

# The Legal Implications of May 4, 1999

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Apr 9, 1999

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Brief Analysis

## NICHOLAS ROSTOW

May 4, 1999, should not be viewed as a "Sword of Damocles." No matter what happens on May 4, both Israel and the Palestinians are obligated by international law to pursue and achieve a negotiated peace within the framework of United Nations Security Council Resolutions 242 and 338, which all parties accepted by the 1991 Madrid Conference. Resolution 242 accepts Israel's right to hold land conquered in June 1967 as "a gauge of peace" and provides for final boundaries to be negotiated and recognized. There is no provision for Israel to withdraw from this land before peace is achieved. A number of solutions would satisfy international law in this case, including autonomy as it currently exists, Palestinian autonomy within Jordan, and Palestinian statehood -- either limited or unlimited. In fact, as long as the minimum requirements of Jewish statehood and respect for the civil and religious rights of every other community in the region are met, almost any solution would satisfy the law as laid out in Resolution 242. In this vein, one should view the 1993 Oslo Declaration of Principles (DoP), the 1995 Interim Agreement, and the 1998 Wye Memorandum as significant steps taken to implement Resolution 242. They are not, however, the only steps that could have been taken. In the final analysis, the framework for peace established in Resolution 242 will remain the only framework, no matter what happens May 4.

Legally, the DoP -- which established mutual recognition and charted future negotiations -- has been superseded by the Interim Agreement and the Wye Memorandum. Yet, in many ways it continues through the terms of these new agreements. As for deadlines, they must be understood in context: the world will not end, either legally or politically, if they are not met. One could argue that throughout the process there have been explicit and implicit understandings from both sides that deadlines are not the "end-all, be-all." At the same time, it is in neither side's best interest for the process to continue indefinitely. The language used in the agreements also casts doubt on whether the agreements actually expire after five years. For example, there is a provision that calls for an interim authority to last not more than five years. This provision implies that new elections should be held after five years, not that this authority as a whole would become defunct. It is implausible that the two parties meant to suggest that, after five years, the Palestinian Authority should stop functioning, no longer providing services like schools and routine law enforcement.

Essentially, May 4 is not very significant, legally, as the "end" of final status negotiations. International law, specifically Resolution 242, requires both sides to pursue and achieve a negotiated settlement -- which is why a Palestinian unilateral declaration of independence (UDI) would be incompatible with the law. And international law is crucial because if the Middle Eastern protagonists struggling for peace can accept the law, they can each emerge from the process relatively satisfied. If they do not accept the law, one side or the other will continue to try to use force to prevail, and stability will not be obtained.

JOEL SINGER

The issue surrounding May 4, 1999, is not really whether or not there should be a Palestinian state. Almost everyone, including former Prime Ministers Yitzhak Rabin and Shimon Peres, knew that autonomy would eventually lead to a state. Rather, the real question is whether the Palestinians should unilaterally declare statehood on May 4, simply because that was the date chosen five years ago for the final status to be achieved. The answer to this question rests on two others: Is a UDI legal? And more important, is it a good idea politically -- for the Palestinians or for the process? The answer to both of these questions is "no," though the second is more significant.

On the legal front, Israel and the Palestinians agreed in the Oslo accords that any unresolved disputes about permanent status issues must be settled through negotiations. They explicitly excluded any third-party intervention. This is an open-ended commitment by both parties and is an important reason why a Palestinian UDI would not be legal.

If the Palestinians were to declare a state unilaterally, they would first have to get rid of the Oslo agreements. This can be done by either claiming (incorrectly) that they expire on May 4, or by repudiating the agreements. Yet, because Israel maintains that the agreements still stand after May 4, either approach by the Palestinians leaves Israel as the side that wants to keep the agreements and the Palestinians as the side that no longer wants them. After struggling for so long and actually achieving an agreement, why would the Palestinians want to force this outcome and get no substitute in return? The answer is that they do not. The Palestinians are using a UDI as a negotiating tool to win rewards from Israel, the United States, or the European Union (EU) (although no European/EU position is likely to have a significant impact on the negotiations; the United States has long been recognized as the "third party" that counts). This is a perfectly acceptable part of the negotiating process, as it makes no sense either to give away a bargaining chip or to make unilateral concessions prematurely. It is unlikely that Yasir Arafat will fall hostage to his own threats. He is a master of brinkmanship and should be able to extricate himself from the threats to declare a state unilaterally. Yet, even with general agreement that a UDI would be counterproductive for the Palestinians and a wide belief that the May 4 issue is already settled, it is still uncertain whether the Palestinians will declare a state unilaterally.

A UDI is a bad idea for the Palestinians because it plays directly into the hands of the Israeli right. A UDI encompassing Gaza and a small part of the West Bank would allow Israel -- almost blamelessly -- to annex the remainder of the territories. That would please the Israeli right, because Israel would free itself of 98 percent of the Palestinians in the West Bank and Gaza while ceding only a small fraction of the land. Arafat does not want this outcome. Continuing Oslo until it is replaced by a new negotiated agreement is in both sides' interest; abandoning Oslo without a binding agreement would result in chaos.

Part of the May 4 problem is that the two sides are not in a position to negotiate, because they have taken completely opposite stands from which neither can afford to back down. Prime Minister Binyamin Netanyahu cannot agree to a short extension; doing so would override his position that the agreements continue until they are superseded. At the same time, it would be politically infeasible for Arafat to allow the agreements to continue indefinitely, because that would provide Israel with too much leverage. Only the United States can put the two sides back into a negotiating mode, and Washington should therefore find a formula that does not require either party to back down from its

position. The first step would be to establish an understanding by both sides that May 4 should pass without a UDI. The United States should then work to establish a new target date that is not so early as to render real negotiations implausible, but which is not so late as to make it politically impossible for the Palestinians to accept. The United States should then encourage and work with both sides for accelerated permanent status negotiations in which neither the threat of a UDI nor that of perpetual autonomy could be used by the two sides as negotiating tools to sidetrack them from the main goal of reaching a permanent settlement within a well-defined target date. The political will to continue the process exists on both sides, but a determined United States is needed to put the process back on track.

This Special Policy Forum Report was prepared by Adam Frey.

Policy #205

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