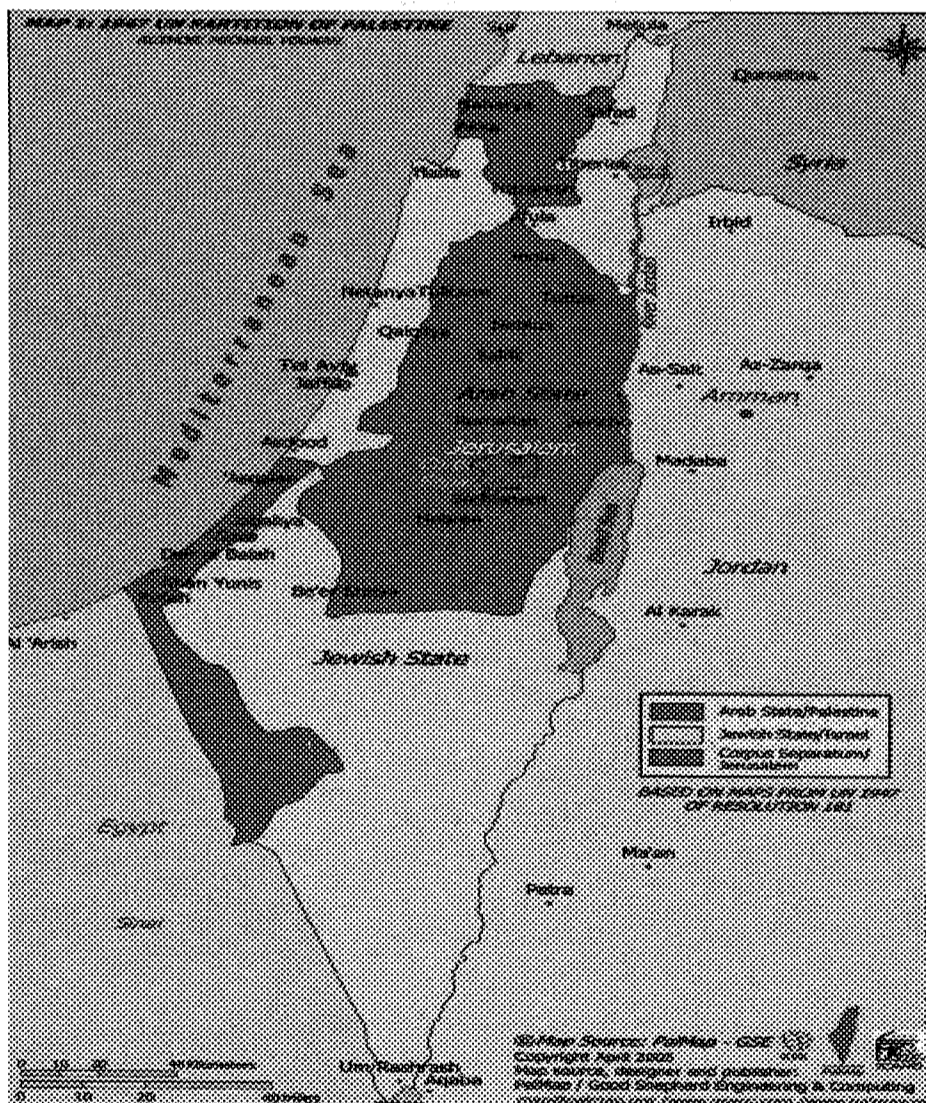
³⁵ *Id.*

³⁶ WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 256 (2008). Foggy Bottom is the nickname for the headquarters of the United States Department of State.

³⁷ G.A. Res. 106(S-1), para. 1, U.N. Doc. A/RES/106(S-1) (May 15, 1947).

earliest possible time.³⁸ Despite the recommendation of “independence” and the committee’s majority view that Palestine was to be partitioned into an Arab state and a Jewish state, the committee stipulated that the territory’s Arab and Jewish communities were to be linked in an economic association.³⁹ The status of Jerusalem, it was recommended, should be a separate entity under international supervision.⁴⁰ The U.N. General Assembly, after lengthy debate, decided with more than 2/3 of a majority to accept the partition recommendations. The U.N. General Assembly decision came in the form of Resolution 181, November 1947.⁴¹ Of particular importance is paragraph 3 of Resolution 181, which provides:

Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem . . . shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948. The boundaries of the Arab State, the Jewish State, and the City of Jerusalem shall be as described in Parts II and III below.⁴²



³⁸ Rep. to GOAR, U.N. Spec. Comm. on Palestine 2d Sess., Sept. 3, 1947, para. 1, U.N. Doc. A/364 (1947).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ G.A. Res. 181(II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

⁴² *Id.* at I(A), para. 3.

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

In a sense, Resolution 181 seems to have influenced the Jewish community in the partitioned part of Palestine to declare on May 14, 1948 the existence of the state of Israel.⁴⁹ This declaration was followed by other sovereign states bilaterally recognizing the state of Israel as a sovereign nation-state.⁵⁰ This indicates that the declaration not only met certain factual preconditions, but also that those preconditions proceeded from the expectation in Resolution 181 that each community would establish the preconditions for a declaration of statehood. In this sense, the Israeli

⁴³ *Id.*

⁴⁴ See generally JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2006) (describing the broad treatment of statehood, particularly in relation to Israel and Palestine).

⁴⁵ Montevideo Convention on the Rights and Duties of States art. 3, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

⁴⁶ *Id.* art. 3.

⁴⁷ *Id.* arts. 4–10.

⁴⁸ Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 544–45 (1998).

⁴⁹ *The Declaration Of The Establishment of the State of Israel*, May 14, 1948, ISRAEL MINISTRY OF FOREIGN AFFAIRS, available at <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel>.

⁵⁰ *Id.* (stating recognition by the United States the night of and by the USSR three days after).

declaration was preceded by the General Assembly decision, which established the territorial contours of the state of Israel in terms of the partition resolution. Moreover, the Resolution gave a quasi-judicial imprimatur that the international community expected communities within the partitioned territories to seize the opportunity for declaring statehood. It therefore would seem to be rare that the creation of a state and a declaration by its people are preceded by a legal fact creating some factual conditions and suggesting that there is an expectation that, from these factual conditions, the community will seize upon the legal "green light" of statehood. Usually, the entity establishes core minimum facts regarding its claim to statehood and then seeks recognition from an organization like the U.N. that it is entitled to recognition as a sovereign state.⁵¹

C. Palestine Mandate and United Nations System

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

⁵¹ See generally Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403 (1999) (discussing different theories of establishing statehood).

⁵² *A Summary of Zionist Terrorism in the Near East, 1944-1948; THE FRENCH CONNECTION* (Oct. 1, 1948), <http://iamthewitness.com/doc/Bunche.Report.on.Zionist.Terrorism.in.the.Near.East.htm>.

⁵³ G.A. Res. 181(II), *supra* note 41; Zaha Hassan, *The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism*, 16 FLA. J. INT'L L. 897, 902 (2004).

⁵⁴ Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 899 n.90 (1983).

control to the U.N., which sanctioned the occupancy of Palestinian territories by growing numbers of Jewish immigrants.⁵⁵

To a large extent, the new Jewish settlers were refugees from elsewhere,⁵⁶ but they also staked their claim to Palestinian lands based on a “right of return,” which is considered by many Jews their biblical and historical birthright.⁵⁷ For the resident Palestinians, it was likely overwhelming and threatening to see such an influx of outsiders claiming the best pieces of land and to have no control over the immigration, taxation, and property policies that gave preference to the Jewish settlers. More challenging to the indigenous Palestinian population may have been the claim that these settlers, many of whom had never set foot in Palestine, claimed a superior heritage to the land.⁵⁸ Nevertheless, Jewish culture—shaped in many ways by the exile from Palestine and the recurring experiences of extreme marginality and persecution from majority cultures everywhere—solidified around the identity of a community united in the Diaspora and destined to return.⁵⁹ Arguably, it was this strength of identity—tied to a geographic location—that permitted the Jewish settlers to assert and achieve independent statehood after the Partition in 1948, when the Palestinian residents could not.

The Partition Resolution prescribed the creation of two states, each guaranteeing certain (new) standards of normative state behavior, but the Partition Resolution was only partially carried out.⁶⁰ The partition claim requires each community to create a constituent assembly of each “state” for the purpose of drafting “a democratic constitution for its state.”⁶¹ Such a drafting would be guided by an international mandate “guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication,

⁵⁵ See generally Michael Akehurst, *The Arab-Israeli Conflict and International Law*, in *THE PALESTINE QUESTION IN INTERNATIONAL LAW* 19–40 (Victor Kattan ed., 2008).

⁵⁶ Press Release, Dep’t of Pub. Info., Ten Countries Reply to the U.N. On Jewish Immigration into Palestine, U.N. Press Release PAL/39 (June 19, 1947).

⁵⁷ See generally NUR MASALHA, *THE BIBLE AND ZIONISM: INVENTED TRADITIONS, ARCHAEOLOGY AND POST-COLONIALISM IN ISRAEL-PALESTINE* (2007); Ayelet Shachar, *Whose Republic? Citizenship and Membership in Israeli Polity*, 13 *GEO. IMMIGR. L.J.* 233, 239–47 (1999).

⁵⁸ Kathryn Westcott, *Settlers: Claiming the ‘Promised Land,’* BBC NEWS (Feb. 18, 2003), http://news.bbc.co.uk/2/hi/in_depth/middle_east/2001/israel_and_the_palestinians/issues/981554.stm.

⁵⁹ William Safran, *The Jewish Diaspora in a Comparative and Theoretical Perspective*, 10 *ISRAEL STUD.* 36, 36–60 (2005).

⁶⁰ Ron Wilkinson, *Resolution 181: A State for Some, Occupation for Others*, AL-JAZEERA, BADIL (Nov. 27, 2004).

⁶¹ G.A. Res. 181(II), *supra* note 41, pt. I(B)(10).

education assembly and association.”⁶² Israel was recognized as a state with the promise that a formal constitution would be adopted no later than October 1, 1948.⁶³ However, the plan of drafting a comprehensive written constitution for the State of Israel, consistent with the expectations of Resolution 181, was never realized.⁶⁴ In fact, the state of Israel is officially a Jewish state, and it has no constitution.⁶⁵ Although there was a Declaration of the Establishment of the State of Israel, which announced that the new state “will endure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex,”⁶⁶ this declaration was not passed by the Knesset and therefore has no legal efficacy within Israel.⁶⁷ Only one state was created (although it failed to adhere to the prescribed state behavior required of the Partition Resolution); and one state failed to be born.⁶⁸

D. Conflict Following the Partition Resolution

Armed conflict broke out between the newly born Jewish state and surrounding Arab states.⁶⁹ To the historians of Israel, the resulting conflict became the War of Independence.⁷⁰ To the Palestinians’ historians these events were catastrophic and were symbolized by the term “Nakba.”⁷¹ Since the Israelis thought that the Arab initiation of conflict was, in effect, a violation of international law, and since they repelled Arab attacks and

⁶² *Id.*

⁶³ *Id.* pt. I(A)(3).

⁶⁴ The Honorable Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325, 1325 (1999).

⁶⁵ DAPHNA SHARFMAN, *LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL* 173 (1993).

⁶⁶ *The Declaration of the Establishment of the State of Israel*, *supra* note 49.

⁶⁷ Ruth Gavison, *Legislatures and the Quest for a Constitution: The Case of Israel*, 11 REV. CONST. STUD. 345, 367 (2005–2006).

⁶⁸ GUDRUN KRÄMER, *A HISTORY OF PALESTINE: FROM THE OTTOMAN CONQUEST TO THE FOUNDING OF THE STATE OF ISRAEL* 296 (Graham Harman & Gudrun Krämer trans., 2008).

⁶⁹ JAMES L. GELVIN, *THE ISRAEL-PALESTINE CONFLICT: ONE HUNDRED YEARS OF WAR* 126 (2005).

⁷⁰ CHAIM HERZOG & SHLOMO GAZIT, *THE ARAB-ISRAELI WARS: WAR AND PEACE IN THE MIDDLE EAST* 49 (2d ed. 2005).

⁷¹ NAKBA: PALESTINE, 1948, AND THE CLAIMS OF MEMORY 5 (Ahmad H. Sa’di & Lila Abu-Lughod eds., 2007) (“The Nakba is often reckoned as the beginning of contemporary Palestinian History, a history of catastrophic changes, violent suppression, and refusal to disappear.”); *see also* BENJAMIN FRANKEL, *HISTORY OF DISPUTE: THE MIDDLE EAST SINCE 1945: FIRST SERIES* 102 (2003) (“The Palestinians recalled their ‘Nakba Day,’ their ‘catastrophe’—the displacement that accompanied the creation of the state of Israel-in 1948.”); Ronit Lentin, *The Contested Memory of Dispossession: Commemorizing the Palestinian Nakba in Israel*, in *THINKING PALESTINE* 207 (Ronit Lentin ed., 2008).

occupied territories beyond the partition line,⁷² the question that emerged was—since the Israelis considered themselves to be victims, and since they were somewhat victorious⁷³—were they victims entitled to the spoils (including ground gains in territory) from the conflict. Unfortunately, modern international law is not as generous regarding the acquisition of territory through the use of force.⁷⁴ Thus, there was (and remains) a concern about the extension of Israeli sovereignty beyond its lawfully declared partition borders.⁷⁵ These new borders were somewhat stabilized by the Armistice Agreements, founded on the military status quo, between Israel and the Arab states.⁷⁶ A principle of realism seemed to influence the international appraisal of Israel's new borders, which were shaped by the Armistice Agreements. The United States' delegation to the U.N. was instructed to support Israel's request to keep the Negev.⁷⁷ The U.S. considered that, practically, the Israeli borders were now a non-issue.

Since 1948, the following events transpired: the Suez invasion of 1956, the Six-Day War of 1967, the October War of 1973, Israel's invasion of Lebanon in 1982, and the most recent War in Lebanon in 2006, and "Operation Cast Lead" in Gaza during winter of 2008–2009.⁷⁸ It was after the 1967 Six-Day War that a number of Palestinian organizations joined together to form the Palestinian Liberation Organization (PLO).⁷⁹ The

⁷² Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 286–87 (1968).

⁷³ Daniel Bar-Tal, *Societal Beliefs in Times of Intractable Conflict*, 9 INT'L J. CONFLICT MGMT. 22, 29 (1998).

⁷⁴ HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 395–401 (3d ed. 2007).

⁷⁵ JOE CLEARY, LITERATURE, PARTITION, AND THE NATION-STATE: CULTURE AND CONFLICT IN IRELAND, ISRAEL AND PALESTINE 142–43 (2002).

⁷⁶ See Ehud Yaari, *Armistice Now: An Interim Agreement for Israel and Palestine*, 89 FOREIGN AFF. 50, 55 (2010) (noting "[t]hese agreements transformed the existing truce into an armistice structure that would, so it was hoped, eventually lead to formal peace treaties. The armistice arrangements consisted of drawing armistice lines as borders . . .").

⁷⁷ See STEVEN L. SPIEGEL, THE OTHER ARAB-ISRAELI CONFLICT: MAKING AMERICA'S MIDDLE EAST POLICY, FROM TRUMAN TO REAGAN 44 (1985) ("The U.S. delegation to the U.N. General Assembly in Paris moved to accommodate policy to Israel's war gains, stressing direct negotiations rather than great power or U.N.—determined territorial positions. In the end, a delicate U.N. balancing act allowed Israel to retain the Negev . . .").

⁷⁸ *Chronology Factsheet*, SADAKA: IR. PALESTINE ALLIANCE, <http://www.sadaka.ie/Files/Chronology.pdf> (2009).

⁷⁹ See ILAN PAPPE, THE ETHNIC CLEANSING OF PALESTINE 236 (2006) ("Nascent nationalism equipped the people with a new sense of direction and identity, following the exile and destruction they had experienced in 1948. These national emotions were to find their embodiment in 1968 in the PLO, whose leadership was refugee-based and whose ideology was grounded in the demand for the moral and factual redress of the evils Israel had inflicted upon the Palestinian people in 1948."). Some historians including Israeli Ilan Pappé hold that

Palestinian Covenant stipulated that: (1) Israel should be removed from its role as occupier of the West Bank and Gaza, (2) a Palestinian state is to be established in the West Bank and Gaza, and (3) the state of Israel is to be dismantled.⁸⁰ Clearly, this final point hardened the resolve of the Israeli policymakers to strengthen the occupancy of the West Bank and Gaza.⁸¹ In any event, the occupancy of Palestine left no doubt that Israel envisioned an indefinite occupation regime. This policy was supported by the full might of the Israeli Defense Forces (IDF).⁸² This compelled the PLO to look to other strategies to advance its objectives.⁸³ It sought to secure for its cause and its people a maximum amount of diplomatic recognition. It stressed that the foundations of Palestinian claims to statehood were founded on the principle of self-determination, to which there was substantial commitment internationally.⁸⁴ For example, Article 1 of the U.N. Charter expresses the idea of "respect for the principle of . . . self-determination of peoples."⁸⁵ The principle is reiterated in Article 55.⁸⁶ Two significant conventions—the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR)—include the affirmation that "[a]ll people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."⁸⁷ The U.N. Declaration on Friendly Relations also affirms the principle of self-

the war was more than simply a matter of Israeli independence; rather, a specific strategy existed to drive out the indigenous Palestinian population, seize their land, and create the conditions for a Jewish majority state.

⁸⁰ See Y. HARKABI, *THE PALESTINIAN COVENANT AND ITS MEANING* 12 (2d ed. 1981) (noting "[t]he plethora of arguments in the Covenant as to why Israel should not exist" and that the "whole of Palestine must be restored").

⁸¹ See generally Graham Usher, *Closures, Cantons and the Palestinian Covenant*, MIDDLE EAST REP., Apr. 24, 1996 (noting the PLO's amendment of provisions in the Covenant that denied Israel its "right to exist").

⁸² See John J. Mearsheimer & Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy*, 13 MIDDLE E. POL'Y, Sept. 2006, at 29, 37 ("No Israeli government has been willing to offer the Palestinians a viable state of their own.").

⁸³ See ARYEH YODFAT & YUVAL ARNON-OHANNA, *PLO STRATEGY AND POLITICS* 61 (1981) (noting the PLO's strategy of "Phased Stages").

⁸⁴ Maria J. Stephan, *Fighting for Statehood: The Role of Civilian-Based Resistance in the East Timorese, Palestinian and Kosovo Albanian Self-Determination Movements*, 30 FLETCHER F. WORLD AFF. 57, 77 (2006) ("The *Intifada* placed Palestinian self-determination on the international agenda and paved the way to direct negotiations between the PLO and Israeli officials.").

⁸⁵ U.N. Charter art. 1, para. 2.

⁸⁶ *Id.* art. 55.

⁸⁷ International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR]; International Covenant on Economics, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 30 (1967).

determination of peoples and stipulates that every state has a duty to respect this right in accordance with the provisions of the Charter.⁸⁸ Also, in 1993, the World Conference on Human Rights adopted the Vienna Declaration and Programme of Action.⁸⁹ This document stresses its affirmation of the right of self-determination of all peoples. The Helsinki Final Act also stresses the salience of the right to self-determination.⁹⁰

The PLO also secured recognition of its role as representative of the Palestinian people in their quest for self-determination.⁹¹ Recognition was given by the Arab League.⁹² This process has resulted in over 100 states recognizing the PLO.⁹³ Over sixty states provide the PLO with full diplomatic status. Fifty states recognize the PLO but have not authorized the establishment of PLO embassies.⁹⁴ States also permit PLO offices to function under the name of the Arab League.⁹⁵ These developments do not indicate the existence of a Palestinian state or government in exile. They focus on the PLO as the sole representative of Palestinian self-determination rights.⁹⁶ As early as 1969, the U.N. General Assembly began adopting

⁸⁸ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121 (Oct. 24, 1970) [hereinafter G.A. Res. 2625(XXV)].

⁸⁹ World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF. 157/23 (July 12, 1993).

⁹⁰ Final Act of the Conference on Security and Cooperation in Europe, 14 I.L.M. 1292 (Aug. 1, 1975).

⁹¹ MADIHA RASHID AL MADFAI, JORDAN, THE UNITED STATES AND THE MIDDLE EAST PEACE PROCESS, 1974–1991, at 21 (1993) (“On 28 October 1974, the seventh Arab summit conference held in Rabat designated the PLO as the sole legitimate representative of the Palestinian people and reaffirmed their right to establish an independent Palestinian national authority in any Palestinian territory that was to be liberated.”).

⁹² Sanford R. Silverburg, *The Palestine Liberation Organization in the United Nations: Implications for International Law and Relations*, 12 ISR. L. REV. 365, 371 (1977).

⁹³ See *Recognizing the Palestinian State on the 1967 Border & Admission of Palestine as a Full Member of the United Nations*, PLO Negotiations Office, <http://www.nad-plo.org> (2011) (“[One hundred twenty-two] UN Member States recognize Palestine.”); see also Santiago González Vallejo, *Recognition of the State of Palestine and the Hypocrisy*, Committee in Solidarity with the Arab Cause (2011) (noting that as of 1988, 104 states recognized Palestine).

⁹⁴ *Directory: Palestine Embassies, Missions, Delegations Abroad*, PERMANENT OBSERVER MISSION OF PALESTINE TO THE UNITED NATIONS (Jan. 25, 2011), <http://www.un.int/wcm/content/site/Palestine/cache/offonce/pid/11548>.

⁹⁵ *Member States: Palestine*, ARAB LEAGUE ONLINE (last visited Mar. 19, 2012), http://www.arableagueonline.org/wps/portal/en/inner?current=true&uril=www:path:/LAS/las/en/about_1as/member_states/palestine.

⁹⁶ Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT’L L. 564, 570 (1993) (noting that the PLO is the “internationally recognized and representative organization of the Palestinians”).

resolutions that recognized the Palestinian right to self-determination as well as the recognition of the PLO as the representative of the Palestinian people.⁹⁷ The PLO secured an invitation to participate in U.N. deliberations and conferences organized under the authority of the General Assembly as well as the Security Council.⁹⁸ The PLO has had observer status at the U.N.⁹⁹ Israel, however, has resisted the idea of “creeping” recognition of Palestinian institutions¹⁰⁰ because they suggest a “creeping” validation of their claims.¹⁰¹

Two of the critical decisions of the U.N. Security Council concerning the Palestinian-Israeli conflict are Resolution 242 (22 November 1967)¹⁰² and Resolution 338 (22 October 1973).¹⁰³ Resolution 242 recognizes the “inadmissibility of the acquisition of territory by war.”¹⁰⁴ Thus, the Resolution stipulates that a form of “creeping” annexation of the West Bank and Gaza is effectively a violation of Resolution 242 and general international law.¹⁰⁵ The Resolution also stipulates that the Charter requires a “just and lasting peace,” which includes some of the following principles: (1) the Israeli armed forces withdraw from occupied territories; (2) an end to the claim of belligerency; and (3) a respect for the “sovereignty, territorial integrity, and political independence” of all states in the area.¹⁰⁶ The Resolution also stipulates that freedom of navigation in international waters is to be respected, and refers to “a just settlement of the refugee problem” and also to the “territorial inviolability and political independence of every State” through the establishment of demilitarized zones.¹⁰⁷ In Resolution

⁹⁷ Division for Palestinian Rights, *The Right of Self-Determination of the Palestinian People*, ch. V, U.N. Doc. ST/SG/SER.F/3 (1979).

⁹⁸ G.A. Res. 3375(XXX), U.N. Doc. A/RES/3375 (Nov. 10, 1975).

⁹⁹ G.A. Res. 3237(XXIX), U.N. Doc. A/RES/3237 (Nov. 22, 1974).

¹⁰⁰ Denis J. Sullivan, *NGOs in Palestine: Agents of Development and Foundation of Civil Society*, 25 J. PALESTINE STUD., Spring 1996, at 93 (showing Israel’s resistance to Palestinian NGOs).

¹⁰¹ By “creeping” we mean incremental steps toward international recognition. See also Adam G. Yoffie, Comment, *The Palestine Problem: The Search for Statehood and the Benefits of International Law*, 36 YALE J. INT’L L. 497 (2011) (arguing that the Palestinian “Plan B” of seeking broad statements of recognition can draw tribunals into supporting Palestinian claims).

¹⁰² S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

¹⁰³ S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973).

¹⁰⁴ S.C. Res. 242, *supra* note 102.

¹⁰⁵ Ninth Emergency Special Session, General Assembly Provisional Verbatim Record of the Tenth Meeting, Held at Headquarters 9 New York, On Thursday, 4 February 1982 at 3 p.m., U.N. Doc. A/ES-9/PV.10 (Feb. 4, 1982).

¹⁰⁶ S.C. Res. 242, *supra* note 102, para. 2.

¹⁰⁷ *Id.*

338, the Security Council called upon all relevant parties to implement Security Council Resolution 242 after a cease-fire.¹⁰⁸

These resolutions imply that the right to self-determination implicates rights that accrue at a minimum to a *de facto* state, including claims to sovereignty, territorial integrity, and independence. It therefore calls for an end to Israeli occupation. The United States, which has been a strong supporter of Israel,¹⁰⁹ has been reluctant to recognize Palestinian identity in the international environment.¹¹⁰ This has been done pursuant to the Sinai Agreement of 4 September 1975.¹¹¹ In this Agreement, the U.S. pledged to not negotiate with the PLO or to recognize it so long as it refused to recognize the right of Israel to exist and so long as the PLO refuses to accept Resolutions 242 and 338.¹¹² Additionally, the U.S. Congress added a further element of the U.S. commitment—namely, that the PLO must renounce terrorism.¹¹³ In short, the U.S. position was that once the PLO publically accepted these resolutions, recognized Israel as a sovereign state, negotiated peace with Israel, and renounced terrorism, the U.S. would have a certain degree of negotiating flexibility with the PLO. When President Jimmy Carter became President in 1977, he launched a significant initiative on the part of the United States to secure a permanent settlement.¹¹⁴ These initiatives culminated in the Camp David Accords.¹¹⁵ The Accords generated two critical frameworks: a Framework for Peace in the Middle East, which dealt with the status of Palestinian rights, and the Framework for the Conclusion of a Peace Treaty between Egypt and Israel.¹¹⁶ The first framework agreement was founded on the stipulations in Security Council resolutions 242 and 338.¹¹⁷ The United States, which had supported these resolutions in the Security Council, now explicitly endorsed them as a foundation for the first framework agreement of the Camp David Accords.

¹⁰⁸ S.C. Res. 238, *supra* note 103, para. 2.

¹⁰⁹ CAROL MIGDALOVITZ, CONG. RESEARCH SERV., RL 33476, ISRAEL: BACKGROUND AND RELATIONS WITH THE UNITED STATES 32 (2009), available at <http://www.policyarchive.org/handle/10207/bitstreams/2862.pdf>.

¹¹⁰ JIM ZANOTTI, CONG. RESEARCH SERV., RL 34074, THE PALESTINIANS: BACKGROUND AND U.S. RELATIONS 2 (2011), available at <http://www.fas.org/sgp/crs/mideast/RL34074.pdf>.

¹¹¹ Interim Agreement between Israel and Egypt, *Isr.-Egypt*, Sept. 4, 1975.

¹¹² CLYDE MARK, CONG. RESEARCH SERV., IB92052, PALESTINIANS AND MIDDLE EAST PEACE: ISSUES FOR THE UNITED STATES 3 (2005), available at <http://www.fas.org/sgp/crs/mideast/IB92052.pdf>.

¹¹³ *Id.*

¹¹⁴ KENNETH W. STEIN, HEROIC DIPLOMACY: SADAT, KISSINGER, CARTER, BEGIN, AND THE QUEST FOR ARAB-ISRAELI PEACE 187–89 (1999).

¹¹⁵ *Id.* at 256.

¹¹⁶ *The Camp David Accords*, *ISR.-EGYPT*, Sept. 17, 1978.

¹¹⁷ *Id.*

In effect the Security Council resolutions became a cornerstone of official U.S. foreign policy. Since Israel signed onto the Accords it expressed its good faith endorsement of the same Security Council resolutions. Egypt and the Palestinian representatives gave a similar endorsement to these Resolutions. While progress was made, resulting in the peace treaty between Egypt and Israel in 1979, little progress was made on the first framework agreement of the Accords. However, Camp David established that both Israel and the United States were clearly committed to respecting the international law principles in these resolutions.

Subsequent U.S. practice has tended to retreat from the Carter breakthrough at Camp David. For example, it may be noted that the U.S. also refused to recognize Palestinian claims to self-determination because it would lead to the creation of a separate state.¹¹⁸ In 1984, Congress codified the provisions of Resolution 242 into law, adding as a new condition that the PLO must renounce terrorism.¹¹⁹ In November 1988, the PLO issued a declaration of independence proclaiming "the establishment of the state of Palestine in the land of Palestine with its capital in Jerusalem."¹²⁰ This implicitly recognized Israel's right to exist.¹²¹ Later, Arafat, representing the PLO, through a Palestinian communiqué, explicitly accepted Israel's right to exist, accepted U.N. Resolutions 242 and 338, and renounced all forms of terrorism.¹²² After a series of PLO statements and clarifications, the U.S. administration said on December 14, 1988, that Arafat had met the U.S. conditions for a dialogue. Secretary Shultz authorized Robert Pelletreau, U.S. Ambassador to Tunisia, as the sole channel for the dialogue. The dialogue was suspended by President George H.W. Bush on June 20, 1990, after Arafat refused to condemn in unequivocal terms a thwarted seaborne terrorist attack against Israel. Meanwhile, as Palestinians sought recognition before UNESCO and the WHO, President Bush declared that any U.N. agency recognizing the PLO might lose U.S. funding.¹²³ On September 10,

¹¹⁸ See generally James Crawford, *The Creation of the State of Palestine: Too Much Too Soon*, 1 EUR. J. INT'L L. 307 (1990) (assessing one legal theory in favor of Palestinian statehood and how the U.S.' failure to recognize Palestine as a separate state impacts the possibility of Palestinian statehood).

¹¹⁹ MARK, *supra* note 112, at 5.

¹²⁰ Permanent Representative of Jordan, Letter dated 18 November 1988 for the Permanent Representative of Jordan to the United Nations addressed to the Secretary General, U.N. Doc. A/43/827 (Nov. 18, 1988); see also James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L L. 681 (1988-1989) (examining the objective and subjective implications of Palestine's declaration of independence).

¹²¹ Political Communique, Palestinian National Council, Nov. 15, 1988, I.L.M. 1661 (1988).

¹²² BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 450 (1991).

¹²³ *Id.*

1993, the same day that Israel and the PLO exchanged letters of mutual recognition, the United States announced a resumption of the U.S.-PLO dialogue.¹²⁴

The Oslo Accords, formally designated as the Declaration of Principles on Interim Self-Government Arrangements [for the Palestinians], were secretly negotiated in Oslo, Norway, hosted by the Fafo Institute, and completed on August, 20 1993. They were publicly signed in Washington, D.C. on 13 September 1993, in the presence of Arafat, Israeli Prime Minister Yitzhak Rabin and U.S. President Bill Clinton.¹²⁵ The Accords initially generated promising understandings that a peaceful settlement was achievable by providing a framework for the future relations between the two parties, for the creation of a Palestinian National Authority (PNA) and for the withdrawal of the IDF from parts of the Gaza Strip and West Bank.¹²⁶ This arrangement was envisioned to last for five years, with the understanding that further negotiations would be covering the issues of Jerusalem, refugees, settlements, security, and borders.¹²⁷ As nationalist political forces began to emerge within Israel, these final status issues never became matters for conclusive decision.¹²⁸

The not-quite-obvious subtext of Oslo was the concession that a Palestinian National Authority without an ostensible claim to sovereignty would in effect concede that the 1988 declaration of Palestinian independence was premature.¹²⁹ On the other hand, the PNA's future would be tied to a final status settlement agreement. So long as Israel was reluctant to settle these issues, there could be no final settlement and no hope of an independent state. Moreover, tying the status of the PNA to a process of agreement with Israel permits the Israelis to essentially exercise a veto over Palestinian claims to statehood by simply delaying the agreement process,

¹²⁴ CLYDE R. MARK, CONG. RESEARCH SERV., IB82008, ISRAELI-UNITED STATES RELATIONS (2004), available at <http://www.fas.org/man/crs/IB82008.pdf>.

¹²⁵ *Declaration of Principles on Interim Self-Government Arrangements*, Isr.-PLO, Sept. 13, 1993 [hereinafter Oslo Accords].

¹²⁶ GRAHAM USHER, PALESTINE IN CRISIS: THE STRUGGLE FOR PEACE AND POLITICAL INDEPENDENCE AFTER OSLO 8-9 (1995). See generally NATHAN J. BROWN, PALESTINIAN POLITICS AFTER THE OSLO ACCORDS: RESUMING ARAB PALESTINE (2003) (describing the Oslo Accords and the results of that process).

¹²⁷ Oslo Accords, *supra* note 125.

¹²⁸ Dani Filc & Udi Lebel, *The Post-Oslo Israeli Populist Radical Right in Comparative Perspective: Leadership, Voter Characteristics and Political Discourse*, 10 MEDITERRANEAN POL. 85 (2005). The "Oslo war" era transformed the Israeli radical right due to Palestinian terror attacks in response to the Oslo Accords. This transformation became the "new" Israeli right.

¹²⁹ James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L L. 681, 703 (1988-1989).

extending Israeli sovereignty by the de facto extension of settlement activity.¹³⁰ It thus became apparent to the Palestinians that the new governing authorities in Israel, led by Israeli Prime Minister Benjamin Netanyahu and his Likud party, were not committed to advancing the peace process because they opposed the creation of a Palestinian state.¹³¹ Having structured the legal expectations in terms of Israel and the PNA, the Israeli negotiators had a veto over claims to self-determination, independence, and sovereignty. We now turn to the question of the possible recognition of an independent sovereign status for the Palestinian people in light of the current impediments.

III. THE INTERNATIONAL LAW CRITERIA OF STATEHOOD AND THE PROCESS OF RECOGNITION

The interrelated legal issues of the “criteria of statehood” that are recognized today, as well as the specific effects and implications of the different aspects of recognition, are complex matters in international law.¹³² This complexity was aggravated after the Second World War, when under the U.N. Charter a clearer picture of a framework of an international constitutional system emerged.¹³³ Statehood and recognition thus became tied to a broader framework of issues and values.¹³⁴ Among the issues is the question of entry into the international constitutional system as well as exclusion from it. This issue is tied to the emergence of self-determination as a peremptory norm of international law as well as the strength accorded to traditional principles of *uti possidetis*, which in general discourages secession from a sovereign state.¹³⁵

The status of Palestine draws sustenance from recent developments in international law. It is also influenced by its rather unique history as a Class A mandate under the United Nations. The evidence of practice under the League demonstrates that Palestine was not subject to an alien

¹³⁰ KHALIL SHIKAKI, U.S. INST. OF PEACE, WILLING TO COMPROMISE; PALESTINIAN PUBLIC OPINION AND THE PEACE PROCESS (2006).

¹³¹ Ira Chernus, *Israel and the Palestinians Through the Looking Glass*, CBS NEWS (May 27, 2011), http://www.cbsnews.com/2100-215_162-20066760.html.

¹³² David O. Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U. J. INT'L L. & POL. 761 (1994).

¹³³ Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429 (2008).

¹³⁴ JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2d ed. 2007).

¹³⁵ See SUZANNE LALONDE, *DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS* 169 (2002) (describing the context of *uti possidetis*).

sovereignty.¹³⁶ It was considered a state on a pathway to independence.¹³⁷ We explore these issues by first setting out the basic law as it currently clarifies the definition of state and the process of recognition.

The definition of a state in international law is still influenced by Article 1 of the Montevideo Convention on the Rights and Duties of States.¹³⁸ In this view a state is a territorially defined or definable entity. It has a relatively stable population and its population and territory are under the control of its own government. This entity engages or has the competence to engage in formal and diplomatic relations with other states and entities in the international environment.¹³⁹ An aspect implicit in the criteria of statehood is that the entity should claim that it is a State.

When we come to the question of the recognition of statehood we can see how the international system functions on two parallel tracks.¹⁴⁰ First, recognition is decentralized and a matter of state sovereign discretion.¹⁴¹ That is to say other states may or may not recognize the entity regardless of meeting the minima of statehood. There are circumstances in which there is an obligation in international law not to recognize a state that has the minimum criteria,¹⁴² if that state has sought to establish itself in violation of the U.N. Charter.¹⁴³ The other track is the recognition of a state as a member of an international body whose membership is restricted to sovereign states only.¹⁴⁴ However, such recognition does not require that the sovereign formally recognize the government of another state, although the system provides for the recognition *de facto* of a state which acknowledges that a government and a state exist.¹⁴⁵ That recognition could be understood as recognizing a state but not necessarily recognizing the government.

¹³⁶ Wasim I. Al-Habil, *Occupations, A. Diaspora, and the Design of Local Governments for a Palestinian State* (Nov. 5, 2008) (unpublished Ph.D. dissertation, Cleveland State University) (available at <http://etd.ohiolink.edu/send-pdf.cgi/AlHabil%20Wasim.pdf?csu1226688053>).

¹³⁷ *Id.*

¹³⁸ Montevideo Convention, *supra* note 45, art. 3.

¹³⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: STATE DEFINED § 201 (1978).

¹⁴⁰ See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 736 (1988) (describing the formation of validity as it relates to recognition).

¹⁴¹ *Id.*

¹⁴² It is generally considered that the four criteria of statehood from the Montevideo Convention are the minimum criteria for statehood under customary international law. See Anonymous, *China and the Principle of Self-Determination of Peoples*, 6 ST. ANTONY'S INT'L REV. 1, 79, 79–82 (2010). (“[T]he Montevideo Principles are a normative statement of the expected attributes of a sovereign state, and thus appear to be minimum criteria.”).

¹⁴³ Lloyd, *supra* note 132, at 767.

¹⁴⁴ See Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1 (2008) (describing the types of international bodies that states may grant authority).

¹⁴⁵ *Id.*

Recognition by an organization like the U.N. is also influenced by the fact that U.N. recognition is premised on the state's ability to uphold U.N. Charter values, including its commitment to peace.¹⁴⁶ These principles are more explicitly expressed in the Declaration of Friendly Principles.¹⁴⁷ The principles are as follows: (1) states shall refrain from the threat or use of force against the territorial integrity or political independence of any state; (2) states shall settle their international disputes by peaceful means; (3) states shall not intervene in matters within the domestic jurisdiction of any state; (4) states have a duty to cooperate with another in accordance with the Charter; (5) equal rights and self-determination of peoples; (6) sovereign equality of states; (7) states shall fulfill in good faith their obligations under the United Nations Charter.¹⁴⁸ With these principles in mind we review the claim of the Palestinians to the recognition of statehood in international law.

A. Palestinian Statehood and the United Nations Mandate

The criteria of statehood that requires a body politic is generally known as a population.¹⁴⁹ The population issue in Palestine has been contentious since the initiation of the Class A mandate.¹⁵⁰ The mandate recognized a population of Palestinians under Article 22 of the league mandate.¹⁵¹ This recognition was influenced by the mandate's purpose to secure the population's right to self-determination.¹⁵² However, Britain, the mandatory power, announced a policy for Palestine to secure a homeland in Eretz Israel for the Jewish people in the Diaspora, prior to assuming mandate responsibilities.¹⁵³ This was expressed in the Balfour Declaration.¹⁵⁴

¹⁴⁶ Thomas D. Grant, *States Newly Admitted to the United Nations: Some Implications*, 39 COLUM. J. TRANSNAT'L L. 177, 183 (2000) ("As the highest international organ consisting of states, the United Nations sets forth as its chief admissions criteria commitment to peace and possession of the attributes of statehood.").

¹⁴⁷ G.A. Res 2625(XXV), *supra* note 88, at 122.

¹⁴⁸ *Id.*

¹⁴⁹ See generally FRANK S. HOFFMAN, *THE SPHERE OF THE STATE; OR, THE PEOPLE AS A BODY-POLITIC* (1895) (discussing the original relationship between population and body politic).

¹⁵⁰ ASSAF LIKHOVSKI, *LAW AND IDENTITY IN MANDATE PALESTINE* 21–22 (2006) (the "Mandate for Palestine" which was granted to the British by the League of Nations accelerated a massive growth in the Jewish population adding to the diversified remnants of the late Ottoman Empire made up of wealthy Muslims, middle class Christian merchants, and peasants and nomads).

¹⁵¹ Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT'L L. 301 (1990).

¹⁵² John Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. INT'L L.J. 1, 1 (1989).

¹⁵³ Nils A. Butenshon, *Accommodating Conflicting Claims to National Self-Determination: the Intractable Case of Israel/Palestine*, 13 INT'L J. ON MINORITY & GROUP RTS. 285, 289 n.15

Balfour, in confidence, expressed the view to the British Prime Minister that the major purpose of Article 22, namely the self-determination for Palestinian inhabitants, could not be implemented because of the undertaking to promote a Jewish homeland in Palestinian territory.¹⁵⁵ As it turned out, because Britain was not able to emerge with a successful solution to this problem, it passed the matter on to the U.N. General Assembly.¹⁵⁶ Article 22, which juridically established a right of self-determination for the Palestinians, was left unimplemented.¹⁵⁷ The critical question is how much of this right has survived to strengthen the claim to statehood under international law for the people of Palestine. To the extent that the government of Israel may provide some impediments to the realization of statehood, international law may support a weakening of the Israeli position. One factor that has influenced Israeli perspectives is the claim that the Palestinians are not a people for the purpose of the population requirement of statehood.¹⁵⁸ The evidence from careful research demonstrates a continuity of Palestinian national identity.¹⁵⁹ Israel has promoted the argument that Palestinians are simply Arabs and therefore indistinguishable from other Arabs in surrounding states.¹⁶⁰ Some Arab nationalists have in fact supported this view in the early efforts to create a Pan-Arab Union.¹⁶¹ The strength of nation-state national identity proved too strong for this innovation.¹⁶² We would therefore submit that Palestinians are a national body politic, with strong national identity, and with an identity that is continuous, particularly during the period of the U.N. Mandate and under the U.N. Charter framework.

(2006).

¹⁵⁴ Solomon Zeitlin, *Jewish Rights in Eretz Israel (Palestine)*, JEWISH Q. REV., JULY 1961, at 12, 27.

¹⁵⁵ ARCHIBALD P. THORNTON, *IMPERIALISM IN THE TWENTIETH CENTURY* 123 (1977).

¹⁵⁶ Eugene V. Rostow, "Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate," 5 YALE STUD. WORLD PUB. ORD. 147 (1978).

¹⁵⁷ Boyle, *supra* note 151.

¹⁵⁸ AVI SHLAIM, *THE IRON WALL, ISRAEL, AND THE ARAB WORLD* 311 (2001) ("It is not as though there were a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them . . . They did not exist.").

¹⁵⁹ RASHID KHALIDI, *PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS* (2010) ("The Palestinians resemble a few other peoples in the modern era who have reached a high level of national consciousness and have developed a clearly defined sense of national identity, but have long failed to achieve national independence.").

¹⁶⁰ Talia Einhorn, *The Arab-Israeli Peace Process: The Law Reform Perspective*, 3 EUR. J.L. REFORM 149, 153 (2001).

¹⁶¹ C. Ernest Dawn, *The Formation of Pan-Arab Ideology in the Interwar Years*, INT'L J. MIDDLE E. STUD., Feb. 1988, at 67, 69.

¹⁶² *Id.*

The next key criterion is that the body politic must be territorially determined or determinable.¹⁶³ In general, we would suggest that boundaries indicated in relevant U.N. Security Council resolutions established conditions which are determined or determinable. There exist factors in the context which suggest that Israel, a key negotiator, may have broader territorial ambitions and this may be at the expense of Palestinian statehood.¹⁶⁴ A justification for Israeli territorial concerns has been suggested by Prime Minister Netanyahu in his speech before the U.N. on September 23, 2011.¹⁶⁵ Essentially, Netanyahu insists that because of the diminutive territorial status of Israel and a period of fifty years of war and insurrection, Israel has some implicit claims to territorial enhancement to ensure a higher level of security for the state.¹⁶⁶ That is the practical issue. The Prime Minister noted that many states entertain a military presence in other states for mutual security purposes; for example, France in Africa and the United States in Europe and Japan.¹⁶⁷ It is possible that the Prime Minister is also influenced by the idealism of the restoration of the historic boundaries of ancient Israel, the Eretz Israel idea.

One pressing issue is the dynamism of territories and the requirement under Montevideo state qualifications that, if there is to be a Palestinian state, this state has to have agreed-upon boundaries that provide a viable territorial base for a state.¹⁶⁸ The apparently interminable negotiations also formed a basis by which Israel can change the facts regarding the appropriate reach of territory that may fall within any settlement. Essentially, one of the ways that the territorial question can be effectually pre-determined prior to negotiation is by a continuation and expansion of the Israeli settlement program. Politically, the expansion of settlements is a cornerstone of the ultranationalist program and policy in Israel.¹⁶⁹ This policy goes forward amidst a propaganda campaign that insists only the Israelis make concessions

¹⁶³ CRAWFORD, *supra* note 134.

¹⁶⁴ Daniel J. Castellano, *A Brief History of the Arab-Israeli Conflict*, REPOSITORY OF ARCANE KNOWLEDGE (2007), <http://www.arcaneknowledge.org/histpoli/palenstine.htm> (stating that the real motivation for Israel's territorial ambition and claim on land beyond what "secure borders" would require stems from nationalistic, religious and economic motives).

¹⁶⁵ *Netanyahu at UN: Palestinians Can Get State Only After Peace With Israel*, HAARETZ, Sept. 23, 2011.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Justus Reid Weiner & Diane Morrison, *Legal Implications of 'Safe Passage' Reconciling a Viable Palestinian State with Israel's Security Requirements*, 22 CONN. J. INT'L L. 233, 246 (2007).

¹⁶⁹ NUR MASALHA, *IMPERIAL ISRAEL AND THE PALESTINIANS: THE POLITICS OF EXPANSION* 22 (2000).

and that the Palestinians “take and take.”¹⁷⁰ It is worth a reminder that the Oslo Accords, in which Peres was a key player, involved Arafat giving up on the 1947 U.N. boundaries for the one defined in 1967.¹⁷¹ In doing so, Arafat gave up 22% of the historic Palestine;¹⁷² and Israel enlarged its territory on the historic Palestine from owning 56% to owning 78%.¹⁷³

The Obama Administration has insisted on a freeze on settlement building projects on Palestinian land.¹⁷⁴ Netanyahu agreed to a ten-month freeze in order to encourage the initiation of talks.¹⁷⁵ However, during these ten months construction was the same as in the previous ten months.¹⁷⁶ The Obama Administration has pressed Netanyahu to give another two months for the freeze.¹⁷⁷ The U.S. administration has had no influence on Netanyahu’s settlement policies.¹⁷⁸ Moreover, the American administration’s position is weakened by the pressure of the American pro-Israel lobby.¹⁷⁹

Why is Netanyahu reluctant to stop the settlement expansion? The longer it continues, the more intractable the foundation of a viable peace becomes. In fact, the settlement strategy may be meant to be a deal breaker. Why would Netanyahu be interested in telling the United States he supports a settlement to the conflict while his activities and behavior all point in the direction of a strategy designed to continue fighting indefinitely with no final

¹⁷⁰ Allan C. Brownfeld, *Israel and Judaism: Finally, Israel’s Settlements Policy, Turn Toward Extremism Making Impact on Jewish Opinion*, WASH. REP. MIDDLE E. AFF., Mar. 2011, at 50.

¹⁷¹ Henry Siegman, *Netanyahu’s Freeze Scam*, HUFFINGTON POST (Oct. 1, 2010), http://www.huffingtonpost.com/henry-siegman/netanyahus-freeze-scam_b_747292.html.

¹⁷² *What Do You Know About Historic Palestine?*, NEW ENGLAND COMMITTEE TO DEFEND PALESTINE, http://www.onepalestine.org/resources/flyers/NECDP_-_general_flyer_%28text%29_v1r.txt.

¹⁷³ MJ Rosenberg, *Remember These Digits: 78-22*, COMMON GROUND NEWS SERVICE (Apr. 17, 2008), <http://www.commongroundnews.org/article.php?lan=en&sp=0&id=22975>; Hussein Agha & Robert Malley, *Camp David: The Tragedy of Errors*, N.Y. REV. OF BOOKS (July 12, 2001), <http://www.nybooks.com/articles/archives/2001/aug/09/camp-david-the-tragedy-of-errors/?pagination=false>.

¹⁷⁴ Elise Labott, *Obama Drops Demand That Israel Freeze Settlements*, CNN (Sept. 22, 2009), <http://www.cnn.com/2009/POLITICS/09/22/us.mideast/index.html>.

¹⁷⁵ Barak Ravid, *Netanyahu Declares 10-Month Settlement Freeze ‘To Restart Peace Talks,’* HAARETZ (Nov. 25, 2009), <http://www.haaretz.com/news/Netanyahu-declares-10-month-settlement-freeze-to-restart-peace-talks-1.3435>.

¹⁷⁶ Ethan Bronner, *Despite Settlement Freeze, Buildings Rise*, N.Y. TIMES (July 14, 2010), http://www.nytimes.com/2010/07/15/world/middleeast/15settlements.html?_r=0.

¹⁷⁷ Barak Ravid, *Obama In Personal Appeal to Netanyahu: Extend Settlement Freeze for Two Months*, HAARETZ (Sept. 30, 2010), <http://www.haaretz.com/news/diplomacy-defense/obama-in-personal-appeal-to-netanyahu-extend-settlement-freeze-for-two-months-1.316450>.

¹⁷⁸ Elliot Abrams et al., *U.S.-Israel: Unsettled Relationship*, COUNCIL ON FOREIGN RELATIONS (Mar. 18, 2010), <http://www.cfr.org/Israel/us-israel-unsettled-relationship/p21671>.

¹⁷⁹ Jim Lobe, *Politics Throws Palestine Under the Bus*, INTER PRESS SERVICE (Sept. 24, 2011), <http://www.ipsnews.net/2011/09/us-politics-throws-palestine-under-the-bus/>.

conclusion, except one that is created on the ground? Settlements are creating and contain the capacity for re-writing the map, making it impossible for future Israeli authorities to undo the map. Netanyahu has refused to give any assurance about the settlement freeze.¹⁸⁰

Netanyahu rules with a complex coalition of ultranationalist interests. The only legitimate boundaries of the state of Israel, according to them, are not defined by international law but by the history and antiquity of Jewish culture.¹⁸¹ This point was also stressed by Balfour.¹⁸² The historical boundaries of Israel, therefore, include Ancient Sumeria and Judea.¹⁸³ In short, the only acceptable boundaries are those of Eretz Israel (a greater Israel).¹⁸⁴ In this Israel, there is no room for Palestinians. The boundaries of greater Israel direct us to another principle: the idea that there will never be a Palestinian state.¹⁸⁵ It has long been accepted in ultranationalist circles that the Palestinians are not a real national entity or people and thus, as the argument goes, the Palestinians may not claim on the basis of national identity that they are people qualified to carry the mantle of statehood.¹⁸⁶

When we come to the question of the governance of the Palestinian entity, this represents a more complex issue. Under the Oslo Accords, a Palestinian National Authority was set up.¹⁸⁷ The agreement left final status issues as matters to be negotiated between Israel and the PNA.¹⁸⁸ This implicitly left the PNA with a certain measure of internal autonomy, and some measure of external competence, but the Oslo Accords suggest that final status includes Palestinian statehood. This understanding carries the assumption that the PNA does not claim full sovereign independent status

¹⁸⁰ Al Arabiya, *Netanyahu Freezes Settlement, Tells Officials to Stay Mum on Iran Ahead of U.S. Trip*, AL ARABIYA, Feb. 24, 2012.

¹⁸¹ Huma Khan, *In Oval Office, Bibi Offers History Lessons to Obama*, ABC NEWS (May 20, 2011), <http://abcnews.go.com/blogs/politics/2011/05/in-oval-office-bibi-offers-history-lessons-to-obama/>.

¹⁸² JONATHAN SCHNEER, *THE BALFOUR DECLARATION: THE ORIGINS OF THE ARAB-ISRAELI CONFLICT* 335 (2010).

¹⁸³ George Berkin, *Return Israel to Pre-1967 Borders? How About Returning U.S. to 1844 (or 1802 or 1861) Borders?*, NJ.COM (May 25, 2011), http://blog.nj.com/njv_george_berkin/2011/05/return_israel_to_pre-1967_bord.html.

¹⁸⁴ Taufiq Rahim, *Time is Running Out for Israel to Salvage a Two-State Solution*, NATIONAL (Sept. 22, 2011), <http://www.thenational.ae/thenationalconversation/comment/time-is-running-out-for-israel-to-salvage-a-two-state-solution>.

¹⁸⁵ Yossi Gurvitz, *Netanyahu Says "No" to the Two-States Solution*, +972 MAGAZINE (May 21, 2011), <http://972mag.com/netanyahu-says-%E2%80%99Cno%E2%80%9D-to-the-two-states-solution/14861/>.

¹⁸⁶ *Palestinians Outraged by Gingrich Remark*, USA TODAY (Dec. 10, 2011), <http://usatoday30.usatoday.com/news/world/story/2011-12-10/Palestine-Gingrich/51781624/1>.

¹⁸⁷ Oslo Accords, *supra* note 125, art. 1.

¹⁸⁸ *Id.*

since the status must be negotiated with Israel. Clearly, to establish a promising claim for statehood the Palestinians would have to repudiate any understanding that statehood is conditioned by an Israeli veto. The veto would not be exercised in any formal sense. It could be reflected simply in a strategy that is unwilling or reluctant to achieve a settlement. In this sense, if Palestinian statehood is tied to the conclusion of an agreement with Israel, and Israelis are reluctant to conclude, their conduct amounts to a veto if it is also claimed that statehood cannot be considered by the U.N. or the international community unless there is an Israeli agreement. The strategy of seeking recognition of statehood must address this question as well. Additionally, we suggest later in this article that more should be done to strengthen the framework of governance internally and externally and including the constitutional foundations of a future Palestinian State.

It could be argued that Resolution 181 at least implies the idea that international law supports the notion of “an Arab state” as part of the Partition Plan.¹⁸⁹ It could also be argued that the Security Council resolutions recognizing the West Bank and Gaza as Palestinian territories are de jure recognition that the boundaries of the Palestinian people are determinable and that the U.N. Security Council resolutions provide the baseline for determining the boundaries. These resolutions form the foundation of negotiations relating to the Oslo Accords, which essentially involved an acceptance by the parties of these boundaries.¹⁹⁰ This means that Palestinians have already conceded a huge portion of Palestinian land to Israel to secure agreement to settlement. From the standpoint of the traditional criteria of what constitutes a state,¹⁹¹ Palestinian lands for a state are determinable.¹⁹² Second, although Israel occupies those lands, the occupancy vests no title in the occupier.¹⁹³ The trumping legal principle is the legally binding Security Council resolutions.¹⁹⁴

¹⁸⁹ Eli E. Hertz, *U.N. Resolution 181 – The Partition Plan: A “Green Light” for Jewish Statehood – A ‘Dead’ Blueprint for Peace*, MYTHS AND FACTS (2009), <http://mythsandfacts.org/conflict/10/resolution-181.pdf>.

¹⁹⁰ Louis Kriesberg, *The Relevance of Reconciliation Actions in the Breakdown of Israeli-Palestinian Negotiations, 2000*, 27 PEACE & CHANGE 546, 546–71 (2002); see also Sara Roy, *Why Peace Failed: An Oslo Autopsy*, 100 CURRENT HIST. 651 (2002).

¹⁹¹ Montevideo Convention, *supra* note 45, art. 1. Article 1 says that states should possess “a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”

¹⁹² GUDRUN KRÄMER, A HISTORY OF PALESTINE: FROM THE OTTOMAN CONQUEST TO THE FOUNDING OF THE STATE OF ISRAEL 1 (Gudrun Kramer trans., 2008) (describing how Palestine’s once-amorphous borders have given way to a defined territory).

¹⁹³ *Id.* at 300, 306 (describing the intentional importation of illegal Jewish immigrants, thus undermining the legitimacy of the occupation title; and describing the U.N. Resolution envisioning a Jewish and a Palestinian entity).

¹⁹⁴ *Id.* at 306.

The second criterion of statehood is that there should be a permanent (Palestinian) population.¹⁹⁵ There is a permanent Palestinian population in the West Bank and Gaza.¹⁹⁶ What makes a final settlement complex is that there are now millions of (absentee) Palestinians whose citizenship rights were abrogated by Israeli legislation and administrative measures.¹⁹⁷ Still, we can conclude that, at a minimum, there is a Palestinian population inside the territories occupied by Israel that qualifies as a permanent population.¹⁹⁸

The third criterion of statehood is having in place a functioning government.¹⁹⁹ This issue is somewhat more problematic, because the Palestinian Authority (PA) was created as an interim entity and not a permanent governing authority.²⁰⁰ Here, the Palestinians, by drafting a valid constitution and creating a government under that constitution, could meet the criteria of statehood unambiguously.²⁰¹ The PNA does meet some of the criteria relating to the capacity to enter into relations with other states.²⁰² The degree of recognition that Palestinian entities have received suggests that the Palestinian leadership is capable of discharging these obligations. The PNA has relations with at least 140 other states²⁰³ that could qualify as meeting the minimum requirements of diplomacy.²⁰⁴ Additionally, the observer status of the PLO at the U.N.²⁰⁵ and the degree of the PNA and the PLO's participation in international organizations,²⁰⁶ significantly enhances

¹⁹⁵ CRAWFORD, *supra* note 134.

¹⁹⁶ *West Bank*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/we.html> (last visited Oct. 4, 2012); *Gaza Strip*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html> (last visited Oct. 4, 2012).

¹⁹⁷ Stephen Lendman, *Israel's Proposed Counterterrorism Law*, PEOPLE'S VOICE (Sept. 3, 2011), <http://www.thepeoplesvoice.org/TPV3/Voices.php/2011/09/03/israel-s-proposed-counterterrorism-law>.

¹⁹⁸ *Israel*, CIA WORLD FACTBOOK (last visited Oct. 4, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>.

¹⁹⁹ BROWN, *supra* note 126.

²⁰⁰ Lisa Hajjar, *Law Against Order: Human Rights Organizations and (versus?) the Palestinian Authority*, 56 U. MIAMI L. REV. 59, 60 (2001) ("The PA is an 'interim government,' not a sovereign state. It lacks independence, control over borders, natural resources, trade, immigration, and other trappings of sovereignty. It also lacks control over 'national time.'").

²⁰¹ John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 5-6 (2009).

²⁰² CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE (2005).

²⁰³ TAYLOR & FRANCIS GROUP, THE EUROPA WORLD YEAR BOOK 2004: VOLUME II 3325 (45th ed. 2004).

²⁰⁴ JAN MELISSEN, WIELDING SOFT POWER: THE NEW PUBLIC DIPLOMACY (2005).

²⁰⁵ Observer status for the Palestine Liberation Organization, G.A. Res 3237 (XXIX), U.N. Doc. A/RES/3237 (Nov. 22, 1974).

²⁰⁶ *Appendix B: International Organizations and Groups*, CIA WORLD FACTBOOK, <http://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html#C> (last visited

the claim that a future government has the capacity to enter into relations with other states and entities in the international environment.

These are the criteria indicated in the Montevideo Convention on the Rights and Duties of States.²⁰⁷ Since the adoption of the U.N. Charter, there has been a modest change in the notion of sovereignty as the criterion of the legal personality of the state.²⁰⁸ That change requires that a state as a sovereign entity is able and willing to accept the rights, as well as the obligations, of a state under the charter of the United Nations.²⁰⁹ Since this would include the fundamental purpose and values behind the U.N. Charter, it would be appropriate that the constitution of a Palestinian state and its practices reflect on issues of international peace and security, commitment to the rule of law, a commitment to fundamental human rights, and a commitment to global security and democracy.²¹⁰ These latter criteria are ones that bring an element of “authority” to the expression of sovereignty.

It could be argued that Israeli sovereignty is somewhat diminished by its unwillingness to adopt the constitutional guidelines of Resolution 181.²¹¹ It has been commonly assumed that Resolution 181 provided the international legal imprimatur for the creation of the Israeli state and an Arab state.²¹² Resolution 181 contained certain guidelines as to what the political structure of rights and duties of the future states should encompass.²¹³ The Israeli leadership took the green light of the Resolution 181 and declared its independence.²¹⁴ The Declaration was a document that complied fully with the guidelines of Resolution 181.²¹⁵ However, although there was an intent that the Declaration should be the inspiration for the new Israeli Constitution, such a Constitution did not emerge.²¹⁶ This means that Israel effectually refused to adopt its own declaration of independence as containing legally binding prescriptive norms.²¹⁷ In this sense, Israeli objections to Palestinian statehood would appear to be objections to the mandate of international law

Oct. 19, 2012).

²⁰⁷ Montevideo Convention, *supra* note 45, art. 1.

²⁰⁸ Zohar Nevo & Tamar Megiddo, *Lessons From Kosovo: The Law of Statehood and Palestinian Unilateral Independence*, 5 J. INT'L L. & INT'L RELATIONS 89 (2009).

²⁰⁹ Iliriana Islami, *The Insufficiency of International Legal Personality of Kosovo as Attained through the European Court of Human Rights: A Call for Statehood*, 80 CHI.-KENT L. REV. 83, 88 (2005).

²¹⁰ U.N. Charter art. 1, para. 1.

²¹¹ Hertz, *supra* note 189, at 7.

²¹² *Id.*

²¹³ G.A. Res. 181(II), *supra* note 41.

²¹⁴ Hertz, *supra* note 189, at 2.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

itself. Our sense is that the only stumbling block on the pathway to the recognition of Palestinian statehood would be the United States exercising a veto over the process in the Security Council. This would be an ill-advised vote, however, it is one that the Palestinians must strategically seek to overcome or minimize through the use of international provisions such as "Uniting for Peace," which we will discuss in a latter part of this Article.²¹⁸

Currently, there are more or less 114 countries that already recognize Palestinian statehood.²¹⁹ Such recognition is in the first instance a matter of state sovereignty exercised bilaterally.²²⁰ The nature of these agreements gives an advantage to the Palestinians for them to try to secure an overwhelming bilateral commitment for a recognition of Palestinian sovereignty. Already, important Latin American states have given their commitments. Additionally, it could also be advantageous for Palestinians to seek recognition of their statehood in regional international organizations such as the League of Arab States, the African Union, OAS, European Union etc. Regional recognition would be politically efficient for the Palestinians to develop their constitution and constitute their government.²²¹ With this background, it may be vastly more difficult for the United States to exercise a veto in the face of an overwhelming global consensus.

It would seem to be clear that the recognition of Palestinian statehood must meet the Montevideo criteria of statehood²²² and more under the U.N. Charter. It must be noted that Montevideo was modified by post World War II developments regarding the criteria of statehood in international law.²²³ The first issue is the recognition of their claims to territory. First, U.N. General Assembly Resolution 181 develops the partition of land.²²⁴ The boundaries indicated in that resolution were the boundaries adopted by Israel to define its territorial space.²²⁵ Since the Palestinians were not an organized

²¹⁸ *Uniting for Peace*, G.A. Res. 377 (V), U.N. Doc. A/RES377 (Nov. 3, 1950).

²¹⁹ Boyle, *supra* note 151.

²²⁰ See Alexander Cooley & Lincoln A. Mitchell, *Engagement Without Recognition: A New Strategy Toward Abkhazia and Eurasia's Unrecognized States*, WASH. Q., Oct. 2010, at 59; see also Alexis Arieff, *De Facto Statehood? The Strange Case of Somaliland*, 3 YALE J. INT'L AFF. 60, 60 (2008); see also Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195, 199–201 (2004).

²²¹ Montevideo Convention, *supra* note 45, art. 1; Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1305 (2008).

²²² Montevideo Convention, *supra* note 45.

²²³ Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 433 (1999).

²²⁴ Hertz, *supra* note 189.

²²⁵ *Id.*

entity at that time,²²⁶ they were not in a position to either adopt the U.N. partition scheme or even to repudiate it. Nevertheless, it is worth noting that, as we had earlier discussed, Israel's boundaries were partially defined and Palestinian boundaries were determinable in this sense. These determinable boundaries would meet the criterion of territoriality for State recognition. After the 1967 war, Israel occupied Gaza and the West Bank.²²⁷ It still occupies those territories. However, Israel has agreed to Resolutions 242 and 338; and the Palestinians have agreed to the territorial dispensation indicated in these resolutions. This means that Palestinians, in effect, accept less territory than originally envisioned in Resolution 181. Boundaries may be redefined by agreement. This means that Israel needs an agreement that will accommodate its settlement activity in Palestinian territory. In short, settlement activity flies in the face of U.N. Resolutions 242 and 338, and is therefore unlawful. Here the lawfulness of the boundaries under these resolutions is grounded in the Security Council's competence to make binding international law.²²⁸ The unlawfulness can be cured by an agreement between Israel and the Palestinians. For such an agreement or understanding to have legal efficacy, it would probably have to be sanctioned or approved by the Security Council.²²⁹ One final point—the matter that does not make it into the front lines of negotiation—is the deep belief of Israeli ultranationalists that international law boundaries in the context of this conflict are not legitimate. They use the legitimate boundaries of Israel as defined by ancient history, in which the ancient state of Israel was sovereign over lands, now claimed to be Palestinian.²³⁰ This is a deeply held belief,²³¹ and it may well be that, so long as the extreme ideology of ultranationalism controls the government of Israel, there will be no final settlement that involves territorial determinations incompatible with the Eretz Israel idea.

The next element of statehood is the element of governance.²³² It would seem that the agreement to create the PA with a degree of internal autonomy goes a long way toward the requirement that there be a discernible form of governance with lines of authority. However, it has been clearly understood

²²⁶ Boyle, *supra* note 151.

²²⁷ WILLIAM W. HARRIS, *TAKING ROOT: ISRAELI SETTLEMENT IN THE WEST BANK, THE GOLAN, AND GAZA-SINAI, 1967–1980*, at 223 (1980).

²²⁸ Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901–05 (2002).

²²⁹ *Id.*

²³⁰ Solomon Zeitlin, *Jewish Rights in Eretz Israel (Palestine)*, JEWISH Q. REV., July 1961, at 12.

²³¹ Jonathan Rynhold, *Re-Conceptualizing Israeli Approaches to "Land for Peace" and the Palestinian Question since 1967*, ISRAEL STUD., Summer 2001, at 33.

²³² Montevideo Convention, *supra* note 45, art. 1.

that the PA is not really meant to be a governing body in an international sense.²³³ This means that the PLO and its allies must reconstitute the PNA in the form of a recognizable government, with a working draft constitution, and with a framework of transparency, responsibility, and accountability. It would also be appropriate that such an organization draft a constitution that approximates international standards in order to show that the Palestinian governing authority is willing, ready, and able to meet its international responsibilities under the U.N. Charter. It bears notice that the U.N. partition plan stipulated that the constitutions of both Arab and Jewish states would guarantee "all persons equal and nondiscriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association."²³⁴

The declaration of the establishment of Israel indicated that the new state "will uphold the full social and political equality of all its citizens without distinction of religion, race, or sex."²³⁵ After this promising start, the declaration was never adopted by the Knesset; and no efforts were made to draft a constitution along these lines.²³⁶ In our view, both Israelis and Palestinians would have benefited by establishing the Israel with a constitution based on this declaration. It should be noted that the Knesset delegated the task of drafting a constitution to its Constitution, Law, and Justice Committee, which has never presented the Knesset with a draft constitution.²³⁷

B. The Relevance of Recent Case Law

Case law frequently provides the particulars of the background context within which the nuances of decisions emerge on the complex question of the validity of claims to statehood in international law. The operational norm reflects complexity in the sense that these norms are in ostensible conflict. International law protects the territorial integrity of the nation-state and does not in general favor claims for self-determination and independence that

²³³ Hajjar, *supra* note 200.

²³⁴ G.A. Res. 181 (II), *supra* note 41, pt.1(B)(10(d)).

²³⁵ *The Declaration of Establishment of the State of Israel*, *supra* note 49.

²³⁶ See Shimon Shetreet, *Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset*, 77 TUL. L. REV. 659, 674-75 (2003) (charting the rejection of a constitution and bill of rights from the First through the Tenth Knesset).

²³⁷ Jonathan Cook, *Israeli Constitutional Committee Faces Double Bind*, 34 MIDDLE E. REP., Summer 2004.

require the breakup of the state.²³⁸ The circumstances under which secession may succeed tend to be fairly situation specific.²³⁹

There seem to be two salient formulas relevant to this context.²⁴⁰ The first presents a unified state in which one part of the state (defined by territory or the identity of the citizens) seeks to secede from the union and form a separate state.²⁴¹ The consensus seems to be that, unless there is extreme ostracism or persecution of the separatist group by the unified state, secession should not be permitted.²⁴²

The Supreme Court of Canada, in the case *Reference re Secessions of Quebec*,²⁴³ analyzed the scope of the right to self-determination with regards of the province of Quebec. The court considered the questions put to it concerning whether the legislature might under international law have the right to unilateral secession from Canada.²⁴⁴ In an exhaustive analysis of the right to self-determination in international law the court ruled that in effect the population of Quebec was not an oppressed people and has not experienced attacks on their physical integrity or the massive violation of fundamental rights.²⁴⁵ The court saw the international right of self-determination as being confined to situations of former colonies where there is oppression or situations of foreign military occupation.²⁴⁶ As indicated above, the claims related to Quebec for the possibility of unilateral secession were rejected by the Supreme Court of Canada because the claims of the Quebecois were not sustained by any sense of repression or disidentification by the state, which is in fact a rule of law-governed states.²⁴⁷ This decision supports the legal position of Palestinian statehood in the sense that it

²³⁸ See Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215, 234–35 (2001) (explaining that in cases where secession was permitted the original state already had clearly defined internal boundaries dividing the successors, which became the interstate boundaries for the successor states).

²³⁹ See generally Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31 (1997) (describing different theories of secession).

²⁴⁰ *Id.* at 36.

²⁴¹ See *id.* at 35 (analogizing remedial secession to revolution); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 186 (1991) (noting the trend of differentiating state governments by either its peoples or its territory when discussing secession issues).

²⁴² See Buchanan, *supra* note 239, at 35–36 (“Secession may be justified, and may be feasible, as a response to selective tyranny, when revolution is not a practical prospect.”).

²⁴³ See generally *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* pt. 3.

²⁴⁷ *Id.*; see Johan D. Van Der Vyver, *Self-Determination of the Peoples of Quebec under International Law*, 10 J. TRANSN'L L. & POL'Y 1, 10 (2000) (identifying Canada as an adherent to the rule of law).

clarifies specific circumstances under which self-determination and secession are valid in international law. These circumstances favor Palestinian rights.

The ICJ upheld Kosovo's unilateral claim for independence and statehood under international law.²⁴⁸ There, particular facts concerning Kosovo seemed to have influenced the determination that Kosovo could secede from Yugoslav sovereignty. Kosovo was an autonomous region under the 1974 Yugoslavian constitution.²⁴⁹ As the constitution eroded, Serbian repression and notorious discrimination characterized the position of the Kosovo majority.²⁵⁰ In fact, international intervention was influenced by the prospect of a program of massive ethnic cleansing of the region.²⁵¹ This established a provisional form of governance under U.N. authority.²⁵² A further factor that supported the validity of the declaration of Kosovo independence was that negotiations for an internal settlement toward a final status seemed to be carrying on interminably and aimlessly.²⁵³

The situation in Kosovo and the occupied territories is similar to the Palestinian situation in that, in both cases, the framework for continued negotiations toward a final settlement was actually taking place under the authority of U.N. Security Council resolutions. In Kosovo, the interim government was directly created by the Security Council resolution;²⁵⁴ in the context of the occupied territories of Palestine, the Oslo Accords—which came under the broad authority of U.N. Security Council resolutions—also created the Palestinian National Authority as an interim institution of governance.²⁵⁵ In Kosovo, the International Court of Justice held that the representatives of the Kosovar people were not limited in their residual claim to sovereignty and independence by the U.N. Security Council resolutions.²⁵⁶ Similarly, U.N. General Assembly resolutions would seem to strengthen the residual competence of the Palestinian people to declare their sovereignty

²⁴⁸ Alexander Orakhelashvili, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, 12 MAX PLANCK Y.B. UNITED NATIONS L. 1, 2 (2008).

²⁴⁹ *Id.*; *Kosovo*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (last visited Oct. 9, 2012).

²⁵⁰ Orakhelashvili, *supra* note 248, at 2–3.

²⁵¹ See Ruth Wedgwood, *Editorial Comment: NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 829–30 (1999) (explaining that the Serbian campaign of ethnic cleansing was one reason given for NATO's intervention in Kosovo).

²⁵² S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (June 10, 1999).

²⁵³ Orakhelashvili, *supra* note 248, at 19.

²⁵⁴ S.C. Res. 1244, *supra* note 252, para. 10.

²⁵⁵ Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73, 82 (2010).

²⁵⁶ Orakhelashvili, *supra* note 248, at 18.

and independence.²⁵⁷ Unlike the Quebecois, the Palestinian claim also does not involve an issue of secession of titled territory from Israel; because Israel has no sovereign title to the territories it occupies.²⁵⁸

We would submit that the factual background and reasoning of the courts in the discussed cases provides support for Palestinian claims to statehood and independence under international law. In the case of Kosovo the court did not include a finding of Kosovo's statehood but what makes the case relevant to the Palestinian situation, is that the governance of Kosovo at the time of its declaration of independence was set up under U.N. authority with provisional institutions of self-governance.²⁵⁹ Additionally, Serbia's claim to territorial authority over Kosovo could be seen as stronger than Israeli claims to prevent the recognition of Palestinian statehood. Kosovo was territorially a part of Serbia, whereas Israeli claims over Palestinian territories are those of an occupying entity.²⁶⁰ It would therefore appear that the case law from the International Court of Justice and the Canadian Supreme Court favors the lawfulness of the claim of the Palestinian people to the recognition of statehood, independence, and sovereignty.

C. *Repressive and Discriminatory Behaviors of the State of Israel*

Resolution 181, also known as the Partition Plan, established criteria for citizenship without regard to religion or ethnicity:

Palestinian citizens residing in Palestine outside the City of Jerusalem, as well as Arabs and Jews who, not holding Palestinian citizenship, reside in Palestine outside the City of Jerusalem shall, upon the recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights.²⁶¹

Subsequent Israeli legislation and practice has ignored these issues. Those practices generated a huge Palestinian refugee crisis.²⁶² Most recently, Prime

²⁵⁷ See, e.g., Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27 (1997) (noting U.N. resolutions promoting the rights of the Palestinian people to self-determination).

²⁵⁸ See David Morris Phillips, *The Unexplored Option: Jewish Settlements in a Palestinian State*, 25 PENN. ST. INT'L L. REV. 75, 119–20 (discussing whether Israel's claim on and control of the West Bank is legal).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ G.A. Res. 181 (II), *supra* note 41.

²⁶² Yoav Peled & Nadim N. Rouhana, *Transitional Justice and the Right of Return of the*

Minister Netanyahu wanted to affirm the validity of internal Israeli practices on citizenship and statelessness by having the Palestinian National Authority agree that Israel (from the perspective of the Palestinians) is a "Jewish state."²⁶³

A brief reference should be made to the laws dealing with a preference for persons of Jewish identity. The Law of Return (Amendment No. 2), 1970 (amending the Law of Return (1950)) effectually defines who is a Jew and, by implication, who is not.²⁶⁴ Greater specificity is given to these distinctions with regard to Palestinians in the Absentee Property Law of 1950, the Entering into Israel Law of 1952 and Israeli National Law of 1952.²⁶⁵ The Absentee Property Law defined the mass of Palestinian Arabs as "absentees" from territories that Israel conquered in the 1948 war.²⁶⁶ The law denies them the citizenship rights envisioned in Resolution 181 and also denies them the rights to their properties inside Israel.²⁶⁷ The status of "absentee" is inherited as well, meaning that children of Palestinian Arabs will also be considered "absentee."²⁶⁸

The absentee law simultaneously affects civic status and land rights. This issue with respect to land rights is supplemented by legislation and administrative practices which are supported by Israeli basic laws.²⁶⁹ Four cornerstones make up the legal basis of Israeli land policy;²⁷⁰ the Basic Law establishing the Israel Land Administration;²⁷¹ the Israel Lands Law;²⁷² the

Palestinian Refugees, 5 THEORETICAL INQUIRIES L. 317, 327 (2004); see also Elia Zureik, *Palestinian Refugees and Peace*, 24 J. PALESTINE STUD. 5, 5–17 (1994) (discussing the refugees and unresolved political issues that resulted from the 1948 and 1967 wars); Kurt R. Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 592 (1978) (noting the Arab exodus following the passage of the 1947 Partition Plan).

²⁶³ Haaretz Service & Natasha Mozgovaya, *Netanyahu: Only When Palestinians Recognize Israel As a Jewish State Will They Be Ready for Peace*, HAARETZ (Oct. 22, 2010), <http://www.haaretz.com/news/diplomacy-defense/Netanyahu-only-when-palestinians-recognize-israel-as-a-jewish-state-will-they-be-ready-for-peace-1.320665>.

²⁶⁴ See Nancy Caren Richmond, *Israel's Law of Return: Analysis of its Evolution and Present Application*, 12 DICK. J. INT'L L. 95, 103 (1993) (noting that a Jew is "one born of a Jewish mother").

²⁶⁵ Jeremy Forman & Alexandre Kedar, *From Arab Land to 'Israel Lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948*, 22 ENV'T & PLAN. D: SOC'Y & SPACE 809, 816 (2004).

²⁶⁶ *Id.* at 815.

²⁶⁷ *Id.*

²⁶⁸ BADIL RES. CTR., PALESTINIAN REFUGEE CHILDREN: INTERNATIONAL PROTECTION AND DURABLE SOLUTIONS (2006), available at http://reliefweb.int/sites/reliefweb.int/files/resources/4347FD59F8965672C12572C700403604-Full_Report.pdf.

²⁶⁹ Israel Lands Administration Law, 5720–1960, 14 LSI 48 (1960).

²⁷⁰ Stephen Lendman, *Israel's Discriminatory Land Policies*, RENSE.COM, <http://www.rense.com/general86/landpol.htm> (last visited Mar. 19, 2012).

²⁷¹ Israel Lands Administration Law, *supra* note 269, at 49.

Israel Land Administration;²⁷³ and the Covenant between the State of Israel and the World Zionist Organization (Jewish National Fund) (1961).²⁷⁴ The net result of these laws is that non-Jews are excluded by law from 92.6% of the land of pre-1967 Israel.²⁷⁵ These and other administrative measures have created a complex background generating great sensitivity and salience to the settlement activity in Palestinian lands since 1948 and after 1967.

In addition, Israel has a formidable array of defensive and emergency regulations so that the state is administered under a dual military-civilian system.²⁷⁶ The defense emergency regulations, which were inherited from Britain, include the power to detain, the power to deport, the power to take possession of land, the power to forfeit and demolish property, and the power to declare closed areas.²⁷⁷ These were supplemented by the Foundation of Legislation Law of 1980, which strengthened the powers of the state and weakened the rights of Palestinians.²⁷⁸

Under the authority of this arsenal of complex laws, the critical question is of course the status of Palestinians in the territories that came under Israeli control after the 1967 war. In 1967, Israel attacked Syria and occupied the Golan Heights.²⁷⁹ It also occupied the West Bank in Gaza, and the Sinai Peninsula up to the Suez Canal.²⁸⁰ Technically international law does not validate the acquisition of territory by the use of force.²⁸¹ On the other hand, the occupancy of such territory, over time, may generate new facts and new expectations if the legal statuses of the occupancy (and those who suffer occupancy) are not appropriately clarified.²⁸² The Palestinians have reasserted their claim to statehood covering the territories now occupied by Israel—namely, Gaza and the West Bank.²⁸³ The Israelis, while negotiating,

²⁷² *Id.*

²⁷³ *Id.* at 50.

²⁷⁴ *Special Reports: The Jewish National Fund Basic Documents*, 2 PALESTINE Y.B. INT'L L. 193, 214 (1985).

²⁷⁵ Lendman, *supra* note 270.

²⁷⁶ Moshe Lissak, *The Unique Approach to Military-Societal Relations in Israel and Its Impact on Foreign and Security Policy*, in PEACEMAKING IN A DIVIDED SOCIETY: ISRAEL AFTER RABIN 235–37 (Sasson Sofer ed., 2001).

²⁷⁷ David A. Kirshbaum, *Israeli Emergency Regulations & the Defense (Emergency) Regulations of 1945*, ISRAEL LAW RESOURCE CENTER, <http://www.israelawresourcecenter.org/emergencyregs/essays/emergencyregssessay.htm> (last visited Mar. 19, 2012).

²⁷⁸ Foundations of Law, 5740-1980, 34 LSI 181 (1979–1980) (Isr.).

²⁷⁹ HARRIS, *supra* note 227, at 59.

²⁸⁰ *Id.* at 15–17.

²⁸¹ SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 249 (1996).

²⁸² *Id.* at 257.

²⁸³ See *supra* Part I.D.

have been doing so in an interminable manner.²⁸⁴ It is possible there are interests in Israel that see continuous negotiation as an opportunity to incrementally change facts on the ground, by engaging in settlement activity, strategically placing roads for exclusive Israeli use,²⁸⁵ as well as limiting Palestinian development and civil rights.

For example, the West Bank aquifer is a major water resource.²⁸⁶ Israelis use approximately 800 liters of water per day while Palestinians are allowed to use only an approximate of 200 liters per day.²⁸⁷ Israel prohibits Palestinians from drilling into the West Bank aquifer without permits.²⁸⁸ Palestinian construction of catchment basins to collect rainwater is prohibited.²⁸⁹ A wide variety of goods are deemed to be "war goods" (such as sewing machines); perishable Palestinian exports are delayed so that they are destroyed.²⁹⁰ Moreover, income to Palestinians is restricted so that Palestinian incomes have to be more than twenty times less than that of Israelis.²⁹¹ Israel limits entrepreneurial activity that may compete with Israelis' and disrupts Palestinian schooling.²⁹² The system of strategic roads has made communication a nightmare.²⁹³ The Israeli policy of targeted assassinations has focused on eliminating educated and moderate Palestinians, making it difficult to create a competent government authority.²⁹⁴ Israel controls

²⁸⁴ See *supra* Part I.

²⁸⁵ E.g., A.S. Hakkert et al., *The Evaluation of Effects on Driver Behavior and Accidents of Concentrated General Enforcement on Interurban Roads in Israel*, 33 ACCIDENT ANALYSIS & PREVENTION 43 (2001); Rami S. Abdulhadi, *Land Use Planning in the Occupied Palestinian Territories*, J. PALESTINE STUD., Summer 1990, at 46, 51–53.

²⁸⁶ Miriam R. Lowi, *Bridging the Divide: Transboundary Resource Disputes and the Case of West Bank Water*, INT'L SECURITY, Summer 1993, at 113, 132 n.67; see also Joyce R. Starr, *Water Wars*, FOREIGN POL'Y, Spring 1991, at 17, 24; SHARIF S. ELMUSA, CTR. FOR POLICY ANALYSIS ON PALESTINE, INFORMATION PAPER No.2, THE WATER ISSUE AND THE PALESTINIAN-ISRAELI CONFLICT 2 (1993).

²⁸⁷ THE WORLD BANK, WEST BANK AND GAZA: ASSESSMENT OF RESTRICTIONS ON PALESTINIAN WATER SECTOR DEVELOPMENT, at iv, 31 (2009).

²⁸⁸ Lowi, *supra* note 286, at 126.

²⁸⁹ *Id.* at 126–27.

²⁹⁰ Erik Schechter, *Legal Scholars Weigh in on Gaza Blockade, Flotilla Deaths*, CARNEGIE COUNCIL (June 28, 2010), http://www.carnegiecouncil.org/resources/articles_papers_reports/0055.html.

²⁹¹ Nadim Kawach, *Real Per Capita Income of Palestine Plunges*, INT'L SOLIDARITY MOVEMENT (Jan. 17, 2010), <http://palsolidarity.org/2010/01/real-per-capita-income-of-palestine-plunges/>.

²⁹² Ismael Abu-Saad, *State-Controlled Education and Identity Formation Among the Palestinian Arab Minority in Israel*, 49 AM. BEHAVIORAL SCIENTIST 1085, 1088 (2006).

²⁹³ Tom Selwyn, *Landscapes of Separation: Reflections on the Symbolism of By-pass Roads in Palestine*, in CONTESTED LANDSCAPES: MOVEMENT, EXILE AND PLACE 225, 225–27 (Barbara Bender & Margot Winer eds., 2001).

²⁹⁴ Gal Luft, *The Logic of Israel's Targeted Killing*, 10 MIDDLE E. Q. 3, 6 (2003).

airspace and prevents Palestinian fishing operations in the Mediterranean.²⁹⁵ Tens of thousands of homes have been demolished.²⁹⁶ Hundreds of thousands of fruit and nut trees have been destroyed.²⁹⁷

The continuance of the conflict escalates tensions and, in turn, accelerates inter-group hostility between the Palestinians and Israelis. One of the significant problems of inter-group escalating tensions is the propensity to shape human behaviors in terms of the perspectives of racism.²⁹⁸ This is a problem that cuts both ways. In Israel, domestic critics seriously lament “the filthy wave of racism that is engulfing us.”²⁹⁹ The charge that Israel generates strong racist constituencies is both serious as well as a matter of extreme concern to the Israeli authorities. The link between racism and the occupation is indicated in the actual practices of sustaining the occupation itself. A recent book titled *The Occupation of the Territories* is summarized in Avnery’s newsletter. The book recounts the testimonies of ordinary Israeli soldiers dealing with the daily and nightly life of occupation. According to Avnery,

There are accounts of nocturnal incursions into quiet Palestinian villages as exercises—breaking into random houses where there were no “suspects”, terrorizing children, women and men, creating mayhem in the village—all this to “train” the soldiers. There are stories about the humiliation of passers-by at the checkpoints (“Clean up the checkpoint and you will get your keys back!”), casual harassment (“He started to complain, so I hit him in the face with the butt of my weapon!”). Every testimony is meticulously documented: time, place, unit.

According to Avnery, the matter-of-factness and the effort to avoid outrageous incidents strengthen the credibility of the book.

²⁹⁵ *Israel’s Control of the Airspace and the Territorial Waters of the Gaza Strip*, B’TSELEM (Jan. 1, 2010), http://www.btselem.org/gaza_strip/control_on_air_space_and_territorial_waters.

²⁹⁶ Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 BROOK. J. INT’L L. 871, 899 (2003).

²⁹⁷ Atyaf Alwazir, *Uprooting Olive Trees in Palestine* (2002), <http://www1.american.edu/ted/ice/olive-tree.htm>.

²⁹⁸ Faye V. Harrison, *Facing Racism and the Moral Responsibility of Human Rights Knowledge*, 925 ANNALS N.Y. ACAD. SCI. 45, 48 (2000); Karen L. Proudford, *Notes on the Intra-Group Origins of Inter-Group Conflict in Organizations: Black-White Relations as an Exemplar*, 1 U. PA. J. LAB. & EMP. L. 615 (1998); David Erdal et al., *On Human Egalitarianism: An Evolutionary Product of Machiavellian Status Escalation?*, 35 CURRENT ANTHROPOLOGY 175 (1994).

²⁹⁹ Uri Avnery, “*The Darkness to Expel!*,” GUSH SHALOM (Dec. 25, 2010), <http://zope.gush-shalom.org/home/en/channels/avnery/1293276148>.

The intention of the book is not to uncover atrocities and show the soldiers as monsters. It aims to present a situation: the ruling over another people, with all the high-handed arbitrariness that this necessarily entails, humiliation of the occupied, corruption of the occupier. According to the editors, it is quite impossible for the individual soldier to make a difference. He is just a cog in a machine that is inhuman by its very nature.³⁰⁰

These reports should also be understood in the context of right-wing elements in Israel seeking to depreciate the civic status of Arab citizens. This includes “loyalty oaths,” “religious edicts” that forbid Jews from renting apartments to Arabs, demonstrations in Bat Yam calling “for the expulsion of all Arabs,” and Tel Aviv’s “Hatikva quarter demand[ing] the expulsion of refugees and foreign workers.”³⁰¹ Jews have been millennial victims of racism, and there is a great sensitivity to the concern that some elements in Israel promote a racist agenda. The right-wing racists seek to challenge the “unequaled humanity” of the Judaic tradition.³⁰² The religion “demands the treatment of ‘Gerim’ (foreigners living in Israel) as Israelites, because you were foreigners in the land of Egypt.”³⁰³ It should also be noted that foreign women are critical to the Jewish biblical history. Bathsheba, the mother of Solomon, had been the wife of a Hittite.³⁰⁴ Her later husband, David, was the descendent of Ruth, who was a Moabite.³⁰⁵ One of Israel’s great kings—King Ahab—was married to a Phoenician.³⁰⁶ Our sense is that the occupation is a major contributor to the disturbing emergence of racism in Israel. In this sense, Israel would benefit as much as the Palestinians from a just settlement.

When the list of depredations is viewed in the aggregate, there is a sense that the occupying authority wants life to be an impossible struggle for the residents of the West Bank and Gaza.³⁰⁷ Palestinian resistance is equated with terrorism³⁰⁸ but, if they resist with non-violence they are not a serious

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ DAVID ADAMS LEEMING, *THE OXFORD COMPANION TO WORLD MYTHOLOGY* (2005). 2 *Samuel* 11:3.

³⁰⁵ 2 *Samuel* 11:3; *Ruth* 1:4; *Ruth* 1:16; *Ruth* 4:10.

³⁰⁶ PHILIP J. KING & LAWRENCE E. STAGER, *LIFE IN BIBLICAL ISRAEL* 2001.

³⁰⁷ See generally Matthew Lippman, *The New Terrorism and International Law*, 10 *TULSA J. COMP. & INT'L L.* 297, 306 (2003) (American policy advanced the interests of the Jewish State of Israel while demonstrating little concern over the occupation of Jerusalem and the murder of Muslims).

³⁰⁸ See Assaf Moghadam, *Palestinian Suicide Terrorism in the Second Intifada: Motivations and Organizational Aspects*, 26 *STUD. IN CONFLICT & TERRORISM* 65 (2003) (explaining the

negotiating party or, the strategies of non-violence are simply viewed as weakness, permitting the Israeli side to up the ante.³⁰⁹ There are, of course, perspectives from the Palestinian side and perspectives from the Israeli side. Any balanced account in law must certainly acknowledge the reality of these perspectives. One balancing factor to be considered is the Palestinian National Authority's relationship with Hamas.³¹⁰ The ambiguous nature of this relationship undermines the authority of the PNA; and the anti-Semitic posturing of Hamas challenges the willingness of other states to recognize a Palestinian state having ties to such an organization.³¹¹

Another balancing factor is the complexity of Israeli society, which has a courageous community of human rights activists.³¹² This community (which supports the individual rights of Israelis as well as Palestinians) has gone mostly unheard in recent years, as the powerful ultranationalist establishment came to the fore with strong support from religious nationalists.³¹³ The Israeli establishment is often supported uncritically by some fifty-two³¹⁴ U.S.-based Jewish groups, sometimes described as "The Lobby."³¹⁵ While these groups apparently work to support "Israel," the reality is that these groups largely channel money in support of the Israeli nationalist cause.³¹⁶ Such distribution

motivational aspects behind the use of terrorism in Palestine, and the groups which have used it); see also Tomis Kapitan, *The Terrorism of 'Terrorism,'* in *TERRORISM AND INTERNATIONAL JUSTICE* 47, 55 (James Sterba ed., 2003) (discussing the history of terrorism in Palestine); Ariel Merari, *Terrorism as a Strategy of Insurgency*, *TERRORISM AND POLITICAL VIOLENCE*, Winter 1993, at 213 (discussing some of the benefits of terrorism).

³⁰⁹ See, e.g., John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 *STETSON L. REV.* 903, 906 (2006) (it has been further opined that the necessity doctrine "represents a concession to human weakness in cases of extreme pressure, where the accused breaks the law rather than submitting to the probability of greater harm if he does not break the law").

³¹⁰ See Michael Schulz, *The Role of Hamas in Building Palestinian Democracy in the Midst of Violence*, in *THE DEMOCRATIZATION PROJECT: OPPORTUNITIES AND CHALLENGES* 113 (Ashok Swain et al. eds., 2009) (discussing the role of Hamas in Palestine).

³¹¹ See, e.g., *id.* at 112, 118 (discussing how Hamas has interacted in and been part of the Israeli-Palestinian peace talks).

³¹² Ben White, *This Smear Against Israeli Human Rights Activists is All Too Familiar: Adalah Defends Palestinian Rights, The European Jewish Congress Attack on it Reflects a Wider Pattern of Bullying*, *GUARDIAN* (Jan. 4, 2010), <http://www.guardian.co.uk/commentisfree/2012/jan/04/israeli-human-rights-activists-adalah>. See Oren Yiftachel, *Israeli Society and Jewish-Palestinian Reconciliation: 'Ethnocracy' and Its Territorial Contradictions*, 51 *MIDDLE EAST J.* 505 (1997) (discussing the complex forces of Israeli political society).

³¹³ Yiftachel, *supra* note 312, at 519.

³¹⁴ JOHN J. MEARSHEIMER & STEPHEN M. WALT, *THE ISRAEL LOBBY AND U.S. FOREIGN POLICY* 117 (2007).

³¹⁵ George P. Schultz, *The 'Israel Lobby' Myth*, *U.S. NEWS & WORLD REPORT* (Sept. 9, 2007), <http://www.usnews.com/opinion/articles/2007/09/09/the-israel-lobby-myth>; see also Mearsheimer & Walt, *supra* note 82.

³¹⁶ *WHO PROFITS FROM THE OCCUPATION, COALITION OF WOMEN FOR PEACE, FINANCING THE ISRAELI OCCUPATION: THE DIRECT INVOLVEMENT OF ISRAELI BANKS IN ILLEGAL ISRAELI*

of outside funding serves to marginalize center-left opinions in Israel.³¹⁷ The influence of these groups is astonishing,³¹⁸ and suggests great complexity and concern about U.S. involvement in the Middle East negotiations.

One thing is clear—the system of occupancy administration falls radically short of the responsibilities of belligerent occupancy under international law and significantly undermines humanitarian and human rights law. This weakens claims by the Israeli authorities for continued occupation of Gaza and the West Bank. The influence of the Israeli ultranationalists on the American neo-con political interests was reflected in the vastly ambitious doctrine of the “Clean Break.”³¹⁹ This doctrine, which sought to reshape the entire state structure of the Middle East, in effect, implies that the Palestinian problem in Israel is a sideshow.³²⁰ The Clean Break Doctrine promoted the idea of regime changes for the dictators of the Middle East on the basis that one could not make peace with authoritarian despots.³²¹ Regime change favored democracy. Events in Tunis and Egypt and other parts of the Middle East, which indicate strong popular demands for democracy, made Netanyahu wish that they had not taken him so seriously regarding the democracy issue.³²² Presumably he misses the stability of an authoritarian friend like Mubarak.

On the other hand, deeply rooted in the Israeli ultranationalist agenda is the idea of a return to an exclusively Jewish state without Arabs; that state's boundaries being the boundaries of Eretz Israel.³²³ The current state of negotiations has floundered on the rock of Israeli settlement activity. The U.S. has now admitted that it is incapable of generating inducements to

SETTLEMENT ACTIVITY AND CONTROL OVER THE PALESTINIAN BANKING MARKET 33 (2010), available at <http://www.whoprofits.org/sites/default/files/WhoProfits-IsraeliBanks2010.pdf>.

³¹⁷ See Walter Russell Mead, *Jerusalem Syndrome – Decoding the Israel Lobby*, 86 FOREIGN AFF. 160, 161 (2007) (discussing some concerns with the approach of Mearsheimer & Walt in the application of their theory of Palestine).

³¹⁸ See Walter Russell Mead, PRESSURE WITHOUT SANCTIONS: THE INFLUENCE OF WORLD JEWRY ON ISRAELI POLICY 57 (1977) (discussing the influence of the diaspora, and particularly the American, Jews); MEARSHEIMER & WALT, *supra* note 314, at 117 (discussing the number of groups and organizations supporting Israel).

³¹⁹ ADAM SHAPIRO, E. FAYE WILLIAMS & KHALED DAWOUD, NEOCON MIDDLE EAST POLICY: THE “CLEAN BREAK” PLAN DAMAGE ASSESSMENT (2005).

³²⁰ INST. FOR ADVANCED STRATEGIC & POLITICAL STUDIES, A CLEAN BREAK: A NEW STRATEGY FOR SECURING THE REALM (2006).

³²¹ *Id.*

³²² Benjamin Netanyahu, Israeli Prime Minister, Remarks at a Joint Meeting of the United States Congress (May 24, 2011); see also Kevin Connolly, *Arab Spring Challenges Israel Leader Benjamin Netanyahu*, BBC NEWS (May 6, 2011), <http://www.bbc.co.uk/news/world-middle-east-13293264>.

³²³ Gideon Biger, *The Boundaries of Israel – Palestine Past, Present, and Future: A Critical Geographical View*, 13 ISRAEL STUD. 68, 75 (2008).

Netanyahu for a settlement freeze.³²⁴ However, the freeze is the essential precondition for Palestinian cooperation in the negotiation process.³²⁵ It is unclear what further steps the U.S. can take short of putting the squeeze on the Lobby, a squeeze that is beyond the capability of the Obama Administration.³²⁶ This has renewed the Palestinian interest in looking at an alternative strategy to secure its claim to statehood.

There are some who propagate the notion that there is no such thing as a “Palestinian.”³²⁷ By refusing to permit Palestinians their identity, these individuals are laying the groundwork for rejecting the Palestinians’ claim to be a “people” under international law for the purposes of self-determination.³²⁸ Some hold that the Palestinians are simply Arabs (and are therefore indistinguishable from the Arabs of contiguous states).³²⁹ Under international law, there is the recognition of rights of entities other than states; and this includes the right of a people to self-determination.

As we have previously discussed, the right of self-determination has evolved by virtue of a framework of complex international agreements and international practices.³³⁰ However, there is not a clear-cut, formal definition of the idea of “peoples.” Given this degree of unclarity, there is sufficient identity, coherence, and visible indicators of who a Palestinian is that, as a practical matter, it would be quite counter-intuitive to regard the Palestinians not as a people entitled to self-determination under international law. The nature of the right of self-determination is expressed in a multitude of international instruments like Article 1(2)³³¹ and Article 55³³² of the U.N. Charter, which express the idea of respect for the principle of self-determination of peoples, the ICCPR³³³ and the ICESCR,³³⁴ both stating that “[a]ll peoples have the right to self-determination,” the U.N. Declaration on Friendly Relations, which also affirms the principle of self-determination of peoples and stipulates that every state has a duty to respect this right in

³²⁴ Jill Dougherty & Elise Labott, *U.S. Ends Bid for Renewed Israeli Settlement Freeze*, CNN (Dec. 7, 2010), <http://www.cnn.com/2010/WORLD/meast/12/07/us.middle.east.talks/index.html>.

³²⁵ Ashraf Khalil, *Palestinians say Full Settlement Freeze is Precondition to New Peace Talks*, CHRISTIAN SCI. MONITOR (Aug. 27, 2009).

³²⁶ Uri Avnery, *Israel Lobby Humiliates Obama Administration*, COUNTERCURRENTS.ORG, <http://www.countercurrents.org/avnery160309.htm> (last visited Mar. 19, 2009).

³²⁷ KHALIDI, *supra* note 159.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995).

³³¹ U.N. Charter art. 1, para. 2.

³³² *Id.* art. 55.

³³³ ICCPR, *supra* note 87, art. 1, para. 1.

³³⁴ *Id.*

accordance with the provisions of the Charter,³³⁵ the 1993 World Conference on Human Rights, which adopts the Vienna Declaration and Program of Action³³⁶ stressing its affirmation of the right of self-determination of all peoples, and the Helsinki Final Act, which also stresses the salience of the right to self-determination.³³⁷ It seems to be clear that the processes by which Israel exercises occupancy control over the Palestinians undermines most of the central elements of the scope of the right of self-determination.

D. Contemporary International Relations

To some extent, Israel achieved statehood by first gaining support in the international community as a proto-state (especially by using formal legal tools like treaties) and then by unilaterally acting with sovereignty as a realized state (particularly by throwing off the paternalistic yoke of the U.N. requirements and by going to war with the neighboring militants threatening the new state's borders and existence).³³⁸ The ruling authority of Israel was able to do this because it had the force of global opinion behind it.³³⁹ What seems to threaten the present leadership of Israel (who oppose the creation of a Palestinian state) so much right now is the wave of global support for the emerging state of Palestine.³⁴⁰

Looking at the example of Israel's achievement of statehood³⁴¹ (in partial defiance of U.N. requirements³⁴²), it would seem that one clear sign of self-determination is that the proto-government makes decisions in the best interest of the polity, whether or not these are the prescribed rules of formulation set out by the controlling entities in international law. Nevertheless, the proto-Palestine ruling authority must make the correct evaluations of what is an "assertion of sovereignty" and what is, frankly, detestable under contemporary international law standards. The proto-state, while it must achieve sufficient independence to earn the qualification of "self-determined," is very vulnerable

³³⁵ G.A. Res. 2625(XXV), *supra* note 88, at 122.

³³⁶ World Conference on Human Rights, *supra* note 89, para. 2.

³³⁷ Conference on Security and Co-Operation in Europe: Final Act, Aug. 1, 1975, *available* at <http://www.osce.org/mc/39501>.

³³⁸ JONATHAN ADELMAN, *THE RISE OF ISRAEL: A HISTORY OF A REVOLUTIONARY STATE* 75–81 (2008).

³³⁹ *Id.* at 190–91.

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

³⁴¹ Zohar Segev, *American Zionists' Place in Israel after Statehood: From Involved Partners to Outside Supporters*, *AM. JEWISH HIST.*, Sept. 2007, at 278, 278; Jerome B. Polisky & Frances R. Wolpaw, *Jewish Statehood Legitimized: Abba Hillel Silver at the American Jewish Conference*, *Q. J. SPEECH*, Apr. 1972, at 209.

³⁴² ADELMAN, *supra* note 338, at 99–101.

to international opinion. Indeed, the fact that it must “earn” recognition (including independence) illuminates the forceful role of foreign opinion and international expectations in contemporary international law. While international relations do not directly make law, they do frame the issues for the interpretation of relevant law standards.

Over the last few months the Palestinians have been deciding whether to seek full membership at the Security Council, or to petition the General Assembly for an enhanced observer status.³⁴³ In January 2010, the Palestinian Foreign Minister, Riad Malki, declared his intention to seek U.N. recognition of Palestinian statehood in September 2011. He also stated that he is currently lobbying for supporting votes worldwide.³⁴⁴ However, the U.N. route is not necessarily an easy process. As we will discuss in more detail, because the General Assembly can only vote on membership based on a positive recommendation from the Security Council, in order to obtain U.N. membership, Minister Malki would have to first gain support from the Security Council.

We have described the scenario of separatists who are granted the right to self-determination under international law. That is one way that global opinion may frame the situation in the occupied Palestinian territories. Another scenario presents a framework unsupported by international law—that of South Africa, a unified state, in which the pre-colonial residents of the state are ruled by the colonists in a disadvantageous way that denies the inherent dignity and self-determination of the pre-colonial citizens.³⁴⁵ Here, the consensus seems to be that, even with extreme persecution of one group, the state should remain united, but there should be a change in the laws and the leadership of the state to enforce the equality of all citizens under a single set of laws.³⁴⁶ However, there are distinct differences between the former apartheid situation in South Africa and that of the occupied Palestinian territories.³⁴⁷

³⁴³ Katherine Reece Thomas, *Non-Recognition, Personality and Capacity: The Palestine Liberation Organization and the Palestinian Authority in English Law*, 29 *ANGLO-AM. L. REV.* 228 (2000); Virginia Tilley, *A Palestinian Declaration of Independence: Implications for Peace*, 17 *MIDDLE E. POL’Y* 52 (2010).

³⁴⁴ Mohammed Daraghme, *Palestinians Say They’ll go to UN for Recognition*, SALON (Jan. 10, 2011), http://www.salon.com/2011/01/10/ml_palestinians_recognition/singleton/.

³⁴⁵ Daryl Glaser, *Zionism and Apartheid: A Moral Comparison*, *ETHNIC & RACIAL STUD.*, May 2003, at 403, 403–07.

³⁴⁶ Mark Marshall, *Rethinking the Palestine Question: The Apartheid Paradigm*, 25 *J. PALESTINE STUD.* 15, 16–17 (1995).

³⁴⁷ MARWÂN BISHĀRA, *PALESTINE/ISRAEL: PEACE OR APARTHEID: OCCUPATION, TERRORISM AND THE FUTURE* (2d ed. 2002).

First, the Jewish settlers have effectively ousted the former natives from the most valuable land (with historical monuments, urban development, and access to significant resources like water),³⁴⁸ and the leadership of Israel seems intractably set against welcoming Palestinians into a secular state of Israel as citizens and equals.³⁴⁹ Under international law, it is the sovereign right of Israel to determine who may become a citizen, who may be a resident, and what type of laws will govern the people within its borders.³⁵⁰ Unless the Israeli polity itself changes these standards in constitutive acts (or violates human rights obligations to the extent that international entities pierce Israel's sovereignty), external forces cannot transform Israel into a unified, secular, equal rights-based state.

Second, the ousting of the Palestinians through military combat seems to have effectively settled Israel's legal claim to the land seized in the 1948 war and subsequent military combat fought over Jewish settlers' lands. As a result, Israel has continued to gain land and extend its constructive borders through combat.³⁵¹ Israeli settlements in Palestinian territories provoke protests and violent reactions of Palestinians, who, having no state, do not have a clear right to defend themselves militarily under international law.³⁵² If they claim such a right they risk being characterized as terrorists. This is a unique situation, produced as a result of evolving international law regarding non-state combatants.³⁵³ It would seem to require further evolution of international law, to provide status for peoples who have no entity with sufficient international personality to protect and provide for them. Given that the state is the most important viable juridical personality in contemporary international law for the protection of peoples and individuals under duress from another state, and that no state contiguous to the borders of the PNA (especially Israel) has provided this, as one scholar has put it, "[m]aintaining the occupation is clearly unsustainable because of the raging violence and the continuation of the state of war"³⁵⁴

³⁴⁸ Izhak Schnell & Shaul Mishal, *Place as a Source of Identity in Colonizing Societies: Israeli Settlements in Gaza*, 98 GEOGRAPHICAL REV. 242 (2008).

³⁴⁹ D. Newman, *The Geopolitics of Peacemaking in Israel–Palestine*, 21 POL. GEOGRAPHY 629 (2002).

³⁵⁰ *Id.*; see also Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923).

³⁵¹ Forman & Kedar, *supra* note 265.

³⁵² Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005).

³⁵³ M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 734 (2008).

³⁵⁴ Alon Ben-Meir, *Negotiating an Israeli-Palestinian Breakthrough*, INTERNATIONAL STRATEGIC RESEARCH ORGANISATION (Dec. 23, 2008).

IV. INTERESTS OF THE PARTIES

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

A. Palestinian Interests in a Two-State Solution

The advantages of a recognized state begin with the idea that a duly recognized state would sharpen the legal question of Israel's continued occupation. The occupation in the face of recognized statehood would be tantamount to the occupation of territory by the use of force in violation of U.N. Charter Article 2(4).³⁵⁵ Thus, Resolution 242, which calls for the end of occupation, in light of legally recognized statehood, would add to the illegality of occupation by the assumption that the IDF's occupancy is now that of an aggressor.³⁵⁶ A fully recognized state would make it difficult for Israel to negotiate or discuss violations of international law, which is a matter of state responsibility. Additionally, the creation of a regularly constituted parliament, administrative agencies, and courts, the organization of the professions with state regulation and backing, and the organization of education and social services should all hopefully progress with the security of established and definable institutions of authoritative and controlling decision-making. Most importantly for the Palestinians, the structures of good governance require transparency, responsibility, and accountability, and a respect for the rule of law.³⁵⁷ To the extent that the PNA is relatively informal at present,³⁵⁸ it suggests that influence may be generated by third party forces that may be partial to strategies of coercion and violence.³⁵⁹ Thus, the benefits of open and transparent good governance could be a critical dimension of political responsibility in maintaining peace and security. It is usually where governance is unformulated and loosely organized that there is an opportunity for penetration by terroristic

³⁵⁵ George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467 (1994).

³⁵⁶ *Id.*

³⁵⁷ Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECONOMICS 659 (2007).

³⁵⁸ Y. Sayigh, *Palestine's Prospects*, SURVIVAL, Vol. 42, Iss. 4 (2010); see also Marshall J. Breger & Shelby R. Quast, *International Commercial Arbitration: A Case Study of the Areas Under Control of the Palestinian Authority*, 32 CASE W. RES. J. INT'L L. 185, 194 (2000).

³⁵⁹ KLEJDA MULAJ, VIOLENT NON-STATE ACTORS IN WORLD POLITICS (Klejda Mulaj ed., 2009).

operatives.³⁶⁰ The establishment of a state would create a state constitutional ideology that stresses the respect for human rights and fundamental freedoms. All Palestinians would benefit from this. The following table below provides a current statistical indication of the costs to the Palestinians of the current occupation policy and the value of sovereign status.³⁶¹

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

EVENT	WEST BANK	GAZA STRIP	TOTAL	NOTES
Deaths	1	6	7	Includes a civilian, whom Israeli settlers killed with sharp tools in Jerusalem city.
Injuries	34	45	79	Includes 16 children, three female civilians, and a journalist. Injured children included an infant baby girl as well as a girl run over by an Israeli settler vehicle.
Attacks	86	65	151	The Israeli military carried out 24 attacks during raids on Palestinian residential areas; 68 attacks during confrontations with Palestinians; and 35 attacks from Israeli army military posts on civilian houses and property. The Israeli army opened fire on Palestinian fishing boats and territory on three occasions. Israeli combat aircraft carried out 18 aerial attacks on Palestinian territory and combat helicopters opened machinegun fire on civilians and property on one occasion. Israeli troops positioned at checkpoints and Israeli settlers opened fire on civilians and property on one occasion each.
Raids	632	14	666	22 in Jerusalem; 73 in Ramallah; 47 in Jenin; 19 in Tubas; 52 in Tulkarem; 71 in Qalqilya; 87 in Nabliis; 39 in Salfit; 36 in Jericho; 69 in Bethlehem; 137 in Hebron; two in Northern Gaza; two in Gaza; one in Central Gaza; four in Khan Yunis; and five in Rafah.
Arrests	239	1	260	37 in Jerusalem; 25 in Ramallah; 22 in Jenin; 12 in Tubas; six in Tulkarem; 18 in Qalqilya; 21 in Nabliis; 17 in Salfit; 14 in Jericho; 22 in Bethlehem; 65 in Hebron; and one in Northern Gaza. Arrested civilians included 45 children, three university students, and four Palestinian security officers.
Home Demolitions	1	1	2	The Israeli military demolished two civilian houses in the districts of Jerusalem and Central Gaza.
Attacks on Public & Private Property	106	10	116	Destruction of Property: Israeli troops and settlers destroyed two petrol stations, wheat crops, barracks, tents, olive trees, civilian vehicles, house furniture, a swimming pool, civilian houses, sheep pens, a bulldozer, a Palestinian Police officer's ID card, a commercial premise, electricity posts, water wells, a blacksmith's and carpenter's workshops, and a drug store. Confiscation of Property: The Israeli military confiscated personal computers, a truck, a hunting rifle, tractors, a vehicle, a fishing boat, and nets.
Home Occupations	4	—	4	The Israeli military occupied and converted into military posts civilian homes in the districts of Jerusalem (1), Ramallah (2), and Hebron (1).
Closure of Crossing Points	—	134	134	International crossing points were closed on 47 occasions (Rafah Crossing to Egypt and continuing closure of Yasser Arafat International Airport) and crossing points to territory under Israeli administration on 87 occasions.
Flying Checkpoints	681	—	681	The Israeli army set up flying checkpoints and searched Palestinian civilians and vehicles in and around Palestinian residential areas in the districts of Jerusalem (65), Ramallah (48), Jenin (7), Tubas (6), Tulkarem (23), Qalqilya (138), Nabliis (143), Salfit (31), Jericho (61), Bethlehem (45), and Hebron (112).
Medical Obstruction	1	—	1	The Israeli military impeded access to an ambulance to transport an ill child in Bethlehem district.
Attacks on Religious Sites	3	—	3	The Israeli military raided the grounds of the Al Aqsa Mosque compound; demolished a mosque; raided a mosque; and delivered a notice for the demolition of a mosque.
School Disruption	1	—	1	The Israeli military raided and searched a basic school in Dahiyyat al Bahadiya area in Hebron city.
Provocation of Palestinian Forces	25	—	25	The Israeli military provoked or harassed Palestinian National Security force on 10 occasions, Civil Police on 13 occasions, and Preventive Security on two occasions.
Settlement Activity	8	—	8	The Israeli military constructed a wall around a settlement and levelled land for the expansion of settlements as well as for the construction of a religious school and a military installation. The Israeli authorities also approved the construction of settlement housing units in East Jerusalem.
Settler Violence	78	—	78	In addition to killing a civilian, Israeli injured and assaulted several civilians. Israeli settlers also threw stones at civilians and property, damaged crops and olive trees; attempted to seize control of civilian land; set fire to a civilian house, a bulldozer, and civilian vehicles; raided Palestinian towns and villages; caused damage to the environment; destroyed a swimming pool, electricity posts, and a commercial premise. Israeli settler vehicles also ran over and wounded three children.
TOTAL	1940	276	2216	

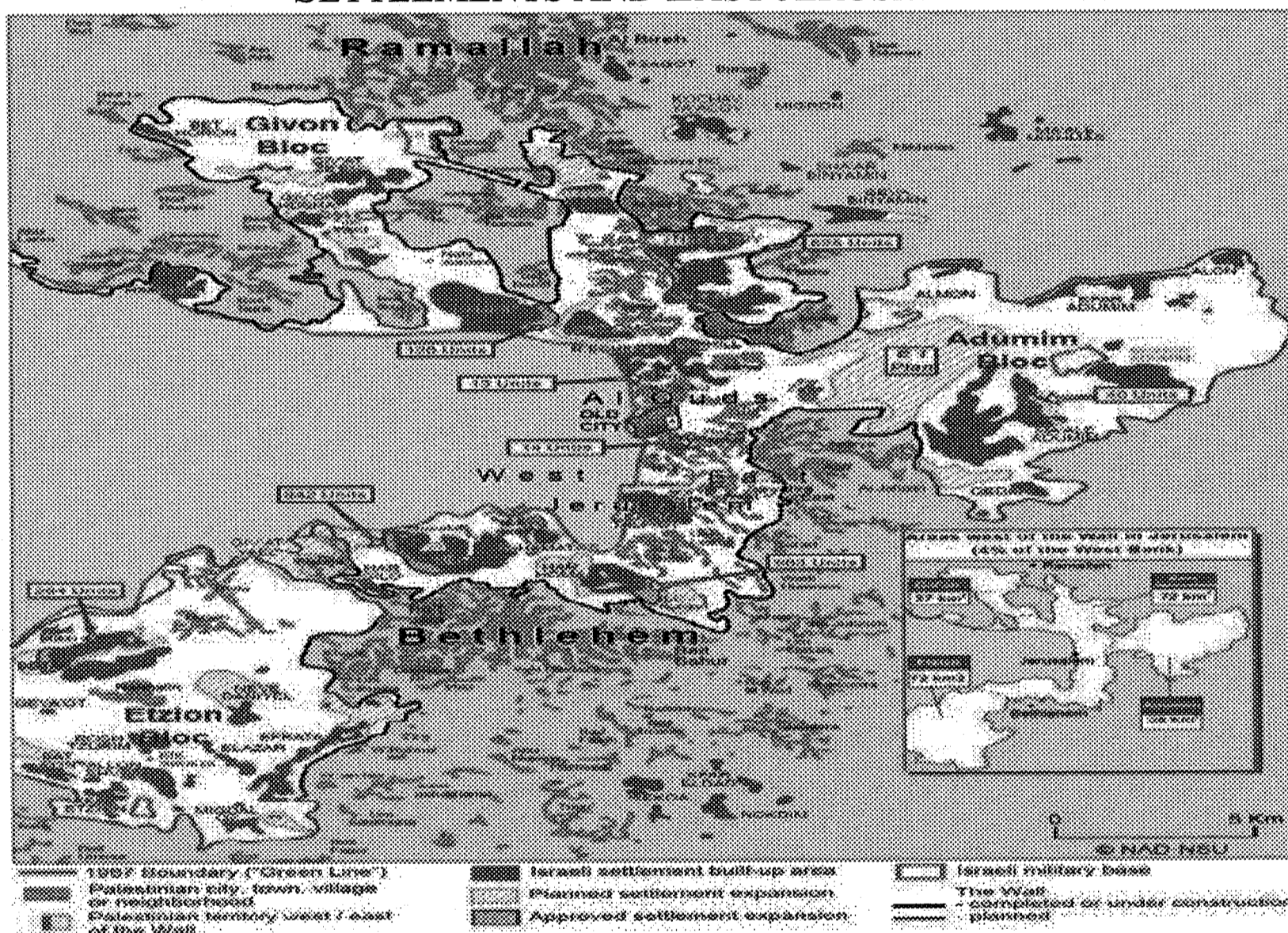
The recognition of a sovereign Palestinian state would improve the negotiating stature of the Palestinian negotiators. At present, negotiations are structured around those of a sovereign State and its officials (Israel) and those of an entity which does not have the functioning diplomatic standing of

³⁶⁰ Donald Black, *The Geometry of Terrorism*, 22 SOC. THEORY 14 (2004).

³⁶¹ PALESTINIAN MONITORING GRP., PALESTINE LIBERATION ORG., MONTHLY SUMMARY OF ISRAELI VIOLATIONS: 01 FEBRUARY 2011 – 28 FEBRUARY 2011 (Mar. 8, 2011).

a sovereign State. This suggests that the bargaining and negotiating structure is an asymmetrical one and that the Palestinians are the weaker entity in the process of agreement making. They would still have to work through central issues for the purpose of a complete peaceful settlement with the state of Israel. Those issues include Jerusalem, settlements, borders and related issues, water, refugees, political prisoners, missing persons and the remains of fallen persons, issues between the state of Palestine and the state of Israel, economic and trade relations, monetary affairs and claims resolution.³⁶² These negotiations implicate the complex map of Israel and Palestine including settlements, the wall and other issues of geographic complexity. The following map provides a guide.³⁶³

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



³⁶² Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People in the Occupied Palestinian Territory, Including Jerusalem, and the Arab Population in the Occupied Syria Golan, U.N. Doc. A/62/75-E/2007/13 (May 3, 2007).

³⁶³ PLO Negotiations Affairs Department, *Israeli Human Rights Violations Within the Occupied Palestinian Territory (oPt): January – May 2011* (June 2011); PLO Negotiations Office, Media Brief, *Israeli Policies in Occupied East Jerusalem: Colonizing The Land and the People* (June 2011).

B. *Israeli Interests in a Two-State Solution*

Israeli interests in the recognition of a Palestinian state are complex. We are rejecting the idea that the majority of Israelis will opt for a state of continual insurrectionary, low-level conflict that threatens to undermine the political development of appropriate institutions of good governance in the Palestinian territories. It is therefore in Israel's interest that a recognition of a Palestinian state with good governance principles, which will diminish the prospect of that governing authority being influenced by shadowy third party forces. This type of government will provide the Israelis with the highest level of security, which they see as an important part of settlement. In short, being freed from the shackles of occupation and constitutional good governance for the Palestinians with the prospect of enterprise could produce a stable and important political entity that would significantly stabilize the prospects for peace and security in the region. The alternative is simply to deny any right to self-determination, realizing that this will have destructive consequences in the long term.

There are two fundamental Israeli interests in the success of a negotiated settlement with the Palestinian leadership; negotiations that may be preceded or succeeded by the emergence of a sovereign Palestinian state. The first is Israel's security interests; interests that are still dependent on United States support and could be in jeopardy if United States efforts at mediation are sabotaged by the extreme right wing that now runs Israel.³⁶⁴ Failure in this regard would compromise both U.S. and Israeli security interests. The second major interest of Israel is the Israeli defense and promotion of the "legitimacy" of Israel.³⁶⁵ This is an issue that is extremely sensitive to the current Israeli leadership and their supporters in the diaspora community.³⁶⁶ The issue of legitimacy emerged in part from the effort of Israeli detractors who suggested that Israeli policy regarding non-Jewish inhabitants of the State were being subjected to policies analogous to some aspects of apartheid.³⁶⁷ Since apartheid was used by South African detractors to delegitimize the apartheid state, Israel's opponents felt that Israeli policy and practices with regard to the

³⁶⁴ See Netanyahu at UN, *supra* note 165.

³⁶⁵ See generally DORE GOLD ET AL., JERUSALEM CTR. FOR PUB. AFFAIRS, ISRAEL AT 60: IT'S HISTORICAL AND LEGAL RIGHTS STILL CHALLENGED? (2010) (presents a series of essays on Israel's struggle for and challenges to legitimacy); Yossi Yonah, *Israel's Political Stability: A Matter of Principle*, ISRAEL STUD., Fall 2000, at 128, 129 (discussing Israeli political stability).

³⁶⁶ See generally JASMIN HABIB, ISRAEL, DIASPORA, AND THE ROUTES OF NATIONAL BELONGING (2004) (discussing the Israeli Diaspora community).

³⁶⁷ Abigail B. Bakan & Yasmeeen Abu-Laban, *Israel/Palestine, South Africa and the "One-State Solution": The Case for an Apartheid Analysis*, 37 POLITIKON 331 (2010).

Palestinians had vulnerabilities ominously close to the policies and practices of Apartheid.³⁶⁸ For example, efforts to create a boycott of Israeli trade and cultural changes were vigorously opposed by Israeli interests.³⁶⁹ However, the problems of legitimacy now seem to be tied to the beliefs, ideology and policies of the extreme right wing in Israel. And these policies committed to the Eretz Israel idea, which have racial overtones, suggest that repudiation of boundaries supported by international law and the idea that sovereigns cannot acquire territory as a consequence of conquest only exacerbates the problems of legitimacy. Moreover, as seen above, the treatment of the Palestinians appears to be discriminatory, and the recent war in Gaza seems to have involved a vastly disproportionate use of force implicating the possibility of war crimes violations.³⁷⁰ One of the most difficult issues, at least for the United States and for many sectors of the international community, is the extreme right wing ideology with racist overtones and concerns about the attacks of international legal institutions.³⁷¹ These are concerns that are problematic for Israeli allies who generally represent liberal democratic ideological values. Indeed, it is maintained that the overwhelming majority of Jewish Americans are inclined to liberal democratic values.³⁷² It cannot be said that these values are shared by the current ruling elite in Israel. We now proceed to consider related Israeli interests.

Any important Israeli security interest could be clarified and advanced with the recognition of Palestinian statehood. Israel has argued that rocket and terrorist attacks from the occupied territories gives it a right of self-defense to respond to such attacks.³⁷³ However, this claim has not met with an approval that carries a global consensus.³⁷⁴ The technical argument against Israel's claim to assert the right of self-defense is based on the principle that the occupied territories under Palestinian National Authority control are not recognized as a nation state. It is therefore maintained that

³⁶⁸ *Id.* at 331–34.

³⁶⁹ *Id.* at 346.

³⁷⁰ Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, Human Rights Council, 12th Sess., U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) (discussing atrocities committed by other parties than just Israel).

³⁷¹ DONALDO MACEDO & PANAYOTA GOUNARI, *THE GLOBALIZATION OF RACISM* (2005).

³⁷² Peter Beinart, *The Failure of the American Jewish Establishment*, N.Y. REV. OF BOOKS (May 12, 2010), <http://www.nybooks.com/articles/archives/2010/jun/10/failure-american-jewish-establishment/?pagination=false>.

³⁷³ Israel Prime Minister Benjamin Netanyahu, Remarks at the Start of the Weekly Cabinet Meeting, *Israel Political Brief* (Sept. 23, 2011) (transcript available at <http://togetherwithisrael.wordpress.com/2011/09/23/Israel-prime-minister-benjamin-netanyahus-speech-at-the-un-ited-nations-full-text-transcript-excerpts/>).

³⁷⁴ *Id.*

Israel cannot assert its right of self-defense against an entity that is not a sovereign state in international law.³⁷⁵ This view has been supported by the following authorities. The Congress has enacted legislation expressing a contrary view, suggesting that Israel does have a right of self-defense under these circumstances. The U.S. Congress may of course declare international law; but the currency of its declaration (which is essentially unilateral) would seem to require more international acceptance for it to be seen as reflecting positive international law. If the Palestinians were granted sovereign nation status, there would be no ambiguity regarding the assertion of the right of self-defense. This at least makes it unequivocal that an Israeli self-defense response is clearly consistent with international law and international obligation. At the same time, the right to self-defense in international law clearly telegraphs the corresponding obligations (of proportionality, etc.) on the Palestinian state, as well as the consequences to follow if those obligations were unmet.

One implicit principle drawn from the claim of the right of self-defense by both Israel and the United States is that they are implicitly recognizing the qualities of statehood and sovereignty of the Palestinians in the occupied territories by holding them to a standard that unequivocally applies to sovereign nation states. To the extent that the right of self-defense is clarified by Palestinian sovereignty, the mutual security interests of each body politic are significantly enhanced.³⁷⁶

The fate of the state of Israel may be at stake, should Israeli leaders continue to stall development of Palestinian self-determination while forbidding real integration into Israeli society. By aggravating the resentment of the Palestinians while disregarding the disapproval of global opinion, Israel faces difficult times ahead. For so long, the Palestinian militants were characterized as terrorists because the world looked down on their resistance to the emerging Jewish state of Israel;³⁷⁷ but these militants may one day be labeled “freedom fighters” if the global consensus holds that the militants belong to an emerging state that was wrongly repressed by Israel.³⁷⁸ To receive the protection of international law rules and

³⁷⁵ Yaroslav Shiryayev, *Circumstances Surrounding the Separation Barrier and the Wall Case and their Relevance for the Israeli Right of Self-Defense*, 14 GONZ. J. INT'L L. 1 (2011); Lisa Hajjar, *International Humanitarian Law and “Wars on Terror”: A Comparative Analysis of Israeli and American Doctrines and Policies*, J. PALESTINIAN STUD., Fall 2006, at 21.

³⁷⁶ Shiryayev, *supra* note 375.

³⁷⁷ See generally Ronald E. Hall, *Beyond the Stereotypical Implications of Terrorism: A Sociological Investigation of Arab Immigrants*, 20 INT'L REV. SOC. 243 (2010); Luft, *supra* note 294.

³⁷⁸ Hall, *supra* note 377; see also Scott Atran, *Genesis of Suicide Terrorism*, 299 SCIENCE 1534, 1534 (2003).

organizations, Israel must behave with the humanity and lawfulness that international law entities (such as the U.N. Security Council) have come to expect from new states.

One of the concerns that observers in Israel have noted with considerable disquiet is the emergence of racism in Israel. They believe this is fueled by the extremist right wing political parties. The first point here is that Israeli intellectuals and human rights campaigners are embarrassed by this. The Jews in the diaspora have been millennial victims of vicious racism that has expressed itself as an ideological structure of “anti-Semitism.”³⁷⁹ The practices against Jews fueled by the banner of anti-Semitism culminated in the worst racist disaster the global community has ever experienced.³⁸⁰ That disaster where Jews were the primary victims was the Holocaust by the Nazis.³⁸¹ It is therefore a great embarrassment to many Jews that some extremists in Israel feel free to exhibit the worst behaviors of pathological racism.³⁸² The non-settlement of matters with the Palestinians fuels this level of insecurity.³⁸³ It will therefore seem to be a matter of some national urgency in Israel that a settlement be expedited. We hold that a sound settlement would serve as powerful antidote to the insipient pathologies of racism fueled by Israeli right-wing fanatics. The two-state solution seems to be one of the most achievable objectives in a settlement and therefore is a matter of important national interest for the state of Israel. It is worthy of note that the basic and fundamental interests of Israel is its right under international law and practice, to exist. It is possible that the two-state solution must do more than theoretically assure the existence of Israel. Recently Fidel Castro, former President of Cuba, stressed in an interview Israel’s right to exist and its concerns in the aftermath of the Holocaust that require important future assurances.³⁸⁴ Castro stressed that the right to exist was a matter free from any doubt.

One of the most important contributions that Israeli society can make to the process of the creation of a peaceful Palestinian state is to contribute positively to the construction of institutions that value democracy and human rights Israeli society has a good progressive peace movement. This

³⁷⁹ Michel Wieviorka, *Racism and Diasporas*, 52 THESIS ELEVEN 69 (1998).

³⁸⁰ *Id.*

³⁸¹ *Id.*; NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* (2d ed. 2003).

³⁸² Wieviorka, *supra* note 379.

³⁸³ *Id.*

³⁸⁴ Barak Ravid, *Netanyahu: Fidel Castro has a Deep Understanding of Jewish History*, HAARETZ (Sept. 25, 2010), <http://www.haaretz.com/news/diplomacy-defense/Netanyahu-fidel-castro-has-a-deep-understanding-of-jewish-history-1.315630>.

movement, contrary to the right wing sentiment in Israel, is not sectarian.³⁸⁵ To the extent the PLO wants to construct a nonsectarian Palestinian state, it would be symbolically useful to have some modest degree of collaboration with the progressives in the region to advance the task of nation building in accordance with democracy and human rights principles. It may be difficult, even for Palestinians, to work in cooperation with the Israelis, especially Israeli progressives. However, such cooperation would send a powerful signal that repudiates the racism currently a part of the right wing agenda in Israel. Israel also has a courageous human rights movement with an abundance of legal talent³⁸⁶ and this resource could be extremely valuable in establishing ties of mutual trust and common interest in institutionalizing the culture of peace and human rights in a new Palestinian state. Such ties, driven by the forces of civil society and with financial support from progressives in the U.S. and Europe, would do a great deal to change the paradigm of relations from conflict to sustainable collaboration in the common interest of all peoples in the region. It should be noted that the driving force behind the Israeli peace lobby and human rights groups has a profound connection to the sacred literature of Judaism, which stresses that justice is integral to every form of human relationship.³⁸⁷ The idea is well expressed in the Book of Amos "let justice roll down like waters and righteousness like an ever-flowing stream."³⁸⁸

C. U.S. Interests in a Two-State Solution

The continuance of conflict and tension between Israel, the Palestinians, and other Middle East states constitutes a serious security concern for the United States.³⁸⁹ In large measure, the conflict (at least in terms of popular perception in the Muslim world) sees a Muslim population being deprived of its most fundamental civil, political, and economic rights, and the repression is fueled by extremist elements in Israel, and their supporters in the United States.³⁹⁰ The conflict tends to assume the dimensions of ethnic/religious fanaticism, and such fanaticism invariably breeds apocalyptic visions that are embraced by alienated terrorists.³⁹¹ The continuance of the conflict, with no

³⁸⁵ See generally Shlomo Avineri, *A Special Issue On Arab-Israeli Conflict; Israel and the New Left*, SOCIETY, July 1970, at 79.

³⁸⁶ Lisa Hajjar, *Human Rights in Israel/Palestine: The History and Politics of a Movement*, J. PALESTINE STUD., Summer 2001, at 21, 21–24.

³⁸⁷ Amos 5:24.

³⁸⁸ *Id.*

³⁸⁹ MEARSHEIMER & WALT, *supra* note 314, at 65–70.

³⁹⁰ *Id.*

³⁹¹ Douglas Kellner, *Globalization, Terrorism, and Democracy: 9/11 and Its Aftermath*, in FRONTIERS OF GLOBALIZATION RESEARCH: THEORETICAL AND METHODOLOGICAL APPROACHES

conceivable end in sight, has now become a much more immediate national security concern.³⁹² The United States was attacked on September 11, 2001 by the Al Qaeda organization;³⁹³ and one of the justifications for the attack was the U.S.'s unconditional support for Israel and its policies *vis-à-vis* the Palestinians.³⁹⁴ The U.S. response to 9/11 involved the nation in high intensity conflict in Iraq and Afghanistan.³⁹⁵ It has been recognized that a central motivating tool for the alienation of activist Muslims, and their deployment as terrorists, is facilitated by the belief that Israel and its policies of occupation simply represent an extension of U.S. policy.³⁹⁶ Hence, the anger directed at Israeli occupation and Israeli anti-Muslim policies may also be attributable to the United States. As a consequence, the continuance of this conflict fuels an ostensible justification for anti-Americanism and an assumption that, fundamentally, United States, too, is anti-Muslim.³⁹⁷ Given that there is a global population of close to 2 billion Muslims, the Israeli-Palestinian occupation is an obvious catalyst to move from alienation to terrorism.³⁹⁸

It appears that the Obama Administration and the U.S. security establishment are aware of these issues.³⁹⁹ When the Obama Administration came to office, they were confronted by concerns in the security establishment that dragging out this conflict served as a recruiting tool for alienated jihadist terrorists.⁴⁰⁰ The specific issue for the United States regarding the Israeli-Palestinian conflict became the security threat posed by ongoing conflict in the region.⁴⁰¹ The current administration therefore brought a significant team of talented negotiators to press for the restart of negotiations toward a settlement.⁴⁰² However, U.S. foreign policy regarding Israel is significantly conditioned by more than twenty-five pro-Israeli lobby groups in Washington, D.C.⁴⁰³

243, 252 (Iwo Rossi ed., 2007).

³⁹² Margaret Webb Pressler, *What was 9/11?*, WASH. POST (Sept. 8, 2011), http://articles.washingtonpost.com/2011-09-08/lifestyle/35276086_1_al-qaeda-terrorist-attacks-hussein-and-bin-laden; *Remembering September 11, 2001*, CNN (Sept. 12, 2004), http://articles.cnn.com/2004-09-11/us/911.anniversary_1_wtc-site-twin-towers-silence?_s-PM:US.

³⁹³ Pressler, *supra* note 392; *Remembering September 11, 2001*, *supra* note 392.

³⁹⁴ MEARSHEIMER & WALT, *supra* note 314, at 67–68.

³⁹⁵ Kellner, *supra* note 391, at 245.

³⁹⁶ MEARSHEIMER & WALT, *supra* note 314, at 65–70.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ CAROL MIGDALOVITZ, CONG. RESEARCH SERV., RL33530, ISRAELI-ARAB NEGOTIATIONS: BACKGROUND, CONFLICTS, AND U.S. POLICY 6–8 (2010) [hereinafter ISRAELI-ARAB NEGOTIATIONS].

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 2, 6.

⁴⁰³ MEARSHEIMER & WALT, *supra* note 314, at 111–12.

These groups are attentive to the needs of Israel's ultranationalist cause; and, whatever the Israeli ultranationalist cause wants, it gets.⁴⁰⁴ The tools used by them and their allies in the United States are sophisticated and incredibly effective.⁴⁰⁵ For example, for several months now, domestic Israeli lobby groups have been giving the U.S. government and Congress a full-court press to prevent the recognition of a Palestinian state and, should the matter come before the Security Council, to be assured that the United States would exercise a veto in order to prevent a resolution supporting the recognition of a sovereign Palestinian state.⁴⁰⁶ This requires the Palestinians to think more carefully about the principles and strategies for which it can stake a successful claim for sovereign independence. Israeli opposition effectually carries the support of the United States only because of the targeted pressure U.S. lobby groups can bring.⁴⁰⁷

The influence of "The Lobby" is most recently evidenced in the recent House Resolution, No. 1765, reaffirming "strong opposition to any attempt to establish or seek recognition of a Palestinian state outside of an agreement negotiated between Israel and the Palestinians."⁴⁰⁸ This Resolution emphasized the principle that a lasting peaceful solution will only come about through the negotiations of both parties (meaning the state of Israel and the representatives of the Palestinian people).⁴⁰⁹ What the Resolution does not address is the inability of the Palestinian representatives to negotiate any solution with Israel while the parties bear such inequality in status.⁴¹⁰ Moreover, in condemning efforts of the Palestinian people to seek statehood (even by purely peaceful and legal means) outside of negotiation with Israel, the U.S. House undermines U.S. treaty obligations to support the achievement of statehood for the Palestinians.⁴¹¹

This successful lobbying effort on behalf of the state of Israel reveals two characteristic aspects of the U.S. Israeli Lobby. First, it can powerfully refocus the attention of the United States—even during the holidays, even with a "lame duck" Congress, even when the PA has committed no indiscretion justifying United States behavior contrary to its international law obligations and its own national interests.⁴¹² Second, the U.S. Israeli Lobby

⁴⁰⁴ *Id.* at 160, 162, 215–19.

⁴⁰⁵ *Id.* at 152–62.

⁴⁰⁶ Beau Miller, *Israel Lobby Drives America's Palestine Veto*, POLICYMICS (Sept. 26, 2011).

⁴⁰⁷ MEARSHEIMER & WALT, *supra* note 314, at 110–11.

⁴⁰⁸ H.R. Res. 1765, 111th Congress (2010).

⁴⁰⁹ *Id.*; i.e., The Palestinian Authority and the PLO.

⁴¹⁰ *Id.*

⁴¹¹ ISRAELI-ARAB NEGOTIATIONS, *supra* note 399, at 48–51.

⁴¹² See MEARSHEIMER & WALT, *supra* note 314, at 111–12 (describing the power of the

does not engage with the U.S. government for U.S. interests but rather in the interest of Israel (arguably to the detriment of the United States' foreign relations and security interests).⁴¹³ Here, the simplistic idea, which some Congressional Representatives accept, is that Israeli and U.S. interests are the same.⁴¹⁴ A more discriminating view would see that Israel has discrete interests.⁴¹⁵ Not all these interests are the same as U.S. interests.⁴¹⁶ Moreover, from a global point of view, U.S. interests clearly transcend the particular state interests of the state of Israel. It was the statesman Disraeli who once said that "states do not have friends, they have interests." Sorting out areas that are distinctive to Israel and distinctive to the United States would be a good starting point. It should be noted that the neoconservatives strongly believe that there are no security differences between Israeli and U.S. security. There are, moreover, reports that well-placed neoconservatives pass on sensitive information to Israeli officials on the assumption that, since there is no difference between Israel and the United States, by definition, they are not really passing on secrets.

The question is whether U.S. national interests are discrete, even if somewhat overlapping, with the national interests of Israel. However, it seems clear that the continuing conflict in Israeli-occupied Palestine increasingly undermines important United States interests.

General Petraeus has raised a concern that, at least in the war against terrorism in Afghanistan, the continuance of the conflict between Israelis and Palestinians serves as a recruiting tool for the global jihadists who commit themselves to terrorist operations against U.S. forces and interests.⁴¹⁷ At least from a security point of view and from the point of view of the risks to the lives of U.S. soldiers and civilians who are serving in zones of danger, there clearly is a distinct U.S. interest in having the Israelis and the Palestinians shift their positions from conflict to some form of accommodation.

The current Administration has taken this matter so seriously that the President went to Cairo to address the billions of alienated Muslims.⁴¹⁸

Israel Lobby).

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 61–62.

⁴¹⁵ *Id.* at 63.

⁴¹⁶ *Id.* at 70.

⁴¹⁷ Mark Perry, *The Petraeus Briefing: Biden's Embarrassment is Not the Whole Story*, FOREIGN POL'Y (Mar. 13, 2010), http://mideast.foreignpolicy.com/posts/2010/03/14/the_petraeus_briefing_biden_s_embarrassment_is_not_the_whole_story.

⁴¹⁸ President Barack Obama, Speech in Cairo, Egypt: A New Beginning (June 4, 2009), available at <http://www.whitehouse.gov/issues/foreign-policy/presidents-speech-cairo-a-new-beginning>; *Obama's Speech in Cairo Reflects a New Direction of US Foreign Policy*, 5

Although the speech was widely regarded as a positive sign, this speech probably sent some apprehensions through the communications networks of the Israeli ultranationalist movement (sometimes described as the Israeli "right-wing").⁴¹⁹ Moreover, it is not at all clear that holding out the olive branch to the Muslim world would be a matter acceptable to the ultranationalist elements of the Israeli lobby.⁴²⁰

The continuing deterioration of the Israeli-Palestinian conflict has gotten to the administration.⁴²¹ It has therefore made it a significant initiative of its foreign policy to purposefully move the parties to a meaningful negotiations posture.⁴²² To do this, it drew on one of the heavy weights in negotiating accommodations in situations of complex conflict: George Mitchell.⁴²³ Additionally, the President's team has a strong Secretary of State (Hillary Clinton), who has no baggage suggesting any alienation against Israel.⁴²⁴ Additionally, the Vice President, a strong supporter of Israel, is fully backing the U.S. initiative.

A high point in the Obama initiative emerged in Washington, D.C. on September 2, when Prime Minister Netanyahu and Palestinian President Abbas met and the Israeli Prime Minister declared that the success of the resumed negotiations would depend on both his and Abbas' readiness to "make painful concessions."⁴²⁵ The critical question that we address is whether Netanyahu was making a statement that was merely a temporary bend in the wind and that he did not in fact intend to consider seriously.

The seriousness of the breakdown in talks between the Palestinians and Israelis and the effort to undermine U.S. mediation efforts have also prompted some of America's most distinguished public servants to issue a

LAYALINA REV. 13 (2009).

⁴¹⁹ *Id.*; Zaki Shalom, *US-Israel Relations: Approaching a Turning Point?*, 13 STRATEGIC ASSESSMENT 21 (2010).

⁴²⁰ 7 JEFF SCHWABER & JONATHAN S. KESSLER, *THE AIPAC COLLEGE GUIDE: EXPOSING THE ANTI-ISRAEL CAMPAIGN ON CAMPUS* (1984); *see also* Khaled Amayreh, *More than an Olive Branch*, Respect-Discussion (Oct. 22, 2010); DAVID HIRST, *THE GUN AND THE OLIVE BRANCH: THE ROOTS OF VIOLENCE IN THE MIDDLE EAST* (3d ed. 2003).

⁴²¹ Stephen Zunes, *The United States and the Breakdown of the Israeli-Palestinian Peace Process*, MIDDLE E. POL'Y, Dec. 2001, at 66.

⁴²² Asli Ü. Bâli, *International Law & Rights-Based Remedies in the Israel-Palestine Conflict Settlements*, 28 HASTINGS INT'L & COMP. L. REV. 387 (2005).

⁴²³ Arthur Lenk, *Fact-Finding as a Peace Negotiation Tool - The Mitchell Report and the Israeli-Palestinian Peace Process*, 24 LOY. L.A. INT'L & COMP. L. REV. 289, 290 (2002).

⁴²⁴ Dana H. Allin & Steven Simon, *Obama's Dilemma: Iran, Israel and the Rumours of War*, SURVIVAL, Dec. 2010, at 15; Naseer Aruri, *United States Policy and Palestine: Oslo, the Intifada and Erasure*, RACE & CLASS, Jan. 2011, at 33; *Hillary Clinton: Israeli Settlements 'Illegitimate'*, ABC NEWS (Feb. 18, 2011), <http://abcnews.go.com/Politics/hillary-clinton-israeli-settlements-illegitimate/story?id=12952834>.

⁴²⁵ Siegman, *supra* note 171.

widely publicized document under the title “*A Letter to President Obama*.”⁴²⁶ The authors of this letter are extremely disquieted by the failure of U.S. Middle East diplomacy. They see this as exacerbating Israeli isolationism and undermining moderation among the Palestinians. They see the political vacuum as dangerous for all parties. They therefore urged for a renewed American effort to revive its role in Middle East diplomacy. Providing a profoundly realistic summation of the central problems that confront the concerned parties, one of the issues they highlight is the vexing problem of the borders, but they also state that

it is not the State of Israel within its 1967 borders that is being challenged. It is Israel’s occupation, the relentless enlargement of its settlements, its dispossession of the Palestinian people in the West Bank and in East Jerusalem, and the humanitarian disaster caused by its blockade of Gaza that are the target of international anger and condemnation.⁴²⁷

These writers concluded their letter with a recommended framework for a permanent status accord. We quote from their letter and summarized the gist of their recommendations:

We understand, Mr. President, that the initiative we propose you take to end the suffering and statelessness of the Palestinian people and the efforts to undermine Israel’s legitimacy is not without political risks. But we believe that if the American people are fully informed by the President of the likely consequences of the abandonment of US leadership in a part of the world so critical to this country’s national security and to the safety of our military personnel in the region, he will have their support.⁴²⁸

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

⁴²⁶ Letter from Lee H. Hamilton, David L. Boren et al., to President of the U.S. Barack Obama (Jan. 24, 2011), <http://www.nybooks.com/articles/archives/2011/jun/23/letter-president-obama/?pagination=false>.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

1. They recommend the U.S. staunchly defend the legitimacy of Israel. This is qualified by the phrase “within internationally recognized borders”;
2. The U.S. must support the establishment of a Palestinian sovereign State based on the 1967 borders. Territorial adjustments are to be made by agreement only. Unilateral acquisitions of territory in violation of international borders would not be recognized nor given legitimacy;
3. The U.S. will work towards a fair solution to the refugee problem. U.S. commitment is based on the realism of the unlimited flow of refugees which would dramatically affect the demographics of Israel;
4. The U.S. will have a crucial role to play in appropriate security policy for both Israel and Palestine. Here, the U.S. supports a demilitarized Palestinian State with security mechanisms that address Israel’s concerns and still respect Palestinian sovereignty. This could include the stationing for multinational force as appropriate;
5. The policy on the emotive and touchy issue of Jerusalem, they recommend a form of complex shared control and unimpeded access to holy places;
6. The U.S. supports the reconciliation of Fatah and Hamas on terms compatible with the above principles and UN Security Council resolutions 242 and 338.⁴²⁹

As we see in the next section, these principles which provide a promising starting point for the Palestinians represent issues that may be anathema to Netanyahu and his supporters.

D. U.S. Interests and the Ultra-Nationalist Leadership in Israel

The Israeli peace scholar Uri Avnery is pessimistic with regard to the current leadership in Israel. “Netanyahu, of course, has no peace plan. His declared position is that the Palestinians must return to direct negotiations without prior conditions, but only after they officially recognize Israel as ‘the state of the Jewish people.’ The Palestinians would never agree to accepting Israel as an exclusively ethnic Jewish state when there are over a million Israeli Arab citizens living there.”⁴³⁰ According to Israeli scholar Uri Avnery

⁴²⁹ *Id.*

⁴³⁰ Uri Avnery’s Newsletter, *Interim Forever*, Jan. 3, 2011.

the interjection into the negotiations of the recognition of Israel as a Jewish state has no coherent intellectual content and is used by Netanyahu “as a trick to obstruct the establishment of the Palestinian State. This week he declared that the conflict has no solution.”⁴³¹ Avnery adds that to deny “the Jewish character” of the state is tantamount to the worst of all political felonies: to claim that Israel is a “State of all its citizens.”⁴³²

Netanyahu’s position is amplified to excess by his Foreign Minister. “The position of the Israeli Foreign Minister holds out even less hope for a settlement. Lieberman believes that the Palestinians cannot be a peace partner because they do not want peace. According to Lieberman, ‘[e]ven if we offer the Palestinians Tel Aviv and they withdraw to the 1947 borders, they will find a reason not to sign the peace treaty.’”⁴³³

Lieberman also stresses that, currently, the Palestinians have no legitimate leaders because Mahmoud Abbas’ term expired on the 15th January, 2009. Lieberman himself also adverts to the stability of the current coalition government running Israel. He states, “[i]n the present political circumstances, it is impossible for us to present a plan for a permanent settlement, because the coalition simply will not survive.”

If Lieberman sees no final agreement, Netanyahu holds out for an interim agreement of multigenerational duration. The idea of an interim agreement simply means that settlement expansion will occur and East Jerusalem will be incorporated into Israel.⁴³⁴ It should be noted that most recently Netanyahu had a telephone conversation with Angela Merkel, the German Chancellor. The gist of this conversation is reported in Avnery’s newsletter of March 5, 2011. According to Avnery;

Netanyahu called to rebuke Angela Merkel for Germany’s vote in favor of the Security Council resolution condemning the settlements — the resolution blocked by the scandalous US veto. I don’t know if our Prime Minister mentioned the Holocaust, but he certainly expressed his annoyance about Germany daring to vote against the “Jewish State.” He was shocked by the answer. Instead of a contrite Frau Merkel apologizing abjectly, his ear was filled by a schoolmistress scolding him in no uncertain

⁴³¹ Uri Avnery’s Newsletter, *Deny! Deny!*, June 18, 2011.

⁴³² Uri Avnery’s Newsletter, *The Dwarfs of Jerusalem*, Mar. 14, 2011.

⁴³³ *Id.*

⁴³⁴ Uri Avnery’s Newsletter, *supra* note 430.

terms. She told him that he had broken all his promises, that no one of the world's leaders believes a single word of his anymore. She demanded that he make peace with the Palestinians.⁴³⁵

When the Israeli Foreign Minister (Lieberman) recently spoke before the U.N. General Assembly, indicating that (contrary to Netanyahu's Washington, D.C. statements) there was no chance for a peace treaty (not within a year or 100 years), this implied a multigenerational interim agreement and limitless Israeli occupation.⁴³⁶ Lieberman's solution is to radically press for an Israeli state free of Arabs.⁴³⁷ It is unclear whether this implies ethnic cleansing for non-Jews; but that would appear to be what Lieberman has in mind.

As Israel's Foreign Minister, Lieberman is an important influence on Israeli foreign policy and, in particular, the promise (or lack of it) of negotiating a settlement. Recently, he summoned Israel's 170 senior diplomats to provide them with a firsthand account of his thinking.⁴³⁸ It should be understood that, according to Avnery, Netanyahu does not have a peace plan. He has only insisted that the Palestinians return to negotiations without prior conditions, but only after they recognize Israel as a state of the Jewish people.⁴³⁹ Such recognition clearly repudiates the Israeli Declaration of Independence, which rejects such a definition of the state.⁴⁴⁰ It is unlikely that the Palestinians who are committed to a secular state would seek to endorse a racially chauvinistic state. Lieberman holds to a view that is more concrete and more radical than Netanyahu.⁴⁴¹ Lieberman firmly believes that the Palestinians do not want peace. According to Lieberman, "even if [we] offer the Palestinians Tel Aviv and a withdrawal to the 1947 borders, they will find a reason not to sign a peace treaty." (The 1947 borders, fixed by the United Nations, gave Israel 55% of the country, while the 1949–1967 borders left Israel with 78%.).⁴⁴² Additionally, Lieberman believes that, since the term of Mahmoud Abbas has expired, there is no one to negotiate with.⁴⁴³ Finally, Lieberman stresses that moving purposefully with peace

⁴³⁵ Uri Avnery's Newsletter, *Wrong Side*, Mar. 5, 2011.

⁴³⁶ Avigdor Liberman, Foreign Minister, *Isr.*, Speech at the UN General Assembly (Sept. 28, 2010), available at http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/FM_Lieberman_Addresses_UN_General_Assembly_28-Sep-2010.

⁴³⁷ Ian Deitch, *Avigdor Lieberman: Cut Ties With Palestinians*, HUFFINGTON POST (Aug. 7, 2011), http://www.huffingtonpost.com/2011/08/07/avigdor-lieberman-west-bank_n_920429.html.

⁴³⁸ Uri Avnery's Newsletter, *supra* note 430; Ereka, Palestine Liberation Organization; Negotiations Office, May 26, 2011.

⁴³⁹ Uri Avnery's Newsletter, *supra*, note 430.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*

negotiations would split the right-wing coalition and possibly their government would not survive.⁴⁴⁴ In short, the survival of the current coalition is far more important than reaching a permanent settlement with the Palestinians. Since Lieberman believes this coalition will last indefinitely, peace may not be possible presently or indeed in the coming decades. Therefore, Israel should strive for a “Long-Term Interim Agreement.”⁴⁴⁵ The essence of this is of course a long-term period of occupancy. The carrot to the Palestinians would essentially be to give them a bigger piece of the economic pie. Avnery sums up Lieberman as follows: “The occupation will continue until one of the following happens: either the Palestinian standard of living will reach that of Israel or the Messiah will come—whichever happens first. In any case, there is no clear indication that either will happen within the next few decades.”⁴⁴⁶

Netanyahu put some mild distance between Lieberman’s views and his own. The mildness of the distance may suggest that Netanyahu is (in principle) on the same page as Lieberman. We must therefore look more carefully at what Netanyahu’s policies are. It would seem that these policies will be critical for the U.S. to better understand its role in this region. Netanyahu’s father, Benzion Netanyahu, was a professor of history.⁴⁴⁷ He was a deep believer in the Eretz Israel defining the target boundaries of Israel.⁴⁴⁸ Netanyahu was raised in a family in which Israel’s historic boundaries were sacred and inviolable.⁴⁴⁹ According to an Israeli journalist, Netanyahu would “not dare to face his father and tell him that he has given away parts of Eretz Israel.”⁴⁵⁰ Netanyahu’s personality is predisposed to delay a successful peace negotiation in which boundary settlements are envisioned.⁴⁵¹

The most recent breaking development concerning settlement activity has emerged as the Israeli government has apparently secured the assurance of a U.S. veto.⁴⁵² The U.S. has justified the veto, as has Israel, by claiming any

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ Avi Shlaim, *The Likud in Power: The Historiography of Revisionist Zionism*, ISRAEL STUD., Fall 1996, at 278.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ Uri Avnery’s Newsletter, *Bibi and the Yo-Yos*, May 28, 2011.

⁴⁵² *U.S. Says It Will Veto Palestinian Statehood Bid at the UN*, HUFFINGTON POST (Sept. 8, 2011), http://www.huffingtonpost.com/2011/09/08/palestinian-statehood-us_n_954246.html; *Palestinians Still Lack One Vote at UN Security Council: FM*, CHINADAILY.COM (Sept. 9, 2011), http://www.chinadaily.com.cn/Xinhua/2011-09-29/content_3941752.html.

resolution supporting a Palestinian State is an impediment to the process of direct negotiations between the Palestinians and Israeli to secure a settlement. As we noted earlier this year, the Israeli Prime Minister rejected a U.S. call for a temporary cessation of settlement building activity in order restart the negotiations toward a comprehensive settlement.⁴⁵³ The current Israeli authorities have now approved the construction of 1,100 new Israeli housing units in East Jerusalem on lands that ostensibly are within the dominion of the Palestinians.⁴⁵⁴ Clearly such a move at this time tremendously undermines the representations made by the Israeli Prime Minister and the American President at the U.N. The United States, the European Union and the U.N. have all expressed “disappointment” at this initiative and its unfortunate timing.⁴⁵⁵ U.S. Secretary of State, Hillary Rodham Clinton, indicated that this issue was “counterproductive to efforts to launch peace talks.”⁴⁵⁶ She added that this amounted to provocative action.⁴⁵⁷ Richard Miron, spokesman for U.N. Middle East Envoy Robert Serry, indicated that the Jerusalem housing announcement “sends the wrong signal at this sensitive time.”⁴⁵⁸ Palestinian leaders have indicated that there be a halt to settlement building as a condition for the resumption of peace talks.⁴⁵⁹ It seems to us that only strong pressure, sufficiently important to compel him to shift his position, will make the difference. Without such pressure, Obama is wasting his time. And, by pressure, we do not mean only the pressure of the government. Critical to pressuring Netanyahu will be a significant number of congressional representatives, supporting the administration, and (even more critically) getting the major Jewish organizations in the United States to be willing to fully support a realistic peace process because it is in the national interest of the United States and of Israel. So long as the Israeli support groups in the United States provide support only to the Israeli ultranationalists, the intransigence of the Israeli ultranationalists to commit to a realistic settlement will be greater. This is not to say that the Israeli nationalists are the exclusive stumbling block to a final resolution, but it certainly is a crucial barrier. Finally, a continuation of conflict may suggest to the ultranationalists in Israel that conflict favors them in the long haul. Israel’s military superiority is a

⁴⁵³ Siegman, *supra* note 171.

⁴⁵⁴ Josef Federman, *Israel Approves 1,100 Homes in East Jerusalem*, WASH. TIMES (Sept. 27, 2011), <http://www.washingtontimes.com/news/2011/sep/27/israel-approves-1100-new-homes-east-jerusalem>.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*; see also Uri Avnery’s Newsletter, *The More Enemies, The More Honor*, Oct. 8, 2011.

⁴⁵⁹ Federman, *supra*, note 454.

destabilizing force that becomes even more dangerous when the levels of conflict sporadically spiral out of control. They also create an incentive for the states surrounding Israel to acquire nuclear weapons capabilities. Thus, the conflict has global implications. Our sense is that a majority of the Israelis would opt for a reasonable settlement with a reasonable adjustment of territorial interests. We do not believe that a majority of Israelis are opposed to a Palestinian state living in peace with Israel. However, like most ultranationalist groups, the Israeli ultranationalist contingency is engaged, energized, and occasionally fanatical.

Israel and the United States have divergent interests regarding military intervention in the Middle East and sustaining the role of international law regarding such interventions. The Bush Administration allied itself with Israeli interests in the Middle East and the United States ended up fighting wars both questionable for the benefit to U.S. interests and for the legal right to preemptively engage in such wars under international law.⁴⁶⁰ The U.S. policy leaders at the time invested in extravagant security ideas originally generated by the Likud, such as the “Clean Break” doctrine. This doctrine found itself mutated after 9/11 into the Bush Doctrine, which claimed preemptive intervention.⁴⁶¹ With the Israeli right-wing cheering, the U.S. invaded Iraq, generating massive anti-Americanism not only in the Islamic world but elsewhere.⁴⁶² Nevertheless, the roots of the desire to attack Iraq came from the Likud’s Clean Break Doctrine and Israel’s interest in regime change was because they saw Saddam Hussein as a serious security challenge to Israel.⁴⁶³ With Saddam gone, there has been a relentless campaign for regime change Iran.⁴⁶⁴ In fact, the Israeli attack on Lebanon and Hezbollah was, in effect, a transparent effort to provoke Iran into intervention to protect its client (Hezbollah).⁴⁶⁵ When Iran restrained itself, the Israelis found themselves in the midst of a significant tactical defeat.⁴⁶⁶ Still, Netanyahu and others (and their surrogate voices in the United States)

⁴⁶⁰ Mitchell Plitnick et al., *Did Israel Lead the US into the War on Iraq?*, JEWISH VOICE FOR PEACE (Dec. 17, 2005), <http://jewishvoiceforpeace.org/content/plitnick-who-decides-us-mideast-policy>.

⁴⁶¹ Hichem Karoui, “Conservative Revolution” Against America: The Bush Legacy: Debate about a Doctrine and Its Tributaries, 1 SOC. SCI. & HUMAN. 3 (2010).

⁴⁶² Sukumar Muralidharan, *Israel: An Equal Partner in Occupation of Iraq*, 39 ECON. & POL. WKLY. 4517 (2004).

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*; see also Gawdat Bahgat, *Iran and the United States: The Emerging Security Paradigm in the Middle East*, 37 PARAMETERS 5, 5–18 (2007).

⁴⁶⁵ Muralidharan, *supra* note 462; see also Hany T. Nakhleh, *The 2006 Israeli War on Lebanon: Analysis and Strategic Implications*, DTIC Document (2007).

⁴⁶⁶ Muralidharan, *supra* note 462.

stridently demand a U.S. attack on Iran.⁴⁶⁷ These views are vigorously promoted by the Likud's neoconservative allies.⁴⁶⁸ The question here is—exactly to whom is Iran such a monumental threat? How imminent is this threat (if it is a threat)? Clearly, both the United States and Israel have interests in the evolution of Iranian politics, but these interests are not the same. The Netanyahu “Clean Break” Doctrine had significant influence on the “Bush Doctrine,” in particular its commitment to preemptive action and regime change.⁴⁶⁹ The adherence to this doctrine in the United States is largely—but not exclusively—affiliated with the pro-Israeli lobby groups as well as the Republican neo-cons.⁴⁷⁰

In the Senate, Senators Graham and Lieberman have been most articulate in demonizing Iran, describing the country as “extreme,” “expansionist,” and “terrorist.”⁴⁷¹ Graham has specifically indicated that the military option against Iran should have in mind “the goal of changing the regime.”⁴⁷² Bill Kristol, the editor of the *Weekly Standard* and director of the Foreign Policy Initiative, is a leading voice following Richard Perle in the neoconservative movement.⁴⁷³ Kristol believes that the credible threat of a military strike is the only option to constrain Iranian ambitions.⁴⁷⁴ John Bolton, who was the Bush Administrations' undiplomatic ambassador to the U.N., has declared that sanctions and negotiations against Iran are useless.⁴⁷⁵ He has stated that the goal of neoconservative opinion makers should be to prepare U.S. public opinion to support an Israeli attack on Iran.⁴⁷⁶ One of the most vociferous

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ MARK GERARD MANTHO, PROJECT ON DEF. ALTS., *THE BUSH DOCTRINE: ORIGINS, EVOLUTION, ALTERNATIVES* 76–77 (2004).

⁴⁷⁰ Karoui, *supra* note 461.

⁴⁷¹ Robert Dreyfuss, *Lieberman, Graham: Bomb, Bomb, Bomb Iran*, NATION (Oct. 4, 2010), <http://www.thenation.com/blog/155159/Lieberman-graham-bomb-bomb-bomb-iran#>.

⁴⁷² *Id.*; James Rosen, *Lindsey Graham Says U.S. Must Prepare to Attack Iran*, MCCLATCHY NEWSPAPERS (Sept. 20, 2010), <http://www.mcclatchydc.com/2010/09/20/100853/graham-us-must-consider-military.html>.

⁴⁷³ JUSTIN VAISSE, LOWY INST. FOR INT'L POLICY, *WHY NEOCONSERVATISM STILL MATTERS* (2010).

⁴⁷⁴ Jamie Fly & William Kristol, *A Period of Consequences: Our Dangerous Iran Policy*, WKLY. STANDARD MAG., June 21, 2010; *see also* Amitai Etzioni, *Iran: The Military Option*, TPM, July 28, 2010.

⁴⁷⁵ John Bolton, Op-Ed, *Get Ready for a Nuclear Iran*, WALL ST. J. (May 2, 2010), <http://online.wsj.com/article/SB10001424052748703871904575216260958684670.html>; *see also* Robert Dreyfuss, *Iran Sanctions: Not Just Useless but Counterproductive*, NATION (June 9, 2010), <http://www.thenation.com/blog/iran-sanctions-not-just-useless-counterproductive>.

⁴⁷⁶ Damien McElroy, *John Bolton Demands US Support for Israeli Strike on Iran*, TELEGRAPH (July 15, 2008), <http://www.telegraph.co.uk/news/worldnews/middleeast/Israel/2403895/John-Bolton-demands-US-support-for-Israeli-strike-on-Iran.html>; *see also* Ali Gharib, *Bolton Attacks Obama For Not Greenlighting Israeli Attack on Iran, but Bush Didn't Either*, THINK PROGRESS

exponents of the use of force against Iran is Reuel Marc Gerecht, who believes “an Israeli bombardment remains the only conceivable means of derailing or seriously delaying Iran’s nuclear program.”⁴⁷⁷ Gerecht also believes that an attack on Iran would force regime change. The hardline ideologue Daniel Pipes is one of the most aggressively pro-Likud voices in D.C.; he also has strong Islamophobia.⁴⁷⁸ Pipes has recently stated that the recipe for salvaging the Obama presidency is the bombing of Iran.⁴⁷⁹ Pipes maintains that if the United States is reluctant, Israel “should do the job.”⁴⁸⁰ Pipes is viewed by other conservatives as an extremist.⁴⁸¹

The neoconservatives were the biggest drumbeaters for the attack on Iraq and the neglect of Afghanistan.⁴⁸² It was Iraq that was Israel’s major security concern.⁴⁸³ The Iraq War was a trillion dollar war.⁴⁸⁴ The price continues to mount.⁴⁸⁵ Additionally, there is strong opinion in the United States indicating war fatigue.⁴⁸⁶ We would submit that it is not in the national interest of the United States at this time to start a new war in the Middle East. Moreover, it is doubtful, notwithstanding the unpopular attitude of the Iranian regime, that the majority of the American people would support a new neoconservative adventure. In this sense, it would be of value for the Obama administration to repudiate those aspects of the Bush Doctrine that are controversial and challenge international law. The pressures from Israel and its supporters in the United States for a new war stem from the security problems that are a product of the unstable situation in the region, generated

(July 13, 2011), <http://thinkprogress.org/security/2011/07/13/267882/bolton-bush-israel-iran/?mobile=nc>.

⁴⁷⁷ Reuel Marc Gerecht, *Should Israel Bomb Iran?*, WKLY. STANDARD MAG., July 26, 2010.

⁴⁷⁸ Eli Clifton, *Daniel Pipes Steps Out of the Closet . . . as an Islamophobe*, LOBELOG FOREIGN POLICY (Jan. 19, 2010), <http://www.lobelog.com/daniel-pipes-steps-out-of-the-closet-as-an-islamophobe/>; see also Sheila Musaji, *Daniel Pipes, Islam 2.0 and Islamophobia 3.0*, AMERICAN MUSLIM (Mar. 26, 2011), http://www.theamericanmuslim.org/tam.php/features/articles/daniel_pipes1/.

⁴⁷⁹ Daniel Pipes, *How to Save the Obama Presidency: Bomb Iran*, NAT’L REV. ONLINE (Feb. 2, 2010), <http://www.nationalreview.com/articles/229059/how-save-obama-presidency-bomb-iran/daniel-pipes>.

⁴⁸⁰ Robert Dreyfuss, *The Hawks Call for War Against Iran*, NATION (Dec. 21, 2010), <http://www.thenation.com/article/156805/hawks-call-war-against-iran>.

⁴⁸¹ *Id.*

⁴⁸² Plitnick et al., *supra* note 460.

⁴⁸³ *Id.*

⁴⁸⁴ David Leonhardt, *What \$1.2 Trillion Can Buy*, N.Y. TIMES (Jan. 17, 2007), <http://www.nytimes.com/2007/01/17/business/17leonhardt.html>.

⁴⁸⁵ *Id.*

⁴⁸⁶ Paul Pillar, *War Fatigue in America*, NAT’L INTEREST (June 3, 2011), <http://nationalinterest.org/blog/paul-pillar/war-fatigue-american-5404>.

significantly by the lack of settlement between the Israelis and the Palestinians.

The United States has an interest in halting the evolution of Israel as a center of international crime. Some analysts believe it to be the premier money-laundering nation in the world and claim that Israeli criminal cartels are deeply involved with smuggling blood diamonds, white slavery, human trafficking, drug trafficking, and more.⁴⁸⁷ While assistance to Israel is clearly not meant to support the criminal elements of Israeli society, it seems clear that not enough is being done by the Israeli government to bring these criminal elements under control. This, in turn, suggests that the Israeli government condones or even colludes with these criminal non-government actors—a behavior that must not be allowed in Israel, Palestine, or *anywhere* on the world stage.

The U.S. supplies Israel with the best military technology;⁴⁸⁸ but in the future this may not be in the best interest of the United States. Despite the history of good relations in the past, Israel and the United States have been on rocky footing in recent times.⁴⁸⁹ The United States could not influence the Israeli government to halt settlements no matter how many highest-grade fighter planes the United States offered them. Nor could the United States induce Israel to behave with transparency and in conformity with international law regarding their nuclear weapons. Indeed, Israel has a significant trade in weapons sales; and holds that the weapons sales issues⁴⁹⁰ mean that Israel has no friends. Given the disinclination of Israel to cooperate with U.S. diplomacy and international law norms, Israeli weapons technologies may well be deployed against U.S. troops in the future.⁴⁹¹

In these difficult financial times, there is the obvious interest of the U.S. citizens in retaining the wealth transferred to Israel for activities that do not engender peace. The state of high-security crisis in Israel is funded largely by

⁴⁸⁷ *Jews and Crime*, RADIO ISLAM, <http://www.radioislam.org/crime/index.htm> (last visited Mar. 19, 2012).

⁴⁸⁸ Thom Shanker, *U.S. Quietly Supplies Israel With Bunker-Busting Bombs*, N.Y. TIMES (Sept. 23, 2011), <http://www.nytimes.com/2011/09/24/world/us-quietly-supplies-israel-with-bunker-busting-bombs.html>.

⁴⁸⁹ Barak Ravid & Natasha Mozgovaya, *U.S. Offers Israel Warplanes in Return for New Settlement Freeze*, HAARETZ (Nov. 13, 2010), <http://www.haaretz.com/news/diplomacy-defense/u-s-offers-israel-warplanes-in-return-for-new-settlement-freeze-1.324496>.

⁴⁹⁰ Michel Chossudovsky, Presentation on The Dangers of a US Sponsored Nuclear War at the Perdana Peace Forum, Kuala Lumpur, Malaysia (Dec. 2005) (available at <http://www.youtube.com/watch?v=OPhDRI44dTI>).

⁴⁹¹ See Carlyn Meyer, Letter to the Editor, *Support Obama's Efforts*, USA TODAY, May 23, 2011 (stating that given that U.S. gives \$3 billion in aid yearly to Israel, Israeli Prime Minister Benjamin Netanyahu's lack of cooperation with U.S. diplomacy in the Middle East is disturbing).

U.S. assistance. In addition to supplementary sources of funding from private U.S. individuals and organizations, there is enormous pressure on the U.S. government to increase aid to Israel from \$10 billion to at least \$20 billion a year.⁴⁹² It is estimated that Israel has received some \$2 trillion from the American taxpayers since 1967.⁴⁹³ As vast billions of U.S. dollars are being borrowed to fund the security needs of the state of Israel, this debt is passed to the children of America's future, along with mounting unrest in a region under occupancy sustained by U.S. assistance. A dramatic move toward the recognition of Palestinian statehood as a step toward an accelerated peaceful settlement would lessen Israel's security anxieties and the need for assistance from borrowed trillions now owed by the U.S. taxpayers.⁴⁹⁴

U.S. policy and the interest groups involved in the Middle East should be very discriminating about which groups they support in this region and in Israel, to ensure that the U.S. interest in peace and security is not held hostage by ultranationalist zealots.⁴⁹⁵ In terms of contemporary international relations, Israeli ultra-nationalism is a danger to regional peace and security. It is quite possible that the greater Israeli interests and U.S. interests are the same, while the interests of the current Israeli leaders are different. The critical challenge for pro-Israel individuals, communities, and lobby groups in the United States is to determine which of their activities support U.S. interests—particularly national security interests and longstanding peace in the region—and which activities undermine U.S. interests.

E. Global Community's Interests in a Two-State Solution

There are clearly some developments and precedents in international and human rights law that would benefit the global community as a result of the establishment of a Palestinian state (existing peacefully with the state of Israel). There is clearly a problem with the current status of international law

⁴⁹² *Israel May Ask U.S. for \$20 Billion More in Security Aid, Barak Says*, HAARETZ (Mar. 8, 2011), <http://www.haaretz.com/news/diplomacy-defense/israel-may-ask-u-s-for-20-billion-more-in-security-aid-barak-says-1.347866>.

⁴⁹³ Christopher Bollyn, *The Real Cost of US Support For Israel—\$3 Trillion*, LOVEARTH NETWORK (Sept. 19, 2003), <http://www.lovearth.net/therealcostofussupportforisrael.htm#cost>; see also Thomas R. Stauffer, Special Report, *The Costs to American Taxpayers of the Israeli-Palestinian Conflict: \$3 Trillion*, WASH. REP. MIDDLE E. AFF., June 2003, at 20 (discussing the estimated cost of instability and conflict in the area).

⁴⁹⁴ Bollyn, *supra* note 493.

⁴⁹⁵ Chisda Magid, *Why A Perry Presidency Would Be Bad For Israel*, TIKKUN (Sept. 30, 2011), <http://www.tikkun.org/nextgen/why-a-perry-presidency-would-be-bad-for-israel> (stating that most ultra-nationalists are opponents of the peace process, contradicting key components of established U.S. policy in the region).

regarding stateless individuals.⁴⁹⁶ While treaties attempt to address their problems, the reality is that customary international law affords little protection to stateless people who suffer continuing abuses by other states. Moreover, there is a problem with the U.N. Security Council veto-system, which occasionally works to undermine the efforts of widely-held global opinion.⁴⁹⁷ It would strengthen the force of the United Nations (and, consequently, international law) to have the U.N. Security Council bypass mechanism in effect yet again to give power to the General Assembly's voice.⁴⁹⁸ It reflects well of our times that the highest constituted authority speaks for even the least represented. It is the next stage in the development of the United Nations that the united "nations" include those people who still do not have a state. And if statehood is the requirement for a "nation" to have a vote, then all nations deserve a state. One final point. The Israeli right wing and its neoconservative allies have been waging a relentless war against the United Nations. This is not good for Israel, for the U.S. or the U.N. The recognition of the Palestinian State may take us past the period of international acrimony.

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

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

⁴⁹⁶ See U.N. High Comm'r for Refugees, *Expert Meeting – The Concept of Stateless Persons under International Law (Summer Conclusions)* (May 2010), available at <http://www.unhcr.org/refworld/docid/4ca1ae02.html> (stating in Section E, para. 11 that there is no specific treaty regime addressing the protection needs to people who do not fall within universal and regional refugee protection instruments).

⁴⁹⁷ Keith Porter, *Can the U.N. Security Council Be Fixed? Enormous Power, Big Problems*, ABOUT.COM (Mar. 30, 2007), <http://usforeignpolicy.about.com/od/unitednations/a/SCreform2007.htm>.

⁴⁹⁸ Patrick Goodenough, *Palestinians Seek U.N. Support for Independence Without Risking U.S. Veto*, CNSNEWS.COM (Nov. 2, 2010), <http://cnsnews.com/news/article/Palestinians-seek-un-support-independence-without-risking-us-veto>.

Of the two real paths to Palestinian statehood, one involves the help and guidance of Israel to achieve the type of state indicated in the U.N. Resolution on Partition and the Oslo Accords.⁴⁹⁹ Israel has long held the support of the world community—especially the United States—in preparing for the final agreement on Partition. However, the longer Israel delays this process (while simultaneously refusing the Palestinian people real inclusion in a unified society based on equal laws and equality of religion) and defies agreements to contain settlement activities within established borders, Israel increasingly risks isolating itself from the external powers that have supported its activities (and refused “unilateral” recognition to a state of Palestine). This “unilateral” path is the alternative path to Palestinian statehood—unilateral recognition under international law, bolstered by international relations, and—ultimately—sanctified by the U.N. Security Council.

The negotiations process overseen by the Obama administration has completely broken down recently.⁵⁰⁰ This has been due in large part to extraordinary contingencies that Israeli representatives have placed upon negotiation, which included the Palestinian recognition of Israel as an ethnically exclusive state and the premise that Jerusalem belongs to Israel (and, as such, that there are no restraints to the building of settlements in East Jerusalem).⁵⁰¹ Moreover, as the Israelis have embarked on more settlement activity, the Palestinians have refused to participate as well.⁵⁰² Both President Obama and Secretary of State Clinton condemned these contingencies and the continuing settlements as unhelpful to the negotiations process.⁵⁰³ A more candid view may be that these activities are “deal breakers,” and the Israeli government *intends* to disappoint, recklessly undermining legitimate expectations under law to continue negotiating a fair resolution of the problem in good faith with the Palestinian people.

Such an assessment—that current Israeli leaders are actively blocking Palestinians’ efforts to achieve statehood—is one that the Palestinian

⁴⁹⁹ G.A. Res. 181(II), *supra* note 41, at 22; *The Oslo Accords, Struggle for Peace, Special Section*, CNN.COM, http://www.cnn.com/WORLD/struggle_for_peace/oslo.agreement.html (last visited Mar. 19, 2012).

⁵⁰⁰ Iyad Barghouti, *Palestinian–Israeli Negotiations: An Objective in Themselves*, 46 INT’L SPECTATOR 15 (2011).

⁵⁰¹ MIGDALOVITZ, *supra* note 399. JOEL BEININ & LISA HAJJAR, PALESTINE, ISRAEL AND THE ARAB-ISRAELI CONFLICT A PRIMER, MIDDLE E. RESEARCH & INFO. PROJECT (2010).

⁵⁰² Karin Laub, *Peace Talks Stalled: Israeli Settlers Keep Building, So Palestinians Refuse Negotiations*, HUFFINGTON POST (Oct. 2, 2010), http://www.huffingtonpost.com/2010/10/03/p-peace-talks-stalled-israel_n_748235.html.

⁵⁰³ Barak Ravid, *Clinton: Israel’s Demolition of East Jerusalem Homes Harms Peace Efforts*, HAARETZ (Mar. 4, 2009), <http://www.wwww.haartz.com/print-edition/news/Clinton-israel-s-demolition-of-east-jerusalem-homes-harms-peace-efforts-1.271377>.

National Authority (and the world community) must consider. In such a case, where Israeli policies actively damage Palestinians' interests in their property, security, and ultimate self-determination, the body governing the Palestinian people in the West Bank and Gaza (currently, the PNA), must consider moving forward "unilaterally"; and, so long as the PNA acts with regard to contemporary standards of human rights and rule-of-law norms, the international community has an ethical obligation to support the Palestinians' efforts. Moreover, certain states and international entities have a legal obligation to support the Palestinians' efforts.⁵⁰⁴ There are strong policy decisions and moves to be made. We take the liberty of presenting some suggestions as to how to proceed strategically.

A. The PA Should Establish a Functioning Government Explicitly Based on International Law Criteria

The PA may not be considered to have sufficient control over Palestine, given that its authority is subordinate to Israel's sovereign control under the Oslo Accords and the Interim Agreement's express prohibition of PA from conducting foreign relations.⁵⁰⁵ However the PA should move to the process of elections from the old Palestinian Parliament, to a newly constituted Parliamentary authority. It is probably appropriate that the Parliament act to create a constituent Assembly for the purpose of drafting a Constitution of the State of Palestine.

B. The PA Should Promote "Good Governance" by Establishing the Preconditions for a Parliament to Create a Constituent Assembly and to Draft a New, Sovereign Constitution

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

Our recommendation would further be that this should be a document meeting the best contemporary normative standards. In other words, the

⁵⁰⁴ JIM ZANOTTI, CONG. RESEARCH SERV., RS 22967, U.S. FOREIGN AID TO THE PALESTINIANS (2011).

⁵⁰⁵ (Israeli-Palestinian) Interim Agreement on the West Bank and the Gaza Strip art. IX, Sept. 28, 1995, 36 I.L.M. 561. Under the Interim Agreement, the PLO may negotiate and enter into international agreements regarding certain economic development plans (as well as certain cultural, scientific and educational agreements), "for the benefit of" the PA. See Interim Agreement, art. IX(b), 36 I.L.M. at 561. Nevertheless, these limited activities "shall not be considered foreign relations." *Id.* at 5(c).

form of governance should be democratic, transparent, accountable, and responsible. It should also be founded on the “rule of law” principle.⁵⁰⁶ Additionally, we would suggest that the PNA examine the Badinter Arbitration Commission’s deliberations concerning the recognition of the statehood of the Balkan states (including Bosnia and Herzegovina).⁵⁰⁷ The Badinter Commission carefully reviewed the constitutions of these new states for the purpose of recognition by the European Union and (later) by the United Nations. These were obtained on the basis that the constitutions made the rights and duties of individuals depend on citizenship (rather than ethnicity or religious identity).

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

C. The PLO Should Reaffirm the 1988 Declaration of Independence in Light of the Creation of a New Government and a New Constitution

By reaffirming the earlier 1988 Declaration⁵⁰⁸ the PNA is stressing the consistent and continuing demand of the right of the Palestinian people to self-determination and independence. Reaffirming this iteration strengthens the perception of the coherence and continuity of the Palestinian perspective of identity.

D. The PNA Should Secure Bilateral Recognition of the New Government and State Worldwide

The actual process of recognition is complex. At one level, states usually claim that (as a function of their sovereignty) they have complete discretion whether to recognize another state or not.⁵⁰⁹ On the other hand, recognition by regional associations of states tends to be less politicized and more focused on the willingness and sense of obligation to conform to regional standards of peace, security, and human rights.⁵¹⁰ We would recommend that the PA present its case to states that clearly would recognize it as a state

⁵⁰⁶ Licht et al., *supra* note 357, at 663.

⁵⁰⁷ Peter Radan, *The Badinter Arbitration Commission and the Partition of Yugoslavia*, 25 NATIONALITIES PAPERS 537, 549 (1997).

⁵⁰⁸ *Palestinian Declaration of Independence*, PALESTINE MEDIA CENTER, Nov. 15, 1988.

⁵⁰⁹ STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 14–15 (1999).

⁵¹⁰ Eugene V. Rostow, *The Drafting of Security Council Resolution 242: The Role of the Non-Regional Actors*, 25 N.Y.U. J. INT’L L. & POL. 489, 500 (1993).

on a bilateral basis. It is possible that the Palestinians could get 90% of the world's states recognizing them.⁵¹¹

E. The PNA Should Encourage Regional Organizations to Recognize the New Government and State

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

F. The PNA Should Seek to Secure a General Assembly Resolution Recognizing the Declaration of Independence, the Constitution, and Government of the Palestinian State

The pitch to the United Nations is more complicated. The U.N. Security Council is initially seized of the matter and essentially makes a recommendation to the U.N. General Assembly whether a state should be recognized.⁵¹² The problem here is that one of the permanent members can exercise the veto power.⁵¹³ Still it may be of some value to have a General Assembly vote on a recommendation to the Security Council that upon its findings of fact and conclusions of law the Palestinian claim to statehood is well founded. It should also be noted that Resolution 181 of the General Assembly stipulated that the partition envisioned the creation of an "Arab

⁵¹¹ James Ball, *Palestinians: We Are Already Recognised as a State by Two-Thirds of the Globe*, GUARDIAN (Sept. 20, 2011), <http://www.guardian.co.uk/world/2011/sep/20/palestinian-s-recognized-two-thirds-globe>; see also Kristen Saloomey, *First Tunisia, then Egypt, next Palestine?*, ALJAZEERA (June 2, 2011), <http://blogs.aljazeera.com/blog/middle-east/first-tunisia-then-egypt-next-palestine>.

⁵¹² *About U.N. Membership*, UNITED NATIONS, <http://www.un.org/en/members/about.shtml> (last visited Mar. 19, 2012); see also Yuen-Li Liang, *Recognition by the United Nations of the Representation of a Member State: Criteria and Procedure*, 45 AM. J. INT'L L. 689, 693 (1951).

⁵¹³ BARDO FASSBENDER, U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE (1998).

State.”⁵¹⁴ Technically, General Assembly Resolutions are not binding.⁵¹⁵ However, the target audience of this Resolution assumed that it was a legally binding instrument.⁵¹⁶ The Israelis acted on this Resolution to declare their independent status and to regard the borders as the legal territorial boundary. When the Palestinians present their case for recognition and statehood, it would seem to be that they are simply asking for a reaffirmation of a preexistent General Assembly Resolution that appears to be the juridical standard in which Israel declared its sovereign independence. Presumably therefore the recognition here is simply a reaffirmation of Resolution 181. It is possible that the issue could be referred for confirmation to the Security Council. Should that happen, it might be important for the Palestinian authority to seek in advance the support of the Council.

G. The PNA Should Seek to Secure Security Council Support

Since the Pro-Israeli Lobby will be very active in securing the veto, the Palestinians and their allies would have to expend enormous resources to reach out to the U.S. government and, if possible, to reach out to liberal Jewish groups in the United States, in order to nullify the dominating role of AIPAC and others. If the wider assessment is that these recent Israeli moves were designed to derail the U.S.-sponsored peace talks,⁵¹⁷ they provide a greater incentive for the recognition of a sovereign Palestinian state. Additionally it would help the Palestinian effort to influence U.S. policy and the liberal Jewish lobby groups in the U.S. if it were to secure the support of the complex groups and perspectives in Israeli society. There is a very powerful peace lobby in Israel. Their support will be critical. There is a vigorous and courageous human rights constituency in Israel and their voices would carry weight with the U.S. and with some Jewish lobby groups in the U.S. It would also be of value for the PA to seek the support of liberal and labor elements in the Knesset. This too would be useful in terms of solidifying public opinion behind their cause.

One of the strident Likud-supporting lobby groups in the United States has already been aggressively working to get the U.S. government to

⁵¹⁴ G.A. Res. 181(II), *supra* note 41.

⁵¹⁵ Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876.

⁵¹⁶ JOHN B. QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* 53 (2d ed. 2005).

⁵¹⁷ *Israel's Foreign Minister Threatens to Derail Peace Talks*, TELEGRAPH (Sept. 6, 2010), <http://www.telegraph.co.uk/news/worldnews/middleeast/Israel/7983843/Israels-foreign-minister-threatens-to-derail-peace-talks.html>.

exercise the veto in the Security Council over Palestinian statehood.⁵¹⁸ This suggests that an enormous amount of political work must be done to ensure that the U.S. does not exercise the veto and, at the minimum, remains neutral. Such a strategy must generate some support inside the United States for the recognition of the Palestinian state. We suspect that a part of that argument could be that it is not for the Netanyahu government to decide to block Palestinian statehood—this is matter for the international community. In this sense, one hopes that, for salvaging the peace process, the United States will not exercise its veto in such circumstances.

H. The PA Should Develop a Strategy to Move Around a U.S. Veto of Security Council Recognition of Palestinian Statehood and Sovereignty Under International Law

Given the furious lobby activity by the pro-ultranationalist lobbyists, there is a strong possibility that the United States will veto any resolution before the Security Council providing statehood for the Palestinian people. In general, a veto normally means that the matter is concluded before the United Nations.⁵¹⁹ However, there is a little-used procedure that was invented by the United States to develop a procedure to get around the exercise of a Security Council veto, if that veto undermined the importance of protecting international peace and security. This procedure became known as the “Uniting for Peace Resolution.”⁵²⁰

It was used when the Security Council, because of a veto, was incapable of performing its primary functions concerning the protection and promotion of international peace and security.⁵²¹ This Resolution assumed that, since the problem relating to peace and security remained, there was a residual competence in the U.N. General Assembly to pass a Resolution by a supermajority, permitting U.N. action to be taken in the protection of international peace and security.⁵²² In this context, the PA’s allies in the General Assembly could certainly make the case that the recognition of Palestinian statehood is a major factor in promoting international peace and security in the region. Moreover, the interminable state of occupancy, which Security Council Resolution 242⁵²³ stipulates must be ended, gives additional

⁵¹⁸ Miller, *supra* note 406.

⁵¹⁹ FASSBENDER, *supra* note 513.

⁵²⁰ *Uniting for Peace*, G.A. Res. 377 (V), U.N. Doc. A/RES/377 (Nov. 3, 1950).

⁵²¹ Keith S. Petersen, *The Uses of the Uniting for Peace Resolution since 1950*, 13 INT’L ORG. 219 (1959).

⁵²² L.H. Woolsey, *The “Uniting for Peace” Resolution of the United Nations*, 45 AM. J. INT’L L. 129 (1951).

⁵²³ S.C. Res. 242, *supra* note 102.

recognition to the importance that recognition of statehood for the Palestinian people has for peace and security. Judging from the support already generated for the recognition of statehood as an indispensable step to resolving conflict and crisis in the region, there should be a greater than supermajority that may be used to overcome a U.S. veto in the Security Council. This interpretative innovation to the U.N. Charter was—it should be recalled—a U.S. initiative. This initiative was upheld by the International Court of Justice in its advisory judgment of *The Expenses Case*.⁵²⁴ If it is clear that there already is a supermajority to support the use of the “Uniting for Peace” Resolution to overcome the exercise of a U.S. veto, the U.S. Administration may be less enthusiastic about either the exercise of the veto, or the idea that the veto will be surmounted by the overwhelming strength of international public opinion. In short, the United States, to avoid the embarrassment of complete isolation and defeat, may simply abstain in the U.N. Security Council regarding this issue.

VI. CONCLUSION

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

The issue of the U.N. role in the status of Palestinian claims to self-determination, statehood and sovereignty is a matter under furious debate and aggressive diplomacy in the U.N. President Obama, in his speech before the United Nations General Assembly on September 21, 2011,⁵²⁵ sought to framed U.S. foreign policy in terms that justified its diplomatic efforts to block the issue from coming before the U.N. at all and with a clear implication that if it came before the Security Council the U.S. would

⁵²⁴ ICJ Reports 1962, at 151.

⁵²⁵ President Barack Obama, Remarks in Address to the United Nations General Assembly (Sept. 21, 2011) [hereinafter Remarks by President Obama], available at <http://www.whitehouse.gov/the-press-office/2011-09-21-remarks-president-obama-address-united-nations-general-assembly>.

exercise its veto to block a decision on Palestinian sovereignty and statehood.⁵²⁶ This decision however, acknowledges that the U.S. supports a two-state solution as a realistic basis for sustainable peace. Moreover, it stresses that Israeli security issues still remain a stumbling block to progress. It also acknowledges that the Palestinians “deserve to know the territorial basis of their state.”⁵²⁷ Given the clarity of these issues the President also insists that these issues cannot be resolved with support from outside negotiating parties such as The Quartet on the Middle East, which includes the United Nations, United States, European Union and Russia.⁵²⁸ It is hoped that the President statement is not an inadvertent repudiation of the Quartet process, because it represents the major security players in the global environment. The problem with the negotiations is to a large extent the significant shift in Israeli politics toward the right, and an unwillingness of the President to acknowledge that the new right-wing coalition in Israel is a reluctant negotiator. Indeed, everyone knows that settlement activity should at least cease during active negotiations. This indeed was acknowledged by the Obama administration. It was rejected by Netanyahu, who knew that this was a deal breaker to continuing negotiations. In effect, the U.S. role as an honest broker was essentially castrated and the U.S. was left diplomatically humiliated.⁵²⁹ The Israeli right wing agenda also included a demand that Palestine and presumably the Quartet should recognize that Israel is not a State based on secular rights and duties if citizenship but makes rights turn on ethnicity.⁵³⁰ This is another deal breaker because there are a million plus Israeli citizens who would be excluded from rights because they do not have the right ethnic pedigree. This is another unnecessary stumbling block and indeed is a complete repudiation of the Israeli Declaration of Independence. Given the pluralistic nature of the United States and its struggle to repudiate discrimination based on race or ethnicity it is surprising that a black President with a multi-ethnic pedigree would not call Mr. Netanyahu on this issue. Additionally, the Camp David Accords, negotiated by President Jimmy Carter, recognize Security Council resolutions which delimit Israeli and Palestinian boundaries.⁵³¹ The United States voted for these

⁵²⁶ *U.S. Says It Will Veto Palestinian Statehood Bid at the UN*, *supra* note 452; *Palestinians Still Lack One Vote at UN Security Council: FM*, *supra* note 452.

⁵²⁷ Remarks by President Obama, *supra* note 525.

⁵²⁸ *Palestinians Welcome Mideast Quartet's Role in Peace Process*, Xinhuanet (Feb. 6, 2011), http://news.xinhuanet.com/english2010/world/2011-02/06/c_13720929.htm.

⁵²⁹ *Id.*

⁵³⁰ *Id.*

⁵³¹ *A Framework for Peace in the Middle East*, U.S.-Egypt-Isr., Sept. 17, 1978, 17 I.L.M. 1469.

resolutions.⁵³² Israel negotiated the Camp David Accords on the basis of these resolutions.⁵³³ It is a real pity and a failure if U.S. diplomacy not to recognize its role in the Security Council and at Camp David on the issue of boundaries. Finally, the President obscures the fact that the hidden subtext that suggests only agreement between the parties is the exclusive basis for moving forward essentially gives the Israeli right wing an indefinite veto over any otherwise legitimate international claim to self-determination, statehood and sovereignty. The Oslo Accords can never be read to suggest that they set in motion a process of negotiation that might continue in a timeless manner. Regrettably, the President's rhetoric about Palestinian and Israeli interests seems to represent only a shallow sense of what as a State the interests of Israel are, the interests of the Palestinians might be, and the national vital interests of the United States in speeding up negotiations toward a viable and sustainable conclusion. In this sense Obama's speech is devoid of strategic vision, tactical specificity or indeed a genuine understanding of the interplay of national interests, regional interests and fundamental global values.

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

⁵³² *Id.*

⁵³³ *Id.*

