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## Stalled Between Seasons: The International Legal Status of Palestine during the Interim Period

### Keywords

Self-Determination, Israel, Constitutional Law, International Law: History

# Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period

OMAR M. DAJANI\*

*What god shall resurrect us  
in his flesh?  
After all, the iron cage is shrinking.  
The hangman will not wait  
though we wail from birth  
in the name of these happy ruins.  
What narrow yesterdays,  
what stale and shriveled years . .  
Even storms come begging  
when the sky matches the gray  
of the sand,  
leaving us stalled between seasons  
barricaded by what we see.<sup>†</sup>*

Palestine first appeared on the United Nations' agenda as a question.<sup>1</sup> To a great extent, it remains one. The Palestinian people have sought for much of this century to achieve national independence, striving for international recognition of their right to determine freely their political status in the territory they claim as their own. In the 1960s, the Palestine Liberation Organization (PLO) emerged as the international representative of the Palestinian people and, since then, has played a central role in defining and pursuing their national aspirations. In 1993, the PLO and the government of Israel agreed to a Dec-

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<sup>†</sup> Ali Ahmed Said (Adonis), *Elegy for the Time at Hand*, in *THE BLOOD OF ADONIS: SELECTED POEMS* (Samuel Hazo trans., 1971).

1. One of the United Nations General Assembly's first items of business was to create a Special Committee to examine "the question of Palestine." See G.A. Res. 104 (S-1), U.N. Doc. A/310, at 6-7 (1947). For a thoughtful analysis of the origins and implications of the phrase, see EDWARD SAID, *THE QUESTION OF PALESTINE* 3-9 (1979).

laration of Principles on Interim Self-Governing Arrangements (DOP)<sup>2</sup> that established a framework for limited Palestinian self-government during an interim period, pending resolution of the permanent status of the territory occupied by Israel since 1967. Pursuant to the DOP, they have concluded a series of agreements elaborating upon and implementing transitional arrangements. The parties, however, have yet to agree on either from what or to what they are making a transition. Upon taking power, the Likud Government of Israeli Prime Minister Benjamin Netanyahu issued guidelines declaring that it "would oppose the establishment of a Palestinian state or any foreign sovereignty west of the Jordan River."<sup>3</sup> In contrast, a member of the Palestinian leadership has asserted that "[t]here will be neither peace nor security without an independent Palestinian state . . . ."<sup>4</sup>

This disagreement regarding what Palestine will be prompts consideration of what Palestine is. In one of its few references to the future, the DOP states that elections for the Palestinian Council established to administer portions of the Occupied Palestinian Territories (OPT) during the interim period are to constitute "... a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements."<sup>5</sup> This declaration raises a number of important questions; foremost, what is the nature of "the legitimate rights of the Palestinian people"? Is the right to self-determination among them? If so, to what extent are the interim arrangements a "significant . . . preparatory step" toward their realization? And how do the interim arrangements — particularly the establishment of the Palestinian Interim Self-Governing Authority (PA) — affect the status of existing Palestinian public bodies in the international system?

In this essay, I undertake to answer these questions. I begin in Part One by reviewing the Palestinian claim to self-determination, outlining international legal treatment of the principle, and evaluating its applicability to the people and territory of Palestine. Next, in Part Two, I examine the Palestinian public bodies established in pursuit of Palestinian national rights by analyzing the structure and legal status of the PLO, the "State" of Palestine established by the Palestine National Council in 1988, and the PA created by the DOP and subsequent agreements. Finally, in Part Three, I try to define the legal status of Palestine as it is presently constituted, and to evaluate the extent to

2. Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, 32 I.L.M. 1528 (1993) [hereinafter Declaration of Principles].

3. *The New Government's Guidelines*, JERUSALEM POST, June 18, 1996, at 3.

4. Adviser to Yasser Arafat rejects Puerto Rico-like Palestine, AGENCE FRANCE-PRESSE, Nov. 9, 1996, available in 1996 WL 12177831.

5. Declaration of Principles, *supra* note 2, art. 3, para. 3. The same language appears in the Interim Agreement concluded by the parties in 1995. See also The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, art. 2, para. 2, (September 28, 1995) <<http://www.israel-mfa.gov.il/peace/interim.html>> [hereinafter Interim Agreement].

which it fulfills the legal requirements for the exercise of self-determination.

## I. THE PALESTINIAN CLAIM TO SELF-DETERMINATION

The principle of self-determination is the legal foundation on which the Palestinian people's struggle for national independence is based. In international practice, however, the principle of self-determination becomes a right only when invoked under certain circumstances, with the status of both the population and the territory concerned determining the viability of the exercise of self-determination. As will be seen, the Palestinians have attained broad international recognition of their right to self-determination in the OPT. Moreover, as I argue below, the territory they claim constitutes a viable self-determination unit.

### A. *The Principle of Self-Determination*

Self-determination has come to elicit broad recognition as an international human right.<sup>6</sup> The United Nations Charter states explicitly that "respect for the principle of equal rights and self-determination" should form the basis for relations among nations in the world system<sup>7</sup> and provides implicitly for its vindication in its provisions regarding the disposition of trusteeships and non-self-governing territories.<sup>8</sup> The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (hereinafter Declaration on Friendly Relations), moreover, characterizes the principle as a right, proclaiming that "by virtue of the principle of . . . self-determination of peoples all peoples have the right freely to determine, without external interference, their political status."<sup>9</sup> Similarly, both

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6. For a thorough analysis of the historical development of the principle of self-determination, See Goyora Binder, *The Kaplan Lecture on Human Rights: The Case for Self-Determination*, 29 STAN. J. INT'L L. 223, 223-48 (1993); John Collins, Note, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 138-143 (1980); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

7. U.N. CHARTER art. 1, para. 2; See also art. 55.

8. See M.C. Baussiouni, *"Self-Determination" and the Palestinians*, 65 AM. SOC'Y INT'L L. PROC. 31, 32 (1971) (arguing that Chapters XI, XII, and XIII of the U.N. Charter embody the principle of self-determination "in spirit"); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 356 (1979) (stating that Chapter XI of the U.N. Charter is an attempt to apply "somewhat similar ideas to those embodied in Article 22 of the [League of Nations] Covenant to a far broader category of territory.").

9. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970). The Resolution was passed unanimously by the General Assembly and "is generally viewed as an authoritative interpretation of the U.N. Charter." Binder, *supra* note 6, at 236. Binder argues:

The Declaration was the culmination of a lengthy effort to legitimate the U.N. Charter for its newer signatories in the developing world who took no part in its drafting. The Declaration was drafted by a committee appointed to develop an official interpretation on which the new as well as the old members could agree.

The internal evidence of the Declaration's authoritative character includes:

(a) the resolution's self-description as a 'Declaration' in its title; (b) the resolution's 'declaration' that 'the principles of the Charter which are embodied

the International Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights affirm that "all peoples" have a right to self-determination, and that "[b]y virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."<sup>10</sup> By the express terms of these international instruments, self-determination has been elevated to the status of a right.

The scope and legal force of the right, however, have varied in application. As Professor Cherif Bassiouni has suggested:

'Self-determination' is a catch-all concept which exists as a principle, develops into a right under certain circumstances, unfolds as a process and results in a remedy. As an abstract principle it can be enunciated without reference to a specific context; as a right it is operative only in a relative context, and as a remedy, its equitable application is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate.<sup>11</sup>

Central among the equitable concerns to which Professor Bassiouni alludes has been regard for the sovereignty of states. Because "peoples" can be defined broadly or narrowly, the right of self-determination can be construed to bestow national rights upon almost any minority group, with potentially destructive consequences for the internal stability and territorial integrity of States. Perhaps unsurprisingly then, States generally have proven hesitant to interpret the right to self-determination

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in this Declaration constitute basic principles of international law[;] (c) the reference in the resolution's title to U.N. Charter article 1 ('Friendly Relations') and in its first paragraph to the 'Principles' of the United Nations listed in U.N. Charter article 2; (d) the observation in the Declaration's preamble that 'progressive development and codification' of those principles would 'promote the realization of the purposes of the United Nations[;]' and (e) the implicit reference to U.N. Charter article 13, conferring on the General Assembly authority to 'encourage the progressive development of international law and its codification.'

The external evidence for the authority of the Declaration would include the Declaration's adoption by consensus, combined with two customary canons of construction. The first is that in treaty interpretation, 'There shall be taken into account, together with the context any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,' and 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.' The second is the custom of reading constitutional texts as necessarily conferring on the institutions they establish authority to 'interpret their own constitutional powers and the specific provisions of the text so constituting them.'

*Id.* at 236 n.52 (citations omitted).

10. International Covenant on Economic, Social, and Cultural Rights, *came into force* on January 3, 1976, part I, art.1, para. 1, 993 U.N.T.S. 3, 5; International Covenant on Civil and Political Rights, *came into force* on March 23, 1976, part I, art. 1, para. 1, 999 U.N.T.S. 171, 173.

11. Bassiouni, *supra* note 8, at 33.

as conveying the right to secession from a sovereign State.<sup>12</sup> Accordingly, the Declaration on Friendly Relations makes clear that it does not "authoriz[e] or encourag[e] any action which would dismember or impair the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of self-determination of peoples."<sup>13</sup> Self-determination, therefore, has not been accepted to be the unqualified right of all peoples.

Indeed, notwithstanding Judge's Dillard's assertion in the *Western Sahara Case* that "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people,"<sup>14</sup> the status of a territory has proven significant in determining whether and how a given people will exercise self-determination. As noted above, States generally have been unwilling to recognize that a right of self-determination extends to peoples residing within the borders of an existing State if the exercise of that right would compromise the sovereignty or territorial integrity of that State. In these situations, State practice has been to regard self-determination as a principle, rather than as a right. As Crawford concludes, "[Self-determination] is not a right applicable directly to any group of people desiring political independence or self-government. Like sovereignty, it is a legal principle. It applies as a matter of right only after the unit of self-determination has been determined by the application of appropriate rules."<sup>15</sup> The question, then, is how to determine what constitutes a "self-determination unit."

The archetypal self-determination units are former mandated territories and colonies. The U.N. Charter places dependent territories into two categories: trusteeships and non-self-governing territories.<sup>16</sup> The principle of self-determination was a basic premise of the Charter's provisions regarding the disposition of trusteeships,<sup>17</sup> and it was gradually accepted to be relevant to the administration and disposition of other non-self-governing territories as well. In its 1971 *Namibia Opinion*, the International Court of Justice (I.C.J.) determined that State practice, as

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12. CRAWFORD, *supra* note 8, at 265 (describing broad non-recognition of Biafra after secession from Nigeria); Emerson, *supra* note 6, at 464-65 (citing the United Nations unwillingness to support Katanga's secession from the Congo). See also G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 67, U.N. Doc. A/4684 (1960) ("Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.").

13. Declaration on Friendly Relations, *supra* note 9.

14. Advisory Opinion on Western Sahara, 1975 I.C.J. 12, 122 (Oct. 16, 1975) (separate opinion of J. Dillard).

15. CRAWFORD, *supra* note 8, at 101.

16. See U.N. CHARTER, chs. 11-13.

17. Article 76 of the Charter states that one of the purposes of the trusteeship system is the "progressive development [of the inhabitants of trust territories] towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned ..." U.N. CHARTER, art. 76; see also CRAWFORD, *supra* note 8, at 92 (referring to mandated and trust territories as "the primary type of self-determination territory").

reflected in the General Assembly's adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and in "the political history of mandated territories in general," indicated that international law had come to require application of the principle of self-determination to all non-self-governing territories that had been under colonial regimes.<sup>18</sup> This view was affirmed by the I.C.J. in the *Western Sahara Case*.<sup>19</sup>

The history of decolonization consequently provides some basis for identifying non-self-governing territories whose peoples are entitled to self-determination. Chapter XI of the U.N. Charter offers only vague guidance for determining which territories and or peoples qualify, referring simply to "territories whose peoples have not yet attained a full measure of self-government."<sup>20</sup> As Crawford states, "[t]he meaning of these terms is not self-evident and has not been entirely settled by subsequent practice."<sup>21</sup> He notes that Article 74 of the Charter makes a distinction between non-self-governing territories and the "metropolitan areas" of existing States, suggesting that "the problem of minorities not inhabiting a clearly defined territory but scattered throughout a State" therefore falls outside of the scope of Chapter XI.<sup>22</sup> The result is that one must consequently determine how to distinguish between non-self-governing territories within and outside a metropolitan State.

In 1959, the General Assembly established a committee to examine the obligations imposed by Chapter XI upon administering States.<sup>23</sup> On the basis of its report, the Assembly passed Resolution 1541 (XV), which sets out "principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter."<sup>24</sup> Principle IV of the Resolution states, "[p]rima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."<sup>25</sup> Once this *prima facie* case is established, other factors could then inform the evaluation of whether a territory is non-self-governing under Chapter XI of the Charter; the central issue being whether those factors "affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination."<sup>26</sup> A territory therefore falls under the ambit of the Charter's provisions regarding non-self-governing territories if it is separate from, distinct from, and subordinate to a metropolitan State.

In sum, the principle of self-determination becomes a legal right

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18. 1971 I.C.J. 6, 31.

19. 1975 I.C.J. 12, 31-3.

20. U.N. Charter, art. 73.

21. CRAWFORD, *supra* note 8, at 359.

22. *Id.* (discussing the U.N. CHARTER art. 74).

23. See GOODRICH, HAMBRO, & SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 461-62 (1969).

24. G.A. Res. 1541, *supra* note 12.

25. *Id.* Annex, Principle 4.

26. *Id.* Annex, Principle 5.



only when it is invoked by a group recognized to constitute a people and with regard to a territory that can serve as a self-determination unit. As I will show, Palestine meets both of these criteria.

### *B. The Palestinian People*

Juridical recognition of the Palestinian people by the international community has expanded in accordance with the development of more inclusive conceptions of participation in the international process and with the Palestinians' evolving conception of national identity. The Palestinians, initially, were defined by what they were not: in 1922, a nascent League of Nations identified them simply as the "existing non-Jewish communities in Palestine." By the end of the 1960s, however, the United Nations General Assembly recognized the Palestinians to be a people and attributed to them the attendant rights to self-determination and sovereignty. This section traces international recognition of the Palestinian people as it has developed over the course of this century.

#### 1. 1919-1947: The Arab Inhabitants of Palestine

The states that structured the international order at the conclusion of the first World War provisionally recognized Palestine to be an independent nation. The League of Nations Covenant [hereinafter Covenant], signed in 1919 in conjunction with the Treaty of Versailles,<sup>27</sup> marked an initial, though perhaps reluctant, departure from the state-focused vision of the international community that prevailed during the nineteenth century.<sup>28</sup> Reflecting the Great Powers' acquiescence to President Woodrow Wilson's advocacy in favor of the principle of self-determination,<sup>29</sup> the Covenant acknowledged the existence of "peoples not yet able to stand by themselves under the strenuous conditions of the modern world" and declared that their "well-being and develop-

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27. One historian has suggested that "neither the Europeans nor the Americans could have the peace treaty without the League or the League without the peace treaty; both would stand or fall together. . . ." F.S. NORTHEGE, *THE LEAGUE OF NATIONS: ITS LIFE AND TIMES, 1920-1946*, at 39 (1986).

28. During the nineteenth century, the European Concert maintained a state-focused vision of international participation, recognizing the legal status only of nations that had been incorporated into recognized states. The "society of nations," as then defined, might more accurately have been characterized as a society of states. Binder, *supra* note 6, at 227.

29. Binder, *supra* note 6, at 228. Scholars disagree about the extent to which the Covenant implies or incorporates the principle of self-determination. Cf. L.C. Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, 65 AM. SOC'Y INT'L L. PROC. 40, 42, 56 (1971) (arguing that Article 22 of the League of Nations is not a recognition of the right to self determination); John A. Collins, Note, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 158 (1981) (arguing that the Covenant implicitly recognizes the right to self-determination); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 463 (1971) (making no reference to the Covenant, but stating that the right of self-determination advocated by Wilson applied to peoples of the Middle East).

ment" formed "a sacred trust of civilization."<sup>30</sup> In accordance with this vision, the Covenant delegated responsibility for carrying out this trust to certain "advanced nations" under whose tutelage the designated Mandates presumably could progress.<sup>31</sup> Palestine, along with the other communities formerly under the sovereignty of the Turkish (Ottoman) Empire, was categorized as developed enough to warrant "provisional" recognition, "subject to the rendering of administrative advice and assistance by a Mandatory until such time as [it was] able to stand alone."<sup>32</sup> The Covenant, therefore, bestowed a level of international recognition upon the "nation" of Palestine with the expectation that it shortly would achieve statehood.

Article 22 of the Covenant, which established the framework for the mandates system, appears to define this "nation" in primarily communal terms. Its provision regarding the "A" Mandates, as Palestine and the other former Turkish provinces would later be known, states that "[c]ertain *communities* . . . have reached a stage of development where their existence as independent nations can be provisionally recognized . . ."<sup>33</sup> The Covenant committed, moreover, to giving prime consideration to the wishes of these "communities" in the selection of the Mandatory.<sup>34</sup> These provisions seem to reflect an acknowledgment that the peoples in this category were more than simply the inhabitants of defined territories, that they were coherent communities that were politically organized enough to articulate preferences regarding their national development. The communal focus of the "A" Mandates provision becomes even more apparent when contrasted with the more territorial definitions of the "B" and "C" Mandates. The "B" Mandates provision makes reference to "peoples," rather than "communities," and makes "the administration of the territory" — not the rendering of administrative advice — the Mandatory's prime responsibility.<sup>35</sup> Moreover, while the "A" Mandates provision makes no reference at all to territory, the Covenant defines the "C" Mandates in entirely territorial terms, making only incidental reference to their "population."<sup>36</sup> The Covenant appears, therefore, to do more than recognize Palestine as a territory; it recognizes the Palestinians as a nation.<sup>37</sup>

The terms of the Mandate for Palestine, which was approved by the League of Nations Council on July 24, 1922, departed in a number of respects from Article 22(4) of the Covenant, shifting significantly away from recognition of a Palestinian national community. As an initial matter, the League of Nations Council ignored the Covenant's requirement that the wishes of the indigenous community be a prime criterion

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30. LEAGUE OF NATIONS COVENANT, art. 22, para. 1.

31. *Id.* art. 22, para. 2.

32. *Id.* art. 22, para. 4 (emphasis added).

33. *Id.*

34. *Id.*

35. *Id.* art. 22, para. 5.

36. *Id.* art. 22, para. 6.

37. See W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* (1986) 189-90.

in the selection of the Mandatory, assigning the Mandate to Great Britain without the consent of Palestine's population.<sup>38</sup> The Mandate, moreover, entrusted to Great Britain "the administration of the territory of Palestine,"<sup>39</sup> words more reminiscent of the role assigned to "B" Mandatories than of the "A" Mandatories. Most significantly, in contrast to its numerous explicit commitments to the establishment of a "Jewish national home" in Palestine,<sup>40</sup> the Mandate referred to the indigenous Arab population of the country, which in 1922 represented almost 90% of Palestine's total population,<sup>41</sup> primarily in contradistinction to the Jewish population.<sup>42</sup> The Mandate, therefore, transformed the "independent nation" provisionally recognized by the Covenant into an assortment of "non-Jewish communities" that happened to reside within the borders of the territory of Palestine.

Some have argued that this conception of the Palestinians simply conforms to the historical record — that the Arabs in Palestine in 1917 were an undifferentiated segment of the larger Arab nation that stretched from Syria to Morocco and that they possessed no independent communal identity that could form the basis for nationhood.<sup>43</sup> According to this view, the national aspirations of Arabs in Palestine were given adequate means of fulfillment by the allocation to "the Arabs" of the vast tracts of land that presently comprise the Arab states.<sup>44</sup> Moreover, it has been suggested that the kingdom of Transjordan, which in 1922 was established as an independent principality, was, itself, a "Palestinian Arab State" and consequently fulfilled whatever interests in self-determination Palestinians legitimately could claim.<sup>45</sup>

38. NORTHEGE, *supra* note 26, at 205.

39. Mandate for Palestine, PmbL, in 44 Stat. 2184 (1924).

40. *Id.* (incorporating Balfour Declaration, expressing support for "... establishment in Palestine of a national home for the Jewish people, . . ."; recognizing Jewish grounds for "reconstituting their national home in" Palestine); *Id.* at art.2, 2185 ("The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home . . ."); *Id.* at art.4 (setting terms for creation of Jewish agency "... to assist and take part in the development of the country" and recognizing the Zionist organization in that capacity); *Id.* at art.6 (committing to facilitation of Jewish immigration to Palestine); *Id.* at art.7, 2186 (committing to acquisition of Palestinian citizenship by Jews).

41. See WALID KHALIDI, *BEFORE THEIR DIASPORA* 86 (1984).

42. Mandate for Palestine, *supra* note 38, at 2184, (committing not to take steps that "might prejudice the civil and religious rights of existing non-Jewish communities. . ."); *Id.* at art.2 ("The Mandatory shall be responsible for . . . [helping to establish the Jewish national home] . . . and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."); *Id.* art. 3 (qualifying commitment to Jewish immigration to ensure "that the rights and position of other sections of the population are not prejudiced"); *Id.* at art.9 (guaranteeing "[r]espect for the personal status of the various peoples and communities and for their religious interests . . .").

43. See, e.g., JULIUS STONE, *ISRAEL AND PALESTINE* 10-15 (1981).

44. *Id.* at 15-16.

45. *Id.* at 22-25. Stone's position rests on the following premises: (1) that the designation "Palestine" referred historically to the territory on both sides of the Jordan River, *id.* at 22; (2) that the division of the territory into the mandates of Palestine and Transjordan represented "a last-minute encroachment on the already small allocation to

While it seems clear that Palestinian national identity at the beginning of the century was intertwined to a significant extent with a more general Arab identity,<sup>46</sup> it does not follow that the establishment of other Arab states negates the Palestinians' right to self-determination in Palestine. Had a different chain of events placed the entire territory of Palestine under, for instance, the rule of Jordan's King Abdallah, Palestinians may have had some difficulty establishing that the principle of self-determination mandated their independence from Jordan, since the Palestinians and Jordanians, as Arab peoples, have long been connected by history and culture and were not always clearly separated by national borders. The notion that the self-determination rights of the people of Jaffa or Ramallah or Jerusalem were amply satisfied by the establishment of an independent state fifty or one hundred miles away and that their cities and land consequently could be "allocated" to a largely foreign<sup>47</sup> population is, however, difficult to square with authoritative interpretations of the principle of self-determination.<sup>48</sup>

Moreover, as indifferent to the political rights of the indigenous Palestinians as the Mandate for Palestine appears to have been, it was

the Jewish nation in the self-determination distribution. . . ." *id.* at 23; (3) that the population of Jordan is, at present, comprised largely of Palestinians, most of whom possess Jordanian citizenship; and (4) that Jordanians and Palestinians share a historical and cultural "affinity," *id.* at 24.

The historical accuracy of Stone's assertions is worthy of some skepticism. See, e.g. ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* 318 (1991) (referring to Transjordan as land east of Palestine and noting that Britain acknowledged no Jewish claim to it); KHALDI, *supra* note 42, at 27-29 (reviewing historical references to Palestine as land west of the Jordan River); Ibrahim Abu-Lughod, *Palestinian Culture and Israel's Policy*, *ARAB STUDIES Q.*, Spring/Summer 1985, at 95, 97-99 (discussing distinguishing characteristics of Palestinian culture).

46. To concede this point is not to suggest that the Arabs in Palestine were culturally indistinguishable from other Arab peoples at the beginning of the twentieth century. The urban and agricultural lifestyles and traditions of Palestinians made them very different from the predominantly Bedouin population of Transjordan. See ARTHUR GOLDSCHMIDT, *A CONCISE HISTORY OF THE MIDDLE EAST* 272-73 (3d ed. 1988); See generally Abu-Lughod, *supra* note 66, at 95,97-99 (discussing distinguishing characteristics of Palestinian culture).

47. Ninety percent of the Jewish population of Palestine in 1946 had immigrated to the country in the previous four decades. See HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW* 88 (1977). Most Jewish immigrants came from Central Europe, Poland, and the Soviet Union. *Id.*

48. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, which is generally seen as an authoritative interpretation of the U.N. Charter's self-determination provisions, see *supra* note 10, and accompanying text, states that "by virtue of the principle of . . . self-determination of peoples . . . all peoples have the right freely to determine, without external interference, their political status," Declaration on Friendly Relations, *supra* note 9, at 123. Even if one assumes, *arguendo*, that the people of Palestine were merely a part of the larger "Arab people" in 1922, it is difficult not to see the "allocation" of their territory by foreign powers to a foreign population as "external interference."

not designed to facilitate placing the indigenous Arab<sup>49</sup> population of Palestine under the sovereignty of a "Jewish State." The Mandate, like the Balfour Declaration from which its language is drawn, commits to the establishment only of a Jewish national home in Palestine.<sup>50</sup> The Balfour Declaration was adopted by the British War Cabinet only after it received Zionist assurances that they did not seek to establish a "Jewish Republic or other form of State in Palestine or any part of Palestine."<sup>51</sup> Moreover, Great Britain refused to interpret the language of the Balfour Declaration as contemplating the transformation of Palestine into a Jewish State.<sup>52</sup>

The framers of the Mandate seem to have envisioned the eventual establishment of a single state in Palestine. For instance, although the Mandate committed in several capacities to helping to secure the establishment of a Jewish national home, it provided for the enactment of a single nationality law for the country, stating that the law should include "provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine."<sup>53</sup> This provision acknowledged the concept of Palestinian nationality and framed it in non-communal (i.e. not Jewish or Arab) terms. Similarly, the Mandate stated that "[t]he Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country"<sup>54</sup> and expressed Britain's commitment to support "the development of self-governing institutions" in Palestine.<sup>55</sup> The broad non-exclusive language of these provisions suggests that the framers of the Mandate conceived of Palestine as a single country whose inhabitants would possess a single nationality and would govern themselves with a single administration. Although inter-communal strife prompted Britain to reconsider this approach, it seems clear that the eventual establishment of a single state of Palestine was Britain's original intention.<sup>56</sup>

Despite these apparent intentions, Britain's policies over the course of the Mandate contributed to the development of severe inter-communal tension in Palestine. The British Mandatory Government's commitment to the creation of a Jewish national home in Palestine, and its initially liberal Jewish immigration policies, aroused the resentment

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49. The term "Arab" is used loosely here to include the entire indigenous population of the country, including Muslims, Christians, and Jews.

50. Mandate for Palestine, *supra* note 39, at 2184; See John A. Collins, *Self-Determination in International Law; The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 157 (1980).

51. MALLISON & MALLISON, *supra* note 37, at 38.

52. CATTAN, *supra* note 47.

53. Mandate for Palestine, *supra* note 39, art. 7, at 2186 (emphasis added).

54. *Id.* art. 11, at 2186 (emphasis added).

55. *Id.* art. 2, at 2185.

56. This textual analysis is supported by the expressed statements of British officials at several points during the Mandate. See BERNARD WASSERSTEIN, *THE BRITISH IN PALESTINE: THE MANDATORY GOVERNMENT AND THE ARAB-JEWISH CONFLICT, 1917-1929*, at 109 (1978); NORTHEDGE, *supra* note 27, at 214. See generally W. THOMAS MALLISON, *THE BALFOUR DECLARATION: AN APPRAISAL IN INTERNATIONAL LAW* (1973).

of indigenous Palestinians who identified themselves as part of a broader Arab nation and feared being placed under the rule of European immigrants.<sup>57</sup> These tensions generated increasingly violent inter-communal strife in Palestine and led the British Peel Commission to conclude in 1937 that "[a]n irrepressible conflict has arisen between two national communities within the bounds of one small country."<sup>58</sup> Based on these observations, the Commission recommended the partition of Palestine into Jewish and Arab states, the latter to be incorporated into Transjordan. The proposal raised the ire of both the Zionists, who felt that the territory allocated to them was too small, and the Arab Palestinians, who challenged Britain's right to partition their territory at all.<sup>59</sup> Although Britain eventually abandoned this proposal declaring its goal to be "the establishment within ten years of an independent Palestine State,"<sup>60</sup> Arab-Jewish relations continued to deteriorate.

In February 1947, Great Britain formally acknowledged that it lacked the power to impose a settlement in Palestine and returned the Mandate to the United Nations, which assumed responsibility for League of Nations trusteeships. After accepting the return of the Mandate in May, the United Nations established a committee composed of delegates from eleven United Nations member states to evaluate the situation in Palestine and make recommendations regarding the future of the territory. In August, a majority of the Committee recommended a partition plan that divided Palestine into three territories — an Arab state, a Jewish state, and an internationally administered enclave around Jerusalem — in a contorted geographical arrangement that one British scholar has described as "two fighting serpents entwined in an inimical embrace."<sup>61</sup> The Partition Plan stated that "[i]ndependent Arab and Jewish States . . . shall come into existence in Palestine two

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57. Christians and Muslims in Palestine began to unite during the early part of the 1900's in opposition to Zionist national aspirations. For instance, after Zionists held a procession in Jerusalem in November 1918 to celebrate the first anniversary of the Balfour Declaration, a deputation of Christian and Muslim sects, headed by the mayor of Jerusalem, submitted a written protest to the British Military Governor of Palestine articulating its concern that the Zionists would be given sovereignty over them. Responding to Zionist assertions that Palestine had become their national home, the deputation stated:

If it is meant that they should obtain national liberty in the country, why should this be confined to the Jews and not to others? . . . We Arabs, Muslim and Christian, have always sympathized profoundly with the persecuted Jews in their misfortunes in other countries. . . . We hoped for their deliverance and prosperity. But there is a wide difference between this sympathy and the acceptance of such a nation in our country, to be made by them a national home, ruling over us and disposing of our affairs.

WASSERSTEIN, *supra* note 56, at 32. See also JAMAL R. NASSAR, THE PALESTINE LIBERATION ORGANIZATION: FROM ARMED STRUGGLE TO THE DECLARATION OF INDEPENDENCE 9 (1991) (quoting an editorial from the Jerusalem daily demanding "self-rule," "unity of territory" and "rejection of a Zionist immigration" in Palestine).

58. MARK TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT 241-42 (1994).

59. *Id.* at 242.

60. *Id.* at 245 (quoting a White Paper issued by Malcolm MacDonald in May 1939).

61. *Id.* at 259 (quoting George Kirk).

months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948."<sup>62</sup> It then set forth an outline for a multi-phased transition period during which each of the States was to develop provisional governmental institutions,<sup>63</sup> and conditioned international recognition of each State upon its establishment of effective independence and its declared commitment to guarantee the protection of religious sites and minority rights.<sup>64</sup>

The Plan, however, never came into effect. Although, after some initial hesitation, the Zionists declared their willingness to accept the recommendations, the Palestinian Arabs rejected them out of hand, arguing that the United Nations had no right to allocate the majority of their territory to the Zionists (who, in March 1947, claimed possession of less than seven percent of the land in Palestine and ownership of only 5.66%<sup>65</sup> and represented less than a third of the territory's population).<sup>66</sup> The United Nations General Assembly nevertheless endorsed the partition resolution on November 29, 1947 by a vote of thirty-three to thirteen, with ten abstentions.<sup>67</sup> Almost immediately thereafter, full-scale war broke out between the Arabs and the Zionists. On May 14, 1948, after establishing control over all of the territory allocated to the Jewish state (and over some allocated to the Arab state),<sup>68</sup> a provisional Zionist national council announced the establishment of the State of Israel on the portion of Palestine allocated by the Partition Plan to form the Jewish State. Israel captured more territory allocated to the Arab state in fighting after its independence. By the time armistice agreements were concluded in 1949, its official boundaries encompassed almost 80% of the territory of Palestine.<sup>69</sup>

In light of these circumstances, the effect of United Nations Resolution 181 (which recommended implementation of the Partition Plan) on the international legal status of Palestine's indigenous inhabitants remains unclear.<sup>70</sup> Although the Partition Plan required each of the proposed States to make a declaration that included a commitment to guarantee the political<sup>71</sup> and religious<sup>72</sup> rights of all Palestinians (Arab

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62. *Plan of Participation with Economic Union*, G.A. Res. 181 (II), part 1, sec. A, para. 3, U.N. Doc. A/519, at 133 (1947).

63. *Id.* part 1, sec. B., at 133.

64. *Id.* part 1, sec. F., at 142.

65. CATTAN, *supra* note 47, at 88 (citing United Nations statistics); KHALIDI, *supra* note 41, at 236.

66. See ABU LUGHOD, *THE DEMOGRAPHIC TRANSFORMATION OF PALESTINE* 155 (1973).

67. TESSLER, *supra* note 58, at 261.

68. *Id.* at 263.

69. CATTAN, *supra* note 47, at 24.

70. A discussion of the legitimacy of the United Nations' decision to endorse the Partition Plan falls beyond the scope of this essay. For a critical evaluation of the legal dimensions of this issue, see CATTAN, *supra* note 47, at 75-89.

71. G.A. Res. 181 (II), *supra* note 62, part 1, sec. C, ch. 3, para. 1 ("Palestinian citizens shall, upon the recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights.").

72. *Id.* at part 1, sec. C, ch. 2 (defining religious and minority rights).

and Jewish), it defined the two states in clearly communal terms. For instance, it provided for voluntary population transfers between the two states and prohibited Arabs and Jews residing within the proposed territory of their own respective states from seeking citizenship in the other state.<sup>73</sup> These provisions show that the United Nations acknowledged the existence of two national communities in Palestine, each on the verge of achieving the status of statehood. Accordingly, they reflect a tacit recognition by the United Nations of the Palestinian Arab nation.

Over the course of the Mandate, therefore, the indigenous inhabitants of Palestine received implicit international recognition as a people entitled to statehood. This recognition is apparent from the terms of the League of Nations Covenant, which granted provisional recognition of the independent nationhood of the communities designated as "A" Mandates. While the terms of the Mandate for Palestine departed significantly from this conception of the Palestinian Arabs, defining Palestine in primarily territorial terms, U.N. Resolution 181 and the Partition Plan affirmed that the Palestinian Arabs were entitled to a State of their own.

## 2. 1948-1969: From Inhabitants to Refugees

Following the establishment of the State of Israel, the international community began to regard Palestinians in individual rather than communal terms.<sup>74</sup> Although the Partition Plan had provided for voluntary population transfers between the proposed Jewish and Arab states,<sup>75</sup> United Nations resolutions following the creation of the State of Israel maintained a territorial focus. The U.N. sought to restore the former inhabitants of Palestine to their homes, whether they were located within the newly-created State of Israel or in what remained of the lands allocated by the Partition Plan to the Arab state.<sup>76</sup> The Palestine Arabs, therefore, were viewed simply as individual refugees, the former inhabitants of the territory of Palestine.<sup>77</sup> This approach continued beyond the June 1967 War.<sup>78</sup>

This shift away from international recognition of Palestinian Arab nationhood likely resulted, at least in part, from changes in the conception of self-determination. One writer has suggested recently that the West's reaction against nationalism after World War II — driven both

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73. *Id.* at part 1, sec. C, ch. 3, para. 1.

74. MALLISON & MALLISON, *supra* note 37, at 189-90.

75. G.A. Res. 181 (II), *supra* note 62, part 1, sec. C, ch. 3, para. 1.

76. G.A. Res. 194 (III), para. 11, U.N. Doc. A/810, at 21, 24 (1948). Similarly, the U.N. created in 1948 a relief agency—UNRWA—to provide assistance to "Palestine Refugees," not Palestinian refugees, reflecting a view of them as the inhabitants of the territory of Palestine rather than as an independent people.

77. S.C. Res. 89, U.N. SCOR, 5th Sess., at 9, U.N. Doc. S/1907 (1950).

78. Security Council Resolution 259 refers to "the inhabitants of the Arab territories under military occupation by Israel." U.N. SCOR, 23d Sess., at 11, U.N. Doc. S/INF/23/Rev.1 (1968).



by horror at Nazi atrocities and by increasing economic and political internationalization — translated into a renunciation by Western nations of the Wilsonian concept of self-determination and a reaffirmation of the principle of state sovereignty.<sup>79</sup> Although the United Nations Charter commits the United Nations to the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,"<sup>80</sup> to the postwar framers of the United Nations Charter, "[s]elf-determination was [still] . . . only . . . a means of furthering the development of friendly relations among states and . . . strengthen[ing] universal peace . . . with the obvious consequence that it might and indeed should be set aside when its fulfillment would give rise to tension and conflict among states."<sup>81</sup> Support for Palestinian nationhood was not easily reconciled with this new vision of self-determination. The Palestinian Arabs, as individuals, were entitled either to repatriation or to compensation for their lost possessions. They could seek vindication of their individual rights within existing state structures. Their claims to nationhood and to the right to establish an independent state, however, were subordinated to the maintenance of the political order established in the Middle East following the Arab-Israeli War.<sup>82</sup>

### 3. 1969-Present: Peoplehood, Participation, & Self-Determination

In the late 1960s, however, a culmination of factors<sup>83</sup> brought the United Nations General Assembly to reaffirm the recognition of Palestinian nationhood articulated in the League of Nations Covenant and the 1947 Partition Plan. Beginning in 1969, the General Assembly passed a series of resolutions recognizing: (1) the Palestinians' status as a people; (2) the centrality of their participation to the achievement of a just resolution of the Palestine question; and (3) their right to self-determination. This recognition, however, was not extended by all Member States. Until 1993, Israel and the United States refused to recognize the Palestinians' peoplehood or their right to participation in the Middle East peace process, and both countries continue to refrain from expressly acknowledging the Palestinians' right to self-

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79. Binder, *supra* note 6, at 230-31.

80. UNITED NATIONS CHARTER, art. 1, para. 2.

81. Binder, *supra* note 6, at 230-31 (quoting Antonio Cassese, *The Helsinki Declaration and Self-Determination*, in HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD 83, 94 (Thomas Buergenthal ed., 1977)); Cf. GOODRICH, ET. AL, *supra* note 23, at 30-31 (discussing U.N. Charter framers' varying interpretations of right to self-determination).

82. See TESSLER, *supra* note 58, at 275-279 (discussing subordination of Palestinian national aspirations to Israeli, Jordanian, and Egyptian political concerns); William J. O'Brien, *The PLO in International Law*, 2 B.U. INT'L L.J. 349, 352 (1984) (identifying the Arab States' failure to take Palestinians seriously as a factor motivating the establishment of the PLO in 1964).

83. Among these factors were the recent independence and participation of former colonial territories in the General Assembly; Israel's occupation of the remaining territory of Palestine following the June 1967 War; and the wresting of control over the PLO from the Arab States by Palestinian *fedayeen*.

determination. As discussed below, however, the actions of Israel and the United States, in this regard, have been at odds with the broad recognition of Palestinian national aspirations by other members of the international community.

The General Assembly departed from its previous focus on the individual rights to repatriation and compensation of refugees from Palestine in 1969, recognizing the Palestinians' status as a people. In resolution 2535, the General Assembly reaffirmed "the inalienable rights of the people of Palestine,"<sup>84</sup> stating that the Palestinian refugee problem had arisen from a denial of the Palestine Arabs' rights under the United Nations Charter and the Universal Declaration of Human Rights.<sup>85</sup> It, thereby, acknowledged that the Palestinians were more than stateless individuals and that their statelessness had resulted from a denial of their right to constitute themselves as a national community. This recognition of Palestinian peoplehood has been reaffirmed by all subsequent General Assembly resolutions dealing with the subject.<sup>86</sup> Accordingly, during its 1970 session, the General Assembly began to use the designation "the Palestinians,"<sup>87</sup> instead of referring to them as the Palestine Arabs, the Palestine refugees, or the (former) inhabitants of Palestine.

In addition to extending international recognition to the Palestinian people, the General Assembly began, during this period, to regard them as primary participants in the settlement of the Palestine question. Previously, U.N. resolutions acknowledged no role at all for the Palestinians. Security Council Resolution 242, for instance, made no specific reference to the Palestinians except insofar as it affirmed the necessity of "achieving a just settlement of the refugee problem."<sup>88</sup> While Resolution 242 emphasized "the need to work for a just and lasting peace," it defined this peace as being one in which "every State in the area can live in security."<sup>89</sup> Maintaining the focus on the inviolability of state sovereignty apparent in the U.N. resolutions following the 1947 Arab-Israeli War, it made no reference to a Palestinian role in the peace process or to Palestinian national rights. In contrast, General Assembly Resolution 2628 (XXV), passed during the 1970 session, recognized the vindication of Palestinian rights to be "an indispensable

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84. G.A. Res. 2535 (XXIV), U.N. GAOR, 24th Sess., Supp. No. 30, at 25, U.N. Doc. A/7630 (1969).

85. *Id.* sec. B, pmbl..

86. MALLISON & MALLISON, *supra* note 37, at 190.

87. G.A. Res. 2628 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 5, U.N. Doc. A/8028 (1970).

88. S.C. Res. 242 U.N. SCOR, 22d Sess., at 8, U.N. Doc. S/INF/22/Rev. 2 (1967). U.N. Resolution 242 deals with the Palestinians in two ways: (1) it states that the U.N. Charter requires "the establishment of a just and lasting peace" based in part on "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict"; and (2) it affirms the necessity of "achieving a just settlement of the refugee problem." *Id.* In light of resolutions throughout the 1960s, the phrase "just settlement of the refugee problem" likely alludes to General Assembly Resolution 194(II), U.N. Doc. A/810, at 24 (1948), which demanded the repatriation or compensation of refugees.

89. S.C. Res. 242, *supra* note 88.

element for the establishment of a just and lasting peace in the Middle East."<sup>90</sup> Building upon that premise, the General Assembly resolved in 1974 that "the Palestinian people is a principal party to the question of Palestine" and invited the Palestine Liberation Organization to participate in plenary meetings of the General Assembly concerning Palestine.<sup>91</sup> In a subsequent resolution, moreover, the General Assembly requested that the Secretary General "establish contacts with the Palestine Liberation Organization on all matters concerning the question of Palestine."<sup>92</sup> The General Assembly, therefore, affirmed that the vindication of the rights of the Palestinian people was a central component of any just resolution of the Palestine question and that, accordingly, the Palestinian people had a right to participate in the settlement of that question.

In a series of resolutions during the same period, the General Assembly made explicit that this right to participation emerged from the Palestinians' right to self-determination. General Assembly Resolution 2649 — entitled Universal Realization of the Right of Peoples to Self-determination and Speedy Granting of Independence to Colonial Countries and Peoples — condemned "those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine."<sup>93</sup> Through this and subsequent resolutions,<sup>94</sup> the General Assembly recognized the legitimacy of the Palestinian national liberation movement and analogized it to other efforts to eradicate the vestiges of colonialism.

This recognition, however, has not been unanimous. While the existence of a Palestinian people and their right to participate in the resolution of the Palestine question appear no longer to be in contention, their right to self-determination has not been fully recognized by the two States, Israel and the United States, that are most able to prevent its realization. In September 1993, in anticipation of the signing of the DOP, Israel Prime Minister Yitzhak Rabin wrote to PLO Chairman

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90. G.A. Res. 2628 (XXV), *supra* note 87.

91. G.A. Res. 3210 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 3, U.N. Doc. A/9631 (1974).

92. G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974) (emphasis added). The international role and status of the Palestine Liberation Organization is discussed in greater depth below. *See infra* Section II(A).

93. G.A. Res. 2649 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 73-74, U.N. Doc. A/8028 (1970).

94. *See* G.A. Res. 2672 (XXV), U.N. GAOR, 25th Sess., at 35-36, U.N. Doc. A/8028 (1970) (recognizing "that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations"); G.A. Res. 2787 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 82, U.N. Doc. 8429 (1971) (entitled "Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights;" "Reaffirming the inalienable rights of all peoples, and in particular those of the Palestinian people, to freedom, equality, and self-determination, and the legitimacy of their struggles to restore those rights."); G.A. Res. 2949 (XXVII) (8 Dec. 1972), U.N. GAOR, 26th Sess., Supp. No. 29, at 82, U.N. Doc. 8429 (1971).

Yasser Arafat stating that, in light of the PLO's acceptance of U.N. resolutions 242 and 338, its recognition of Israel's right to exist, and its commitment to renounce terrorism, Israel recognized the PLO "as the representative of the Palestinian people."<sup>95</sup> Further, in the DOP itself, the Government of Israel and the PLO, as representative of the Palestinian people, agreed to "recognize their mutual, legitimate and political rights,"<sup>96</sup> words the two parties reaffirm in their subsequent agreements.<sup>97</sup> Although these commitments by Israel fall short of the PLO's recognition of Israel's right "to exist in peace and security,"<sup>98</sup> they represent formal recognition that the Palestinians possess "legitimate and political rights" as a people. The scope of the rights recognized by Israel is, however, difficult to assess.

The agreements concluded between the PLO and Israel pursuant to the DOP are silent with regard to Palestinian self-determination. The U.N. Security Council resolutions to which the agreements refer make no direct reference to the issue of self-determination or even name the Palestinian people, Resolution 242 affirming only the need for "a just settlement of the refugee problem."<sup>99</sup> The U.N. General Assembly recently has made some effort to link Palestinian self-determination to Resolution 242. Following the conclusion of the DOP, the Assembly passed a resolution reaffirming that final status negotiations between Israel and the PLO should be based, *inter alia*, upon:

(a) [t]he realization of the legitimate national rights of the Palestinian people, *primarily the right to self-determination*, (b) [t]he withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and from the other occupied Arab territories, [and] (c) guaranteeing arrangements for peace and security for all States in the region, *including those named in resolution 181(II) of 29 November 1947, within secure and internationally recognized boundaries*.<sup>100</sup>

The resolution, therefore, not only expresses the Assembly's sense that Palestinian self-determination should be a basis of permanent status negotiations, but also incorporates the principle into Resolution 242 by including the states named by Resolution 181 (and therefore, the Arab State envisaged by the 1947 Partition Plan) among the States whose borders should be respected. Israel and the United States both voted against the resolution, however, with Israel asserting that it predetermined the outcome of permanent status negotiations and the United States seeking to avoid focusing on "divisive and polarizing

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95. Letter from Yitzkah Rabin to Yasser Arafat, THE PALESTINIAN-ISRAELI PEACE AGREEMENT: A DOCUMENTARY RECORD 128-29 (Inst. For Palestinian Studies, ed. 1993) [hereinafter THE PALESTINIAN ISRAELI PEACE AGREEMENT].

96. Declaration of Principles, *supra* note 2, at 1527.

97. See Interim Agreement, *supra* note 5, pmbl.; Gaza-Jericho Agreement, pmbl.

98. THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 128.

99. See S.C. Res. 242, *supra* note 87; S.C. Res. 338, U.N. SCOR, 28th Sess., at 10, U.N. Doc. S/INF/29 (1973); Bassiouni, *supra* note 8, at 35.

100. G.A. Res. 48/158D, U.N. GAOR, 48th Sess. (1993) (emphasis added).

statements."<sup>101</sup>

It is, therefore, uncertain whether the governments of Israel and the United States recognize the Palestinian right to self-determination. In view of Israel's acknowledgment that the Palestinians are a people and possess the "legitimate rights" attendant to that status, Israel's unwillingness to support the General Assembly Resolution may arise from the view that, even if the Palestinians do possess a right to self-determination, as the vast majority of the international community has recognized, the ultimate status of the territory that they claim is not theirs alone to decide. That is, that the OPT do not constitute a viable self-determination unit. As discussed below, however, that position is difficult to reconcile with international practice regarding the disposition of non-self-governing territories.

### *C. The Territory of Palestine*

A people's right to exercise self-determination is constrained by the status of the territory to which they lay claim. As Professor Bassiouni suggests, "[i]n the abstract, people determine their goals regardless of geographic limitations; however, realistically, [self-determination] is exercisable only when it can be actuated within a given territory susceptible of acquiring the characteristics of sovereignty . . . ."<sup>102</sup> Thus, while authoritative international instruments recognize self-determination to be a right of all peoples, the full exercise of that right, in practice, has been restricted to the populations of certain classes of territory. Owing perhaps, to the fact that the law of self-determination has developed largely within the context of decolonization, the territories most universally recognized to be "self-determination units" have been mandate territories and the former colonial holdings of metropolitan States.

In order to assess the scope of the Palestinian right to self-determination, it is necessary to evaluate the extent to which the OPT themselves comprise a self-determination unit. The provisional recognition of Palestine's independence in the League of Nations Covenant and in U.N. Resolution 181(II) arguably confers this status upon Palestine.<sup>103</sup> As argued below, however, this status can also be seen to emerge from the U.N. Charter's provisions regarding the disposition of non-self-governing territories. While the OPT may not be a former colonial territory *per se*, and Israel's role in the OPT has been one of a belligerent occupant rather than an administering authority, the OPT otherwise conform to the Charter's definition of a non-self-governing

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101. 1993 U.N.Y.B. 530, U.N. Sales No. E.94.I.1.

102. Bassiouni, *supra* note 8, at 34.

103. With the exception of the U.S. administered Pacific Islands, all "A", "B" and "C" Mandates have achieved independence. See CRAWFORD, *supra* note 8, at 426-28. See also Allen Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, 24-27 (1973) (arguing that sovereignty in mandated territories resides ultimately in their populations, who have the right eventually to exercise that sovereignty through independence).

territory. Since international law has evolved to recognize the right of the populations of all non-self-governing territories to self-determination, so too must Israel recognize the Palestinians' right to self-determination on their territory.

Based on the framework established by the U.N. Charter for the definition and disposition of non-self-governing territories, the OPT constitute a self-determination unit. Although the U.N. General Assembly has interpreted Chapter XI of the Charter primarily to apply to territories that were colonies in 1945,<sup>104</sup> the Charter, itself, requires U.N. Members "which have or assume responsibilities for the administration"<sup>105</sup> of non-self-governing territories to abide by its provisions.<sup>106</sup> This suggests that it is applicable to territories acquired by metropolitan States after 1945.<sup>107</sup> The General Assembly's subsequent resolutions analogizing the Palestinian liberation movement to other anti-colonial movements imply, moreover, that the OPT possess characteristics similar to the colonial territories to which Chapter XI has been recognized to apply. Further, as discussed below, the OPT conform to Chapter XI's definition of non-self-governing territories in that they are separate from, distinct from, and subordinate to Israel, the State presently administering them.

Under U.N. General Assembly Resolution 1541, there is a *prima facie* obligation to transmit information "in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."<sup>108</sup> The OPT meet all three criteria. The OPT's geographic separateness from Israel is apparent from a number of factors. First, the international community — including both the U.N. Security Council and the General Assembly — consistently has regarded Israel's presence in the OPT as an occupation of foreign territory and has demanded the withdrawal of Israeli forces.<sup>109</sup> Second, while members of the Israeli polity have laid claims to the OPT on the basis of religious, political, security, and other interests, the Government of Israel has not annexed the OPT.<sup>110</sup> Accordingly, Israel has

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104. See G.A. Res. 1541 (XV), *supra* note 24, at Annex, Principle 1.

105. U.N. CHARTER, art. 73 (emphasis added).

106. See CRAWFORD, *supra* note 8, at 359-60.

107. *Id.*

108. G.A. Res. 1541 (XV), *supra* note 24, at Annex, Principle IV.

109. See, e.g., G.A. Res. 49/62D, U.N. GAOR, 49th Sess. (1994); G.A. Res. 2443(XXIII), U.N. GAOR, 23d Sess. (1968). The fact that the U.N. Security Council and the General Assembly have demanded that Israel recognize the *de jure* applicability of the Fourth Geneva Convention to the OPT confirms its view that the OPT are not seen as part of the State of Israel. See *The Situation in the Arab Territories Occupied by Israel*, S.C. Res. 446, U.N. SCOR, 34th Sess., at 4, U.N. Doc. S/INF/35 (1979); G.A. Res. 48/41 B, U.N. GAOR, 48th Sess., Supp. No. 49, at 114, U.N. Doc. A/48/49 (1993) (demanding that Israel accept *de jure* applicability of Fourth Geneva Convention to OPT).

110. Although the Knesset extended Israeli law over East Jerusalem shortly after its occupation in 1967 and made "unified Jerusalem" the capital of Israel in 1980, its Annexation has been condemned by the U.N. General Assembly and Security Council. G.A. Res. 49/87A, U.N. GAOR, 49th Sess. (1994) (citing past resolutions); S.C. Res. 252, U.N. SCOR, 23d Sess., at 9, U.N. Doc. S/INF/23/Rev.1 (1968).

imposed a separate legal regime upon the OPT than that prevailing in Israel, and Palestinian residents of the territories have been granted no right to citizenship in Israel. Finally, the express terms of the Interim Agreement concluded between Israel and the PLO affirm that both parties see the West Bank and the Gaza Strip "as a single territorial unit, the integrity and status of which will be preserved during the interim period."<sup>111</sup> While the Interim Agreement does not indicate precisely what "status" will be preserved, it does affirm that the OPT constitute a distinct, coherent territorial unit.

The population of the OPT, moreover, is to a great extent ethnically and culturally distinct from the population of Israel.<sup>112</sup> The distinctions between the two populations were explicitly recognized in the United Nations 1947 Partition Plan and are the implicit basis for the international community's recognition of Palestinian peoplehood. The differences in the predominant languages and religions of the two populations also attest to this distinction. While almost two hundred thousand Israeli citizens presently reside in the OPT, their presence in the Territories has repeatedly been condemned by the international community as an illegal contravention of humanitarian law.<sup>113</sup> They constitute, moreover, only a small percentage of the Territories' total population. The OPT, therefore, are geographically, ethnically, and culturally distinct from the State of Israel. On that basis, there exists a presumption under Principle IV that the OPT is a non-self-governing territory under Chapter XI of the U.N. Charter.

Once the *prima facie* case described in Principle IV has been met, Principle V provides for scrutiny of other elements of the relationship between the concerned territory and the metropolitan State in order to assess the extent to which the territory has been placed "in a position or status of subordination."<sup>114</sup> As discussed in Part II(C), below, the OPT remain almost entirely under Israeli authority and control, even though portions of the Territories have been administered by the PA since June 1994.

The OPT, therefore, possess the attributes, though not the formal

111. Interim Agreement, *supra* note 5, at ch. 2, art. 11, para. 1.

112. I must admit that I speak of ethnic and cultural distinctions with some hesitation. Ethnicity and culture are dynamic, largely imagined concepts that, like the communities they are used to describe, resist rigid delineation. It is, after all, only an accident of history that we do not now speak of "Jewish Palestinians" with lack of irony with which we speak of "Christian Palestinians." Many writers have reflected thoughtfully on these issues. See, e.g., BENEDICT R. O'G. ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983); JAMES CLIFFORD, *THE PRECIPITANT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* (1988); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* (1973); FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington trans., 1968); FRANCOISE LIONNET, *AUTOBIOGRAPHICAL VOICES: RACE, GENDER, SELF-PORTRAITURE* (1989); EDWARD W. SAID, *ORIENTALISM* (1978).

113. See Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 85-86 & nn. 152-53 (1990) (citing U.N. General Assembly and Security Council Resolutions condemning Israeli settlement activity).

114. G.A. Res. 1541 (XV), *supra* note 24, Annex, Principle V.

status, of a non-self-governing territory under the terms of Chapter XI of the U.N. Charter. It would be naive, if not cynical, however, to characterize Israel's occupation of the West Bank and Gaza as a form of trusteeship, although at least one writer has suggested that Israel assume the role of "trustee-occupant."<sup>115</sup> Since Israel is an occupying power with significant economic and political interests in the OPT and a relationship of extreme enmity with its population, it is unlikely that its acceptance of "the obligation to promote to the utmost . . . the well-being of the inhabitants" <sup>116</sup> of the West Bank and Gaza would be received with great confidence by the Palestinian population. The point of demonstrating the OPT's functional status as a non-self-governing territory is not, therefore, in order to recommend a shift in Israel's status from occupant to trustee but, rather, to show that the OPT possess the requisite characteristics for the exercise of self-determination. The OPT are a coherent and distinct territorial unit that is separate, both legally and practically, from Israel. In light of the fact that the populations of other non-self-governing territories that meet these criteria have been seen to possess the right to self-determination, the OPT should be recognized to constitute a legitimate self-determination unit.

## II. PALESTINIAN PUBLIC BODIES

The international community, therefore, has recognized the Palestinians' status as a people, the centrality of their participation to equitable resolution of the Palestine question, and, by and large, their inalienable right under the United Nations Charter and other international instruments to self-determination. This recognition of Palestinian peoplehood — and the international participation it has facilitated — has resulted, to a great extent, from the establishment of Palestinian public bodies, which have served both as constitutive expressions of Palestinian nationhood and as vehicles for the pursuit of self-determination. The Palestine Liberation Organization (PLO) has, for many years, represented — in the myriad senses of the word — the Palestinian people. Through the PLO, the Palestinians have established a symbolic State and a very real administrative authority. This section examines the functions and international status of each of these bodies.

### A. *The Palestine Liberation Organization*

Over the last thirty years, the PLO has emerged as the international representative of the Palestinian people and has played an instrumental role in defining and pursuing Palestinian national aspirations. This section analyzes the PLO's legitimacy as representative of the Palestinian people and its international status, as it has developed since its establishment in 1964.

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115. Gerson, *supra* note 103, at 45-47.

116. U.N. CHARTER, art. 73.



## 1. Representation of the Palestinian People

In January 1964, Egyptian president Gamal abd-el-Nasser convened the first Arab Summit Conference in an attempt to formulate responses to Israel's plan to divert the waters of the Jordan River for its own use. Although the Conference proved unable to develop a viable strategy to counteract Israel's plans, it did recommend the establishment of "a sound basis for organizing the Palestinian people in order to enable them to assume their duties in liberating their homeland and determining their destiny."<sup>117</sup> Accordingly, a council selected by committees composed of Palestinians in various Arab countries met that spring and on June 1, 1964 established the PLO and adopted the Palestine National Covenant. Although the Covenant is occasionally referred to as the "PLO Covenant," it is more than an organizational charter. By its own terms, at least, it represents a constitutive expression of Palestinian nationhood; defining the Palestinian people and articulating their national character and aspirations, as well as establishing the PLO to act as their international representative and to work toward vindication of their national rights.

The Covenant defines the Palestinian people in ethnic, temporal, and territorial terms. Perhaps reflecting the emphasis at the time of its enactment on the principle of Arab unity, the Covenant's first article proclaims, "Palestine is the homeland of the Palestinian people. It is an inseparable part of the bigger Arab nation, and its people are an integral part of the Arab people."<sup>118</sup> The Covenant, therefore, situates both the territory of Palestine and the Palestinian people within the Arab nation. Although this provision arguably is designed more to emphasize the incongruity of the "Zionist-imperialist"<sup>119</sup> presence in the region than to define an ethnic or cultural criterion for Palestinian nationality. More substantively, the Covenant defines the Palestinian people in temporal and territorial terms. Article Five states, "[t]he Palestinians are those Arab citizens who under normal conditions used to live in Palestine<sup>120</sup> until 1947; they include those who remained there as well as those who were evicted. The offsprings [sic] of an Arab Palestinian parent, since that date, whether born in Palestine or outside, are regarded as Palestinians."<sup>121</sup> The Covenant also states that "Jews who

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117. NASSAR, *supra* note 57, at 20. President Nasser initially proposed creating a "Palestinian entity." *Id.* at 19. During discussion of the issue, the leaders of the Arab states represented at the conference, suggested a variety of forms, ranging from the creation of a Palestinian state in the West Bank and Gaza Strip (which at the time were occupied by Jordan and Egypt, respectively) to the formation of a national liberation front. See LEILA KADI, ARAB SUMMIT CONFERENCES AND THE PALESTINE PROBLEM 99 (1966).

118. Palestine National Covenant, art. 1, *reprinted in* NASSAR, *supra* note 57, app. 2 at 219.

119. Palestine National Covenant, art. 15, *reprinted in* NASSAR, *supra* note 57, app. 2 at 220.

120. See generally Palestine National Covenant, art. 2, *reprinted in* NASSAR, *supra* note 57, app. 2 at 219 (defining Palestine in terms of "the borders that existed during the British Mandate").

121. Palestine National Covenant, art. 5, *reprinted in* NASSAR, *supra* note 57, app. 2 at

used to live under normal conditions in Palestine until the Zionist invasion of the country are to be considered Palestinians."<sup>122</sup> The Covenant, therefore, defines the Palestinians as the people who resided in the territory of Palestine, as delimited by the British Mandate, before 1947 (or, for Jewish Palestinians, before 1923) and their descendants.

Having thus defined the Palestinian people, the Covenant assigns to the PLO the role of facilitating the liberation of their homeland. This role is apparent not only from its name — the Palestine *Liberation* Organization — but also from article 26 of the Covenant:

The Palestine Liberation Organization, which represents all the forces of the Palestinian revolution, is responsible for the activities of the Arab Palestinian people *in their struggle to liberate their land and return to it to practice their right to self-determination*. This applies to all military, political, and financial matters, as well as anything related to the Palestinian problem on the Arab and international levels.<sup>123</sup>

The Covenant makes clear that, whatever functions the PLO might assume in relation to the Palestinian people and the international community, its overriding goal is securing for the Palestinian people the opportunity to return to their homeland under circumstances that will enable them to exercise self-determination. Since its creation, the PLO has developed an elaborate bureaucratic structure and administers a variety of social services to Palestinians in diaspora. Nevertheless, its focus has not been the amelioration of conditions in exile, but rather the termination of the condition of exile. While it has on occasion played a significant role in the national politics of other countries in the region (despite the Covenant's commitment to the contrary),<sup>124</sup> it has not sought to represent the interests of Palestinians as members of the national communities of the States in which they reside. Rather, its political activities have focused on those States' policies regarding Israel and the question of Palestine. It is in this capacity that the PLO characterizes itself as the sole legitimate representative of the Palestinian people.<sup>125</sup>

The internal legitimacy of this claim among the Palestinian people

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122. Palestine National Covenant, art. 6, *reprinted in* NASSAR, *supra* note 57, app. 2 at 219. The PLO selected 1923 as the year when the "Zionist invasion" began. As Cherif Bassiouni has pointed out, however, "That cut-off date is debatable since Palestinian Arab representatives agreed in the ensuing years to an immigration quota which allowed for the lawful entry of many European Jews." Baussiouni, *supra* note 8, at 38.

123. Palestine National Covenant, art. 26, *reprinted in* NASSAR, *supra* note 57, app. 2 at 222 (emphasis added).

124. See Palestine National Covenant, art. 27, *reprinted in* NASSAR, *supra* note 57, app. 2 at 222 ("The Palestine Liberation Organization cooperates with all Arab States, each according to its potentials, and it adheres to a neutral policy in its relations with these States in the light of the requirements of the liberation battle. On the basis of this, it does not interfere in the internal affairs of any Arab State").

125. As discussed in the next section, the international community roundly accepts the PLO's claim to represent the Palestinian people.

has been consistently affirmed. As a liberation organization representing the sometimes disparate interests of a dispersed population, the PLO has not functioned democratically at all times.<sup>126</sup> Nevertheless, Palestinians continually have identified the PLO as their international representative since its founding in 1964. Palestinian labor unions and women's and students' groups pledged their support for the organization promptly after it was created, and they have continued to regard it as the sole legitimate representative of the Palestinian people.<sup>127</sup> Other Palestinian institutions, including newspapers, political parties, and guerrilla groups, also have acknowledged the legitimacy of the PLO's representative status.<sup>128</sup> Perhaps most indicative of the internal legitimacy of the PLO, however, has been the consistent failure of other States to circumvent it in their dealings with the Palestinians. Israel, for instance, was unable to establish an alternative Palestinian leadership structure in the Occupied Territories in the 1970s, when the elected mayors in the West Bank agreed to confine their dealings with the Israelis to municipal matters on the grounds that the PLO was the "political representative" of all of the Palestinian people.<sup>129</sup> Similarly, even though the PLO did not participate directly in the 1991 Madrid Conference, the Palestinian delegation affirmed in its response to the invitation to participate that "[t]he fact that the PLO has agreed not to be directly or overtly involved in the process at present, does not in any way prejudice its role as the sole legitimate representative of the Palestinian people everywhere, and the only body empowered to negotiate or conclude agreements on behalf of the Palestinian people."<sup>130</sup> The PLO, therefore, has firmly established its status among Palestinians as their sole international representative.

A brief review of the organization's institutions of internal governance reveals some of the contours of this representation. Although the PLO has not sought recognition as a government in exile,<sup>131</sup> its institutions are modeled after governmental structures and provide Palestinians worldwide with an array of social services.<sup>132</sup> The PLO has two primary policymaking organs: the Palestine National Council (PNC), a 300 to 400 member body that functions as the PLO's legislative branch; and the Executive Committee, a fifteen member council apparently based in form on the British cabinet system.<sup>133</sup> The PNC, alone, is empowered to make or change basic PLO policy positions.<sup>134</sup> Its members,

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126. See NASSAR, *supra* note 57, at 74-76 (discussing democratic and autocratic strains apparent in PLO politics).

127. *Id.* at 30-31.

128. *Id.* at 31-36.

129. *Id.* at 35. See generally 7 J. PALESTINE STUD. 132-36 (1978) (presenting Israeli press coverage regarding Palestinian municipal elections and PLO).

130. Palestinian Response to Madrid Invitation, Oct. 22, 1991. THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 14.

131. See notes 140-41, *infra* and accompanying text.

132. See NASSAR, *supra* note 37, at 68-73.

133. *Id.* at 50.

134. William V. O'Brien, *The PLO in International Law*, 2 B.U. INT'L L. J. 349, 355 (1984).

who serve three-year terms, assemble annually to consider the report of the Executive Committee, the Organization's budget, proposals by various committees, and other policy matters.<sup>135</sup> PNC members originally were elected based upon a geographic scheme, under which members of the PLO assembled quarterly on the local level to elect representatives.<sup>136</sup> Following the 1967 War, however, the PLO adopted an occupational electoral scheme, in order to make mobilization possible under Israeli occupation, since Israel permitted the organization of professional and labor unions.<sup>137</sup> Presently, the various Palestinian resistance organizations (e.g. *Fatah* and the Popular Front for the Liberation of Palestine) and mass unions and syndicates (e.g. the General Union of Palestinian Women and the General Union of Palestinian Students) hold seats on the Council in much the same way as would political parties in a national legislature.<sup>138</sup>

The PLO Executive Committee has the mandate of establishing and supervising the organization's bureaucratic institutions and of ensuring that PNC policies are implemented.<sup>139</sup> Originally, the Chairman of the Committee, who is appointed by the National Council, selected the members of the Executive Committee, but the system was altered later to require their election by the Council.<sup>140</sup> Yasser Arafat has been Chairman of the Executive Committee since his election to the position at the fifth session of the PNC in February 1969.<sup>141</sup>

The PLO's institutional structure to a great extent reflects its mandate. It was conceived as and remains a liberation organization. It has never characterized itself as a government-in-exile. According to Anis Kassim, "authoritative officials of the PLO" have taken the position that the establishment of a government-in-exile would "create problems of dual loyalty for Palestinians living in different countries" and possibly "invite conflicts with host governments."<sup>142</sup> Kassim suggests that, while the PLO might seek to establish such a government at some point in the future, the Palestinians remain — or remained (Kassim wrote in 1980) — too "far way from realizing their objectives" to make it a prudent enterprise.<sup>143</sup> Moreover, it is unclear whether the PLO has the power to

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135. NASSAR, *supra* note 57, at 50.

136. *Id.* at 73.

137. *Id.* at 73-74.

138. *See generally id.* at 60-61. *Fatah* has been the largest movement in the PLO since 1969. *See generally id.* at 80-86. It should be noted that the various unions with representatives in the PLO are not occupational in the traditional sense — they do not represent the interests of workers as workers, for instance. As Nassar explains, "[t]hese unions are formed around political and social issues rather than work-related questions. These unions do not concern themselves with worker-management matters, but function mainly to mobilize their members behind the Palestinian cause." *Id.* at 74.

139. *Id.* at 51.

140. *Id.*

141. *Id.* at 60-61.

142. Anis Kassim, *The Palestinian Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 DENV. J. INT'L L. & POL'Y 1, 31-32 (1980).

143. *Id.* Although there was some expectation that the PLO might move to establish itself as a government body following the issuance of the Palestinian Declaration of Inde-

reconstitute itself in that way. As noted above, the Palestine National Covenant assigns the PLO the role of facilitating circumstances through which Palestinians can exercise their right to self-determination on their territory. The PLO's role ends, therefore, when the exercise of self-determination begins.<sup>144</sup> Under the Covenant, the PLO does not have the power to determine, itself, how to constitute the Palestinian nation; whether, for example, it should take the form of an independent State or should enter into an association with another State. Since the PLO's international legitimacy emerges from its role as representative of the Palestinian people, the power ultimately to ratify or decline agreements regarding the final status of Palestine remains with the Palestinian people.

## 2. International Status

### a. Recognition

The Palestine Liberation Organization's legitimacy as the international representative of the Palestinian people has been affirmed consistently by the United Nations General Assembly, Security Council, and other constituent organs, as well as by most States in the international system, including, since 1993, Israel and the United States. However, few States or organizations outside of the Arab World have recognized the PLO as a government.

#### United Nations

The United Nations General Assembly has extended recognition to the PLO as the international representative of the Palestinian people and, accordingly, has facilitated its participation in United Nations activities. As discussed above, the General Assembly recognized, in the early 1970s, the rights of the Palestinian people to participate in the settlement of the Palestine question and, more broadly, to self-determination. Pursuant to this recognition, in October 1974, it invited the PLO, which one month earlier had been affirmed by the Arab League to be "the sole legitimate representative of the Palestinian people,"<sup>145</sup> to participate during plenary sessions in its deliberations re-

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pendence, it has not taken steps formally to alter its status. NASSER, *supra* note 57, at 43.

144. Testimony introduced on behalf of the PLO in litigation related to the *Achille Lauro* incident conforms to this conception of the PLO's role: "The PLO describes itself as 'the internationally recognized representative of a sovereign people who are seeking to exercise their rights to self-determination, national independence, and territorial integrity. The PLO is the internationally recognized embodiment of the nationhood and sovereignty of the Palestinian people while they await the restoration of their rights through the establishment of a comprehensive [sic], just and lasting peace in the Middle East.'" Klinghoffer v. Achille Lauro, 739 F. Supp. 854, 857 (S.D.N.Y. 1990) (quoting Ramsey Clark Aff., Apr. 27, 1987) (emphasis added).

145. THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 210-11. The Rabat Summit marked Jordan's acquiescence to the PLO's claim to represent the Palestin-

garding the question of Palestine.<sup>146</sup> Shortly thereafter, the General Assembly approved even broader participation by the Palestinian people in United Nations activities, requesting the Secretary General "to establish contacts with the Palestine Liberation Organization on *all matters* concerning the question of Palestine."<sup>147</sup> Finally, during the same session, the General Assembly granted the PLO the status of observer, inviting it to participate in the work of the General Assembly and of all international conferences convened either by the General Assembly or under the auspices of other United Nations organs.<sup>148</sup> Accordingly, a number of United Nations organs and independent agencies have extended observer status to the PLO or have cooperated with it to provide services to the Palestinian people.<sup>149</sup>

The observer status granted to the PLO gives it broader access to General Assembly activities than that granted to any other non-state entity. For instance, while the PLO has access to both the plenary and Main Committees of the General Assembly,<sup>150</sup> the other national liberation movements (excepting the South West Africa People's Organization (SWAPO)) have been accorded access only to the Main Committees,<sup>151</sup> and their participation in General Assembly activities has been limited to deliberations regarding the territories that they claim to represent.<sup>152</sup> The other liberation movements, moreover, have been invited to participate only in United Nations conferences, meetings, and other seminars that concern their countries, while the PLO and SWAPO — before Namibia's independence — have been invited to participate in the sessions and work of all such conferences.<sup>153</sup> Non-governmental organizations, similarly, are entitled to attend only public meetings of the General Assembly and committee meetings on items relevant to their work.<sup>154</sup> Even intergovernmental organizations generally have access

ian people after having previously claimed that role for itself. Kassim, *supra* note 141, at 18 n.99.

146. G.A. Res. 3210 (XXIX), *supra* note 91, at 3.

147. U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 31, at 4, U.N. doc. A/9631 (1974). The vote on this resolution was 89 in favor, 8 against, and 37 abstentions. Israel and the United States were among the states voting against the resolution. Patrick J. Travers, *The Legal Effect of United Nations Action In Support of the Palestinian Liberation Organization and the National Liberation Movements of Africa*, 17 HARV. INT'L L. J. 561, 570-71 (1976). In its 1975 session, the General Assembly emphasized that Palestinian participation in U.N. deliberations regarding the Middle East would be on "equal footing" with all other parties. U.N. GAOR, 30<sup>th</sup> Sess., Supp. No. 34, at 3, U.N. Doc. A/10034 (1975).

148. G.A. Res. 3237 (XXIV), U.N. GAOR, 30<sup>th</sup> Sess., Supp. No. 31, at 5, U.N. Doc. A/9631 (1974). This resolution reflected the General Assembly's broader objective of shifting the role of observers from simple observation to active participation. See Erik Suy, *The Status of Observers in International Organizations*, 160 ACADEMIE DE DROIT INTERNATIONALE 75, 130-31 (1978).

149. Travers, *supra* note 147, at 569-75.

150. Suy, *supra* note 148, at 107 (citing G.A. Res. 3237 (XXIX) (1974)).

151. *Id.*

152. Travers, *supra* note 147, at 570.

153. Suy, *supra* note 148, at 111-12.

154. *Id.* at 106.

only to international conferences that deal with matters of direct interest to them.<sup>155</sup> Erik Suy, the former Legal Counsel to the United Nations, suggests that the breadth of access afforded the PLO emerges from the assumption that it is "strongly connected with [the] future state[] of the people [it] represents" and therefore has "a much wider interest in the works undertaken by the United Nations than regional intergovernmental organizations, the work and interest of which are expected to be more limited."<sup>156</sup> The General Assembly, therefore, has established a unique status for the PLO; while it has not been granted the full access to U.N. activities accorded Member States, its recognized connection to the land and people of Palestine has facilitated broader participation than other non-State entities.

The Security Council has proven less sympathetic to Palestinian participation than the General Assembly, due in large part to the United States' traditional rejection of attempts to establish direct links with the PLO.<sup>157</sup> The Security Council has, however, acknowledged the PLO's representative status. In 1975, and again in 1976 and 1978, it invited the PLO to take part in the debate over a resolution that would have condemned Israel for its repeated air attacks on Lebanon. What is notable about the invitation is that it extended to the PLO "the same rights conferred upon a member State invited to participate under rule 37,"<sup>158</sup> rather than relying upon rule 39, under which the African movements appeared before the Council.<sup>159</sup> Although the legal validity and implications of the invitation have been hotly disputed,<sup>160</sup> it appears beyond contention that the Council's decision to structure PLO participation in this way was calculated to reaffirm the PLO's status as representative of a people with recognized national rights. Since then, however, the Security Council has done little to facilitate the expansion of the PLO's international participation. Other International Organizations

The PLO has also been recognized by and permitted to participate in the activities of other international organizations, but this recognition largely has been limited to organizations with members sympathetic to the Palestinian cause. Arab regional organizations and Islamic organizations have granted the PLO the broadest recognition and participation, giving it the status and privileges of a State member.

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155. *Id.* at 112.

156. *Id.*

157. See Travers, *supra* note 147, at 573.

158. U.N. Monthly Chronicle, No. 1, at 14-15 (1976). "Rule 37 applies to '[a]ny Member of the United Nations which is not a member of the Security Council;' rule 39 applies to 'persons.'" Kassim, *supra* note 142, at 20.

159. Travers, *supra* note 147, at 573.

160. See, *eg.*, Kassim, *supra* note 142, at 20-21, 31 (suggesting that invitation and implicit recognition of the PLO by the Security Council constituted authoritative legal precedent); Evyatar Levine, *A Landmark on the Road to Legal Chaos: Recognition of the PLO as a Menace to World Public Order*, 10 DENV. J. INT'L L. & POL'Y 259, 259-61 (1981); Leo Gross, *Voting in the Security Council and the PLO*, 70 AM. J. INT'L L. 470, 476-91 (1976).

Among these organizations are the League of Arab States and its specialized agencies (e.g. the Arab Fund for Economic and Social Development), the Organization of the Islamic Conference, the Arab Monetary Fund, the Council of Arab Economic Unity, and the Islamic Development Bank.<sup>161</sup> The nonaligned nations conference also has invited the participation of the PLO as a full member.<sup>162</sup> States

The governments of more than one hundred states have extended recognition to the PLO, generally in its capacity as the representative of the Palestinian people.<sup>163</sup> Among these States are most of the countries in the developing world and former Soviet bloc, as well as China, Japan and a number of European countries, including France, Belgium, Italy, Sweden, and Austria.<sup>164</sup> In 1993, moreover, Israeli Prime Minister Yitzhak Rabin wrote a letter to PLO Chairman Yasser Arafat stating that "the Government of Israel has decided to recognize the PLO as representative of the Palestinian people."<sup>165</sup> More than half of these countries have accorded the PLO full diplomatic status and have authorized the establishment of PLO embassies within their borders. A number of others have permitted the PLO to establish offices under the auspices of the Arab League.<sup>166</sup> With a few exceptions, however, the embassies have played more of a symbolic role than a practical one.<sup>167</sup>

#### b. International Status

The international status of the PLO has been a point of some contention among legal scholars. One commentator, Anis Kassim, characterized the PLO as a "territorial public body," which he defined to include "territorial units the elites of which are in the process of consolidating their respective nation state units."<sup>168</sup> He argued that, by virtue of its broad recognition as the international representative of the Palestinian people,<sup>169</sup> its exercise of typical governmental functions,<sup>170</sup> and its role as successor to the Arab Higher Committee, which, Kassim suggested, had elicited *de facto* recognition as a public body by Great Britain and Arab governments,<sup>171</sup> the PLO was legally entitled to participate in the international process as representative of the Palestinian people.<sup>172</sup>

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161. See generally YEARBOOK OF INTERNATIONAL ORGANIZATIONS (33d ed. 1996).

162. Kassim, *supra* note 142, at 3 n.3.

163. O'Brien, *supra* note 134, at 379.

164. NASSAR, *supra* note 57, 163.

165. Letter from Yasser Arafat to Yitzhak Rabin (Sept. 9, 1993), THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 129.

166. O'Brien, *supra* note 134, at 379.

167. *Id.* at 380.

168. Kassim, *supra* note 142, at 9.

169. *Id.* at 19-22.

170. *Id.* at 22-26, 32.

171. *Id.* at 18.

172. *Id.* at 33. In support of his position, Kassim cited numerous precedents acknowledging that governments in exile, anti-colonial movements, and fledgling revolutionary governments are subjects of international law and extending to them recognition com-



In a critique of Kassim's analysis, Israeli Military Judge Evyatar Levine suggested that the PLO, as a non-state entity, could claim no right to international recognition as representative of a people<sup>173</sup> and that the PLO's lack of control over any portion of the territory it claimed differentiated it from other revolutionary movements that had received international recognition.<sup>174</sup> Another critic, Professor William O'Brien, argued in 1984 that internal divisions prevented the PLO from effectively representing the Palestinian people at the international level: "[i]n its present disarray, the PLO can apparently not perform the most essential of all functions of an organization purporting to represent a people, namely, negotiating diplomatically on their behalf."<sup>175</sup> O'Brien suggested, moreover, that the PLO's broad recognition by international organizations and States had little functional significance since the PLO had not (in 1984) been recognized by Israel or the United States, the two States most capable of effecting or stifling Palestinian national aspirations.<sup>176</sup>

Much has changed since these commentators debated the PLO's status in the early 1980s. The PLO has renounced terrorism and has established diplomatic connections with Israel and the United States, both of whom recognize it as the legitimate representative of the Palestinian people and as a "partner" in the ongoing Middle East peace negotiations. Also, the PLO is substantially connected to the Palestinian administration governing sections of the OPT under the DOP and its progeny. In view of these developments, the objections cited above to Kassim's characterization of the PLO as a "territorial public body," and, more broadly, to the PLO's participation in the international process lack currency. While, as discussed below, neither the establishment of the "State of Palestine" in 1988 or the PA in 1994 has altered the PLO's international role and status, both have helped to facilitate universal recognition of the PLO as international representative of the Palestinian people.

## *B. The "State" of Palestine*

### *1. The Palestinian Declaration of Independence*

During its nineteenth session, in November 1988, the PNC voted to adopt the Palestinian Declaration of Independence, proclaiming "the establishment of the State of Palestine on our Palestinian territory with its capital Holy Jerusalem."<sup>177</sup> The Declaration clearly was conceived,

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mensurate with that granted to nascent states. *Id.* at 9-13.

173. Levine, *supra* note 160, at 247-48.

174. *Id.* at 248-49.

175. O'Brien, *supra* note 134, at 392.

176. *Id.* at 392-95.

177. *Palestinian Declaration of Independence*, 19<sup>th</sup> Sess., para. 10, U.N. Doc. A/43/827 (1988) [hereinafter *Declaration of Independence*].

in part, as a symbolic gesture in support of the Palestinian *intifada*, which at that time had been in progress for eleven months.<sup>178</sup> The terms of the Declaration, however, suggest that the PNC intended for the Declaration to have broader consequences. Following its expulsion from Lebanon in 1982, the PLO leadership began to focus more resolutely on achieving a negotiated settlement with Israel within an internationally-mediated framework. To that end, it heightened its efforts to fortify its international legitimacy, pursuing the establishment of diplomatic relations with the United States and engaging in an informal dialogue with leaders of the Israeli peace movement. The Declaration of Independence appears designed to legitimate the PLO's political agenda by reconciling it with the already-existing legal framework established by the United Nations for resolution of the Palestine question.

The Declaration of Independence bases its proclamation of Palestine's independence on two specific international commitments to the Palestinian people and, more generally, on the principles enshrined in the United Nations Charter. First, it makes reference to the League of Nations' recognition of Palestine as a provisionally independent nation in Article 22 of the League of Nations Covenant and in the Treaty of Lausanne,<sup>179</sup> arguing that those authorities confirm the falsehood of the notion that Palestine was ever a "land without a people." Secondly, it characterizes the 1947 partition plan endorsed in U.N. General Assembly Resolution 181 as bestowing "international legitimacy" upon the Palestinian Arab people's claim to self-determination and sovereignty.<sup>180</sup> Since the PNC voted, after its adoption of the Declaration, to declare the territorial boundaries of the state of Palestine to be the West Bank (including East Jerusalem) and the Gaza Strip, the Declaration's evocation of Resolution 181 appears to represent a retroactive acceptance of the principle of dividing Palestine into two states, the idea being that nothing has occurred since 1947 that would nullify the Palestinian right to sovereignty recognized in Resolution 181.

Finally, the Declaration states that the occupation of Palestinian land has subverted the Charter and subsequent resolutions of the United Nations, which guarantee "the right of Return, the right of independence, [and] the right to sovereignty over territory and homeland."<sup>181</sup> Although it does not make reference to a specific provision of the U.N. Charter, several clauses of the Charter could be construed as bestowing these rights on the Palestinians. The Charter states, for instance, that one of the purposes of the United Nations is the development of "friendly relations among nations based on respect for the prin-

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178. *Id.* para. 9 (speaking of the *intifada* as having been the decisive change prompting Palestinian independence). See also Youssef M. Ibrahim, *P.L.O. Proclaims Palestine to be an Independent State; Hints at Recognizing Israel*, N.Y. TIMES, Nov. 15, 1988, at A1 ("The announcement by the Palestinian council had been expected for months. Leaders of the Palestinian uprising in the West Bank and Gaza have demanded the gesture in recognition of their 11-month-long insurrection . . .").

179. Declaration of Independence, *supra* note 177, para. 4.

180. *Id.* para. 5.

181. *Id.* para. 6.

ciple of equal rights and *self-determination of peoples* . . . ."182 Article 55 of the Charter uses a similar formula to express the United Nations' goals in the fields of social and economic development and human rights. Further, Article 73 compels U.N. members assuming responsibility for non-self-governing territories "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement."<183 Finally, the U.N. General Assembly has interpreted the Charter's requirement that States refrain from the use of force in international relations as a prohibition of action that "deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status and pursue their economic, social, and cultural development."<184 These provisions of the Charter can all be seen to legitimize the Palestinians' claims to self-determination and the pursuit of sovereignty.

Beyond demonstrating the legitimacy of Palestinian national aspirations within the established international legal framework, however, it is unclear precisely what purpose the Declaration is intended to serve. Despite its retroactive acceptance of Resolution 181 and, shortly thereafter, its acceptance of U.N. Resolutions 242 and 338, the PNC made no effort following the Declaration to reconstitute itself as a government-in-exile and, thereby, to formalize Palestine's status as a State under occupation. Similarly, the PNC Central Council's election of Yasser Arafat to the position of President of the State appears to have been little more than honorific, there having been no apparent distinction between his responsibilities as President and as Chairman of the PLO. As suggested by the Declaration's call to other Arab peoples "to consolidate and enhance the emergence *in reality* of our state,"185 the PNC's decision to proclaim the independence of Palestine appears to have been a largely symbolic gesture, an attempt to affirm the reasonableness and international legal legitimacy of the Palestinian cause.

## 2. International Recognition

To the extent that the Declaration was conceived as an effort to bolster the international legitimacy of the Palestinian national liberation movement, it met with considerable success. Perhaps unsurprisingly, Israel's Likud-dominated coalition government refused to recognize the legitimacy of any unilateral action taken by the PLO, which it continued to regard as a terrorist organization.<sup>186</sup> A number of other

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182. U.N. CHARTER, art. 1 ¶ 2 (emphasis added).

183. *Id.* art. 73(b).

184. G.A. Res. 2160 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 4, U.N. Doc. A/6316 (1966) (apparently basing prohibition of denial of self-determination on Charter art. 2(4)); see also CRAWFORD, *supra* note 8, at 89-90.

185. Declaration of Independence, *supra* note 177, para. 12 (emphasis added).

186. 1988 U.N.Y.B. 208, U.N. Sales No. E.93.I.100.

nations welcomed the move, however, at least thirteen of them immediately recognizing the newly-declared state.<sup>187</sup> By April 1989, 114 nations had extended some form of recognition to the Palestinian state,<sup>188</sup> but the majority of these countries appear to have recognized the State to be a legitimate aspiration, not an existing reality.<sup>189</sup>

The U.N. General Assembly took a similar approach. In Resolution 43/177, the General Assembly voted to replace the designation "Palestine Liberation Organization" with "Palestine" within the United Nations system, but it did so "without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system."<sup>190</sup> Thus, while the General Assembly (on a vote of 104-2-36, the United States and Israel voting against the resolution) explicitly affirmed the Palestinians' right to exercise their sovereignty over the West Bank and Gaza, it stopped short of altering the status of the PLO. Significantly, however, the General Assembly ratified the Declaration's interpretation of Resolution 181 as legitimating the establishment in the Occupied Territories of a Palestinian state.<sup>191</sup> In subsequent resolutions, moreover, the General Assembly began to interpret U.N. Security Council Resolution 242 to require that the territorial integrity of the States created by Resolution 181 be respected, appearing, thereby, to recognize the PNC's retroactive acceptance of the 1947 Partition Plan and affirming that the terms of the Plan continue to legitimate the Palestinians' claim to self-determination.

### C. *The Palestinian Interim Self-Government Authority (PA)*

Over the course of several months in 1993, while formal peace negotiations within the framework established by the 1991 Madrid Peace Conference proceeded separately (and largely without progress), representatives of the Israeli government and the PLO engaged in at least fourteen rounds of secret meetings in Oslo, the process mediated by the late Johann Jorgen Holst, former foreign minister of Norway. This process led to formal mutual recognition between the State of Israel and the PLO, as the representative of the Palestinian people, and to the formulation of the DOP, which was signed on September 13, 1993 by Is-

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187. *13 Countries Back Palestinian Move*, N.Y. TIMES, Nov. 16, 1988, at A10.

188. Arafat is Elected President of State He Hopes to Form, N.Y. TIMES, Apr. 3, 1989, at A3.

189. The U.S.S.R., for instance, recognized "the proclamation of the Palestinian state," but noted that its "practical" creation would result from a "comprehensive settlement" in the region. Phillip Taubman, *Moscow Lauds P.L.O. State But Is Vague on Recognition*, N.Y. TIMES, Nov. 19, 1988, § 1, at 4. Similarly, Egypt, Norway, and Spain expressed support for the PNC move, although they did not bestow formal recognition on the State of Palestine. *13 Countries Back Palestinian Move*, *supra* note 185.

190. G.A. Res. 43/177, U.N. GAOR, 43rd Sess., Supp. No. 49, at 62, U.N. Doc. A/43/49 (1988).

191. The General Assembly acknowledged its awareness "of the proclamation of the State of Palestine by the Palestine National Council in line with General Assembly resolution 181 (II) and in exercise of the inalienable rights of the Palestinian people." *Id.* (emphasis added).

raeli Foreign Minister Shimon Peres and Mahmoud 'Abbas, head of the PLO's Political Department. The DOP created a framework for long-term negotiations regarding the final status of the OPT and the establishment in the interim period of a Palestinian self-governing authority. Subsequent agreements concluded between the Government of Israel and the PLO further defined the functions and jurisdiction of this PA, which began to administer portions of the OPT in May 1994.

This section analyzes the PA's jurisdiction and claim to legitimacy with a view toward evaluating its legal status in relation to Israel, the PLO, the Palestinian people, and the international community.

### 1. Jurisdiction

The powers, structure, and jurisdiction of the PA are defined by the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (IA), which was concluded in Washington, D.C. on September 28, 1995, pursuant to Article VII of the DOP.<sup>192</sup> The Interim Agreement, as its name suggests, is a self-consciously temporary arrangement. While it governs the administration of portions of the OPT during "the transitional period," the Agreement is purposefully vague about both to what and from what the parties are making a transition.<sup>193</sup> It makes no fundamental changes to the legal status of the OPT<sup>194</sup> and, indeed, explicitly limits its effect to the interim period.<sup>195</sup> The OPT, therefore, remain under Israeli occupation, even if Palestinians are now afforded a broader role in their administration. Accordingly, the authority of the Palestinian governing institutions established by the DOP is entirely local in character.

The central components of the Palestinian Interim Self-Government Authority (PA) are a Council with limited legislative authority, a President, and an executive authority. The Interim Agreement fixes the size of the Council at eighty-two members<sup>196</sup> and provides for the democratic election of its members by registered Palestinian voters residing in the OPT, including (parts of) Jerusalem.<sup>197</sup>

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192. Because the IA supersedes earlier agreements between the PLO and Israel, such as the Agreement on the Gaza Strip and Jericho Area, Interim Agreement, pmbl., cl. 10, this essay does not address the terms of the other agreements. Interim Agreement, 36 I.L.M. 551, 558.

193. The only constraint on final status negotiations acknowledged by the Interim Agreement is that the permanent settlement must be "based on Security Council Resolutions 242 and 338." *Id.* pmbl., at 558.

194. Article 31 of the Interim Agreement 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." *Id.* ch. 5, art. 31, cl. 7, at 567.

195. Article 31 of the Interim Agreement states, "Nothing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims, or positions." *Id.* art. 31, cl. 6, at 567.

196. *Id.* ch. 1, art. 4, at 559.

197. See generally *id.* Annex 3. The IA disqualifies from election candidates who are

The President of the PA is also democratically-elected.<sup>198</sup> Both the President and the Council members are to serve throughout the transitional period, which is to have ended by May 4, 1999.<sup>199</sup> While the Council technically possesses both legislative and executive authority, the IA provides for the delegation of its executive authority to a committee comprised of the President of the PA and other persons appointed by the President and approved by the Council.<sup>200</sup>

The IA strictly enumerates the powers of all three components of the PA, limiting their authority and jurisdiction to Palestinian affairs at the local level. Article One of the IA, which sets the basic terms for the transfer of authority, states that "Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred."<sup>201</sup> The terms of this provision make three things clear: first, that the limited authority transferred to the PA flows from the Israeli military government, not from the Palestinian people; second, that Israel possesses all residual authority over the OPT; and, third, that the transfer of authority is defined by agreement of both sides, not unilaterally by Israel. The first two points are reflected throughout the IA's provisions regarding the PA's territorial, functional, and personal jurisdiction, each of which is reviewed in turn below. The apparent implications of the third point, particularly with regard to the PA's legitimacy, are discussed later in this essay.

#### a. Territorial Jurisdiction

The IA provides for a phased transfer of territorial jurisdiction<sup>202</sup> from the Israeli Civil Administration and Military Government to the PA. Although the Agreement affirms that both sides regard the West Bank and Gaza Strip as "a single territorial unit, the integrity and status of which will be preserved during the interim period,"<sup>203</sup> it divides that "unit" into a patchwork of smaller districts, each classified into one of three categories: Area "A," Area "B," and Area "C."<sup>204</sup> The IA

members of groups that advocate "racism" or pursue their aims "by unlawful or non-democratic means." *Id.* Annex 2, art. 3, para. 2.

198. *Id.* ch. 1, art. 3, para. 3, at 559.

199. *Id.* ch. 1, art. 3, para. 4, at 559.

200. *Id.* ch. 1, art. 5, para. 4. At least 80% of the members of the Executive Authority must be elected members of the Council. *Id.* at ch. 1, art. 5, para. 4, cl. (c), at 559.

201. *Id.* ch. 1, art. 1, para. 1, at 558

202. Territorial jurisdiction is defined in the Interim Agreement as including "land, subsoil, and territorial waters, in accordance with the provisions of this Agreement." *Id.* ch. 3, art. 17, para. 2(a), at 564. As discussed below in the functional jurisdiction section, the Interim Agreement places significant restraints on the exercise of Palestinian territorial jurisdiction in all spheres of authority.

203. *Id.* ch. 2, art. 11, para. 1, at 561.

204. The Gaza Strip is not subject to the same territorial classifications. Gaza effectively is divided into two territories, one under Palestinian authority (as in Areas A and B

assigns the PA varying degrees of territorial jurisdiction over the areas in each of these categories.

Area "A" includes portions of major Palestinian population centers in the OPT and represents, in total, three percent of the West Bank.<sup>205</sup> Pursuant to the IA, the Israeli military redeployed its forces away from these areas prior to the elections for the Council, which took place on January 20, 1996. The PA's functional and personal jurisdiction, as defined by the IA, have full force in Area A. The PA also has authority over "internal security and public order in Area A."<sup>206</sup>

Area "B", which represents twenty-seven percent of the West Bank,<sup>207</sup> consists of other Palestinian-populated regions of the OPT, including a number of small towns, villages, and hamlets. Area B, like Area A, falls entirely within the PA's functional and personal jurisdiction. The "B" areas differ from the "A" areas, however, in two significant respects: first, Israeli redeployment out of these areas is to take place over a more extended period of time; and, second, while the Council is to assume "responsibility for public order for Palestinians," Israel maintains "overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism."<sup>208</sup>

Area "C" covers all remaining territory in the West Bank and Gaza Strip. Included in this category are all Jewish settlements, areas that Israel considers to be of strategic importance, and unpopulated areas. Area C encompasses the vast majority of the OPT: thirty-five to forty percent of the Gaza Strip and approximately seventy percent of the West Bank. The PA is to assume limited functional and personal jurisdiction (over Palestinians only) in Area C during the first phases of Israeli redeployment.<sup>209</sup> During these initial phases, Israel will retain complete territorial jurisdiction over Area C,<sup>210</sup> but it is to transfer gradually "powers and responsibilities relating to territory" to the PA over an eighteen month period.<sup>211</sup> Settlements and Israeli military installations, however, will remain entirely under Israeli control since they are considered to be among the "issues that will be negotiated in

of the West Bank) and one under Israeli authority, the latter comprised of the Israeli military installations and settlements in Gaza. *Id.* ch. 2, art. 11, para. 1, at 561.

205. Al Haq, Draft Analysis of Basic Law sec. 1.2.1.

206. Interim Agreement, ch. 2, art. 13, para. 1, 36 I.L.M. 551, 561. During the 1996 session of the Commission on Human Rights, the representative of the Permanent Observer from Palestine criticized Israel for violating this provision of the IA, citing the Israeli assassination in Gaza of Hamas operative Yehia Ayyash.

207. Haq, *supra* note 205.

208. Interim Agreement, ch. 2, art. 13, para. 2, 36 I.L.M. 551, 562.

209. As of late November 1996, even this limited jurisdiction has not yet been transferred. *Id.* ch. 2, art. 17, para. 2 (c) (d), at 564.

210. "In Area C, during the first phase of redeployment Israel will transfer to the Council civil powers and responsibilities not relating to territory . . . ." *Id.* ch. 2, art. 11, para. 2(c), at 561.

211. *Id.* ch. 2, art. 11, para. 2(e), at 562.

the permanent status negotiations."<sup>212</sup> Israel, moreover, will retain "authority to exercise its powers and responsibilities with regard to internal security and public order."<sup>213</sup> The Israeli deployment of combat forces throughout Area C and into Areas A and B in response to mass demonstrations by Palestinians following the opening of a tunnel beneath the Dome of the Rock in Jerusalem suggests that Israel is likely to continue to interpret this provision as broad authority for pursuing whatever security measures it deems prudent.

Two additional facets of the Interim Agreement's (IA) territorial jurisdiction provisions bear mention. First, although East Jerusalem legally remains part of the Occupied West Bank, and despite its illegal annexation by Israel, the IA does not give the PA any form of jurisdiction over the city and its residents, although a small number of Palestinian residents of Jerusalem (5,000) were permitted to register to vote in Palestinian Council elections. Secondly, although the West Bank city of al-Khalil (Hebron) has 120,000 Palestinian residents, the IA applies special arrangements to it for the interim period as a result of the continued presence of 120 Israeli settlers. As Al-Haq summarizes:

The Oslo B Agreement divides al-Khalil into two areas of administration, designated as H-1 and H-2. The Council will assume all civilian powers and responsibilities throughout al-Khalil in relation to Palestinian residents, as in other West Bank cities. In Area H-2 the IDF will not redeploy and will retain all powers and responsibilities for internal security and public order.<sup>214</sup>

Thus, under the IA, al-Khalil/Hebron is to be split into two sectors: one treated essentially as an Area-B territory, with partial PA jurisdiction; the other treated as an Israeli settlement, over which the PA can exercise no jurisdiction at all. Israel's new Likud administration led by Prime Minister Benjamin Netanyahu has expressed dissatisfaction with this arrangement, however, and negotiations to revise the provision have continued for several months without final resolution.<sup>215</sup>

During the interim period, therefore, the PA will assume limited authority over a limited portion of the OPT. The division of the OPT into these categories and the maintenance of Israeli control over Israeli settlements, which, particularly in the West Bank, are scattered between Palestinian population centers, ensure that the different areas under the territorial jurisdiction of the PA are largely non-contiguous. Palestinians residing within them consequently remain subject to Israeli controls on movement between towns and cities in the West Bank, as well as between the West Bank and Gaza Strip. In these respects, the IA appears to define the PA's authority in largely popular — as opposed to territorial — terms. This emphasis is also apparent in the IA's

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212. *Id.*

213. *Id.* Annex 3, art. 4, para. 4.

214. Haq, *supra* note 205.

215. See Christopher Walker, *West Bank Disputes Delay Plan for Summit*, THE TIMES OF LONDON, Dec. 7, 1996.



provisions concerning the PA's functional and personal jurisdiction.

#### b. Functional Jurisdiction

The Interim Agreement defines the PA's functional jurisdiction in specific terms and makes clear that all powers beyond the scope of that sphere reside with Israel.<sup>216</sup> Accordingly, the IA requires the Palestinian Council to confine its legislative and executive acts to the areas within its jurisdiction. Legislation that exceeds the scope of the Palestinian Council's authority "or that is otherwise inconsistent with the provisions of the DOP, [the Interim] Agreement, or of any other agreement that may be reached between the two sides during the interim period" is to be considered *void ab initio*.<sup>217</sup> In order to facilitate the evaluation of disputed legislation, the IA establishes a Legal Committee comprised of an equal number of Israelis and Palestinians and requires the "communication" of all Palestinian legislation to the Israeli side of the Committee.

Substantively, the functional jurisdiction assigned to the PA is confined to the internal affairs of the Palestinian population in the OPT. The IA appears to place governmental functions into three primary categories: (1) functions to be transferred entirely to the Council; (2) functions to be coordinated between the Council and the Israeli authorities in the OPT; and (3) functions remaining entirely under Israeli authority. Governmental functions that fall primarily within the province of Palestinian internal affairs — e.g. health, education, culture, etc. — are placed into the first category; functions that implicate Israeli concerns in the Territories — primarily infrastructure issues — fall into the second; and functions related to external affairs, including external security, fall into the third. In this respect, the Council's functional jurisdiction closely parallels — and, to a great extent, works in tandem with — its multi-tiered territorial jurisdiction.

The first tier of functional jurisdiction — generally designated "transfer of authority" by the IA — is characterized by transfer to the PA of primary authority over issues that concern the Palestinian population exclusively and by required cooperation in any related areas that conceivably implicate Israeli concerns. For most issues falling into this category, the IA assigns the PA full authority in Areas A and B and

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216. Article 17 of the Interim Agreement states, *inter alia*:

(3) The Council has, within its authority, legislative, executive, and judicial powers and responsibilities as provided for in this Agreement.

(4) (a) Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis.

(b) To this end, the Israeli military government shall retain the necessary legislative, judicial, and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis in personam.

Interim Agreement, ch. 3, art. 17, paras. 3-4, 36 I.L.M 551, 564.

217. *Id.*

provides for a gradual transition of authority in Area C (certain areas, such as Israeli settlements, remaining permanently outside of PA). For instance, while the IA provides for the transfer to the PA of "[p]owers and responsibilities in the sphere of archaeology" in Areas A and B, authority in area C is to be "transferred gradually;" additionally, the IA establishes a Joint Committee of experts "to deal with archaeological issues of common interest" and requires each side to inform the other of the discovery of any new sites in the sections of the OPT under its jurisdiction.<sup>218</sup> Similarly, while the IA transfers authority to the PA over social welfare services, it requires the Palestinians, upon request, to provide Israel with reports regarding juvenile offenders,<sup>219</sup> presumably to serve Israel's security interests. The IA establishes similar frameworks for the transfer of authority in the following areas: agriculture<sup>220</sup> and forests;<sup>221</sup> direct taxation;<sup>222</sup> education and culture;<sup>223</sup> gas, fuel, and petroleum facilities;<sup>224</sup> health;<sup>225</sup> insurance;<sup>226</sup> interior affairs;<sup>227</sup> labor;<sup>228</sup> land registration;<sup>229</sup> legal administration;<sup>230</sup> local government;<sup>231</sup> parks;<sup>232</sup> planning and zoning;<sup>233</sup> population registry and documentation;<sup>234</sup> postal services;<sup>235</sup> telecommunications;<sup>236</sup> tourism;

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218. *Id.* Annex 3, app. 1, art. 2, para. 4, at 605.

219. *Id.* Annex 3, app. 1, art. 33, para. 3(b), at 619.

220. *Id.* Annex 3, app. 1, art. 1, at 604.

221. *Id.* Annex 3, app. 1, art. 14, at 609.

222. *Id.* Annex 3, app. 1, art. 8, at 606.

223. *Id.* Annex 3, app. 1, art. 9, at 607.

224. *Id.* Annex 3, app. 1, art. 15. The PA must inform Israel of any oil exploration or production that it undertakes. *Id.* para. 4(a), at 610.

225. *Id.* Annex 3, app. 1, art. 17, at 611.

226. *Id.* Annex 3, app. 1, art. 19, at 612.

227. *Id.* Annex 3, app. 1, art. 20. "Interior affairs" is defined by the IA as including, *inter alia*, "licensing of newspapers and publications and censorship of films and plays." *Id.* para. 1, at 613.

228. *Id.* Annex 3, app. 1, art. 21, at 613.

229. *Id.* Annex 3, app. 1, art. 22, at 613.

230. *Id.* Annex 3, app. 1, art. 23, at 614.

231. *Id.* Annex 3, app. 1, art. 24, at 615. In addition to giving the PA a wide degree of latitude in defining and managing local government institutions, the IA transfers to the Palestinian local governments the authority to issue building permits for various purposes. *Id.* at para. 5.

232. *Id.* Annex 3, app. 1, art. 26, at 615.

233. *Id.* Annex 3, app. 1, art. 27, at 616.

234. *Id.* Annex 3, app. 1, art. 28, at 616-17. Under the IA, the administrative dimensions — e.g. the issuance of identity cards, the maintenance of birth and death records, etc. — are to be handled by Palestinians, but Israel is to be informed of "Every change in its population registry, including, *inter alia*, any change in the place of residence of any resident." *Id.* para. 4.

235. *Id.* Annex 3, app. 1, art. 29, at 617. Emphasizing the local nature of the PA, as defined in the IA, Palestinian postage stamps are to contain only the terms "Palestinian Council" or "Palestinian Authority." *Id.* para. 2(a), at 618. The PLO is to arrange for sending and receiving postal items between the Palestinian side and foreign countries through commercial agreements with Postal Authorities of Jordan, Egypt, and Israel. *Id.* para. 6(a). The PLO's status at the Universal Postal Union, however, is not to change. *Id.* para. 6(b).

236. *Id.* Annex 3, app. 1, art. 36, at 620. Under the IA, the PA may construct its own telecommunications network, although, in the interim, it will enter into a commercial

transportation;<sup>237</sup> public works and housing;<sup>238</sup> and holy sites.<sup>239</sup> The spheres of authority transferred to the PA, therefore, are primarily municipal functions. To the extent that they move beyond being local concerns — implicating regional resource allocation, infrastructure development, or international relations — the IA requires coordination with Israel.

Accordingly, the IA places into the second category of functional jurisdiction — partial authority — those spheres involving the OPT as a whole, as opposed to the local affairs of municipalities. For these functions, the IA requires cooperation between the PA and Israeli authorities in the OPT, establishing a Civil Affairs Coordination and Cooperation Committee (CAC) composed of an equal number of Palestinians and Israelis and charged with addressing "matters arising with regard to infrastructures, such as roads, water, and sewage systems, power lines and telecommunications infrastructure, which require coordination according to [the] Agreement."<sup>240</sup> Like the territorial jurisdiction provisions described above, the IA's assignment of partial functional jurisdiction to the PA in spheres related to general infrastructure prevents the Palestinians from establishing effective authority over the OPT as a whole, limiting their power to the affairs of individual municipalities in the Territories. Indeed, since any significant construction in Area C for any purpose can proceed only with Israeli approval, the Palestinians' capacity to construct an independent infrastructure is severely constrained by the IA.

The IA's provisions concerning electricity reflect these tensions well. The Agreement provides for the establishment of a Palestinian Energy Authority (PEA), to which it assigns the authority "to issue licenses and to set rules, tariffs, and regulations in order to develop electricity systems."<sup>241</sup> It also establishes a Joint Electricity Subcommittee to deal with "issues of mutual interest concerning electricity."<sup>242</sup> The Palestinians, therefore, have jurisdiction over the administrative dimensions of electricity provision and have a forum within which to coordinate broader functions with the Israelis. The remaining details regarding the assignment of powers and responsibilities over electricity, however, remain unresolved. Israeli and Palestinian negotiators have yet to agree on the scope of the Palestinian authority over electricity. Indeed, the two sides have precisely opposite positions: the Palestinians seek primary authority over the electrical grid in the entire West Bank and construction rights throughout that territory but would agree to Is-

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agreement with the Israeli telephone company (Bezeq). As in other spheres, however, the PA must seek Israeli approval for any construction in Area C. *Id.* para. a(2).

237. *Id.* Annex 3, app. 1, art. 37-38, at 622-23.

238. *Id.* Annex 3, app. 1, art. 30, at 618.

239. *Id.* Annex 3, app. 1, art. 32, at 619.

240. *Id.* Annex 3, art. 1, para. 1(c)(2), at 603.

241. *Id.* Annex 3, app. 1, art. 10, para. 2 (merged version), at 607.

242. *Id.* Annex 3, app. 1, art. 10, para. 8 (merged version), at 608.

raeli operation and maintenance of electricity supply systems within the Israeli settlements and military installations; the Israelis, conversely, seek to retain control over the OPT's electricity infrastructure but would cede local, administrative authority to the Palestinians.<sup>243</sup> In the absence of agreement, "the existing status quo in the sphere of electricity in the West Bank and Gaza Strip shall remain unchanged."<sup>244</sup> Since the status quo and the Israeli position are virtually indistinguishable, the prospects for expanded Palestinian authority in this sphere appear limited. Thus, the infrastructure issues that strike closest to defining the future of the OPT generally and Palestinian self-rule specifically remain largely unresolved, resulting in the perpetuation of the *status quo ante*, i.e. Israeli occupation and control.

The Interim Agreement, moreover, prohibits the PA from assuming any jurisdiction at all over functions that involve external relations. Article 17 of the IA states, "[i]n accordance with the DOP, the jurisdiction of the [Palestinian] Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for: (a) issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis."<sup>245</sup> Although the Agreement acknowledges the PLO's role as international representative of the Palestinian people and permits it to "conduct negotiations and sign agreements with states or international organizations for the benefit of the Council" in certain spheres, including economic, cultural, scientific, and educational agreements,<sup>246</sup> the Council itself is denied "powers and responsibilities in the sphere of foreign relations."<sup>247</sup> It cannot establish embassies, consulates or other types of foreign missions abroad or facilitate their establishment in the West Bank or Gaza Strip.<sup>248</sup> It also cannot contribute to the defense of the OPT's against "external threats."<sup>249</sup> Furthermore, under the IA, any involvement between the Council and representatives of foreign states and international organizations — even for the approved purpose of carrying out cultural, scientific, or educational agreements — is not to be considered "foreign relations."<sup>250</sup> Through these provisions, the IA expressly disallows the PA from participating in the international process in any way that could influence its international status.

The functional jurisdiction of the PA, therefore, is limited to an array of municipal powers and responsibilities. The IA explicitly prohibits the PA from engaging in external relations, except in relation to the provision of basic services to the local population and the economic de-

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243. These positions are represented in the "merged version" of Annex 3, Appendix 1, Article 10 of the IA. *Id.* at 607-608.

244. *Id.* Annex 3, app. 1, art. 10 (merged version), at 608.

245. *Id.* ch. 3, art. 17, para. 1(a), at 564.

246. *Id.* ch. 1, art. 9, para. 5(b), at 561.

247. *Id.* para. 5(a).

248. *Id.*

249. *Id.* ch. 1, art. 12, para. 1, at 562.

250. *Id.* ch. 1, art. 9, para. 5(c), at 561.

velopment of the OPT. It also severely circumscribes the PA's role in the management of OPT-wide infrastructures, establishing a system of required coordination with the Israelis that leaves ultimate authority over these issues to Israel.<sup>251</sup> Thus, although the IA makes repeated reference to maintaining the territorial integrity of the OPT, the agreement ultimately has more to do with local governance of the Palestinian population than with the development of Palestinian territorial autonomy.

### c. Personal Jurisdiction

The fact that the PA governs a population, rather than a territory, is also apparent from its limited personal jurisdiction. Article 17 of the IA states, "[t]he territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in this Agreement."<sup>252</sup> According to the Agreement, Israel maintains exclusive personal jurisdiction over Israelis in all criminal matters, even for offenses committed in areas under PA (i.e. Areas A and B).<sup>253</sup> Israelis, moreover, will only come under the jurisdiction of Palestinian judicial authorities in civil matters when they explicitly consent in writing to that jurisdiction, when they maintain ongoing businesses in territory under Palestinian authority, or when the subject matter of the action is real property located in Palestinian territory.<sup>254</sup> The PA's powers, therefore, extend only over the Palestinian population and other non-Israelis within Palestinian jurisdiction.

## 2. Legitimacy

The Interim Agreement provides for the transfer of authority over the Palestinian population in the West Bank and Gaza Strip from Israel to the PA. As noted above, the terms of this transfer were determined through a process of negotiation between Israel and the PLO. The DOP and the IA consequently are neither unilateral enactments by the State of Israel nor agreements between Israel and the Palestinian population currently residing in the OPT. Rather, they are international agreements between the Government of Israel and the PLO, acting on behalf of all Palestinian people. Thus, while the PA derives its authority in the OPT from Israel, it derives its legitimacy, at least during the interim period, from its relationship to the PLO in its capacity as international representative of the Palestinian people. The legal and func-

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251. While the Interim Agreement (IA) provides a three-tier process for the settlement of disputes including, ultimately, their submission to arbitration, IA, ch. 3, art. 21, the IA's arbitration clause is arguably pathological. *Id.* at 566. There is no indication regarding the arbitral forum or the applicable law. Submission to arbitration is entirely voluntary. The uselessness of the clause is demonstrated by the recent unsuccessful attempt by Palestinian negotiators to have the dispute regarding the electricity infrastructure submitted to international arbitration.

252. *Id.* ch. 3, art. 17, para. 2(c), at 564.

253. *Id.* Annex 4, art. 1, para. 2, at 635.

254. *Id.* Annex 4, art. 3, para. 2, at 638.

tional relationship between the PLO and the PA consequently bears some review.

As discussed earlier in this essay, the international community unanimously recognizes the Palestinians' status as a people and their right to participate in the resolution of the question of Palestine. Most States also recognize the Palestinians' right to national self-determination. To give substance to this recognition the international community, including, since 1993, Israel and the United States, has consented to the PLO's participation in the international process as the representative of the Palestinian people. Because the PLO is recognized only as agent for the Palestinian people, its international legitimacy hinges upon international confidence that it represents the interests of the Palestinian people, in whom the rights to participation and self-determination reside. The PLO, consequently, is bound to act in accordance with the wishes of the Palestinian people, as a whole, not simply that portion that resides in the OPT.

The decisions of the Palestine National Council (PNC) and the Central Committee, its subsidiary, provide the best indication of the extent to which the agreements concluded between the PLO and the Government of Israel have elicited the approval of the Palestinian people. In 1974, the PNC "called for the establishment of an independent national authority over any part of Palestine that may be liberated."<sup>255</sup> The Arab League ratified this approach during its Summit Conference in Rabat in 1974, and that ratification was later cited as precedent supporting the establishment of the PA.<sup>256</sup> More recently, the Central Committee of the PNC voted on October 11, 1993 to ratify the DOP,<sup>257</sup> which was signed one month earlier by Yasser Arafat, acting on the authority of the Executive Committee of the PLO.<sup>258</sup> Since the DOP established the framework within which the ongoing PLO-Israel negotiations have proceeded, the PNC, by ratifying it, authorized the Executive Committee of the PLO to conclude further agreements consistent with its terms.<sup>259</sup> The PA, therefore, was established with the authorization of the PLO and, by extension, of the Palestinian people.

The establishment of the PA, however, does not alter the relationship between the PLO and the Palestinian people — either those living within the OPT or those residing in other States. Although the PLO Executive Committee played a significant role in governing the sections

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255. NASSAR, *supra* note 57, at 63.

256. *Id.*

257. Israelis, Palestinians Laud PLO Ratification of Peace Accord, UPI, Oct. 12, 1993, available in LEXIS, Nexis Library, UPI file.

258. *See generally*, Executive Committee, Statement on the Declaration of Principles, Tunis, Sept. 12, 1993, THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 143.

259. One PLO official in the United States suggests that these measures constitute a delegation of authority to conduct negotiations from the PNC, where ultimate authority in the PLO resides, to the Executive Committee and Chairman Arafat. Interview with Khalis A. Foutah, Deputy Chief Representative, Palestine Liberation Organization, Palestine National Authority, Washington, D.C. (Feb. 9, 1996).

of the OPT under Palestinian administration during the transitional period before the election of the Palestinian Council in January 1996, it did so purely in a caretaker capacity until the Council was in a position to assume the functions assigned to it by the DOP and IA.<sup>260</sup> Otherwise, the PLO and the PA have very different functions vis-à-vis the Palestinian people. The PA, as discussed above, has largely municipal authority over the affairs of Palestinians in the OPT. It lacks the legal competence to make any broader decisions regarding the Palestinian people living outside the OPT or even regarding the ultimate status of Palestinians in the OPT. These functions remain the province of the PLO, which, as discussed in the next section, continues to serve as the representative of the Palestinian people in negotiations with Israel and in other international contexts.

Conversely, the PLO does not have legal authority over decisions of the PA that relate to local governance of the Palestinians in the OPT. The Interim Agreement, in its provisions regarding Palestinian Council elections, states, "[i]n order that the Palestinian people of the West Bank and the Gaza Strip may govern themselves according to democratic principles, direct, free, and general elections will be held for the Council and (the President) of the Executive Authority of the Council . . . ."<sup>261</sup> This provision emphasizes that the Council is to represent the interests of the "Palestinian people in the West Bank and Gaza Strip," who, through the Council, will "govern *themselves*." Thus, only their elected leaders in the OPT have the authority to make decisions included in the Council's functional jurisdiction.

This interpretation is supported by the Palestinian Election Law, which was issued by the PA in early December 1995. Article 12 of the Election Law requires members of the Palestine National Council (the PLO's legislative organ) who are seeking office in the PA Palestinian Council not only to reside within the OPT, but also to transfer their registration with any external constituencies to one of the interior constituencies in the OPT, thereby preventing any one person from serving both interior and exterior constituencies.<sup>262</sup> The Election Law thereby formalizes the distinction between the interests of Palestinians residing in the OPT and those who remain in diaspora and emphasizes the local

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260. During the transitional period before the Council's election, the territories under Palestinian self-rule (the Gaza Strip, excluding Israeli settlements and military installations, and beginning with Jericho, several of the population centers in the West Bank) were governed by a Palestinian Council of National Authority, which was established pursuant to a Basic Law approved by the Central Committee of the PNC. Draft Basic Law for the National Authority During the Transitional Period, art. 58(1) (June 1994). The Council acted in a caretaker capacity during the transitional period and was "generally . . . responsible for the government and administration of the affairs of the country." *Id.* art. 59. The Basic Law made the Chairman of the Executive Committee of the PLO the "President" of the Council, *id.* art. 50, and provided for the appointment of other Council members by the PLO Executive Committee, *id.* art. 58(1). The Council's term ended upon the election of the Palestinian Council provided for by the Interim Agreement.

261. Interim Agreement, ch. 1, art. 2, para. 1, 36 I.L.M. 551, 559.

262. The Palestine National Authority, Palestinian Election Law, art. 12, para. 7 in Palestine Report, Special Supplement, Jan. 12, 1996.

character of representation in the Palestinian Council.

It is worth mentioning, however, that although the PLO and the PA are legally and functionally divided, they are intrinsically intertwined: the PLO negotiated the creation of the PA; the two bodies share a leader (President/Chairman Arafat) and are dominated by the same political party (*Fatah*);<sup>263</sup> and at least six of the elected members of the Palestinian Council also hold positions in the Palestine National Council.<sup>264</sup> A PLO official in the United States has suggested that this overlap helps to ensure consistency between PLO and PA positions and more fluid coordination of their activities.<sup>265</sup> This arrangement has, however, elicited severe criticism with many Palestinians arguing that the administration of Yasser Arafat has become unresponsive to the needs of Palestinians in diaspora.<sup>266</sup> Critics also have expressed concern that the establishment of the PA has marginalized the PLO's political bodies and has relegated the PLO to the role of international "wheeler-dealer" on behalf of the PA.<sup>267</sup>

In view of these concerns, it is important to emphasize that while the PA's authority over the affairs of Palestinians in the OPT is based upon the transfer of powers and responsibilities from the Government of Israel, its legitimacy emerges from the Palestinian people. Its external legitimacy derives from the role that the PLO, as international representative of the Palestinian people, played in negotiating and approving its establishment, and its internal legitimacy arises from the participation of the Palestinian population in the OPT in the election of the Palestinian Council.<sup>268</sup>

### 3. International Participation

The PA can participate in the international process only through the PLO. As discussed above, the Interim Agreement expressly prohibits the PA itself, from assuming powers and responsibilities in the

263. Candidates affiliated with *Fatah* won 76% of the votes in the January elections for the Palestinian Council. Ghada Karmi, *What Role for the Palestinian Diaspora After Oslo?*, in *PALESTINIAN ELECTION AND THE FUTURE OF PALESTINE: A SPECIAL REPORT 98* (The Center for Policy Analysis in Palestine, ed. 1996).

264. The following Palestinian Council members are PNC members: Hakam Bal'awi (Tulkarem District); Dawood El-Zeir (Bethlehem District); Sharif Ali Hussein Mash'al'Abbas Zaki (Hebron District); Nabil ' Amr (Hebron District); Abdul Jawad Saleh (Ramallah District); Azmi El-Shuai'bi (Ramallah District).

265. Foutah Interview, *supra* note 259. Interestingly, Mr. Foutah's business card identifies him as the Chief Representative in the United States of both the PLO and PA, an arrangement that would seem to be precluded by the terms of the Interim Agreement.

266. See Karmi, *supra* note 263, at 11 (citing Arabic press report that eighty thousand Palestinian refugees signed petition denouncing Palestinian Council elections because Palestinians outside of OPT were excluded from voting).

267. *Id.* at 12-13.

268. The elections for Palestinian Council members yielded an extremely high overall turnout rate of 79% of registered voters, despite the attempted boycott of the elections by opposition parties. Salma A. Shawa, *The Palestinian Elections: A Strong Start Into an Uncertain Future*, WASH. RPT. ON MIDDLE EAST, Apr. 1996, at 23.



sphere of foreign relations. It does, however, permit the PLO to "conduct negotiations and sign agreements with states or international organizations for the benefit of the Council" in the spheres of economic, social, and technical development.<sup>269</sup> As discussed earlier in this essay, the PLO has established relationships with and participated in the proceedings of a variety of international organizations. Under the terms of the IA, the PLO may work with these organizations to address the specific problems and needs of the Palestinians in the OPT. In this respect, the PLO can participate more substantively in the international process than it could before its link to the Palestinian population in the OPT was formalized by the DOP.

The IA appears, however, to limit the extent to which the PLO may use this broadened participation as a basis for altering its international status during the interim period. This issue emerges in the IA's terms regarding the provision of postal services to the OPT's population. The Agreement states, "[w]ithout derogating from the generality of paragraph 5 of Article IX of this Agreement (Foreign Relations), the status of the Palestinian side to this Agreement in the Universal Postal Union (UPU) will remain as it is at present, and the Palestinian side will not be party to any action to alter or change its status."<sup>270</sup> In the context of the Agreement, the "Palestinian side" refers to the PLO, which is not a member of the UPU. The provision, therefore, precludes the PLO from seeking membership in the UPU as a "sovereign state,"<sup>271</sup> despite the UPU's traditionally liberal membership policy.<sup>272</sup> Although the Interim Agreement does not address this issue with regard to other organizations, it is indicative of the likely reaction from Israel to PLO attempts to alter its status in other international organizations. Since Israel will continue to control the admission of foreign visitors to the OPT throughout the Interim Period,<sup>273</sup> it will be in a position to stifle PLO efforts that it views as possibly prejudicing the outcome of final status negotiations.

#### 4. Conclusion

The majority of the States in the international system have recognized that the Palestinian people form a nation and are entitled freely to determine their political status. In order to facilitate vindication of that right, the international community has consented to the participa-

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269. Interim Agreement, ch. 1, art. 9, para. 5(b), 36 I.L.M. 551, 561.

270. *Id.* Annex 3, app. 1, art. 29, para. 6(b), at 618.

271. "Article 3(1) of the Constitution of the UPU prescribes that 'any sovereign state may apply for admission as a member.'" W. MICHAEL REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION 79 (1975).

272. According to Michael Reisman, the gates to membership in the UPU have been "opened wide," with little discussion of the attributes of sovereignty. As he notes, "Membership in the UPU] includes the Netherlands Antilles and Surinam, Portuguese provinces in West Africa, East Africa, Asia, and Oceania, Liechtenstein, Monaco, the Vatican, San Marino, and so on. With such a liberal membership policy, there has been no need for the development of associate status." *Id.*

273. Interim Agreement, Annex 1, 36 I.L.M. 551, 569.

tion of the Palestinian people in the international process through their international representative, the Palestine Liberation Organization. The PLO, however, does not govern the Palestinian people; rather, it exists to secure for them the opportunity to govern themselves, and its legitimacy and international status arise from that role. Neither the establishment of the symbolic State in 1988 nor the creation of the PA in 1994 legally altered the relationship between the PLO and the Palestinian people: the 1988 Declaration of Independence simply marked an official redefinition of Palestinian national aspirations — a retroactive acceptance of the two-state solution embodied in the 1947 U.N. Partition Plan; and the PA was established as a government of limited authority to serve the local needs of the Palestinians residing in the OPT during the interim period and to create a practical foundation for some broader form of self-government.

### III. THE INTERNATIONAL LEGAL STATUS OF PALESTINE UNDER INTERIM SELF-GOVERNMENT ARRANGEMENTS

Thus, Palestine at present is a people, a territory, a liberation organization with a legal status as something more than a liberation organization, a State with a legal status as something less than a State, and an Interim Authority of rather limited authority. But is Palestine more than the sum of its parts? Can the public bodies established to represent and liberate the people and territory of Palestine be fused into an entity with a legal status of its own? In this section, I undertake to situate Palestinian public bodies within the normative framework governing the exercise of self-determination. Ultimately, I will argue that, while the legal and functional separation of the PLO and the PA has precluded Palestine from acquiring an international legal status independent of those bodies, that separation also has served to preserve the independence of the PLO as the international representative of the Palestinian people, which is a necessary precondition for its role in facilitating the legal exercise of Palestinian self-determination.

#### *A. The Exercise of Self-Determination*

Modern international law has developed relatively defined standards to govern the legal exercise of self-determination. As Crawford notes, "[i]t is a peculiarity of this area of practice that it is possible to be more certain about the 'consequences' of self-determination than about the criteria for the territories to which the principle is regarded as applying."<sup>274</sup> The goal articulated by the U.N. Charter for non-self-governing territories is the eventual attainment of "a full measure of self-government."<sup>275</sup> The General Assembly has interpreted the Charter to permit three alternatives:

A Non-Self-Governing Territory can be said to have reached a full

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274. CRAWFORD, *supra* note 8, at 91-92.

275. U.N. Charter, art. 73.

measure of self-government by[:]

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.<sup>276</sup>

Thus, although self-government most frequently has taken the form of full independence from the administering State,<sup>277</sup> "[m]any federations, real unions, personal unions and associations are treated with equanimity by the international decision process."<sup>278</sup> Indeed, for entities too small or underdeveloped to be economically or politically viable as independent States, association or integration with another State can provide the self-determining population with heightened security and broader access to other markets, while at the same time permitting the associate to maintain a discrete political identity and to participate in potentially significant ways in the international process.<sup>279</sup>

Association and integration have taken a variety of forms in the international system, providing populations with different levels of independence from metropolitan States. The formal status of association maintains both parties' legal status of statehood but involves "the significant subordination of and delegations of competence by one of the parties (the associate) to the other (the principal)."<sup>280</sup> Thus, to cite one example, although Puerto Rico maintains a relationship of association with the United States — it has delegated significant foreign affairs powers to the United States, and its citizens hold United States passports — it remains a sovereign State and legally may terminate the association if its population so desires. Even integration within another State need not entirely extinguish the autonomy and international personality of the subordinate political entity. For instance, although Greenland was integrated within the realm of Denmark in 1952, the territory retains a significant degree of autonomy under Home Rule arrangements,<sup>281</sup> and it maintains a limited international personality.<sup>282</sup>

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276. G.A. Res. 1541 (XV), *supra* note 24, at Annex, Principle VI; Declaration on Friendly Relations, *supra* note 9, at 124. The International Court of Justice endorsed the General Assembly's interpretation in the *Western Sahara Case*. *Western Sahara Case*, 1975 I.C.J. 12, 32.

277. As Crawford notes, "[o]f approximately 100 Chapter XI territories in the period 1945-78, 59 achieved joint or separate independence (this includes Grenada, Surinam, and Singapore, which had a previous status of self government)." CRAWFORD, *supra* note 8, at 369 n.60.

278. REISMAN, *supra* note 271, at 11.

279. *See generally id.* at 19-20, 51-103; *see also* CRAWFORD, *supra* note 8, at 370-77.

280. REISMAN, *supra* note 271, at 10. Neither the delegation of its foreign affairs competence nor the existence of common trade agreements, common currency, or common citizenship have deemed to extinguish the international personality of an associate. *Id.* at 17.

281. Under the Greenland Home Rule Act, Greenland is defined as a "distinct community within the Kingdom of Denmark." NII LANTE WALLACE-BRUCE, *CLAIMS TO STATEHOOD IN INTERNATIONAL LAW* 191 (1994) (quoting the Greenland Home Rule Act art. 1). Accordingly, Greenland has a legislature and executive with authority in the areas of "taxation, education, culture, church affairs, production and export, supplies and

Similarly, while China resumed its sovereignty over Hong Kong in 1997, the Joint Declaration concluded between China and the United Kingdom assures that Hong Kong will enjoy "a high degree of autonomy, except in foreign and defense affairs."<sup>283</sup> These and many other precedents show that a territory may preserve limited international personality and autonomy even in the context of association or integration with another State.

Where the right of self-determination is involved, however, the legal inquiry in such cases does not end with a declaration that a self-determining population has opted for association or integration. As Professor Michael Reisman notes, "[t]he lawfulness of particular associations is determined by content and not by form."<sup>284</sup> Article One of the International Covenants on Civil and Political and Economic, Social, and Cultural Rights declares, "[a]ll peoples have the right to self-determination. By virtue of that right they *freely* determine their political status and *freely* pursue their economic, social, and cultural development."<sup>285</sup> Apparent from the Covenants' definition of self-determination is that the right, if nothing else, revolves around freedom — the freedom of a people to define their own political status and to determine for themselves the nature of their relationships with other members of the international system. That is not to say, of course, that that freedom is absolute. In a world system characterized by both interdependency and at least *de facto* inequality, the freedom of every community is constrained by myriad political and economic factors. Nevertheless, the right to self-determination would be rendered an empty promise if the choice among types of self-government were imposed upon, rather than selected by, the concerned population. Interna-

transport, technology, telecommunications and housing." *Id.* at 191-92. The areas excluded from Greenland's home rule authority are external relations, financial, monetary and currency policy, defense, the administration of justice and police, and constitutional, contract, inheritance, and family law. *Id.* at 192.

282. Greenland is affiliated with the European Community as an Overseas Territory; it also sends its own delegation to the Nordic Council, where it is treated as an independent nation, and it is a member of the Inuit Circumpolar Conference, which has observer status at the United Nations. *Id.* at 192-93. Moreover, the Greenland Home Rule Act requires that treaties affecting the interests of Greenland be referred to home rule authorities before they are concluded by Denmark. *Id.* at 193.

283. *Id.* at 203-04. Hong Kong nevertheless will continue to participate, albeit to a limited degree, in the international arena. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China stipulates that, under the name Hong Kong, China, the territory may establish and maintain diplomatic relations and conclude agreements in the fields of economics, trade, financial, monetary, shipping, communications, tourism, culture, and sports. *Id.* at 204-05. Since Hong Kong has not been regarded as a self-determination unit, however, its disposition is not directly relevant to the question of Palestine.

284. REISMAN, *supra* note 271, at 11.

285. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, para. 1, 993 U.N.T.S. 5; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 1, para. 1, 999 U.N.T.S. 173 (emphasis added).

tional practice, accordingly, has been to strive to assure that self-government has been achieved through the free choice of the self-determining people.

One way in which the international community has evaluated the integrity of an exercise of self-determination is by examining popular support for the decision. A choice of association or integration has elicited particular scrutiny, since there is a greater possibility that these forms of self-determination resulted from coercion by a metropolitan State, rather than from the free choice of the concerned population.<sup>286</sup> Principle VII(a) of the Annex to U.N. General Assembly Resolution 1541 (XV) states, "[f]ree association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes."<sup>287</sup> As Professor Reisman points out, the consent of the elite or effective leader no longer suffices to ratify the association: "[i]n contemporary practice, the demand for plebiscite or some other reliable consultation of popular will indicates that dispositions of territorial communities can be effected lawfully only with the free and informed consent of the members of that community."<sup>288</sup> Resolution 1541 is even more explicit in its provisions regarding integration, requiring that integration be "the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."<sup>289</sup> Thus, the international community has come to require objective evidence of popular support among a self-determining population for a decision to associate with or be incorporated within another State.

This principle has also been applied, at least on one occasion, in the context of independence. The principle of self-determination requires not only that a territory be self-governing, but also that the people of that territory be self-governing. The international community consequently has been unwilling to recognize the independence of territories whose population effectively has been denied the opportunity to exercise self-determination by the transfer of power to an unsupported or unrepresentative government.<sup>290</sup> While, as Crawford points out, "self-determination does not necessarily involve the establishment of a democracy based on the principle of 'one vote, one value,' and the administering authority has a measure of discretion in determining the persons in the territory to whom the grant of authority will be made,"<sup>291</sup> the international community has required that authority be transferred to a government possessing the support of a territory's general popula-

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286. See CRAWFORD, *supra* note 8, at 370, 373.

287. G.A. Res. 1541 (XV), *supra* note 12, at Annex, Principle VII(a).

288. Reisman, *supra* note 271, at 12, quoting STEPHANSKY, PUERTO RICO IN THE UNITED STATES AND THE CARIBBEAN 95 (T. Szulc. ed. 1971).

289. G.A. Res. 1514 (XV), *supra* note 12, at Annex, Principle IX(b).

290. See DUGARD, RECOGNITION AND THE UNITED NATIONS 97-98 (1987) (discussing non-recognition of white minority government of Rhodesia).

291. CRAWFORD, *supra* note 8, at 219.

tion.<sup>292</sup>

The United Nations also has sought to confirm the voluntary consent of a population to an association by scrutinizing the terms of the agreement between the metropolitan and associated States. It has required for instance that there be procedures in place that permit the Associate to terminate the association as easily as the metropolitan State and that demonstrate that the association is "a continued expression of the right of self-determination of the people of the Associated State."<sup>293</sup>

Because of concern about the voluntariness of putative exercises of self-determination, international law requires special scrutiny when a territory's status changes while it is under belligerent occupation. The Fourth Geneva Convention provides:

Protected persons who are in occupied territory shall not be deprived, in any case or in any matter whatsoever, of the benefits of the present Convention by any change introduces, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.<sup>294</sup>

There is a presumption that a State that comes into being under belligerent occupation is a puppet State, and, as a result, it should not be recognized as independent by other States.<sup>295</sup> The international norm against the recognition of puppet states traditionally has been defined in terms of state sovereignty: a puppet state is an organ of the occupant State and, therefore, is subordinate to its legal order; since a sovereign State is subordinate only to international law, a puppet state cannot be recognized as sovereign.<sup>296</sup> While this argument need not be framed with reference to self-determination, the norm against recognition of puppet States suggests that the creation of a puppet State is not a valid exercise of self-determination since Principle VI of General Assembly Resolution 1541 permits only "[e]mergence as a *sovereign* independent State." An occupant State, therefore, may not avoid its legal obligations to the population of an occupied territory simply by obscuring its control through the creation of a puppet State. Indeed, Marek suggests that the presumption that a State or government established during a belligerent occupation is of a puppet character can "only be re-

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292. *Id.* at 220 (citing the U.N. Security Council and General Assembly's insistence that the United Kingdom not transfer power to the white minority government of Rhodesia and, rather, "promote the country's attainment of independence in accordance with the aspirations of the majority of the population.").

293. *Id.* at 376.

294. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47, 6 U.S.T. 3548, 75 U.N.T.S. 318.

295. See KRYSZYNA MAREK, AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 113 (1968).

296. See *id.* at 113-14.

butted after the liberation of the territory."<sup>297</sup>

In sum, therefore, international law requires that self-determination be exercised with regard for the free will of the self-determining population. The establishment of statehood is not the only legitimate outcome: the international community has shown tolerance for decisions by self-determining populations to associate with or integrate within another State, rather than to establish complete independence. These alternative outcomes have, however, elicited greater scrutiny by the international community, particularly when, as in cases of military occupation, there is great potential that an ostensible exercise of self-determination resulted from coercion rather than free choice.

### *B. The Legal Status of Palestine*

International law recognizes the participation of a variety of types of actors in the international process. Under traditional doctrine, states were the only recognized international participants.<sup>298</sup> Over the course of the twentieth century, however, international law has come to recognize the participation of other, non-state entities.<sup>299</sup> McDougal, Laswell, and Reisman define a participant in the international constitutive process as "an individual or an entity which has at least minimum access to the process of authority in the sense that it can make claims or be subjected to claims."<sup>300</sup> As their definition suggests, different types of international actors participate in different capacities, the breadth of their participation determined by their relations with other actors in the international system. Accordingly, "an international person need not possess all the international rights, duties, and powers normally possessed by states. Some states only possess some of those rights and duties; they are therefore only in those limited respects subjects of international law and thus only possess limited international personality."<sup>301</sup> Thus, although States remain preeminent within the international process, it is no longer their exclusive province.

Under prevailing international legal standards, Palestine is not a State. Although the PLO and the PA each fulfill aspects of the objective criteria for statehood at least as well as some recognized States, the two bodies do not, together, form a unit independent and unified enough to constitute a State. The PLO remains the independent voice and international representative of the Palestinian people, but it lacks direct authority over the population and territory of Palestine. Conversely, while the PA directly governs segments of the OPT, its authority is subordinated to Israel's, and it is prohibited by the DOP and subsequent

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297. *Id.*

298. See Myres McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 262 & n.8 (1967); J.D. van der Vyver, *Statehood In International Law*, 5 EMORY INT'L L. REV. 9, 12 (1991).

299. See Suy, *supra* note 148, at 84, 100-01.

300. McDougal, *supra* note 298, at 262.

301. LASSA OPPENHEIM, INTERNATIONAL LAW ch.2, sec. 33 (H. Lauterpacht ed., 8th ed. 1955).

agreements from independently participating in international affairs. The relationship between the PA and the PLO consequently may best be characterized as a variation on association, although neither entity is a sovereign State. Ultimately, while this arrangement does not itself represent a fulfillment of the Palestinian right to self-determination, it leaves open the possibility for the free exercise of self-determination in the future.

### 1. Statehood

The creation of States is a matter appraised by international law. Indeed, the idea that an entity's international legal status could be subject to definition by another State's municipal law repudiates one of the central premises of modern international law: the sovereign equality of States. Since no one State legally may impose its municipal order upon another, some higher order must prevail over interstate relations. As Marek explains, "[s]ince they break the framework of municipal law, the birth, extinction, and transformation of States can be made subject of a legal inquiry only by reference to a legal order which is both higher than State law and yet belongs to the same system of norms . . . ." <sup>302</sup> Thus, while "[i]nternational law does not 'create' States, just as a State does not 'create' individuals . . . [i]t is international law and international law alone which provides the legal evaluation of the process, determines whether the entity is in fact a State, delimits its competences and decides when it ceases to exist."<sup>303</sup> Since an entity's participation in the international system is defined by its perceived status among other international actors, however, there has been some controversy regarding the role that recognition plays in conferring the legal status of Statehood on aspirant communities.

Two predominant views have emerged regarding this issue: the declaratory approach and the constitutive approach. The orthodox constitutive approach holds, generally, that an entity legally becomes a State when other international actors recognize it to be one, the act of recognition being constitutive of a new State's legal status. According to Lauterpacht, this view is based upon a Hegelian vision of international law "as a loose 'law of co-ordination' based on agreement as distinguished from the overriding command of a superior rule of law." <sup>304</sup> States, within this perspective, exist only in relation to one another, their status emerging from their relationships, not on the basis of objective legal criteria. Proponents of the declaratory view argue that this relativist dimension of the constitutive approach is "destructive of the very notion of an international community."<sup>305</sup> They maintain that an entity becomes a State when it fulfills the legal criteria for statehood and that,

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302. MAREK, *supra* note 295, at 2.

303. *Id.*

304. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 38 (1947).

305. MAREK, *supra* note 295, at 132, *quoting* TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 42 (L.C. Green ed., 1951).



therefore, recognition by other states is simply declaratory of an existing fact. As Chen summarizes:

The fact that States cannot have the same faculty for appreciating the fact of the fulfillment of [the] requirements [for statehood] is no reason for denying that there is an objective point of time at which such fulfillment takes place. Third States may be unable or unwilling to acknowledge this fact, but they certainly cannot alter it to suit their ignorance, caprice, or self-interest.<sup>306</sup>

Lauterpacht attempts to reconcile the declaratory and constitutive approaches by suggesting that while recognition is "declaratory of facts," it is "constitutive of rights." He reasons, "[a] State may exist as a physical fact. But it is a physical fact which is of no relevance for the commencement of particular international rights and duties until by recognition — and nothing else — it has been lifted into the sphere of law, until by recognition it has become a juridical fact."<sup>307</sup>

An evaluation of the relative merits of each of these approaches is beyond the scope of this essay. It suffices to note that an entity's claim to Statehood may be evaluated either on the basis of objective legal criteria or in light of the degree of recognition it has received by the international community. As discussed below, Palestine has yet to achieve statehood within either framework.

## 2. The Declaratory Approach and the Montevideo Convention Criteria for Statehood

The declaratory view of recognition, as noted above, holds that an entity becomes a State when it fulfills the internationally accepted criteria for statehood.<sup>308</sup> The Montevideo Convention of 1933 established four criteria for evaluating an entity's claim to statehood. The entity is required to possess: "(a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."<sup>309</sup> The requirement of independence is also frequently appended to the Montevideo criteria.<sup>310</sup> Although the Montevideo Convention technically binds only the parties to it, its criteria for statehood, with minor variations, have been widely accepted as authoritative by international jurists.<sup>311</sup>

Although the analysis below addresses each of the criteria indi-

306. CHEN, *supra* note 305, at 44-45.

307. LAUTERPACHT, *supra* note 303, at 75.

308. These criteria are also relevant to Lauterpacht's view of recognition insofar as he recommends that States base their decisions about whether to recognize a nascent State on the applicable legal criteria, rather than political concerns. *Id.* at 55.

309. Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 165 U.N.T.S. 19 [hereinafter Montevideo Convention].

310. See generally MAREK, *supra* note 295 at 162-68.

311. See, e.g., CRAWFORD, *supra* note 8, at 31-34; WALLACE-BRUCE, *supra* note 281, at 51. Cf. OPPENHEIM, *supra* note 301, § 34 (replacing the requirement of capacity to enter into foreign relations with the requirement of sovereignty).

vidually, it is important to note, as an initial matter, that they cannot be applied piecemeal. Marek summarizes prevailing opinion as follows: "[t]here is a State in the international law sense, when there is an independent legal order, effectively *valid throughout* a defined territory *with regard to* a defined population."<sup>312</sup> Similarly, Oppenheim states, "[a] state proper is in existence when a people is settled *in* a territory *under its own* sovereign government."<sup>313</sup> As these jurists' opinions suggest, the Montevideo criteria relate to and find definition in one another. A putative state, therefore, must possess a government that, itself, governs a population within a specified territory and that, itself, has the capacity to enter into foreign relations. While Palestine fulfills aspects of each of the Montevideo criteria, it continues to lack a full measure of independence, which synthesizes and gives substance to the other criteria for statehood.

#### a. Defined Territory

The international community has adopted an exceptionally flexible construction of the "defined territory" criterion for statehood. In order to qualify for statehood, an entity's territory need not exceed a minimum size.<sup>314</sup> It also need not be "coherent . . . or conform to any particular form."<sup>315</sup> Finally, the entity seeking statehood need not have perfectly-delimited territorial boundaries. This standard was articulated in a well-known decision of the Polish-German Mixed Arbitral Tribunal:

Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected, the state in question cannot be considered as having any territory whatsoever . . . In order to say that a state exists . . . it is enough that this territory has a sufficient consistency, even

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312. MAREK, *supra* note 295, at 162 (emphasis added). The following statement by U.S. President Grant, cited by Marek as indicative of state practice regarding the conditions for statehood, also draws attention to the relationship between the criteria:

[T]here must be a people occupying a *known* territory, united under some known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations and capable of performing the corresponding international duties *resulting from its acquisition of the rights of sovereignty*.

A power should exist complete in its organization, ready to take and able to maintain its place among the nations of the earth.

Marek, *supra* note 295, at 165, quoting J.B. MOORE, A DIGEST OF INTERNATIONAL LAW 107-08 (1906).

313. OPPENHEIM, *supra* note 301, § 34 (emphasis added).

314. CRAWFORD, *supra* note 8, at 36 (stating that Tuvalu, Malta, Nauru, Liechtenstein and Seychelles—ranging in size from 26 sq. km. to 170 sq. km.—have been all recognized as meeting the defined territory requirement). WALLACE-BRUCE, *supra* note 281, at 51.

315. WALLACE-BRUCE, *supra* note 281, at 38 (noting that the international community recognizes states, such as the United States and Tanzania, comprised of non-contiguous territory).

though its boundaries have not yet been accurately delimited, and that the state actually exercises independent public authority over that territory.<sup>316</sup>

As the Tribunal made clear, the defined-territory criterion does not require the legal demarcation of a state's boundaries. Indeed, the international community has on several occasions extended recognition to states whose territorial borders remained in dispute.<sup>317</sup> What appears central, instead, is the putative state's exercise of independent governmental authority over a territory.<sup>318</sup>

It is in that last respect that Palestine, as presently constituted, fails to meet the defined territory criterion. One commentator has suggested that Palestine is not a defined territory because "[w]hat territory is Palestine remains the source of bitter conflict."<sup>319</sup> However, that analysis seems to ignore the traditionally flexible interpretation of the defined territory criterion. What territory is Palestine, after all, is no greater a source of conflict than what territory is Israel.<sup>320</sup> Moreover, the PLO has defined very specific territorial goals for a State of Palestine — the West Bank and Gaza Strip<sup>321</sup> — and a substantial portion of

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316. CRAWFORD, *supra* note 8, at 52 (quoting *Deutsche Continental Gas-Gesellschaft v. Polish State*, (1929) 5 A.D. No. 5, 14-15). See also MAREK, *supra* note 295, at 163 ("It may happen that, in special circumstances, international law will provisionally accept, as its subject, a community with only a rough delimitation of its territorial and personal spheres."); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. 201 cmt. b ("An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state.").

317. See, e.g., *Monastery of St. Naoum Case*, 1924 P.C.I.J. (ser. B) No. 9, at 10 (granting Albania international recognition and induction into League of Nations despite dispute over Serbo-Albanian); *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 32 (Feb. 20).

318. See CRAWFORD, *supra* note 8, at 40 ("The only requirement is that the State must consist of a certain coherent territory effectively governed—a formula which demonstrates that the requirement of territory is rather a constituent of government and independence than a separate criterion of its own.").

319. Kathryn M. McKinney, Comment, *The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine*, 18 SEATTLE U. L. REV. 93, 95 (1994).

320. Indeed, recognition of Israel was urged by the United States *despite* the controversy regarding its borders. WALLACE-BRUCE, *supra* note 281, at 53 (quoting Jessup, U.S. Representative to the Security Council, advocating admission of Israel to the U.N., U.N. SCOR, 383rd Mtg. Supp. No. 128, at 9-12, (1948):

One does not find in the general classic treatment of this subject [definition of a state in international law] any insistence that the territory of a state must be exactly fixed by definite frontiers. . . The formulae in the classic treatises somewhat vary, one from the others, but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitations of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a state is that it shall possess territory is that one cannot contemplate a state as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some position of the earth's surface which its people inhabit and over which its government exercises authority.'

321. See *supra* text accompanying notes 179-180 (discussing Palestinian Declaration of Independence).

the international community recognizes the legitimacy of those territorial aspirations.<sup>322</sup> Although the precise boundaries of such a state have yet to be precisely delimited, that fact, as noted above, has never been regarded as a barrier to meeting the "defined territory" requirement. Thus, ongoing controversy regarding the proper boundaries of Palestine is not an impediment to the Palestinian claim to statehood.

What is an impediment is the fact that a Palestinian government does not yet exercise independent authority over a defined territory. As discussed above, agreements between Israel and the PLO severely limit the territorial, functional, and personal jurisdiction of the PA. While the PA has significant municipal authority over areas of the OPT, it does not possess sovereignty over them in any practical sense. Israel retains authority to review all legislation governing the administration of the territories, it has personal jurisdiction over all Israelis in the territories, it exercises control over most aspects of economic development and security in the territories, and it continues to regulate movement between the Palestinian administrative enclaves. As a result, it cannot be said that a Palestinian government exercises independent authority over any territory at all.

#### b. Permanent Population

International jurists also have construed broadly the Convention's permanent population requirement. According to Wallace-Bruce, the criterion "simply requires that there must be people identifying themselves with the territory no matter how small or large the population might be."<sup>323</sup> Oppenheim provides a somewhat different interpretation, defining a "people" as "an aggregate of individuals *who live together as a community*, though they may belong to different races or creeds or cultures, or be of different colour."<sup>324</sup> His definition suggests that a putative state's population not only must form a national community, but also must live together as one. Combining these two interpretations, a state's population should (1) identify themselves with a territory and (2) live together as a community.

The Palestinian population meets both criteria. Palestinians not only identify with the territory of Palestine, they define themselves in terms of it.<sup>325</sup> Although a large segment of the Palestinian population, as defined by the PLO Covenant, is dispersed across the globe, the existence of Palestinian refugees does not, as some have suggested,<sup>326</sup> defeat their claim to constitute a permanent population. Palestinians live together as a community in the West Bank and Gaza Strip, where they form the vast majority of the population. The fact that members of

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322. See G.A. Res. 48/158D, *supra* note 100.

323. WALLACE-BRUCE, *supra* note 281, at 53. In 1984, thirty-six United Nations member States had populations of less than one million. DUGARD, *supra* note 290 at 71.

324. OPPENHEIM, *supra* note 301, at sec. 34 (emphasis added).

325. See *supra* text accompanying notes 117-124.

326. McKinney, *supra* note 319, at 96.

their national community reside elsewhere and may, if circumstances permit, return to Palestine at a later date is irrelevant to Palestine's viability as a State. No doubt millions of people in the world may claim citizenship in countries in which they do not presently reside; their residence elsewhere does not, however, extinguish those states' claims to possessing a permanent population. The Palestinian population in the OPT, therefore, constitute Palestine's permanent population.

### c. Government

Although there has been some movement toward making respect for the rights of citizens a requirement for statehood,<sup>327</sup> the government criterion does not require that a state adhere to a particular form of government. The international community has recognized states with myriad forms of government, from people's republics to constitutional monarchies to theocracies.<sup>328</sup> Rather, the government<sup>329</sup> criterion can be reduced to the elements of effectiveness and legal title. As Crawford observes, "[t]he point about 'government' is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority."<sup>330</sup> A government's effectiveness — or "actual exercise of authority" — refers to its structural coherence and its general capacity to maintain law and order within a territory. An examination of state practice with regard to this element, however, reveals little in the way of standards. States have recognized governments, such as the former Belgian Congo (Zaire), that possessed only the most tenuous grasp of authority.<sup>331</sup> The second element, legal title, refers to the government's exclusive legal right under international law to govern a territory.<sup>332</sup> This right may have been granted by the former sovereign of the territory<sup>333</sup> or recognized in accordance with the principle of self-determination. Therefore, the government criterion possesses both factual and legal dimensions.

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327. See DUGARD, *supra* note 290, at 97-98 (discussing developing norm of non-recognition of regimes based upon systematic denial of population's civil and political rights); van der Vyver, *supra* note 298, at 14.

328. WALLACE-BRUCE, *supra* note 281, at 54.

329. MAREK, *supra* note 295, at 162. Marek uses the term "legal order" instead of government.

330. CRAWFORD, *supra* note 8, at 44.

331. Crawford describes the situation in the Belgian Congo when recognition was granted to it in 1960 as follows:

No effective preparations had been made; the new government was bankrupt, divided, and in practice hardly able to control even the capital. Belgian and other troops intervened, shortly after independence, under claim of humanitarian intervention; and extensive United States financial and military assistance became necessary almost immediately. Among the tasks of the United Nations force was, or came to be, the suppression of secession in Katanga, the richest Congolese province. Anything less like effective government it would be hard to imagine.

*Id.* at 43.

332. *Id.* at 44.

333. *Id.*

State practice appears to indicate, however, that a strong legal title can compensate for a lack of effectiveness and, conversely, that a weak legal title requires more complete effectiveness.<sup>334</sup> According to Crawford, it is this inverse relationship that explains the international community's willingness to grant early recognition to the Belgian Congo despite its government's relative lack of control over the country.<sup>335</sup> It similarly explains the almost universal non-recognition of the government of Rhodesia, which assumed power in contravention of the principle of self-determination, even though the Rhodesian government maintained effective control over the country.<sup>336</sup>

The long-standing dispute over the legal title to the West Bank and Gaza Strip has been the focus of a large body of scholarly literature. An appraisal of that debate is beyond the scope of this essay. Regardless of the strength of the Palestinians' general claim of right to self-government, however, the interim character and extraordinarily limited powers of the PA make it impossible to characterize that body as the "effective government" of the OPT. The PA's authority, after all, is conferred on it by the agreements reached between Israel and the PLO, not by international law. While an independently constituted Palestinian government conceivably could assert a legitimate claim to being the "effective government" of Palestine without having established full control over the territory it claims, the PA is not such a government. Since the PLO at present exercises authority in the OPT only through its relationship to the PA, its effectiveness is similarly limited. Palestine therefore lacks an effective government.

d. Capacity to enter into foreign relations.

A state's capacity to enter into foreign relations is evaluated in terms of its legal competence to participate in the international process and to carry its international obligations into effect on the domestic level. The economic<sup>337</sup> and political<sup>338</sup> factors that define the breadth of its international activity are not relevant to the determination. As Crawford explains, the foreign relations requirement is essentially a synthesis of the government and independence criteria: "[c]apacity or competence . . . depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of such relations so that no other entity carries out and accepts

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334. MAREK, *supra* note 295, at 102.

335. CRAWFORD, *supra* note 8, at 44.

336. See DUGARD, *supra* note 290, at 97-98.

337. "Capacity" here refers to a state's legal competence, not its economic or monetary situation. WALLACE-BRUCE, *supra* note 281, at 56-57 (discussing a significant number of countries that lack economic capacity to participate fully in the international system but are nevertheless recognized as states).

338. See *id.* at 55-56 ("Capacity" in this context refers to legal competency. Once that competency exists, it is left to the discretion of the entity to choose which international persons it desires to engage in relations with.").

responsibility for them."<sup>339</sup> The international recognition of Liechtenstein's statehood<sup>340</sup> illustrates the centrality of independence to the foreign relations criterion: while Liechtenstein has delegated the conduct of its foreign relations to Switzerland, it remains politically independent, its foreign relations "carried out by Switzerland only from case to case and inasmuch as they are the subject of a special instruction of the Government of the Principality."<sup>341</sup> Thus, the actual capacity to participate in the international process is subordinate to independence, which is itself the legal basis for a state's foreign relations activity. Accordingly, while independent states participate more fully than other types of entities, their participation is "not a criterion, but rather a consequence, of statehood, and one which depends on the status and situation of particular states."<sup>342</sup>

Although the PLO has demonstrated its capacity to enter into foreign relations on behalf of the Palestinian people, the legal and functional separation of the PLO and the PA prevent the PLO from independently implementing international obligations in the territory and with regard to the population of Palestine. Under the terms of the DOP and the subsequent agreements concluded pursuant to it, Israel maintains authority over most aspects of the PA's external relations; the PLO is empowered to represent it only in international negotiations regarding economic, social, and technical development. It cannot regulate the flow of goods and persons into and out of Palestinian territory; it cannot facilitate the establishment of diplomatic missions from foreign countries in its territory; and it cannot translate international commitments affecting the territory or population of Palestine into PA policies without first obtaining Israel's consent. Thus, while the PLO engages in international relations, its activities are one step removed from the territory and population of Palestine.<sup>343</sup> Under these circumstances, Palestine, as a national and territorial unit, does not have the capacity to engage independently in international relations.

#### e. Independence

A requirement generally appended to — and implicit in<sup>344</sup> — the

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339. CRAWFORD, *supra* note 8, at 47.

340. Liechtenstein is a party to the Statute of the International Court of Justice, a privilege reserved to states. U.N. Charter, art. 93. DUGARD, *supra* note 290, at 77.

341. CRAWFORD, *supra* note 8, at 190 (quoting Note of June 18, 1973: SCOR 29th yr., Sp. Supp. No. 2, 120).

342. *Id.* at 47.

343. See McKinney, *supra* note 319, at 112-13; James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L L. 681, 696 (1989).

344. Wallace-Bruce suggests that the independence requirement is implicit in the capacity to enter into foreign relations. WALLACE-BRUCE, *supra* note 281, at 57. See also CRAWFORD, *supra* note 8, at 47 ("[E]ach State is an original foundation predicated on a certain basic independence. This was represented in the Montevideo formula by 'capacity to enter into relations with other States.'").

Montevideo criteria is independence.<sup>345</sup> Indeed, some international jurists see independence as the central criterion for statehood, all other requirements subordinate to and emerging from it.<sup>346</sup> The classic formulation of the independence criterion appears in Judge Anzilotti's opinion in the *Austro-German Customs Union Case*:

[T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint Germain, *as a separate state not subject to the authority of any other State or group of States*. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no authority other than that of international law.<sup>347</sup>

Independence in this context means, therefore, that a State must be separate and sovereign, that is, that it possess a legal order that is both distinct from another State's and subordinate only to international law.<sup>348</sup>

The separateness requirement is logically grounded in the very concept of international law. As Marek explains, independence is a criterion for statehood because "international law, above all, is a legal order governing relations between independent States, that is to say, between separate and distinct entities. No international law would be either possible or necessary, without a clear delimitation of its subjects, which together form the international community."<sup>349</sup> The existence of an international community, therefore, presupposes the existence of defined individual members. It is perhaps in vindication of this principle that international law requires that a putative State govern a defined territory and population. Definition, after all, presupposes differentiation.

The independence requirement is not, however, satisfied by separateness alone. The additional element of sovereignty ensures that a State has the legal capacity to effect the commitments into which it has entered on behalf of its population and territory. As Judge Huber stated in the *Island of Palmas Case*: "[s]overeignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state."<sup>350</sup> Sovereignty, therefore, is framed in exclusive terms. An independent State, in the international context, cannot be subordinate to another State's legal order.

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345. See generally MAREK, *supra* note 295, at 162-68.

346. CRAWFORD, *supra* note 8, at 48 (citing a number of international legal scholars) (emphasis added).

347. 1931 P.C.I.J. (ser. A/B), at 57 (Anzilotti, J., concurring).

348. See CRAWFORD, *supra* note 8, at 51-52.

349. MAREK, *supra* note 295, at 162-63.

350. CRAWFORD, *supra* note 8, at 48 (quoting *Island of Palmas Arbitration*, 2 R.I.A.A. 829, 838 (1928) (Huber, J.)).



Palestine arguably fulfills the requirement of separateness, but not of sovereignty. The West Bank and Gaza Strip are territorially distinct from the State of Israel and are governed by a separate legal order.<sup>351</sup> Palestinian residents of the OPT are not represented in the Israeli Government, they are subject to separate laws and a separate judicial system, and they may not claim the legal rights guaranteed to residents of Israel. The international community, moreover, has consistently regarded the OPT as legally separate from Israel and has decried Israel's attempts to impose its legal order on the Territories.

As discussed at length in Section II(C), however, the PA has established, at best, only limited sovereignty over the territories under its administration. Israel continues to exercise many state functions in the OPT, including the maintenance of overriding control over the Territories' infrastructure, borders, and security; and it is empowered by the agreements concluded pursuant to the DOP to veto any of the PA's legislative enactments that it deems objectionable. In view of these arrangements, it would be difficult to characterize the PA as an independent entity. While the PLO's independence is not compromised by the DOP and subsequent agreements, the PLO does not, itself, possess legal authority over the OPT; under the DOP, that authority resides in the PA and in Israel. Thus, the government of the population and territory of Palestine, the PA, lacks the independence necessary to consolidate Palestine's legal status as a State.

### 3. The Constitutive Approach

In order for an entity's statehood to be "constituted" by recognition, it must first be recognized to be a State. The establishment of the PA has not, however, brought about international recognition of Palestinian statehood. Indeed, while the United Nations General Assembly and several individual States have expressed the hope that the current peace process will culminate in the establishment of a State of Palestine, no State or international body has recognized the PA as an independent State, and the PLO has not urged such recognition. Palestine consequently is no more a State under the constitutive approach than under the declaratory approach.

### 4. Transitional Association

As presently constituted, Palestine does not fit easily into defined

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351. The recent agreements between the PLO and Israel affirm the legal and territorial distinctness of the OPT. *See, e.g.*, Interim Agreement, ch. 2, art. 11, para. 1, 36 I.L.M. 551 (stating that both sides regard the West Bank and Gaza Strip as "a single territorial unit, the integrity and status of which will be preserved during the interim period"). Although Israeli citizens residing in the OPT may claim the protection of Israeli law, those rights flow from their Israeli citizenship, not from their residence in the OPT. In much the same way, the United States Constitution protects American citizens abroad from invasions of their rights by the U.S. Government. *See generally*, Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

categories of international status. Under the interim arrangements established by the DOP, Palestine may best be described as a transitional association between the PA and the PLO. The PLO, which has been recognized to possess an independent international personality as representative of the Palestinian people, has been delegated the power to act on behalf of the PA in the international arena with regard to specific substantive areas. Nevertheless, the PA's constituent organs (the President and Legislative Council) are elected by and serve the interests of the population of the OPT. They form a local government with largely municipal functions and, with regard to those functions, they are independent of the PLO. In this limited respect, the relationship between the two public bodies approximates an association between states.

That noted, however, several factors distinguish the PA-PLO relationship from the traditional legal status of association. Foremost, of course, neither entity is a State. While each, as seen above, possesses certain attributes of statehood, neither meets the objective or subjective criteria requisite for that status. Moreover, the powers withheld from the PLO by the DOP — i.e. the authority to conclude international agreements (with parties other than Israel) that affect the status or security of the OPT — are held by Israel, not by the PA. The PA is consequently in a position of subordination to both the PLO and Israel. Further, the current arrangements have elicited the support of the Palestinian population only insofar as they are transitional. The terms of the DOP, as approved by the PNC, characterize the PA as an interim measure pending the conclusion of permanent status negotiations. The idiosyncratic association between the PA, the PLO, and Israel therefore cannot be seen as an exercise of the free choice of the Palestinian people, who cannot alter the international status of their territory at will.

The relationship between the existing Palestinian public bodies does, however, have an important function with regard to the exercise of Palestinian self-determination. As discussed in Section III(A), above, international law requires heightened scrutiny of changes to a territory's status while it is under belligerent occupation in order to ensure that the changes meet the approval of the territory's population. Agreements concluded between the authorities of an occupied territory and the Occupying Power are especially suspect, raising concerns about the authorities' capacity for independent action. Although the potential for coercion in negotiations between Israel and the Palestinians remains great so long as the OPT remain under Israeli occupation, the relationship between the PLO and the PA helps to preserve Palestinian negotiators' independence from Israel and to avoid the presumption that the PA is merely a puppet of the Government of Israel. Perhaps ironically, the separation between the two public bodies serves these interests as much as the connections between them. While the fact that the PLO sanctioned and negotiated the transitional arrangements pro-

vides them with international legitimacy,<sup>352</sup> its legal and functional separation from the PA ensures that the entity conducting permanent status negotiations with Israel is not subordinate to Israeli authority. Since independence is a prerequisite for freedom, the continuing independence of the international representative of the Palestinian people is essential to the free exercise of Palestinian self-determination.

#### IV. CONCLUSION

In the words of the Syrian poet Adonis, Palestine remains "stalled between seasons." The international community has afforded universal recognition to the Palestinians' peoplehood, and most States support their right to self-determination in the territory defined in the 1988 Palestinian Declaration of Independence. Moreover, all States recognize the special status of the PLO as international representative of the Palestinian people. Through the establishment of the PA, the PLO now has the opportunity to translate its efforts on the international front into more concrete benefits for the Palestinian population in the OPT. The creation of the PA has not, however, altered the international status of the PLO or, more broadly, of Palestine. It does not itself represent a fulfillment of the national aspirations articulated in the Palestinian Declaration of Independence or of the internationally-recognized legal rights that it invoked. The legal and functional separation of the PLO and the PA erected by the DOP and subsequent agreements maintains the independence of the PLO, despite Israeli control of the OPT. It also serves, however, as a barricade against changes in the status of either public body: it denies the PLO effective authority over the territory it claims for the Palestinians, and it denies the PA independence and access to the international decision-making process.

The Government of Israel and the PLO have allocated the permanent status of the OPT to the final stage of negotiations within the framework established by the DOP. The PLO has consistently articulated its commitment to the establishment of an independent Palestinian state in the OPT and has emphasized the inadequacy of any proposed solutions that fall short of that goal.<sup>353</sup> Although Israel's Labor Party adopted a platform omitting the once-standard clause rejecting the establishment of a Palestinian state before Israeli elections last June,<sup>354</sup> the Likud government of Benjamin Netanyahu has stated unequivocally that it opposes Palestinian statehood.<sup>355</sup> While a majority of

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352. See *infra* Section II(C)(1).

353. The establishment of an independent Palestinian state remains the PLO's chief negotiating goal, according to the Organization's Chief Representative in the United States. Interview with Khalil A. Foutah, *supra* note 259; see also *Advisor to Yasser Arafat Rejects Puerto-Rico-like Palestine*, AGENCE FRANCE-PRESSE, Nov. 9, 1996, available in 1996 WL 12177831.

354. See Stephen McFarland, *Foes Soften on Palestine: Israel Party Platform Vote*, DAILY NEWS (New York), Apr. 26, 1996, at 2.

355. Government Guidelines for the Israeli Government Elected on 29 May 1996, JERUSALEM POST, June 18, 1996, at 3.

the States represented in the U.N. General Assembly regard Palestinian statehood to be a legitimate aspiration, the United States traditionally has opposed the idea, supporting instead association of Palestine with Jordan.<sup>356</sup> An evaluation of the status most beneficial to the Palestinian people and most likely to ensure the maintenance of long-term minimum order in the Middle East will require a thorough assessment of the political conditions and economic relationships in the region, an undertaking beyond the scope of this essay (and, regrettably, the capacities of its author). It is important to make clear at the outset, however, that the process of evaluating these alternatives should be informed, indeed governed, by certain core legal principles. Perhaps above all, while the Palestinians' exercise of self-determination may manifest itself in any one of a number of forms of self-government, international law requires that the outcome ultimately be the freely-expressed choice of the Palestinian people.

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356. See, e.g., Letter from President Ronald Reagan to Prime Minister Menachem Begin (Sept. 1, 1982), THE PALESTINIAN-ISRAELI PEACE AGREEMENT, *supra* note 95, at 253-56. ("In the Middle East context, the term self-determination has been identified exclusively with the formation of a Palestinian state. We will not support this definition of self-determination.") The United States government has not articulated its present official position on the issue. See, *Remarks of Former Secretary of State James A. Baker III at the Center for Middle East Peace and Economic Cooperation Conference*, FED. NEWS SERV., available in 1996 WL 5796086.