



7 April 2016

VIA OVERNIGHT DELIVERY SERVICE

[REDACTED]

RE: Proposed Security Council Resolution to Set Time and Territorial Parameters for Resolving the Palestinian-Israeli Conflict

Your Excellency:

By way of introduction, the European Centre for Law and Justice ("ECLJ") is an international, Non-Governmental Organisation ("NGO"), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the rule of law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007¹.

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It has been reported that the United States Government is considering submitting a proposal to the UN Security Council which would include a time limit for resolving all outstanding issues between Palestinians and Israelis and which would recognise the 1949 armistice lines as the presumed borders (with some limited adjustments and land swaps) of a future Arab Palestinian state². Although the attempt by the U.S. Government to encourage the UN Security Council to adopt a resolution mandating negotiations between Palestinian and Israeli authorities is well-intentioned, it is nonetheless misguided.

The Palestinian-Israeli conflict cannot be resolved by setting artificial time and territorial requirements deemed reasonable by non-parties to the conflict. It must be resolved by good-faith negotiations without preconditions between the affected parties. Both sides must be prepared to make painful compromises to achieve peace between

¹NGO Branch, U.N. Dep't of Econ. & Soc. Affairs, Consultative Status for the European Centre for Law and Justice (2007). <http://esango.un.org/civilsociety/> (accessed by searching "European Centre for Law and Justice" in the iCSO Database).

²Carol E. Lee, *White House Working on Renewed Mideast Peace Push*, WALL ST. J. (7 Mar. 2016). <http://www.wsj.com/articles/white-house-working-on-renewed-mideast-peace-push-1457389793>.



them. Unless *both* sides are prepared to entertain such compromises, no resolution is possible. In the recent past, Israel has been prepared on at least two occasions—to wit, during the Barak and Olmert premierships³—to make such painful compromises, whereas the Palestinians rejected Israel’s good-faith efforts and assumed an all-or-nothing position.

The conflict involving Palestinians and Israelis is both complex and fraught with myths and half-truths. This letter will attempt to shed light on the facts underlying the ongoing conflict and explain why outside pressure to resolve the conflict is more apt to prolong the conflict than it is to resolve it.

I. ARAB PALESTINIANS HAVE HAD MULTIPLE OPPORTUNITIES TO ESTABLISH AN ARAB PALESTINIAN STATE & THEIR FAILURE TO ACHIEVE STATEHOOD WAS NOT BECAUSE OF ISRAEL.

Following the British withdrawal from Palestine in 1948, the UN partition plan⁴ had designated specified territory within the Mandate for Palestine for an Arab state, but the Arabs rejected that plan. Following that rejection, Palestinian Arabs have never had the opportunity to exercise full sovereign control over any Palestinian territory.⁵ When *Jewish* Palestinians proclaimed the existence of the State of Israel, they were attacked the very next day by Arab Palestinians and the armies of neighbouring Arab states, thereby triggering the 1948-1949 Arab-Israeli war.

Once the 1948-1949 Arab-Israeli war was concluded, Arab states in control of Palestinian territory at the time of signing the various armistice agreements with Israel declined to relinquish to *Palestinian* Arab authorities control over Palestinian territory remaining in Arab hands.⁶ Thus, it was not Israel that kept Arab Palestinians from establishing a state in either 1948 or 1949; it was the neighbouring Arab states. The Gaza Strip remained under Egyptian occupation, and the West Bank remained occupied by Jordanian forces. In fact, Jordan even went so far as to claim Jordanian sovereignty over the entire West Bank.⁷ Hence, Arab Palestinians were precluded by their putative Arab allies, not by Israel, from exercising sovereignty over any portion of Palestine from 1948 to the 1967 Arab-Israeli War.

³See, e.g., Ari Shavit, *Barak to Haaretz: Israel Ready to Cede Parts of Jerusalem in Peace Deal*, HAARETZ (1 Sept. 2010), <http://www.haaretz.com/barak-to-haaretz-israel-ready-to-cede-parts-of-jerusalem-in-peace-deal-1.311356> (Israel was prepared to offer parts of Jerusalem to Palestine); Avi Isacharoff, *Revealed: Olmert's 2008 Peace Offer to Palestinians*, JERUSALEM POST (24 May 2013), <http://www.jpost.com/Diplomacy-and-Politics/Details-of-Olmerts-peace-offer-to-Palestinians-exposed-314261> (Israel agreed to “forgo sovereignty of the Temple Mount in Jerusalem, Judaism’s holiest site, and proposed that . . . the area containing the religious sites in Jerusalem would be managed by a special committee consisting of representatives from five nations: Saudi Arabia, Jordan, Palestine, the United States and Israel.”).

⁴G.A. Res. 181(II), U.N. Doc. A/RES/181 (29 Nov. 1947).

⁵Even noted Palestinian supporter, Professor Avi Shlaim, admitted as much. Don Attapatu, *Interview With Middle East Scholar Avi Shlaim: America, Israel and the Middle East*, THE NATION (16 June 2004), <http://www.thenation.com/article/interview-middle-east-scholar-avi-shlaim/> (“[T]he Palestinians have never exercised sovereignty over the land in which they lived . . .”).

⁶YEZID SAYIGH, *ARMED STRUGGLE AND THE SEARCH FOR STATE: THE PALESTINIAN NATIONAL MOVEMENT, 1949–1993* 35 (1999).

⁷*Id.* at 16. Jordan’s claim was rejected by most states, and Jordan has since renounced all claims to the West Bank.



As a result of the 1967 Arab-Israeli War, both the West Bank and the Gaza Strip came under Israeli control, once again *without any intervening period of Arab Palestinian rule whatsoever*. Hence, Israel never took over territory over which Palestinian Arabs had ever exercised sovereignty. Rather, Israel seized territory which had been under continuous military occupation by neighbouring Arab states since the departure of the British in 1948. Because no independent (Arab or Jewish) *Palestinian state* had, prior to 1967, ever existed in the West Bank or the Gaza Strip, the last people in whom sovereignty over those territories resided included both Arab and Jewish Palestinians (the latter now known as Israelis). As such, in 1967, Israel captured territory to which it has an arguable claim of sovereignty as the only existing, sovereign successor state to the British Mandate⁸ (especially since the Arab Palestinians had explicitly rejected accepting sovereignty in 1947 or 1948 over any part of the territory of the Mandate as proposed by the UN partition plan). In that light, it is questionable whether Israel can legitimately be viewed as an occupying power.⁹ That position was also made clear to the international community by the Israeli Government when Israel announced its intention to implement Fourth Geneva Convention humanitarian measures, *despite having no legal duty to do so*¹⁰, since a State cannot “occupy” territory (in the sense of the Fourth Geneva Convention) over which it has colourable “sovereign” claims and which had no legitimate prior sovereign¹¹.

⁸See, e.g., Avinoam Sharon, *Keeping Occupied: The Evolving Law of Occupation*, 1 REGENT J. L. & PUB. POL’Y 145, 155 (2009) (noting that “saying that the territories were occupied by Israel ‘could conceivably be interpreted as a renunciation of sovereign rights by Israel to the areas [since] one does not ‘occupy’ one’s own territory’”). An additional Israeli concern is that saying that the territories were occupied by Israel “could be construed as acceptance of the 1949 ceasefire lines as international borders.” *Id.* at 155. This latter point refutes the assertion that there is no other claimant to “Palestinian territory,” since Israel will doubtless seek to negotiate “defensible boundaries” (meaning boundary adjustments that will modify the 1949 ceasefire line in Israel’s favour) pursuant to UN Security Council Resolution 242.

⁹For an interesting, in-depth discussion of this topic, see generally Sharon, *supra* note 8.

¹⁰Sharon, *supra* note 8, at 153–54. Sharon continues:

Upon assumption of control of the territories, Israel had to make a decision as to the applicable law. There were several reasons for Israel not to wish to view the captured territories as occupied, and therefore subject to the provisions of the Fourth Geneva Convention. From a legal standpoint, Israel took the view that in the absence of a prior sovereign, Israel’s control of the West Bank and Gaza did not fall within the definition of “occupation” inasmuch as a fundamental premise of the law of occupation—a prior legitimate sovereign—was lacking.

Israel’s argument concerning *de jure* application of the law of occupation did not, however, deter it from declaring its intention to act in accordance with customary international law and the humanitarian provisions of the Fourth Geneva Convention This intention seems consistent with the view of [Yehuda Z.] Blum:

The conclusion to be drawn from all this is that whenever, for one reason or another, there is no concurrence of a normal “legitimate sovereign” with that of a “belligerent occupant” of the territory, only that part of the law of occupation applies which is intended to safeguard the humanitarian rights of the population.

Id. (quoting Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 IS. L. REV. 279, 294 (1968)).

¹¹The last internationally recognised sovereign over the territory of the Mandate for Palestine had been the Ottoman sultan, but Turkey, the successor state to the Ottoman Empire, renounced all claims to territories not part of the modern-day State of Turkey. The British were appointed as the Mandatory power over the Mandate for Palestine, but that appointment did not convey sovereignty to the British. Instead, Britain served as Trustee for the people of Palestine, which included both Jews and Arabs in Palestine. When the 1948-1949 Arab-Israeli war ended, Israel (made up primarily of Jewish Palestinians) ruled portions of Palestine, and the rest remained under belligerent military occupation of foreign Arab armies, which could assert no legitimate sovereign claims. Hence, when Israel captured the West Bank and Gaza Strip in 1967,



Although Israel understands and agrees that an Arab Palestinian state must be established to fulfill the national aspirations of Arab Palestinians, the establishment of such an Arab state must result from bilateral negotiations between the parties. To that end, Israelis and Palestinians have periodically engaged in negotiations to resolve the outstanding issues between them, one of which is the eventual establishment of a viable, independent Arab Palestinian state. The negotiations process has led to two real opportunities for Arab Palestinian statehood that were rejected by the Palestinians—to wit, negotiations at the end of the Clinton Administration where Prime Minister Ehud Barak was willing to make significant compromises for peace¹² as well as during the Premiership of Ehud Olmert, who was also willing to make significant compromises¹³.

The major problem appears to be the Palestinian negotiation tactic, i.e., that its negotiators reject Israeli concessions, provide no alternative proposals of their own, and then wait for additional Israeli concessions. Hence, in reality, the Israelis are left to negotiate with themselves. This exposes the fundamental lack of good faith on the Palestinians' part. Both parties need to be prepared to make painful compromises. The Israelis cannot be expected to continually yield in the face of Palestinian intransigence. Until the Palestinians are prepared to negotiate in good faith, negotiations will go nowhere and achieve nothing, despite the best of intentions on the part of the U.S. Government and others on the Security Council.

II. IT IS NOT CLEAR WHETHER CURRENT PALESTINIAN LEADERS HAVE AUTHORITY TO ENGAGE IN GOOD-FAITH NEGOTIATIONS WITH ISRAEL.

The current Palestinian political situation is confused at best. Fatah theoretically leads the government most widely recognised by other states, whereas Hamas firmly controls the Gaza Strip¹⁴. Neither faction has submitted itself to recent elections to ratify whether either faction enjoys the confidence of the Palestinian people to negotiate on their behalf¹⁵. Unless negotiations with Israel are considered by the Palestinian people to be legitimate, they are a waste of time by all concerned.

Further, since Fatah and Hamas are bitter rivals and since each faction dominates different portions of the territories that will most probably form a future Palestinian state, it remains unclear which faction can speak authoritatively for the Palestinian people as a

it could assert a sovereign claim to such territory. Admittedly, so could Arab Palestinians. Since both could assert colourable claims, negotiations are required to resolve who gets what territory from the West Bank and Gaza Strip.

¹²Ari Shavit, *Barak to Haaretz: Israel Ready to Cede Parts of Jerusalem in Peace Deal*, HAARETZ (1 Sept. 2010), <http://www.haaretz.com/barak-to-haaretz-israel-ready-to-cede-parts-of-jerusalem-in-peace-deal-1.311356>.

¹³Avi Isacharoff, *Revealed: Olmert's 2008 Peace Offer to Palestinians*, JERUSALEM POST (24 May 2013), <http://www.jpost.com/Diplomacy-and-Politics/Details-of-Olmerts-peace-offer-to-Palestinians-exposed-314261>.

¹⁴See, e.g., Amira Hass, *How Hamas Holds onto Power*, HAARETZ, <http://www.haaretz.com/st/c/prod/eng/2015/year-to-gaza-war/hamas-in-gaza/> (last visited 5 Apr. 2016); Shadi Bushra, *Fatah-Hamas Agreement Gives Unity Government Control over Gaza*, REUTERS (25 Sept. 2014), <http://www.reuters.com/article/us-mideast-gaza-cairo-talks-idUSKCN0HK1J20140925>.

¹⁵See *Palestinian Elections on Hold Until Further Notice*, AL-MONITOR (2 June 2014), <http://www.al-monitor.com/pulse/originals/2014/10/palestine-presidential-parliamentary-elections-on-hold.html#>; Khaled Abu Toameh, *Who is Blocking Palestinian Elections?*, GATESTONE INSTITUTE (4 June 2015), <http://www.gatestoneinstitute.org/5883/blocking-palestinian-elections>.



whole. The Israelis and others have the right to know who has authority to make decisions for the Palestinian people before negotiations recommence. That is currently not the case, and the West's *hope* that Fatah will somehow be able to pull off successful negotiations is not sufficient. Hope is not a plan.

III. FACTUAL & LEGAL PREMISES OF THE PROPOSED NEGOTIATIONS ARE QUESTIONABLE.

A. The So-Called Pre-1967 Lines Were in Fact the 1949 Armistice Lines & Not Intended to Be Internationally-Recognised Borders.

Historically, when Great Britain informed the UN in 1947 that it was going to withdraw its forces from Palestine in 1948, the UN General Assembly decided upon a plan to partition Palestine into an Arab state, a Jewish state, and an area under international control¹⁶. Jewish Palestinians accepted the plan, whereas Arab Palestinians rejected it. Following the British withdrawal in 1948, the newly proclaimed Jewish Palestinian State, called Israel, was immediately attacked by its Arab neighbours. The war continued into 1949, when a series of armistice agreements was signed¹⁷.

The resulting 1949 armistice lines, which delimit the so-called West Bank and Gaza Strip (often referred to as the pre-'67 lines), have never been regarded as international boundaries. In fact, *it was at Arab insistence that the 1949 lines be designated as mere armistice lines*, not international boundaries, because the Arab world did not want to confer any form of international legitimacy on the newly proclaimed Jewish State of Israel. From 1949 until 1967, the portions of Palestine not under the control of Israel remained under military rule by Jordanian and Egyptian armed forces, respectively. No Arab Palestinian state was ever created in the West Bank or Gaza Strip between the 1948-49 and the 1967 Arab-Israeli wars, and no Arab Palestinian state has been created in any territory of Palestine since 1967, although Israeli leaders have expressed support for the position that an Arab Palestinian state may someday be created in parts of the West Bank and Gaza Strip pursuant to direct negotiations between Israeli and Palestinian authorities.

Moreover, as a result of the 1967 Arab-Israeli war, Egyptian forces withdrew from the Gaza Strip, Jordanian forces withdrew from the West Bank, and Israel acquired control of both territories¹⁸. Following the 1967 war, the UN Security Council adopted Resolution 242¹⁹. Note, **first**, that the language in that Resolution requires that Israel

¹⁶G.A. Res. 181(II), *supra* note 4.

¹⁷General Armistice Agreement art. 5, para. 1. Isr.-Syria, 20 July 1949, 42 U.N.T.S. 327 (noting that the armistice line does not enshrine an "ultimate territorial arrangement[.]"); General Armistice Agreement art. 6, para. 9, Isr.-Jordan, 3 Apr. 1949, 42 U.N.T.S. 303 (noting that the armistice line is "without prejudice to future territorial settlements or boundary lines"); General Armistice Agreement art. 4, para. 2, Isr.-Leb., 23 March 1949, 42 U.N.T.S. 287 (noting that the "basic purpose" of the armistice line is to "delineate the line beyond which the armed forces of the respective Parties shall not move"); General Armistice Agreement art. 5, para. 2, Isr.-Egypt, 24 Feb. 1949, 42 U.N.T.S. 251 (noting that the armistice line is "not to be construed . . . as a political or territorial boundary" and that the line is "delineated without prejudice" to the "ultimate settlement of the Palestine question").

¹⁸Israel also acquired control over the Sinai Peninsula and the Golan Heights. Neither the Sinai Peninsula nor the Golan Heights is relevant to this discussion.

¹⁹S.C. Res. 242, U.N. Doc. S/RES/242 (22 Nov. 1967).



withdraw “from territories”²⁰ it captured—not from “the” territories or “all the” territories it captured. We know from historical record that these were intentional omissions from the language of the Resolution. Lord Caradon, then Permanent Representative of the United Kingdom to the United Nations and chief drafter of Resolution 242, aptly noted the following:

Much play has been made of the fact that we didn’t say “the” territories or “all the” territories. But that was deliberate. I myself knew very well the 1967 boundaries and if we had put in the “the” or “all the” that could only have meant that we wished to see the 1967 boundaries perpetuated in the form of a permanent frontier. This I was certainly not prepared to recommend²¹.

Note also in that regard that Israel had also captured the Sinai Peninsula from Egypt and the Golan Heights from Syria in the 1967 war. Those areas were also part of the “territories” to which Resolution 242 referred, and Israel has, in fact, returned the entire Sinai Peninsula to Egypt pursuant to the peace treaty between the two countries²², thereby demonstrating Israel’s willingness to comply with Resolution 242 when Arab nations are serious about making peace.

Note, **second**, that the Resolution requires “secure . . . boundaries”²³—something that did not exist prior to 1967 as evidenced by the persistent attacks mounted against Israel from Arab-controlled territory and would not exist today if the status quo ante were reinstated (i.e., the 1949 armistice lines were to serve as actual borders).

Note, **third**, that the Resolution calls for the termination of all “states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area . . .”²⁴. None of that has occurred following the 1967 war, except with Egypt in 1979 and Jordan in 1994. Once again, by returning the Sinai Peninsula to Egypt, Israel has demonstrated its willingness to withdraw “from territories” it captured in 1967 via peace negotiations with its Arab neighbours.

To date, no internationally recognised, defensible borders have been negotiated between Israel and a future Arab Palestinian state to be carved out of remaining territory of the Mandate for Palestine.

B. The Existence of Jewish Settlements in the West Bank Does Not Constitute Occupation of Palestinian Territory.

The issue of Israeli settlements in the West Bank is hardly new—in fact, it is over forty years old. Further, declaring that Israeli settlements are in “occupied Palestinian territory” (commonly abbreviated as “OPT”) is both factually inaccurate and legally

²⁰*Id.* at 1(i). Note that the territories Israel captured included the Sinai Peninsula and the Golan Heights in addition to the West Bank and the Gaza Strip.

²¹Yoram Meital, *EGYPT’S STRUGGLE FOR PEACE: CONTINUITY AND CHANGE, 1967–1977* 49 (1997).

²²Peace Treaty Between Israel and Egypt, *Isr.-Egypt*, Mar. 26, 1979, 32 U.S.T. 2146.

²³S.C. Res. 242, *supra* note 19, at 1(ii).

²⁴*Id.* Note also that the language does not refer at all to the Palestinians, since there was no Palestinian “state” at the time, and no Palestinian “state” currently exists.

questionable. The main argument repeatedly raised against Israeli “settlements” is that they violate Article 49(6) of the Fourth Geneva Convention of 1949, which states: “The occupying power shall not deport or transfer parts of its own civilian population into territories it occupies”²⁵. Yet, the cited provision presupposes the “occupation” of the territory of a High Contracting Party (a state party to the Convention)²⁶, whereas the territory in question (i.e., the West Bank²⁷) has not belonged to any state since the Ottoman Empire, whose successor state renounced all territorial claims to Palestine. In the absence of a prior sovereign, the Fourth Convention does not apply to the Israeli presence in the West Bank²⁸.

Moreover, Israel has legitimate claims to West Bank territory and, thus, is not and cannot be considered an occupier. The most accurate term to describe the status of the West Bank is “disputed territory”—a position Israel has continuously asserted since 1967. The following brief historical analysis buttresses the Israeli position further.

First, one must note that Article 6 of the British Mandate permitted Jewish settlement throughout the territory of the Palestinian Mandate²⁹, territory that encompassed the current State of Israel, a slice of the Golan Heights (ceded by Great Britain to the French Mandate of Syria in 1923)³⁰, the West Bank, and the Gaza Strip³¹. The State of Israel was established in 1948 on part of the territory of the Mandate, but, with respect to the remainder of the territory, i.e., the West Bank and Gaza Strip, nothing has extinguished the terms of the Mandate for Palestine; its terms are still valid under international law³² and will remain so until a binding final status arrangement comes into

²⁵Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49, para. 6. 12 Aug. 1949. 6 U.S.T. 3516. 75 U.N.T.S. 287. It is also questionable whether Article 49 applies when a government takes no action to move its population, but the population moves itself based on individual choices. The words “deport” and “transfer” imply coercive governmental action, not passive acquiescence or private choices.

²⁶See *id.* art. 2.

²⁷Note that all Israeli armed forces and settlers were removed from the Gaza Strip in 2005. *Settlers Protest at Gaza Pullout*, BBC (15 Aug. 2005), http://news.bbc.co.uk/2/hi/middle_east/4150028.stm. Hence, the issue of Israeli settlements in the Gaza Strip is now moot.

²⁸It should be noted, however, that as a matter of domestic legal policy, Israel applies the humanitarian provisions of the Fourth Geneva Convention *de facto* despite the fact that they do not apply *de jure*.

²⁹Mandate for Palestine, League of Nations Doc. C.529.M.314.1922.VI (1922). The text of Article 6 reads as follows: “The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes” (emphasis added).

³⁰Martin Gilbert, *THE ROUTLEDGE ATLAS OF THE ARAB-ISRAELI CONFLICT* 8 (9th ed. 2008).

³¹Trans-Jordan was separated from the Mandate and designated by the British as an exclusively Arab homeland in 1921.

³²In issuing several decisions and advisory opinions on Namibia, the International Court of Justice declared that a League of Nations Mandate “is a binding international instrument like a Treaty, which continues as a fiduciary obligation of the international community until its terms are fulfilled.” Eugene V. Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 *Yale Stud. World Pub. Order* 147, 157 (1979). Specifically, the Court opined that

[T]he League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question where the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfillment of a sacred trust cannot be presumed to lapse before the achievement of its

effect. As such, the Jewish population of the Palestinian Mandate (present-day Israelis) have at least as much claim to the remaining unallocated territories as do its Arab residents. Hence, labeling Israel's presence in the West Bank as "occupying" Palestinian (by which is meant *Arab*) territory is, at best, questionable and, at worst, simply untrue.

Once Israel acquired political control over the West Bank, it made a policy decision to exercise authority *in accordance with* the humanitarian provisions of the Fourth Geneva Convention, *not pursuant to* the Fourth Convention per se, since, under the circumstances, it had no obligation to apply the Fourth Convention at all³³. Given Resolution 242, which foresaw border (and, thus, territorial) adjustments and legitimate Israeli claims to (at least some) portions of the captured territories, Israel's decision to apply only the humanitarian portions of the Fourth Convention was both logical and reasonable at the time and remains so today.

Following the 1973 Arab-Israeli war, the UN Security Council adopted Resolution 338, which essentially reiterates the call to implement the terms of Resolution 242³⁴. Since Resolutions 242 and 338 anticipate negotiated territorial adjustments, it is simply incorrect to conclude that Israel is an occupying power. In short, Israel has an outstanding, valid, internationally-sanctioned claim to (as yet undefined) portions of the so-called "occupied territories". Once the contours of a future Arab Palestinian state are negotiated directly between Israelis and Palestinians, Israeli control and administration of land that ultimately forms the future Palestinian state will cease, and the issue of settlements will be moot³⁵.

In sum, the following must be reiterated. First, the Mandate for Palestine was, and remains, a valid part of international law. Second, the Mandate expressly permitted Jews to settle throughout Palestine. Third, the Jews continue to possess their right to settle throughout Palestine. Hence, until a final agreement is negotiated between Israelis and Palestinians, the Jewish people have the right to settle throughout the territory of the Palestinian Mandate, including the West Bank and East Jerusalem. To state otherwise is a misrepresentation of international law.

purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276. Advisory Opinion, 1971 I.C.J. 16 ¶ 55 (21 June 1971). Similarly, "the Palestine Mandate survived the termination of the Mandate administration as a trust under Article 80" of the U.N. Charter. Eugene V. Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 *Yale Stud. World Pub. Order* 147, 158-59 (1979). Article 80 states that "nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties." U.N. Charter art. 80.

³³See *supra* note 10.

³⁴S.C. Res. 338, ¶ 2, U.N. Doc. S/RES/338 (22 Oct. 1973).

³⁵Further, Israel has demonstrated that it is prepared to remove settlements when required as evidenced by the removal of Israeli settlements from the Sinai pursuant to the peace treaty with Egypt.

C. The Only Sure Way to Resolve the Outstanding Differences Between Israelis & Palestinians is Via Good Faith Negotiations Without Preconditions.

Good faith negotiations require that both parties to the negotiations be prepared to make the often painful and unpleasant compromises necessary to reach the goal of achieving peace between them. Neither side will get everything that it wants, and both sides must recognise that they will have to make often painful compromises to achieve peace. Israeli officials have been far more forthcoming in the past than have Palestinian negotiators³⁶. Following the negotiations sponsored by President Clinton, for example, Mahmoud Abbas (a.k.a. Abu Mazen), then one of the key Palestinian negotiators, stated: "We made clear to the American and Israeli sides several times that the Palestinian side is unable to make concessions on anything"³⁷. Accordingly, such meetings could not legitimately be considered negotiations at all, since the Palestinian side was unprepared to entertain making any compromises.

Meaningful negotiations must also proceed without preconditions, and no preconditions means what it says. Saying that Palestinian officials will enter into negotiations *only if* Israeli authorities agree in advance that no more settlements will be established in the West Bank is a precondition, just as saying that Israeli officials will enter into negotiations *only if* Palestinian authorities agree in advance to recognise Israel to be a Jewish state is a precondition. Other examples of non-helpful preconditions are the requirement to recognise the 1949 armistice lines as the presumptive default point for determining the future borders between Israel and a future Palestinian state or the requirement that Israel's annexation of east Jerusalem must be disavowed before negotiations may begin or the requirement that Palestinians must disavow the right of return before negotiations may begin.

If negotiations are to proceed *without preconditions*, then each side must recognise and accept that it may not impose preconditions on the other. Preconditions are, in effect, illegitimate attempts by one side to achieve a desired goal *prior to* entering into negotiations with the other side. Preconditions poison the well and destroy the likelihood of success by causing one party to doubt the other party's sincerity to resolve remaining contentious issues.

D. UN Agencies Have No Authority to Create States, Unilaterally Delineate International Borders or Designate Capitals.

On 29 November 2012, the UN General Assembly overwhelmingly adopted the Palestinian Authority's status change resolution which changed the designation of "Palestine" at the UN from "entity" with observer status to "non-member state" with observer status³⁸. Despite Palestinian euphoria at the time, all that the General Assembly resolution accomplished was to change how "Palestine" was to be treated at the UN. Nothing at all changed on the ground vis-à-vis Palestinian sovereignty or statehood.

³⁶See *supra* note 3.

³⁷Abu Mazen, *Had Camp David Convened Again, We Would Take the Same Positions: Part I*, Middle East Media Research Institute, Special Dispatch Series No. 249, 1 Aug. 2001 (quoting from an interview published in the Palestinian daily *Al-Ayyam* for July 28, 2001).

³⁸G.A. Res. 67/19, U.N. Doc. A/RES/67/19 (29 Nov. 2012).



The resolution was so limited because: **First**, no UN body has authority to recognise or create a “state”³⁹; **Second**, no UN body has authority to designate the borders, the territorial extent, or the capital of any state, which the resolution of 29 November 2012 clearly attempted to do⁴⁰; and **Third**, no UN body has authority to supersede the terms of existing treaties or any other international documents, which the resolution, if valid outside the UN, would do⁴¹.

Accordingly, it is doubtful that one can convincingly argue that a state of Palestine exists in any meaningful way. Nowhere does a political entity called “Palestine” exercise sovereign control over one square meter of territory. Nowhere does a political entity called “Palestine” issue its own currency. Nowhere can Palestinian officials definitively identify when a “state” of Palestine came into existence. To date, Palestinian statehood remains an aspiration that must await the resolution of the outstanding issues that exist between the Israeli and Palestinian peoples.

Further, in light of the foregoing, the Security Council lacks authority to force the parties to “resolve their differences *or else*”. Lasting peace will only occur when both sides are ready to compromise. Until both sides are willing to do that, negotiations are futile. Both sides must have the political will to compromise. Until that exists on both sides, there can and will be no lasting peace.

CONCLUSION

In light of the foregoing, we urge the Council to refrain from adopting a resolution that cannot and will not lead to resolving the issues between Israelis and Palestinians. Adopting a resolution that cannot achieve its stated goal is a futile gesture on the Council’s part and would demonstrate impotence rather than strength.

Respectfully submitted,



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³⁹The UN does not officially recognize states or declare statehood; such actions are the responsibility of individual governments:

The recognition of a new State or Government is an act that *only other States and Governments may grant or withhold*. It generally implies readiness to assume diplomatic relations. The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government.

Member States: About UN Membership, U.N., <http://www.un.org/en/members/about.shtml> (last visited 6 Apr. 2016) (emphasis added). Accordingly, the adoption by the General Assembly of the PA’s status change resolution could only affect how the PA is treated within the UN. Nothing whatsoever changed on the ground.

⁴⁰G.A. Res. 67/19, *supra* note 38, at 3–4 (affirming, for example, pre-1967 borders).

⁴¹QUARTET ON THE MIDDLE EAST, A PERFORMANCE-BASED ROADMAP TO A PERMANENT TWO-STATE SOLUTION TO THE ISRAELI-PALESTINIAN CONFLICT (2003); Trilateral Statement on the Middle East Peace Summit at Camp David, 25 July 2000; Israeli Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 Sept. 1995, 36 I.L.M. 551 (1997); Oslo Accords, Declaration of Principles on Interim Self-Government, 13 Sept. 1993, 32 I.L.M. 1525 (1993).

