AVERTING PALESTINIAN UNILATERALISM:

THE INTERNATIONAL CRIMINAL COURT AND THE RECOGNITION OF THE PALESTINIAN AUTHORITY AS A PALESTINIAN STATE

Ambassador Dore Gold
with Diane Morrison

Based on their submission to the Office of the ICC Prosecutor
The Hague, October 20, 2010

On September 28, 1995, Israel and the PLO signed the Interim Agreement which states: "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations."

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Executive Summary

- The Palestinian Authority's January 22, 2009, declaration to the Office of the Prosecutor of the International Criminal Court amounts to an official request to confirm that the PA can be considered as a state for purposes of ICC jurisdiction.
- Yet the 1995 Israeli-Palestinian Interim Agreement which created the PA established a fundamental principle: "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the Permanent Status negotiations."
- It is at least doubtful that the ICC would want to become involved in an attempt to effect a material breach of the only valid and legally binding framework that has governed, and continues to govern, the relationship between Israel and the Palestinians.
- If the Palestinian Authority, acting as a non-state entity, succeeds in achieving standing in the ICC, then any political community contemplating a move to political independence or statehood will be motivated to follow suit. The Chechens, Basques, Tibetans, Sudanese Christians, and Kurds immediately come to mind.
- While some academics try to argue that a State of Palestine existed following the demise of the Ottoman Empire and the creation of the British Mandate, the Palestinian Arab leadership at the time saw their country as part of Southern Syria and their demand was for the reconnection of Palestine with Syria rather than for an independent Palestinian state.
- The Principal Allied Powers that drafted the postwar Treaty of Sèvres and the Mandate for Palestine in 1920 did not specifically assign political rights to the local Arab population, but clearly promoted the re-establishment of a Jewish "national home."
- To retroactively revise the political status and reinvent the area as an already existing Arab state or as a precursor to a would-be Arab state of Palestine would be tantamount to wiping out the historical and legal roots of the State of Israel and the internationally recognized rights of the Jewish people to a homeland in Palestine.
- Finally, inserting the issue of ICC jurisdiction into the present environment in Israeli-Palestinian negotiations is likely to fortify Palestinian intransigence at the peace table, since PA negotiators will feel that they can fall back on unilateralist options instead of compromising in order to reach an agreement.

The Palestinian Authority Submission to the International Criminal Court

On January 22, 2009, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) received an official communication from the Minister of Justice of the Palestinian Authority (PA), Ali Kashan, which expressed the PA's readiness to recognize the jurisdiction of the ICC over "the territory of Palestine."[1] The PA's declaration made no mention of the war in the Gaza Strip which took place between December 27, 2008, and January 18, 2009, though it appeared to come on the heels of that conflict.

Formally, the PA declaration purported to invoke Article 12 (3) of the Rome Statute which originally established the court, which specifically enables a "state" which is not a party to the treaty to request that the ICC exercise its jurisdiction on an *ad hoc* basis with respect to an alleged crime on that state's territory or involving its nationals. The PA's declaration raises several issues of concern – legal, historic, and diplomatic.[2]

Can the Palestinian Authority Argue that It Already Constitutes a State?

It is clear that Palestine is not a state, despite the considerable political support that the cause of Palestinian statehood has enjoyed in recent years. As Professor James R. Crawford of Cambridge concluded in his monumental work, *The Creation of States in International Law*, "The State of Palestine has not yet become a fact as distinct from an aspiration."[3] Nor was there a state of Palestine in the past. When the Ottoman Empire lost its Asiatic provinces in 1917, Britain took control of a number of territories in the region, including parts of Ottoman provinces, which it would incorporate into a new geographic entity, placed under its control as the Mandate for Palestine. When Britain withdrew its forces from Mandatory Palestine in 1948, the State of Israel was established in part of that territory, while the remaining parts of that territory (known today as the "West Bank" and the "Gaza Strip") were immediately invaded and occupied by neighboring Arab states. Thus, when Israel captured the West Bank and the Gaza Strip in the 1967 Six-Day War, there was certainly no Palestinian state on those territories, or anywhere else. At the time, each territory was under the control of Jordan and Egypt, respectively.

While the Oslo Accords signed in the 1990s between Israel and the Palestine Liberation Organization (PLO) resulted in the establishment of, and transfer of limited powers to, a newly created Palestinian Authority, this did not create Palestinian statehood in any part of the West Bank and the Gaza Strip. The Palestinian Authority today, whose Minister of Justice approached the ICC in 2009, may also not be considered a state.

In 2005, the U.S. Court of Appeals for the First Circuit considered the issue when it upheld a default judgment against the PA which sought to invoke a right of sovereign immunity from a lawsuit emanating from the murder of U.S. nationals who were killed in a terrorist act.[4] The U.S. court found that "Palestine was not a state" and therefore dismissed the argument made on behalf of the PA.

A similar view on the matter of statehood is also clearly evident in the 2004 advisory opinion from the International Court of Justice (ICJ) on the legality of Israel's security fence. In that case, the ICJ specifically referred to the requirement for "efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian state, existing side by side with Israel and its other neighbors, with peace and security for all in the region" (at para.162).

Furthermore, the ICJ even rejected the possibility of Israel's reliance on Article 51 of the UN Charter and the right of self-defense on the basis that Article 51 could only apply to "the case of armed attack by one State against another State."[5] While this restrictive approach to Article 51 can be criticized, it is clear that the ICJ was firmly of the view that a Palestinian state was not already in existence. PA Minister Kashan might have sought to sidestep this inconvenient problem of the PA's status by writing to the ICC in the name of the "Government of Palestine," but his letterhead was still officially that of the "Palestinian National Authority" – the name the Palestinian side uses for the PA.

The fact remains that when Israel signed the Declaration of Principles in 1993, also known as the Oslo Agreement, and its subsequent implementation accords during the 1990s, the Palestinian side was formally represented by the PLO, and not by the PA, which notably did not undertake international commitments for the Palestinians. Indeed, it was the second Oslo implementation accord, the 1995 Israeli-Palestinian Interim Agreement,[6] which created the "Palestinian Interim Self-Government Authority" (known as the Palestinian Authority, or PA) (Article III, 1)[7] and provided for the transfer of certain limited powers to it, while expressly reserving to Israel all powers not so transferred (Article I, 1).[8]

The PA Declaration and the Erosion of Binding Israeli-Palestinian Agreements

The PA declaration poses a number of diplomatic challenges. The 1995 Interim Agreement specifically provides that the Palestinian Authority "will not have powers and responsibilities in the sphere of foreign relations" (Article VII, 5, a),[9] which were retained by Israel. Exceptionally, the PLO was designated as the party that could conduct negotiations and sign agreements with states or organizations on behalf of the PA; however, this exception was limited to highly circumscribed areas related to the economy, development, cultural matters, science, and education.

In addition, under the Oslo Agreements, Israel expressly retained exclusive criminal jurisdiction over all Israelis and, in addition, the agreements defined and limited the jurisdiction transferred to the PA over Palestinians both in those territorial areas that were and those that were not transferred to it.[10]

However, the PA's declaration amounts to an official (even if implied) request to confirm that the PA can be considered as a state for purposes of ICC jurisdiction. Yet the Interim Agreement established in its Final Clauses (Article XXXI) a fundamental principle: "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the Permanent Status negotiations."[11]

These obligations were supported by important components of the international community, including the European Union, the Russian Federation, the U.S., Egypt, and Norway, which were in fact signatories to the Interim Agreement in their capacity as witnesses. It is at least doubtful that the ICC would want to become involved in an attempt to effect a material breach of the only valid and legally binding framework that has governed, and continues to govern, the relationship between Israel and the Palestinians.[12]

These obligations from the Interim Agreement create a dilemma for the Palestinian Authority. A unilateral declaration of statehood, instead of a negotiated solution to the conflict, would not only be a treaty violation, but could affect international reactions to the newly created Palestinian state. For example, states strictly adhering to international law would have grounds to deny the Palestinian state recognition. After all, there is a general principle of law, noted by Professor Malcolm Shaw, that an "illegal act cannot produce legal rights."[13]

According to the Restatement of the Foreign Relations Law of the United States, a state is required not to recognize or treat as a state any entity which has "attained the qualifications of statehood in violation of international law."[14]

To circumvent this problem, the Palestinian Authority might attempt to be conferred with statehood by others, especially by international institutions that decide it already has the attributes of a state. The ultimate action in this regard would be a decision by the UN Security Council, which determined a Palestinian state already existed and should be recognized. The PA's involvement of the ICC in establishing that it be defined as a state should be seen as the first step in a decision to move in this strategic direction.

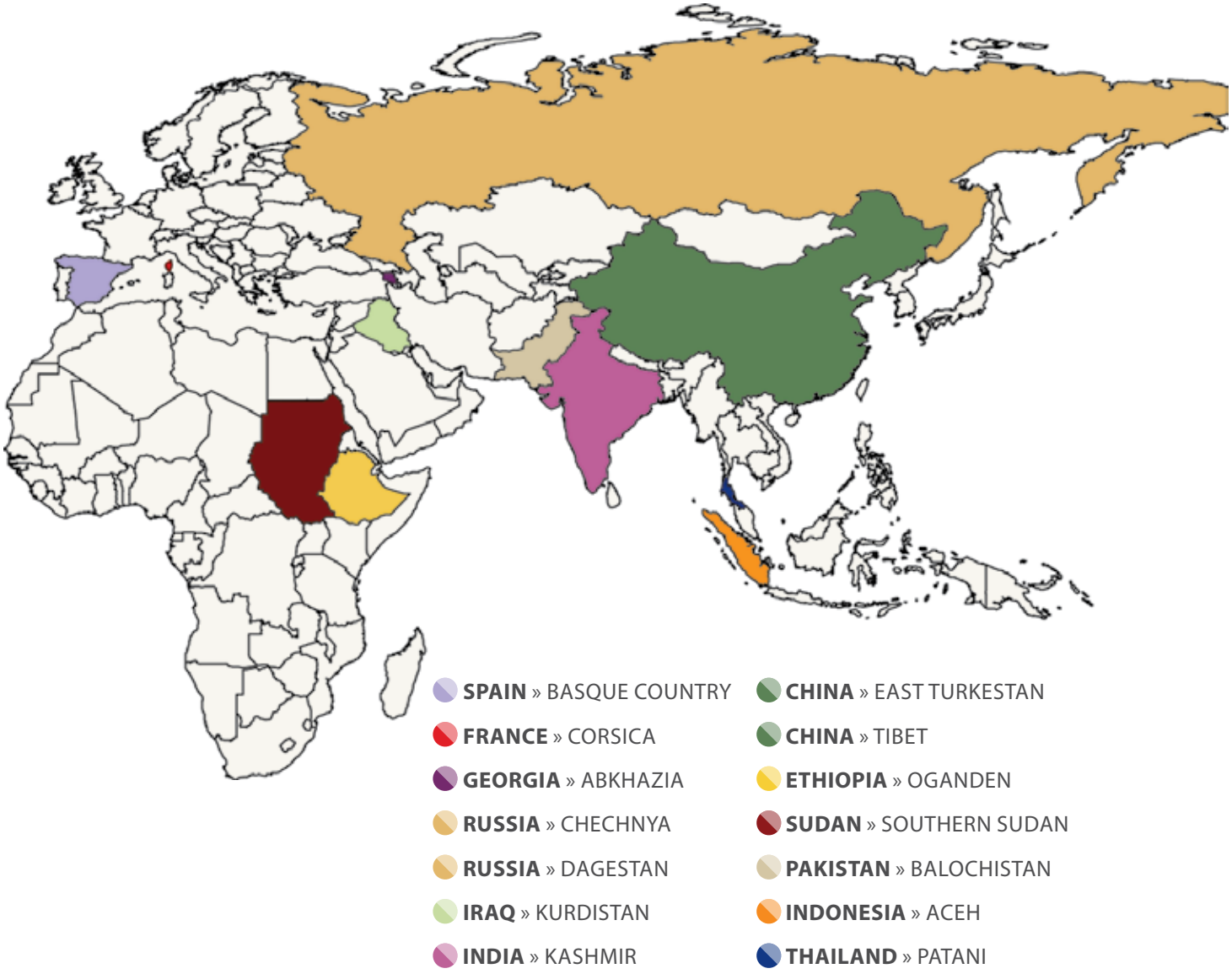
In general, the Palestinian Authority's attempt to involve the ICC in its dispute with Israel is in fact part of a wider and long-running campaign to pursue the Palestinian cause in complete disregard, and at the expense, of the most basic rules and procedures of international institutions. These attempts – to which I was sadly and all too often a witness in my capacity as an ambassador to the United Nations – may have succeeded in engulfing certain United Nations bodies, causing very considerable damage to the international reputation and credibility of these bodies in the process. It is not clear, however, why the ICC should go out of its way to follow suit, especially since this would require it to manipulate its own multilaterally-agreed rules and trample on binding international peace agreements between the relevant parties in order to do so.

Implications for Other Non-State Entities

There is also one other critical foreign policy issue that needs to be considered that goes beyond Israel and the Palestinians. If the Palestinian Authority, acting as a non-state entity, succeeds in achieving standing in the ICC, then any political community contemplating a move to political independence or statehood will be motivated to follow suit. Within the international community today there are dozens of internal conflicts that seek and may well result in the formation of new states. There is no reason why various political communities

will not be similarly inspired to follow the Palestinian example: the Chechens, the Basques, the Tibetans, the Sudanese Christians, and the Kurds immediately come to mind. Regardless of whether these groups have just national aspirations or causes, their differences with their central governments must ultimately be resolved through a political process.

Selected Separatist Movements that Could Be Affected Should Palestinian Unilateralism Be Successful



Clearly, these causes cannot be solved by the ICC, or the ICC Prosecutor; nor, indeed, were these institutions created for such purposes. But if there is a sudden surge of unilateralism that comes about because of the precedent from the Palestinian case, then the result will not be international justice but rather increased international chaos, an erosion of diplomacy as a means for conflict resolution and, most worryingly for the ICC, embroilment of the ICC and its institutions in hotly contested internal political disputes that they were neither designed nor mandated to deal with.

Beyond these legal issues, the PA's declaration and submissions to the ICC raise important historical issues and claims that require careful examination. **The argument that a Palestinian state already exists and that its borders have already been defined might spare the Palestinian Authority from having to declare a state at present, but it is extremely problematic.** At best, these arguments are based on questionable historical evidence. In some cases, they directly undermine Israel's most important international rights:

» **First,** in support of the Palestinian Authority's declaration, an argument has been submitted to the ICC that a State of Palestine existed following the demise of the Ottoman Empire, and that sovereignty rested with the population of Palestine at the time the Palestine Mandate was established.[15] According to this theory, any new claims to Palestinian statehood are to be viewed against a background of a pre-existing Palestinian state. This argument distorts the historical record by flagrantly ignoring the recognition given by the international community at that time, through the League of Nations, to the historic rights of the Jewish people to reconstitute their national home in Palestine, as well as the confirmation of these rights by the United Nations in November 1947.[16] Denial of these historical facts only reinforces the dangerous trend to delegitimize the very existence of the State of Israel, as well as the national rights of the Jewish people, which were recognized by both the League of Nations and the United Nations.

» **Second,** PLO Chairman Yasser Arafat issued a Palestinian Declaration of Independence on November 15, 1988, following which a state of Palestine was recognized by a number of countries on a bilateral basis. However, not only did the status of the PLO Observer Mission at the UN not change in any significant way, but subsequent developments in Palestinian politics also raise questions as to whether the Palestinians themselves believe they had indeed formed a state in 1988.

» **Third,** by accepting the PA's declaration, the ICC would be thrusting itself into the serious historic territorial disputes that exist between Israel and the Palestinians which are presently part of the core agenda of Arab-Israeli diplomacy. Where exactly is the "territory of Palestine" designated by the PA as subject to ICC jurisdiction? It is doubtful that it is the intent of the PA to refer to all of British Mandatory Palestine, for then the declaration would include Israeli sovereign territory. If the intent is to refer only to the West Bank and the Gaza Strip, then the PA is seeking ICC jurisdiction in an area that is historically disputed, subject to conflicting territorial claims, and demarcated by ceasefire lines that do not amount to recognized international boundaries, even as it is hoped that future negotiations may determine them.

Arguing against the idea that the Palestinians constitute a state at present does not preclude the idea that Israel and the PA should reach a political settlement in the future. Though the Jewish people had internationally recognized rights in British Mandatory Palestine that were in many respects stronger than those of the Palestinian Arabs, nonetheless, Israel might decide to make historical compromises over lands where its title is indisputable.

In addition, the fact that the Palestinian Authority does not constitute a state at present does not render the Gaza Strip and the West Bank a legal "black hole," precluding justice for both Israeli and Palestinian victims of violence. Israel's legal system is internationally acclaimed, with the Israeli Supreme Court praised for both its jurisprudence and its independence, with

its rulings cited favorably by foreign courts including the Supreme Court of Canada, the House of Lords in the United Kingdom, and the European Court of Justice. Israel's ability to independently and fairly evaluate itself was also recognized by the Criminal Chamber of the National Court of Spain.[17]

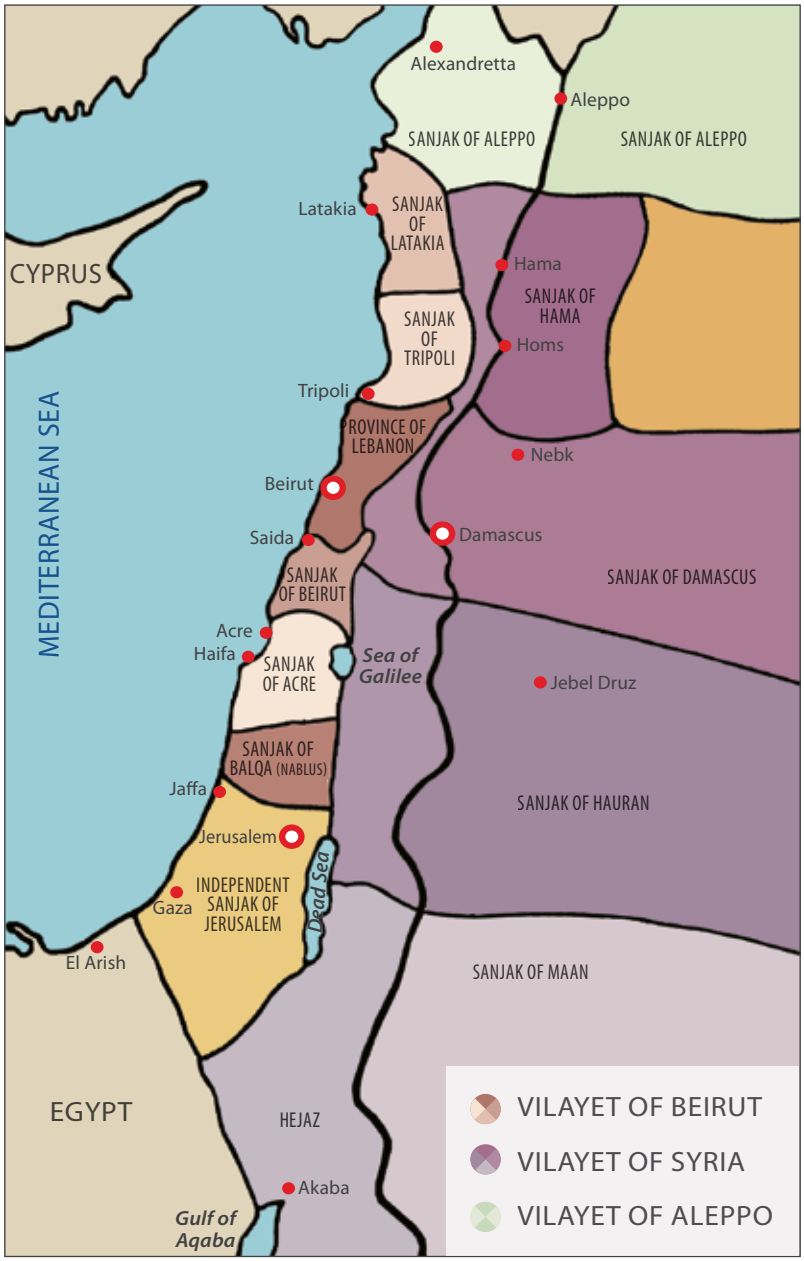
1. Contesting the Assertion of a Pre-Existing Palestinian Statehood from the Time of the British Mandate

Palestine, as a geographically distinct political unit, was a product of the First World War and the peace settlement that the Allied Powers reached in its wake. As already noted prior to the war, there was no state of Palestine. During the period between 1517 and 1917, this territory was divided between different provinces of the Ottoman Empire. In the late nineteenth century, the largest of these provinces was part of the *Vilayet* (district) of Beirut, which ran southward from modern-day Lebanon to an east-west line running from the Jordan River to the town of Jaffa.[18] The territory that was to become Palestine was also known in Arabic as *Surya al-Junubiyya* (Southern Syria).[19] It is, therefore, not surprising that assertion of a separate Palestinian (Arab) national identity actually developed much later.

Indeed, the central demand initially voiced by the local Arab population after the First World War was for the reconnection of Palestine with Syria rather than for an independent Palestinian state. During this formative period it was common for the Palestinian Arab leadership to see their country as part of Southern Syria.[20] This theme was to persist up until the 1960s.[21] To say that Palestine emerged as a distinct state after the First World War certainly does not take into account the thinking of its residents at the time. It involves assigning to that period a political consciousness that only emerged decades later.

This fact is confirmed by international diplomacy at the time. At the end of the First World War, the Arab national movement, led by Amir Faisal and the Hashemite family in Mecca under King Hussein, spoke for all the Arabs of the Ottoman Empire. The core bargain that appeared to be emerging in 1919 was that if the Arab nationalist movement would receive a large Arab state covering what is today Syria, Iraq, and the Arabian Peninsula, then Faisal would be prepared to accept a Jewish national home in Palestine in accordance with the 1917 Balfour Declaration.[22]

Internal Ottoman Districts Prior to the Establishment of British Mandatory Palestine



As a British Royal Commission wrote at the time: "If King Hussein and the Emir Faisal [*sic*] secured their big Arab State, then they would concede little Palestine to the Jews."[23] This was also the *quid pro quo* contained in the Faysal-Weizmann Agreement in 1919.[24] This understanding was ultimately undermined by French actions in Damascus that led to Faisal losing Syria and becoming King of Iraq. But that did not alter the perception of Britain and the Great Powers that on the whole a fair compromise had been struck. As Lord Balfour, himself, stated in July 1920, Britain had liberated the Arabian Peninsula and Iraq, indeed much of the Arab world, from the Ottoman Turks, hoping the Arabs would not "grudge that small notch" which was to be given to the Jewish people.[25]

This was also the political context of the legal rights that were established in British Mandatory Palestine at that time. In 1919, Article 22 of the Covenant of the League of Nations formally introduced the idea of mandated territories in the defeated Ottoman Empire: "certain territories detached from Turkey" would be "provisionally recognized" as "independent nations" subject to the advice and assistance they would receive from the Mandatory Powers. With the Treaty of Sèvres, signed in August 1920, the Ottoman Empire relinquished sovereignty over its Asiatic territories to the south of modern day Turkey.[26] According to Article 94 of the Treaty of Sèvres, Syria and Mesopotamia (Iraq) were to be "provisionally recognized as independent states subject to the rendering of advice and assistance by a mandatory until such time as they are able to stand alone."

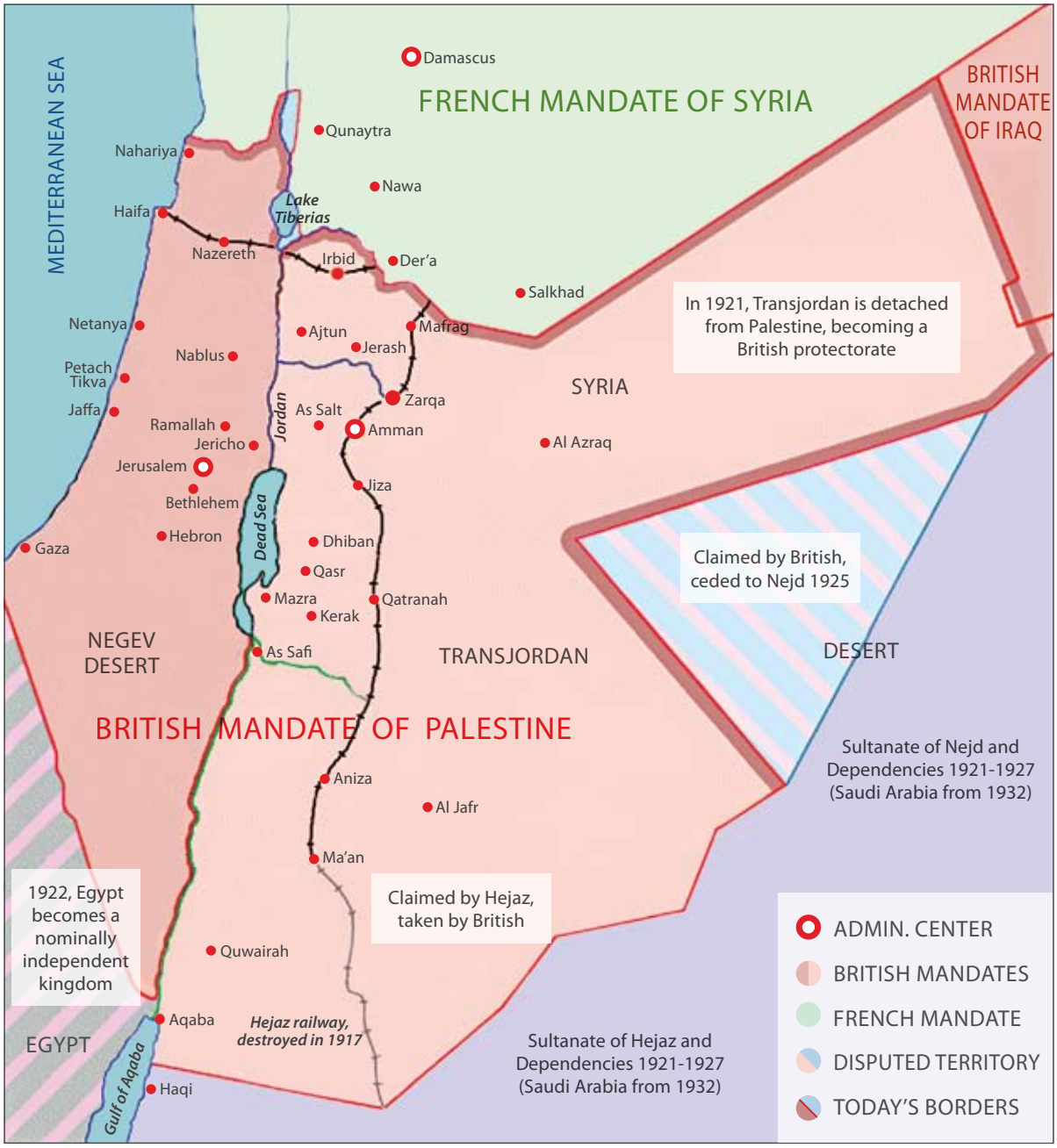
Yet with regard to Palestine, no such provisional recognition was given to it as an independent state. Instead, the Treaty of Sèvres reaffirmed the Balfour Declaration of November 1917 in favor of the establishment of a national home for the Jewish people. This distinction between Syria (including Lebanon) and Mesopotamia (Iraq), on the one hand, and Palestine, on the other, would continue in the language of the diplomatic instruments creating all three League of Nations mandates in the years that followed.[27]

True, the mandates for Syria, Mesopotamia, and Palestine were all categorized by the Allied Powers as "Class A Mandates" which, according to Article 22 of the Covenant of the League of Nations, meant that they had "reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone." But to use this clause to ascribe to the Palestine mandate a status that is the same as the other mandates would be a mistake. Sir Hersch Lauterpacht noted that all three are Class A Mandates, but he cautioned: "It would however be wrong to think they are uniform entities in internal, constitutional and administrative law."[28] In the words of one international legal expert, it is best to think of the Mandate for Palestine as "*'sui generis'* among mandated territories."[29]

The Mandate for Palestine, which was formally approved by the League of Nations on July 22, 1922, was even more explicit about Jewish national rights than the Treaty of Sèvres. In the third clause of its preamble, it states: "Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country." While a specific clause regarding independence was included in the draft Mandate for Iraq, and the mandate document for Syria and Lebanon, in accordance with Article 22 of the Covenant of the League of Nations, no such clause appeared in the Mandate for Palestine, where the League of Nations had undertaken an international commitment to the Jewish national home.[30]

The Principal Allied and Associated Powers that drafted the language of the Treaty of Sèvres and the language of the Mandate for Palestine, when they met in San Remo, Italy, in April 1920, did not create the rights of the Jewish people with those documents, but rather recognized a pre-existing right, referring to the Jews as "reconstituting their national home." They did not ignore the non-Jewish residents, but, in the language of the mandate, sought only to protect their "civil and religious rights."

British Mandatory Palestine, 1922



Thus, the mandate did not specifically assign political rights to the local Arab population, but clearly promoted the re-establishment of a Jewish national home. Furthermore, the rights of the Jewish people that were recognized in the mandate document did not end with the dismantling of the League of Nations, but rather were preserved, in the modern period, by the United Nations, which determined under Article 80 of the UN Charter that there was no intention by the UN to alter the existing rights of any states or any peoples.

The central question, therefore, becomes: how did the Great Powers interpret Jewish national rights? What did the Great Powers intend when they committed themselves to the "re-establishment of a Jewish national home?" Three months after he issued his famous declaration in 1917, Lord Balfour admitted: "My personal hope is that the Jews will make good in Palestine and eventually found a Jewish state."[31] President Wilson received intelligence recommendations prior to the 1919 Paris Peace Conference that assessed: "It will be the policy of the League of Nations to recognize Palestine as a Jewish state as soon as it is a Jewish state in fact."[32]

Finally, the French government also drafted regulations for the Paris Peace Conference in 1919 which included "nationalities in the process of forming states which had not yet been recognized." They included Yugoslavs, Finns, Arabs, Armenians, and the Jews of Palestine.[33] In short, there was a general awareness among the Great Powers after the First World War that a Jewish national home would lead to a Jewish state.

The recognition of the need to re-establish a Jewish homeland started to receive support from important legal authorities even before the First World War. Rev. William Blackstone of Illinois prepared a petition in 1891 for President Benjamin Harrison that described the connection of the Jewish people to Palestine: "It is their home – an inalienable possession from which they were expelled by force."[34] The petition was supported at the time by 413 prominent Americans including Melville Fuller, Chief Justice of the U.S. Supreme Court and subsequently by Justice Louis Brandeis, who asked Blackstone to prepare a second petition for President Woodrow Wilson.

Ernst Frankenstein, a British-based authority on international law in the inter-war period, who became one of the founders of a European Code of Private International Law, made the legal case for Jewish rights in Palestine in a similar fashion by stating that the Jewish people never relinquished their title after the Roman conquest of their commonwealth.[35] For that to have happened, the Romans and their Byzantine successors would have had to have been in "undisturbed possession" of the land, with no claims being voiced, which did not occur given the continuation of Jewish resistance for centuries thereafter.[36]

The rights of the Jewish people that were now expressed by both internationally approved San Remo documents – the Treaty of Sèvres and the Mandate for Palestine – had important legal significance. Judge John Bassett Moore of the Permanent Court of International Justice stated in his dissenting opinion in the *Mavrommatis* case that the mandate's recognition of Palestine as a Jewish national home was "a Legislative Act" of the Council of the League of Nations.[37]

Before his accession to the U.S. Supreme Court, Felix Frankfurter wrote in the same spirit that with the Mandate for Palestine, the Balfour Declaration was "made part of the law of nations, and thereby the establishment of a Jewish national home became an international obligation."[38]

The Treaty of Sèvres was not ratified by the Ottoman Empire, which was replaced by the Republic of Turkey. However, the new Turkish government signed a new agreement, the Treaty of Lausanne, in 1923, re-confirming its renunciation of "all rights and title" with respect to territories beyond the frontiers of the Republic of Turkey (Article 16).[39]

But who then actually had sovereignty in British Mandatory Palestine after it was relinquished by Turkey? An argument has been made that "sovereignty rested with the population of Palestine and that Palestine was a state."[40] This suggestion, however, contradicts the views of the leading scholars of the time who reviewed this issue, and whose legal theories have also been confirmed by current legal experts. In his analysis of the mandate system at the time, Lauterpacht concluded that sovereignty "lies with the League of Nations and is derived from it."[41] The famous jurist Lord Arnold McNair, who came to be a judge and president of both the International Court of Justice and the European Court of Human Rights, wrote: "The conclusion in this controversial matter which commends itself to us is this: that the rights, powers and interests which make up the relationship of the normal State towards its territory and the inhabitants belong in the case of the mandated areas in part to the mandatory, while the remainder are reserved to the League."[42]

Quincy Wright wrote in the *American Journal of International Law* in 1923 that it would be accurate "in ascribing sovereignty of mandated territories to the mandatory [in this case Britain] acting with the consent of the League of Nations."[43] Wright reached this conclusion by analyzing the internal and external aspects of sovereignty, which he saw as being the power to amend the mandate (internal act of sovereignty) and the power to alienate or transfer the mandate (external aspects of sovereignty).[44] His view that ascribed sovereignty in mandated territories to the mandatory acting in consent with the League of Nations was confirmed when the Mandate of Palestine was amended so that in two-thirds of its territory – the territory of the East Bank, which would eventually become the Hashemite Kingdom of Jordan – the provisions calling for the establishment of a Jewish national home would not be applied. This case of state practice demonstrated Wright's contention in an area that is a major expression of national sovereignty.

A second argument has been made that once the territory that made up British Mandatory Palestine was set aside by the League of Nations as an entity separate from the other districts of the former Ottoman Empire, a state had essentially been formed, or at least an entity enjoying some of the attributes of a state, including the power to issue passports and conclude treaties. The practices and powers enjoyed by British Mandatory Palestine, however, lead to quite the opposite conclusion: for example, while British Mandatory Palestine issued passports, its residents relied on Britain for diplomatic protection when they traveled abroad and needed to rely upon British consulates and embassies, since the mandatory government did not open any foreign representations.[45]

These formal arguments, however, miss the central weakness in the claim that a Palestinian state already existed from the time of the British Mandate: that pre-state entity was – and was recognized as – an expression of Jewish national rights, and was, in fact, the precursor to the modern State of Israel, whose claims to sovereignty are in part based on it. The stated intent of the Great Powers who drafted the mandate instrument and the concomitant Ottoman surrender of sovereignty were to create a Jewish national home, which would inevitably become a Jewish state. As already noted, the only time these powers sought to territorially limit the Jewish national home was when, in accordance with Article 25 of the Mandate for Palestine, they separated the East Bank of the Jordan from it in 1922, which years later became the Hashemite Kingdom of Jordan. The rest of Palestine remained the area designated by both the Balfour Declaration and the League of Nations Mandate for the re-establishment of a Jewish homeland.

Therefore, to retroactively revise its political status, and reinvent the area as an already existing Arab state or as a precursor to a would-be Arab state of Palestine, would be tantamount to wiping out the historical and legal roots of the State of Israel and the internationally recognized rights of the Jewish people to a homeland in Palestine. Currently, there is a disturbing trend in several international bodies to challenge the very legitimacy of the State of Israel, ignoring the extensive diplomatic history that supported the historical rights of the Jewish people to a nation-state of their own. This trend perhaps began in 1975 when the UN General Assembly adopted a resolution characterizing Zionism as a form of racism (a disgraceful position from which it subsequently retreated in 1991).[46] Some see this trend gaining ground with the infamous UN-sponsored World Conference against Racism held during 2001 in Durban, South Africa.

Regardless of its source, a legal determination linking the current efforts of the Palestinian Authority to be recognized as a state, for any purpose, with the original Mandate for Palestine would serve the interests of those who seek to delegitimize the State of Israel by erasing the fact that the international community envisioned the mandate to evolve into a Jewish state. Despite this legal history, Israel has repeatedly offered to make territorial compromises for the sake of peace. But it cannot accept any effort to compromise the legitimacy of its fundamental rights and the historical basis for its establishment as a Jewish national homeland.

2. *Questioning the Argument that Palestinian Statehood Emanated from the 1988 Algiers Declaration of Statehood by Yasser Arafat*

At a meeting of the Palestine National Council (PNC)[47] in Algiers on November 15, 1988, Yasser Arafat issued a Palestinian Declaration of Independence: "In exercise by the Palestinian Arab people of its rights to self-determination, political independence and sovereignty over its territory, the Palestine National Council, in the name of God, and in the name of the Palestinian Arab people, hereby proclaims the establishment of the State of Palestine on our Palestinian territory with its capital Jerusalem."

The declaration did not stipulate the territorial boundaries of this state. It made reference to UN General Assembly Resolution 181 from 1947, also known as the "Partition Plan" (which was never in fact implemented due to its outright rejection by Arab states and peoples), stating: "It is that Resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty." It also described the State of Palestine as being the state of the Palestinians "wherever they may be." This last point might suggest that the PLO wanted jurisdiction over Palestinian populations in already existing states, especially Israel and Jordan, creating significant conflicts with these two countries. It should not be surprising that many states refused to recognize that the declaration had any legal significance. Even Moscow, which was a close ally of the PLO during the Cold War, was only prepared to say, "the Soviet Union recognizes the *declaration* of the Palestinian state, but not the state itself" (emphasis added).[48]

In the wake of the Algiers declaration of Palestinian statehood, the UN General Assembly adopted Resolution 43/177 on December 15, 1988, which "acknowledged the proclamation of the State of Palestine by the Palestine National Council" and then authorized that from then on, the PLO Observer Mission should be called "Palestine."

The fact that this change in the nomenclature of the PLO Mission to the UN was recognized by 104 states has been argued by some to mean that Palestine was regarded as a state by a majority of the international community back in 1988.[49] However, a careful examination of the language of the 1988 UN General Assembly resolution suggests a very different conclusion.

True, the resolution states that it "acknowledges" the PNC's proclamation, and in practical terms the resolution adds that: "the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organization' in the United Nations system." But this change in nomenclature is followed by a critical clause that this step should be undertaken "without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system." In other words, the resolution admitted that this was essentially a symbolic move, since the actual powers of the PLO Mission remained unchanged.

In practice, in the years that followed, the PLO Observer Mission continued to sit in the UN General Assembly alongside the other UN observer missions, including the Arab League and the Islamic Conference, and not with the member states of the UN. Indeed, the PLO Observer Mission itself acknowledges that while it enjoys a "unique and unprecedented" status at the UN, "somewhere in between the other observers, on the one hand, and the member states, on the other," it is not a member state.[50]

There is yet another aspect of the 1988 declaration of statehood by the PLO that raises serious questions as to its exact legal implications: how can it be argued that the 1988 declaration created a Palestinian state if the Palestinian leadership continued to threaten that it was going to unilaterally declare a state in 1999 and then again in 2009?

On the first occasion, Palestinian Authority leaders noted that the PA had been created as a five-year interim arrangement on May 4, 1994. They proposed that with the end of this transition period on May 4, 1999, it was necessary for the PA to declare a state. For example, Ahmed Qurei (Abu Ala), who then served as Speaker of the Palestinian parliament, wrote in the official Palestinian Authority newspaper *al-Hayat al-Jadida* on December 21, 1998: "On May 4, 1999, a political, legal and administrative vacuum will be created in the territories, and it will then be incumbent upon the Palestinian Authority and its institutions to declare the Palestinian state, which will fill this vacuum."[51]

This was a false argument, for the Oslo implementation agreements did not stipulate that the Oslo Accords would expire after five years. While they expressly envisaged a target date of five years to complete the negotiations for a permanent status agreement, they did not provide that if the two sides were unable to conclude these negotiations by May 4, 1999, then the interim arrangements would simply terminate. Moreover, in practice, when the two sides had been unable to reach agreements according to specified target dates, the arrangement that had been in force continued to apply.[52]

Ultimately, the PA failed to realize its threats to unilaterally declare statehood in 1999, but the campaign it waged nonetheless indicated that whatever action the PLO took in 1988 with regard to declaring a State of Palestine, it was not sufficient to fill the "legal vacuum" that the PA's spokesmen asserted would emerge should the interim period under the Oslo Agreements come to an end.

A second occasion on which the Palestinian leadership threatened to unilaterally declare a Palestinian state was after the Albanian majority government in Kosovo seceded from Serbia in February 2008 and declared it was forming an independent state.[53] Yasser Abd Rabbo, a senior advisor to PA President Mahmoud Abbas, said in 2009: "Our people have the right to proclaim independence even before Kosovo. And we ask for the backing of the United States and the European Union for our independence."[54] In a new variation to the unilateral Palestinian declaration, but still invoking the Kosovo example, chief Palestinian negotiator Saeb Erekat said in mid-November 2009 that "it is time [for the Security Council] to recognize a Palestinian state on the borders of 4 June 1967 with Jerusalem as its capital."[55]

Simultaneously, in November 2009, Muhammad Dahlan, the former Gaza security chief and senior Fatah leader, provided a more detailed version of this idea. In the Palestinian newspaper *al-Ayyam,* Dahlan stated that the PA was considering "unilaterally" declaring a state and then approaching the UN Security Council to define the borders of the Palestinian state as the 1967 lines, as well as to acknowledge that its capital will be East Jerusalem.[56] A third Fatah leader, Nabil Shaath, who had previously been active in negotiations on behalf of the PLO, explained that Mahmoud Abbas was leading a delegation to South America in order to seek endorsements from these countries that would lead to recognition of a Palestinian state.[57]

Abbas himself held a joint press conference with President Hosni Mubarak of Egypt in November 2009 in which he confirmed that the PA was committed to approaching the UN Security Council and requesting a resolution recognizing a Palestinian state on the 1967 lines. Of course, the role of the UN Security Council when new states emerge is to be a part of the process that leads to their acquisition of UN membership. Presumably, Abbas was not just seeking a UN Security Council resolution alone, but hoped such multilateral action would lead to dozens of states recognizing the Palestinian state on a bilateral basis.

Again, this entire effort would be superfluous if the recognition granted in 1988 of the declaration of Palestinian statehood was sufficient. Prof. James Crawford of Cambridge also appeared to be baffled by this Palestinian unilateralism and it raised a serious question for him regarding the 1988 declaration: "If a new unilateral declaration is thought to be necessary by some within the PLO, on what basis was that of 1988 insufficient?"[58] Apparently, the Palestinian leadership did not feel that, whatever its symbolic value, the 1988 declaration had legally created a state, the emergence of which now requires multilateral action by the UN and bilateral recognition by its member states.

Finally, it was noteworthy that in 2004, when the UN General Assembly sought an advisory opinion from the ICJ on the legality of Israel's security fence, the Palestinians were actually represented by a number of noted jurists, including Prof. Crawford, who rejected the critique that this was a contentious issue that should only be brought before the ICJ with the consent

of both parties, including Israel, like any other bilateral dispute between two states. By implication, and in line with his express and recorded position on the matter, his argument was based on the idea that a Palestinian state did not exist.[59] Even the Palestinians themselves spoke in their submission of a "*future* Palestinian state" (emphasis added).[60] All these actions raise serious questions as to whether the Palestinian leadership, which relied on this line of argument before the ICJ, believed it had actually declared a state in 1988, or only expressed a policy goal.

The ICJ itself confirmed the matter. It both specifically referred to the need for a negotiated solution in order to resolve outstanding issues and achieve "the establishment of a Palestinian state," and also rejected Israel's argument that its construction of a security fence to halt suicide-bombing attacks from the West Bank was consistent with Article 51 of the UN Charter on the grounds that Article 51 could only be applied in "the case of armed attack by one State against another State."[61] This restrictive view of the right of self-defense came under considerable criticism, especially in a post-9/11 security environment; it nevertheless showed that the ICJ itself did not consider that a Palestinian state already existed.

The Palestine Liberation Organization's (PLO) National Council (PNC) adopted the Palestinian Declaration of Independence in Algiers on 15 November 1988.

3. Challenging the Palestinian Claim to Uncontested Territorial Jurisdiction

The Palestinian Authority's 2009 declaration expressed the PA's readiness to recognize the jurisdiction of the ICC over "the territory of Palestine." The declaration did not, however, specify the area that purportedly constitutes the "territory of Palestine," and left this crucial phrase open to interpretation. Indeed, several possible interpretations can be attributed to the phrase.

Each of the possible interpretations, however, gives rise to serious diplomatic difficulties: involving, at worst, claims to internationally recognized sovereign territory, and, at best, drawing the ICC into a quagmire of historic territorial disputes for which it was surely not designed nor intended to resolve.

The broadest territorial definition of the area of jurisdiction being claimed would be the original territory of British Mandatory Palestine. But this would clearly mean that the PA would be making a declaration of jurisdiction with regard to territory that is recognized in the international community as already being under full Israeli sovereignty. This interpretation is therefore untenable.

If the PA is of the view that a Palestinian state already exists on the basis of the 1988 Algiers Declaration of the PNC, and the PA declaration was made on this basis, then similar problems would also arise. As discussed above, the 1988 declaration based itself on UN General Assembly Resolution 181 of November 29, 1947, also known as the Partition Plan, which recommended the partition of Mandatory Palestine into a Jewish state and an Arab state. The Palestinian leadership and the Arab states rejected and tried to overturn the UN resolution and its recommendation by force of arms in 1948. Nevertheless, despite this history, the Algiers Declaration states: "It is this resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty."

The idea that Resolution 181, and the borders proposed therein, is "the legal basis" for any Arab state in former British Mandatory Palestine was proposed by Abu Ala in *al-Hayat al-Jadida* on December 21, 1998, when he stated: "It should be emphasized that the [Palestinian] state has internationally recognized borders set in the [1947] partition resolution."[62] It was also raised by the PLO observer, Nasser al-Kidwa, in an official letter to UN Secretary-General Kofi Annan on March 25, 1999.[63] In the letter, which dealt with Resolution 181, al-Kidwa expressed doubts over Israeli territorial rights in areas beyond the boundaries recommended by the UN General Assembly in 1947: "We believe that Israel must still explain to the international community the measures it took illegally to extend its laws and regulations to the territory it occupied in 1948, beyond the territory allocated to the Jewish state in Resolution 181 (II)."[64]

While the principle behind Resolution 181 – the creation of a Jewish state and an Arab state – retains value, unfortunately for al-Kidwa, according to international legal authorities, the specific boundaries proposed in the resolution have no relevance.[65] It bears repeating that the Palestinian leadership and the Arab states not only rejected Resolution 181, but actively sought to overthrow it: contemporaneous with the British withdrawal from Palestine, the country was invaded by the armies of Egypt, Iraq, Jordan, Lebanon and Syria. This attack justified Israeli

defensive measures, including those beyond the boundaries proposed by the Partition Plan.[66] According to Lauterpacht, "at the moment when the Resolution [181] failed to be implemented, its description of specific boundaries ceased to be fully relevant."[67]

Moreover, the 1949 Armistice Agreements signed between Israel, Jordan, Egypt, Lebanon, and Syria brought an end to official hostilities between Israel and its neighbors and replaced the territorial boundaries proposed in Resolution 181, extending Israeli sovereignty beyond the proposed partition boundaries. Thus, even if one were to overlook the Arab rejection of Resolution 181 and rely upon the resolution as a basis for the 2009 PA declaration to the ICC (a new territorial point of reference for any Palestinian claim), then that would also involve land that is under internationally recognized Israeli sovereignty today.

Clearly, basing the Palestinian claim to statehood on the 1988 Algiers Declaration poses a serious dilemma in which the territorial extent of the Palestinian request reaches into the sovereign territory of Israel. This, too, therefore, appears untenable.

However, if the Palestinian declaration were only intended to apply to the territory of the West Bank and the Gaza Strip alone, the ICC would find itself dragged into serious territorial questions that are at the heart of the peace process and the bilateral negotiations between the parties. Since Israel expressed its willingness to live alongside a demilitarized Palestinian state, the Israeli-Palestinian conflict has become increasingly a territorial dispute in which the Palestinian side seeks to establish a viable, contiguous state, while Israel hopes that at the end of the day it will obtain defensible borders.

Israeli Claims in the West Bank

It would be incorrect to assert that there are no competing claims to sovereignty in the West Bank.[68] Legally, UN Security Council Resolution 242, adopted in November 1967, months after the 1967 Six-Day War, never called on Israel to withdraw from all the territories it captured, but rather proposed that "secure and recognized boundaries" replace the 1949 armistice lines from which Israel was attacked. These new boundaries need to be negotiated between Israel and its Arab neighbors.

Israel's territorial claims to the West Bank and Gaza Strip are not solely security-based – they emanate from the circumstances of the Six-Day War, as well. Israel captured the Gaza Strip, West Bank, and east Jerusalem in July 1967 in a war of self-defense, while the territories' previous occupiers, Egypt and the Hashemite Kingdom of Jordan, respectively, controlled these territories unlawfully as a result of a war of aggression in 1948 (when Egypt and Jordan invaded the nascent State of Israel, along with three other Arab armies). Stephen Schwebel noted this important distinction and its legal consequences in the *American Journal of International Law* in 1970, before he became president of the International Court of Justice: "Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title."[69]

A similar view was expressed by Lauterpacht, who stated: "territorial change cannot properly take place as a result of the *unlawful* use of force. But to omit the word 'unlawful' is to change the substantive content of the rule and to turn an important safeguard of legal principle into

an aggressor's charter. For if force can never be used to effect lawful territorial change, then, if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct."[70] In short, the boundaries between Israel and a future Palestinian state are still very much in dispute.

Over the years, Israel has articulated its security interests in key strategic areas of the West Bank, in particular. The Jordan Valley has served as the forward line of defense for the Israel Defense Forces and, under Israeli control, weapons smuggling and infiltration from the east have been prevented. The peaks of the West Bank hill ridge also contain early-warning stations that Israel would seek to retain. In past negotiations, Israel has sought to maintain control of the airspace over the West Bank in order to retain sufficient warning time to intercept potentially hostile aircraft from other states in the region. The fate of Israeli military positions in the West Bank will inevitably come up in any peace negotiations, where Palestinian claims to these territories will be met with Israeli claims, as well. And while Israel fully withdrew unilaterally from the Gaza Strip in September 2005, it still controls the area's airspace and territorial waters, both of which will arise as issues to be addressed in future security negotiations.

Thus, it would be an error to conclude that the entire territory of the West Bank and Gaza Strip will inevitably come under Palestinian sovereignty, so that the "territory of Palestine" can already be anticipated for purposes of ICC jurisdiction. The issue has become more complicated with Israeli proposals, from some quarters, that Israel compensate the Palestinian side through land swaps, according to which Israel would cede some of its own territory in exchange for West Bank territory that it might seek to annex. And as already noted, there are security issues that still must be resolved in relation to the Gaza Strip that have implications for the shape of a future Palestinian state. In any case, it would be premature to establish at present what might be the territorial contours of a Palestinian state in advance of a permanent status agreement between the parties.

Diplomatic Considerations

The above historical survey highlights a number of serious diplomatic implications that would result from an ICC decision to accept the PA declaration. First, after surveying the legal commitments undertaken by the PLO in the 1995 Interim Agreement, it becomes immediately apparent that the PA's attempt to involve the ICC in its conflict with Israel violates the agreement in a number of core areas. This is an international agreement that is still in force today and, though critics have questioned its continued validity, neither Israel nor the PLO has renounced it.

Thus, the first consequence of the PA's declaration being accepted by the ICC would be a significant erosion of the Oslo Agreements that have governed Israeli-Palestinian relations since 1993. As previously noted, three core elements of the agreement would be affected: the prohibition against the PA's conducting foreign policy, the obligation both parties undertook to resolve their differences through negotiations and not through unilateral acts, and the understandings the parties had reached regarding criminal jurisdiction. If a signed undertaking in these important areas is violated, then many of the other remaining elements in the Interim Agreement might also come to be discarded.

Second, any breakdown of the Interim Agreement would accelerate a disturbing trend that has been evident over the last decade or more: the Palestinians' interest in unilateralism over negotiations as the preferred mechanism for resolving their political differences with Israel. By supporting the Oslo Agreements, the international community has continually preferred that a resolution of the Arab-Israel conflict will come about through a negotiated settlement rather than by any other means. It is also a fact that throughout this period, states supporting the peace process have discouraged the PA from taking steps such as unilaterally declaring a Palestinian state.

The PA's declaration recognizing the jurisdiction of the ICC invokes Article 12 (3) and in so doing bases itself on an article in the ICC statute reserved for states. Indeed, the statute makes clear that only states can accept ICC jurisdiction under Article 12 (3).[71] Thus, if the ICC accepts the PA's declaration, and in so doing grants recognition that in effect treats the PA as a state, it would be contributing to unilateralist sentiment on the Palestinian side. Such action would undermine the fragile negotiating process that Israel and other interested international parties are trying to advance.

Negotiations over such difficult issues as borders, the status of Jerusalem, and the fate of refugees inevitably can become stalled and undergo repeated crises. They might also break down completely from time to time. Inserting the issue of ICC jurisdiction into the present environment in Israeli-Palestinian negotiations is likely to fortify Palestinian intransigence at the peace table, since PA negotiators will feel that they can fall back on unilateralist options instead of compromising in order to reach an agreement.

There is also a fundamental issue of principle. Should the Palestinians move in the direction of unilateralism, as noted earlier, they will be violating core commitments that appeared in their past agreements with Israel. In short, it would be an illegal act. Highly politicized international bodies might not be concerned with taking steps that could encourage the violation of bilateral agreements. However, a more principled approach would seek to stay clear of any diplomatic initiatives which could promote an act of this sort. For this reason, states are not supposed to recognize an entity that has declared statehood unlawfully.

By analogy, international institutions like the ICC should also seek to stay clear of contentious political questions, such as whether the PA qualifies as a state government, which are completely premature and conflict with the substance of past signed agreements.[72] Professor George P. Fletcher of Columbia Law School has aptly warned in this regard: "It is not the role of the ICC to involve itself in political issues or to truncate that international and bilateral process through a unilateral ascription of statehood, whether direct or implied, countering delicate agreements and on-going international effort in this matter."[73] He also sees involvement in this issue having negative implications for the ICC's reputation. "It would be most unfortunate if a general perception of politicization of the Court's handling of the Article 12 (3) declaration of the Palestinian Authority were to take hold."[74]

The likely diplomatic consequences in the Middle East itself of the adoption of a unilateralist option by the Palestinians have been previously considered. On November 11, 1998, when the Israeli government accepted the Wye River Memorandum, but simultaneously became aware of Palestinian statements regarding opting for unilateralism in the future, it issued the following statement: "A unilateral declaration by the Palestinian Authority on the establishment

of a Palestinian state, prior to the achievement of a Final Status Agreement, would constitute a substantive and fundamental violation of the Interim Agreement. In the event of such a violation, the government would consider itself entitled to take all necessary steps, including the application of Israeli rule, law and administration to settlement areas and security areas in Judea, Samaria, and Gaza, as it sees fit."[75]

The Israeli statement raises the possibility that Palestinian unilateralism could result in Israeli unilateralism. It has already been noted that in parts of these territories, Israel has vital security interests, which it cannot afford to forfeit as a result of a Palestinian unilateralist move. Whether the Israeli statement was an actual political program in 1998 or only a form of diplomatic deterrence cannot be determined, but it does indicate that should the Palestinians be urged to move in a unilateral direction, Israel cannot be expected to stand still and, as a result, the overall stability of the Middle East region may well be affected.

Any action which promotes Palestinian unilateralism is particularly explosive precisely because it is very difficult to delineate at this point where the future borders of a Palestinian state may be situated. From the previous analysis it becomes clear that Palestinian political leaders have spoken about very different boundaries for defining a Palestinian state. Would the Palestinian claim be to the 1967 lines, known formally as the 1949 Armistice lines? UN Security Council Resolution 242, as previously noted, was adopted in 1967, after the Six-Day War, but did not explicitly call on Israel to withdraw to the pre-war lines. Palestinian spokesmen have also made reference to the 1947 lines appearing in UN General Assembly Resolution 181. The potential for overlapping territorial claims will be considerable should the PA decide on a more unilateralist course rather than on a path of negotiations.

To conclude, the question of whether the ICC accepts the PA declaration of jurisdiction cannot be viewed in a vacuum. The international community has supported a peace process which at times looks promising while at other moments seems to be precarious. In the past, the PLO sought to adopt symbolic steps to promote its goal of achieving Palestinian statehood, even though it was not entirely clear to what extent its actions were rooted in careful legal considerations. Now the PA appears to have chosen a similar course of action by which it seeks to be recognized as a state by the ICC, without expressly declaring itself to be so, by basing itself on a clause in the ICC statute reserved only for state actors. The place where Palestinian interests should be addressed and realized is at the negotiating table, not the ICC.

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Notes

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1 Palestinian National Authority, Ministry of Justice, Office of the Minister, "Declaration Recognizing the Jurisdiction of the International Criminal Court," signed in The Hague, Netherlands, January 21, 2009.

2 See, in particular, Opinion of Professor Malcolm Shaw, submitted to the OTP by the International Association of Jewish Lawyers and Jurists, September 9, 2009; Submission of the European Centre for Law and Justice, submitted to the OTP, September 9, 2009, and Opinion of David Davenport, Kenneth Anderson, Samuel Estreicher, Eugene Kontorovich, Julian G. Ku, and Abraham D. Sofaer, submitted to the OTP, November 19, 2009.

3 James. R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006), p. 421.

4 "First Circuit Rejects Sovereign Immunity Claim by Palestinian Authority," 99 *American Journal of International Law,* 696 July 2005.

5 *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion, 2004 ICJ Reports 136, paragraph 139.

6 *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, DC, September 28, 1995* (Jerusalem: Ministry of Foreign Affairs).

7 While the agreements refer to a Palestinian Council and an Executive Authority of the Council, including a *Ra'ees* (Arabic, for President or Chairman), these are commonly referred to as the "Palestinian Authority" (or by the Palestinians as the "Palestinian National Authority").

8 Additionally, the principle that "[t]he withdrawal of the military government shall not prevent it [Israel] from exercising the powers and responsibilities not transferred to the Council" is entrenched in Article I, 5.

9 *Ibid.*

10 See Articles III, 6; XVII; and the relevant provisions of Annex IV.

11 Article XXXI.

12 Alan Baker, "A Paradox of Peacemaking: How Fayyad's Unilateral Statehood Plan Undermines the Legal Foundations of Israeli-Palestinian Diplomacy," *Jerusalem Viewpoints,* No. 574, November-December 2009, Jerusalem Center for Public Affairs, http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=2&DBID=1&LNGID=1&TMID=111&FID=443&PID=0&IID=3185&TTL=A_Paradox_of_Peacemaking:_How_Fayyad's_Unilateral_Statehood_Plan_Undermines_the_Legal_Foundations_of_Israeli-Palestinian_Diplomacy.

13 Prof. Malcolm Shaw QC, "In the Matter of the Jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority: Opinion," as submitted to the Prosecutor of the International Criminal Court in The Hague by the International Association of Jewish Lawyers and Jurists, Alex Hertman, Adv., President, September 9, 2009.

14 Tal Becker, *International Recognition of Unilaterally Declared Palestinian State* (Jerusalem: Jerusalem Center for Public Affairs, 2000), p. 17.

15 John Quigley, "The Palestine Declaration to the International Criminal Court: The Statehood Issue," *Rutgers Law Record*, Volume 39, Spring 2009. See also, "Al-Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statue," Al-Haq, December 14, 2009, http://www.alhaq.org/pdfs/position-paper-icc-(14December2009).pdf. Quigley relies on the analysis of Henry Cattan, who represented the Arab Higher Committee, and Fouad Ammoun, a judge on the International Court of Justice who wrote about mandates, in general, and not the Mandate for Palestine in particular. See John Quigley, *The Statehood*

of Palestine: International Law in the Middle East Conflict (Cambridge: Cambridge University Press, 2010), pp. 69-70. If an argument is to be advanced that a national group had sovereignty in British Mandatory Palestine, it would make more sense to speak about the rights of the Jewish people since the Mandate only related to their national homeland, and did not speak about the "national" rights of any other group. See Howard Grief, *The Legal Foundation of Borders of Israel under International Law* (Jerusalem: Mazo Publisher, 2008), p. 71.

16 UN General Assembly Resolution 181, November 29, 1947.

17 Unofficial translation of Decision no. 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals ("Sala de lo Penal de la Audiencia Nacional"), regarding Preliminary Criminal Proceedings no. 154/2008 of the Central Investigation Court no. 4. See also Appeal of the Coordinating Prosecutor (Pedro Martinez Torrijos), 6 May 2009, from the Order of the Audiencia Nacional de Madrid, 4 May 2009, in Preliminary Proceedings Case no. 157/2008 (emphasizing that Israel's investigatory system, with review by Military Advocate General, Attorney General, and Supreme Court, "fully satisfy" the requirements of "an independent and impartial system of justice").

18 J.C. Hurewitz, *The Struggle for Palestine* (New York: Schocken Books, 1950), p. 17. J. Stone, "Israel, the United Nations, and International Law: Memorandum of Law, June, 1980," *The Arab-Israel Conflict, Volume IV: The Difficult Search for Peace (1975-1988), Part One*, edited by John Norton Moore (Princeton, NJ: Princeton University Press, 1991), p. 800.

19 Muhammad Y. Muslih, *The Origins of Palestinian Nationalism*, Institute for Palestine Studies Series (New York: Columbia University Press), p. 11.

20 Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (New York: Columbia University Press, 2009), p. 163. "Many in Palestine and elsewhere were motivated by the hope that all of Syria (here meaning greater Syria, or *Bilad al-Sham*, including the modern-day countries of Syria, Lebanon, Jordan and Palestine/Israel) would remain united under the state established by Amir Faisal, the third son of Sharif Husayn, as a first stage toward a larger Arab unity, a hope that was to wane in succeeding years, although it remained alive."

21 For example, the Arab Higher Committee (AHC), headed by Hajj Amin al-Husseini, asked in 1958 "for the joining of Filastin, within its natural borders as being the Southern part of Syria" to the United Arab Republic. Moshe Shemesh, *The Palestinian Entity 1959-1974: Arab Politics and the PLO* (London: Frank Cass, 1996), p. 28. Daoud Kuttab has also noted, "Because Palestinians looked to the Arab world for their salvation, Arab nationalism was still stronger than a more localized Palestinian form of nationalism." Kuttab explains that "this changed after 1967." See Daoud Kuttab, "Palestinian Nationalism," Common Ground News Service, September 23, 2009.

22 On November 2, 1917, the British Government issued a formal statement of policy, which came to be known as the Balfour Declaration. The Balfour Declaration states: "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object." Martin Gilbert, *Israel: A History* (London: Black Swan, 1998), p. 34.

23 William Foxwell Albright, *et al. Palestine: A Study of Jewish, Arab and British Policies*, Esco Foundation (New Haven: Yale University Press, 1947), Volume I, p. 143.

24 Nathan Feinberg, *Some Problems of the Palestine Mandate* (Tel Aviv: 1936), pp. 37-39.

25 See Peal Commission Report, 1937, http://unispal.un.org/pdfs/Cmd5479.pdf.

26 The Treaty of Sèvres was not ratified by the Ottoman Empire as a result of an internal national uprising. The succeeding state, the new Republic of Turkey, signed a new agreement, the Treaty of Lausanne, in 1923 re-confirming the surrender of all non-Turkish territories and the renunciation of Turkish rights with respect to them.

27 Hurewitz, p. 18. See also Allan Gerson, *Israel, the West Bank, and International Law* (London: Routledge, 1978), p. 43.

28 Hersch Lauterpacht, "The Mandate under International Law in the Covenant of the League of Nations," in E. Lauterpacht (ed.), *Hersch Lauterpacht: International Law, Collected Papers, Volume 3, The Law of Peace* (Cambridge: Cambridge University Press, 1977), p. 45.

29 Gerson, p. 43.

30 Lauterpacht, *op. cit.*

31 Benny Morris, *1948: The First Arab-Israeli War* (New Haven: Yale University Press, 2008), p. 10.

32 "Tentative Recommendations for President Wilson by the Intelligence Section of the American Delegation to the Peace Conference," January 21, 1919, in J.C. Hurewitz (ed.), *The Middle East and North Africa in World Politics: A Documentary Record, Vol. 2, British-French Supremacy, 1914-1945* (New Haven: Yale University Press, 1979), pp. 132-36.

33 Nathan Feinberg, "The Legal Status of the Jews at the Peace Conference," in Nathan Feinberg, *Some Problems of the Palestine Mandate*.

34 Albright, *et al.,* Volume One, p. 241.

35 *Ibid.,* p. 229.

36 *Ibid.* The historical record in fact shows Jewish resistance continued with major armed revolts in 115 against Trajan, 135 against Hadrian, 351 against Gallus, and 614, when the Jews joined the Persians to fight Roman rule. See S. Safarai, "The Era of the Mishnah and Talmud," in H.H. Ben-Sasson (ed.), *A History of the Jewish People* (Cambridge: Harvard University Press, 1976), pp. 330-363.

37 *The Mavrommatis Palestine Concessions (Greece v. Great Britain),* 1 P.C.I.J. Reports 293, 1934.

38 Felix Frankfurter, "The Palestine Situation Restated," *Foreign Affairs*, 418, 1930-1931.

39 Treaty of Peace with Turkey Signed at Lausanne, July 24, 1923.

40 See, for example, Submission of John Quigley to the Office of the Prosecutor, International Criminal Court, March 23, 2009.

41 Lauterpacht, p. 68.

42 Arnold D. McNair, "Mandates," *Cambridge Law Journal*, Vol. III, No. 2.

43 Quincy Wright, "Sovereignty of the Mandates," *American Journal of International Law*, Vol. 17, No. 4, October 1923, p. 698.

44 *Ibid.*, pp. 698-703.

45 McNair, "Mandates."

46 See UN General Assembly Resolution 3379, November 10, 1975, and UN General Assembly Resolution 46/86, December 16, 1991.

47 The PNC is the largest decision-making body within the PLO.

48 James L. Prince, "The International Legal Implications of the November 1988 Palestinian Declaration of Statehood," *Stanford Journal of International Law*, 681, 1988-1989, p. 704.

49 See Quigley, *Rutgers Law Record*, *op. cit.*

50 http://www.un.int/palestine/status.shtml.

51 "Resolution 181 Chronology: Statements in the Palestinian Media," *MEMRI Special Report* No. 3, May 13, 1999.

52 Document 15, Letter from Israel's Ambassador to the United Nations, Dore Gold, to UN Secretary-General Kofi Annan on the Palestinians' Intention to Proclaim a Palestinian State on 4 May 1999. April 19, 1999, State of Israel, Ministry of Foreign Affairs, *Yearbook of Official Documents* (Jerusalem, 2002), p. 78.

53 Dan Diker, "The Palestinians' Unilateral 'Kosovo Strategy': Implications for the PA and Israel," *Jerusalem Viewpoints* No. 575, January-February 2010, Jerusalem Center for Public Affairs.

54 *Ibid.*

55 International Crisis Group, "Tipping Point? Palestinians and the Search for a New Strategy," *Middle East Report,* No. 95, 26 April 2010, p. 18.

56 *Ibid.*

57 *Ibid.*

58 Crawford, p. 446.

59 Yael Ronen, "ICC Jurisdiction Over Acts Committed in the Gaza Strip: Article 12 (3) of the ICC Statute and Non-State Entities," *International Journal of Criminal Justice,* Vol. 7(1), 2009.

60 *Ibid.*

61 *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion, 2004 ICJ Reports 136, paragraph 139.

62 MEMRI, *op. cit.*

63 UN General Assembly, Security Council, A/53/879, S/1999/334, 25 March 1999, "Letter dated 25 March 1999 from the Permanent Observer of Palestine to the United Nations addressed to the Secretary-General."

64 *Ibid.*

65 Elihu Lauterpacht, "Jerusalem and the Holy Places," The Anglo-Israel Association, Pamphlet No. 19 (1968), p. 21.

66 Stephen Schwebel, "What Weight to Conquest," 64 *American Journal of International Law*, 1970, p. 346.

67 Lauterpacht, "Jerusalem and the Holy Places," p. 21.

68 Israel withdrew from all of the Gaza Strip in September 2005 as part of the Disengagement Plan.

69 Schwebel, "What Weight to Conquest," p. 346.

70 Lauterpacht, "Jerusalem and the Holy Places," p. 52.

71 George P. Fletcher, "No Jurisdictional Basis for an Investigation Pursuant to the Palestinian Declaration," Human Rights International Criminal Law Online Forum, UCLA.

72 Tal Becker, p. 17.

73 Fletcher, *op. cit.*

74 *Ibid.*

75 Quoted by Crawford, p. 445.

Decleration Recognizing the Jurisdiction of the Criminal Court

بسم الله الرحمن الرحيم

Palestinian National Authority *Ministry of Justice* *Office of Minister*		السلطة الوطنية الفلسطينية وزارة العدل مكتب الوزير

Date: ---------- ---------- :التاريخ

Ref: ---------- ---------- :الرقم

Declaration recognizing the Jurisdiction of the International Criminal Court

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.

This declaration, made for an indeterminate duration, will enter into force upon its signature.

Material supplementary to and supporting this declaration will be provided shortly in a separate communication.

Signed in The Hague, the Netherlands, 21 January 2009

For the Government of Palestine

Minister of Justice AL'i Khashan

Ramallah ,Almasyon
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About the Jerusalem Center for Public Affairs

The Jerusalem Center for Public Affairs is a leading independent research institute specializing in public diplomacy and foreign policy. Founded in 1976, the Center has produced hundreds of studies and initiatives by leading experts on a wide range of strategic topics. Dr. Dore Gold, Israel's former ambassador to the UN, has headed the Jerusalem Center since 2000.

Jerusalem Center Websites

www.jcpa.org (English)

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President - **Dr. Dore Gold**

Director General - **Chaya Herskovic**

Chairman of the Board - **Dr. Manfred Gerstenfeld**

Jerusalem Center Programs

Iran and the New Threats to the West – Preparation of a legal document jointly with leading Israeli and international scholars and public personalities on the initiation of legal proceedings against Iranian President Mahmoud Ahmadinejad for incitement to commit genocide and participate in genocide. This program also features major policy studies by security and academic experts on Iran's use of terror proxies and allies in the regime's war against the West and its race for regional supremacy.

Defensible Borders Initiative – A major security and public diplomacy initiative that analyzes current terror threats and Israel's corresponding territorial requirements, particularly in the strategically vital West Bank, that Israel must maintain to fulfill its existential security and defense needs. (www.defensibleborders.org)

Global Terrorism – Using previously unpublished documents, Jerusalem Center President Dore Gold explored the influence of Saudi Wahhabism on 9/11 in the *New York Times* bestseller *Hatred's Kingdom: How Saudi Arabia Supports the New Global Terrorism* (Regnery, 2003).

Institute for Contemporary Affairs (ICA) – A diplomacy program, founded in 2002 jointly with the Wechsler Family Foundation, that presents Israel's case on current issues through high-level briefings by government and military leaders to the foreign diplomatic corps and foreign press, as well as production and dissemination of information materials.

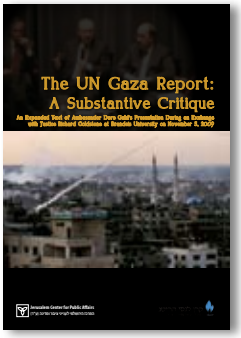
Global Law Forum – A ground-breaking program that undertakes studies and advances policy initiatives to protect Israel's legal rights in its conflict with the Palestinians, the Arab world, and radical Islam. (www.globallawforum.org)

Anti-Semitism After the Holocaust – Initiated and directed by Dr. Manfred Gerstenfeld, this program includes conferences, seminars, and publications discussing restitution, the academic boycott, Holocaust denial, and anti-Semitism in the Arab world, European countries, and the post-Soviet states. (www.jewishaffairs.org)

Jerusalem in International Diplomacy – Dr. Dore Gold analyzes the legal and historic rights of Israel in Jerusalem and exposes the dangers of compromise that will unleash a new *jihadist* momentum in his book *The Fight for Jerusalem: Radical Islam, the West, and the Future of the Holy City* (Regnery, 2007). Justus Reid Weiner looks at *Illegal Construction in Jerusalem: A Variation on an Alarming Global Phenomenon* (2003). Researcher Nadav Shragai assesses the imminent security threats to Israel's capital resulting from its potential division, and offers alternative strategies for managing Jerusalem's demographic challenge in his monograph *Jerusalem*: *The Dangers of Division* (2008).

New Models for Economic Growth in Israel – This comprehensive, 10-year project has studied the application and impact of privatization policy and other financial innovations in Israel. Sponsored by the Milken Institute, the project includes nine published volumes in Hebrew and English.

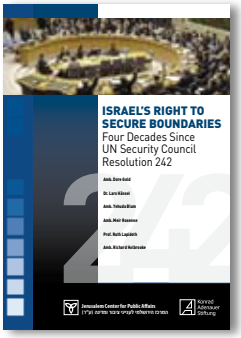
Related Jerusalem Center Publications



The UN Gaza Report: A Substantive Critique

An Expanded Text of Ambassador Dore Gold's Presentation During an Exchange with Justice Richard Goldstone at Brandeis University on November 5, 2009

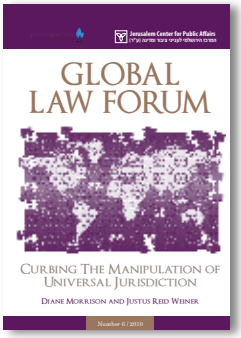
The language used by the UN Gaza Report, with its allegations about "deliberate" Israeli attacks on civilians, reaches its conclusions on the basis of Palestinians interviewed in Gaza who argued that when civilians were killed, no Palestinian combat operations were underway. Yet the report contradicts itself by stating that the very same Palestinians who were interviewed were reluctant to report Palestinian military actions against the Israel Defense Forces. In its conclusions the report specifically condemns Israel, yet does not specifically blame Hamas for the war it imposed.



Israel's Right to Secure Boundaries: Four Decades Since UN Security Council Resolution 242

Amb. Dore Gold, Amb. Meir Rosenne, Prof. Ruth Lapidoth, Amb. Yehuda Blum, Amb. Richard Holbrooke

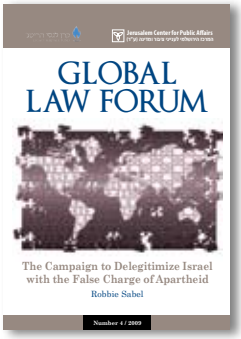
UN Security Council Resolution 242 of November 1967 is the most important UN resolution for peacemaking in the Arab-Israel conflict. The resolution never established the extent of Israel's required withdrawal from territories captured during the Six-Day War in exchange for peace with its Arab neighbors. The borders of any Israeli withdrawal were meant to reflect its right to live within "secure and recognized" boundaries.



Curbing the Manipulation of Universal Jurisdiction

Diane Morrison and Justus Reid Weiner

The principle of universal jurisdiction continues to be an essential tool for achieving justice for international crimes. Unfortunately, this principle is now being abused by highly-politicized NGOs that petition British courts to arrest Israeli officers using baseless charges, instead of directing attention to the perpetrators of genocide and ethnic cleansing for which universal jurisdiction was originally conceived.



The Campaign to Delegitimize Israel with the False Charge of Apartheid

Robbie Sabel

Israel is a multi-racial society, and the Arab minority actively participates in the political process. There are Arab parliamentarians, Arab judges including on the Supreme Court, Arab cabinet ministers, Arab heads of hospital departments, Arab university professors, Arab diplomats in the Foreign Service, and very senior Arab police and army officers. Incitement to racism in Israel is a criminal offence, as is discrimination on the basis of race or religion. The comparison of Israel to South Africa under white supremist rule has been utterly rejected by those with intimate understanding of the old Apartheid system.