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## The Sum of the Parts

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## The Sum of the Parts

### Abstract

From one perspective the Middle East lends itself as a macabre mise-en-scene where the triumph of realpolitik over the legitimacies of international law can be continually re-staged. To be sure, at least two sovereign states seem to go their own way, even in the face of rampant and valid international criticism—the end of a construction freeze on illegal settlements and failures to condemn clearly illustrate this point. However, two can play at that game. The US veto of the October 2003 draft Security Council resolution declaring as illegal Israel’s construction of its security fence, beyond the 1949 Green Line and into the Occupied Territories, illustrated raw power and military strength in action—the very definition of hegemony.

### Keywords

Human rights, Palestine, International law, United Nations, International Court of Justice, Hamas, Self-determination

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## The Sum of the Parts

by Therese O'Donnell

“It seems to be difficult for international lawyers to write in an impartial and balanced way about the Palestine issue.”

(James Crawford (1990)[\[1\]](#)).

“Never a dull moment in the Middle East.” Editorial (2011)[\[2\]](#)

From one perspective the Middle East lends itself as a macabre *mise-en-scene* where the triumph of *realpolitik* over the legitimacies of international law can be continually re-staged. To be sure, at least two sovereign states seem to go their own way, even in the face of rampant and valid international criticism—the end of a construction freeze on illegal settlements and failures to condemn clearly illustrate this point. However, two can play at that game. The US veto of the October 2003 draft Security Council resolution declaring as illegal Israel’s construction of its security fence, beyond the 1949 Green Line and into the Occupied Territories, illustrated raw power and military strength in action—the very definition of hegemony. However, even giants always have weaknesses. Cyclops springs to mind. A 360 degree perspective would have taken into account that there were other powerful institutions in the metaphorical UN room besides the Security Council. The power and protection of a permanent member’s veto could not deter the UN General Assembly’s request for an Advisory Opinion from the International Court of Justice (ICJ) on the legality of the wall. Of course, even the ICJ’s eventual condemnation in 2004 did not actually halt the wall’s construction but what it did was make clear the illegality of Israel’s action. Further, the court made clear that there was no doubting the Palestinian people’s right to self-determination.

Of course, the issues of UN membership and statehood can exist independently of each other. At the same time, as Richard Falk himself acknowledged in September 2011, “[t]he upcoming debate on Palestine’s initiative at the United Nations provides a momentous occasion for the international community to respond to a legacy of injustice,” and for individual Palestinians to enjoy a variety of human rights. If such debates are aired in all of their grisly detail, and still a UN Security Council veto is ultimately invoked that precludes Palestinian UN membership, it is entirely possible that the same ICJ route could be pursued to examine in detail Palestinian claims to statehood or even a (reissued) Palestinian Unilateral Declaration of Independence.

Such a question would come before a court that has just honed its skills on the law of statehood during the recent Kosovo Advisory Opinion of July 2010. While such a route is not intended for contentious-type cases, at the same time, the contentious route is not possible where a non-state actor is involved due to Art 34 of the ICJ Statute.

Now, such proceedings might present themselves as equally nerve-racking to both Palestinian and Israeli constituencies. However, a particularly critical eye may be cast over the conditions prompting the claim to external self-determination, perhaps making Palestinian statehood only one of Israel's problems. An Advisory Opinion may also sidestep the anxieties Falk has regarding Israel's position on direct negotiations and the creation of "facts on the ground" as simply representing strategies geared toward the "ratification of massive illegality." Of course, one obstacle standing in the middle of this fast-track ICJ legal freeway is determining just which entity would have the representative right to speak for the Palestinian people.

Falk implies an interesting Palestinian spin on the self-determination trap, which, *pace* Marc Weller, has hitherto been understood to mean a people's endurance of extreme misery in return for possible independence. Might such a trap also be understood to place institutions, structures, and territorial borders at a premium while imperilling (or at least relegating) resolution of such thorny issues as to who or what legitimately represents the Palestinians?

A "We the governments" approach is indeed unnerving. Fetishizing Weberian approaches to state structures almost certainly obscures the diversity of the very constituency seeking representation—where does the right of return for Palestinian exiles fit within such an interpretative lens? When Mahmoud Abbas presented the application for Palestinian UN membership in September 2011, he showed the Palestinian Authority's hand not only to the world but also to residents of the Gaza Strip, the West Bank, Palestinian exiles, and Hamas. At the very moment that the kidnapped IDF soldier Gilad Shalit, held since summer 2006, has been released by Hamas in exchange for a large number of Israeli-held Palestinian prisoners, it seems befitting to ponder the diversity and prominence of the actors on our stage. Although Falk is concerned with Hamas' non-involvement in the Palestinian UN initiative, the reconciliation agreement of May 2011 between Hamas and Fatah perhaps indicates some awareness that the right to democracy is more complex and should be more meaningful than simple possession of a vote.

Without carelessly transplanting one historical moment into another, it may be worth considering the angst prompted by the Anglo-Irish Treaty of 1922. The consequent territorial concessions split the Irish independence movement, leading to a bitter civil war that divided for decades thereafter. The misery of much of that history requires no revisiting, but the ultimate conclusion resulted in some form of resolution over seventy years later. This has been taken to its cosmopolitan conclusion in recent times. A former IRA leader, deputy First Minister of Northern Ireland and Westminster MP for Mid-Ulster (who practises a policy of abstentionism), Martin McGuinness, was recently an Irish Presidential candidate. He had thus spanned several political structures, represented very different constituencies, and evolved in his own political identity.

Self-determination of a people is unquestionable. But what is equally clear is that self-determination itself is complex, fraught, evolving, and its consequences are unknowable. That always cuts both ways.

[1] Crawford, James. 1990. "The Creation of the State of Palestine: Too Much Too Soon?" *European Journal of International Law*. 1(1): 307.

[2] Editorial. 2011. "The Birth of Israel and Palestine -The Ifs of History, Then and Now." *European Journal of International Law*. 22(3): 623.

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