

# Legal Aspects of the 'May 4 Issue'

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## ABOUT THE AUTHORS



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## Brief Analysis

The issue of what will happen on May 4, 1999, likely will be central to President Bill Clinton's meeting with Palestinian Authority (PA) chairman Yasir Arafat tomorrow. There is a widespread view that the Oslo accords between Israel and the Palestinians will terminate on May 4, and Palestinian Liberation Organization (PLO) leader Yasir Arafat has threatened to declare an independent Palestinian state on that day if, as is near certain, the two parties have not reached agreement on final status issues.

To address the legal aspects of the "May 4 issue," including the durability of the Oslo accords and the right of the Palestinians to make a unilateral declaration of statehood, The Washington Institute commissioned the opinions of two leading legal authorities, Herbert Hansell, who served as State Department legal adviser during the Jimmy Carter administration, and Nicholas Rostow, who served as National Security Council legal adviser during the Ronald Reagan administration. In addition, Nasser al-Kidwa, the permanent representative of the PLO observer mission to the United Nations, and Joel Singer, a former Israeli government adviser who helped negotiate the Oslo accords, discussed the May 4 issue at a seminar sponsored by The Washington Institute on October 18, 1998. The full text of the views of all four experts are included in the Institute publication [Legal Implications of May 4, 1999.](#)

[\(templateC04.php?CID=107\)](#) Following are edited excerpts of the executive summary of that publication.

HERBERT HANSELL The view that the Oslo accords will terminate on May 4, 1999, is based on the fact that those accords clearly establish a five-year limit on the terms of office of the interim Palestinian self-governing institutions. Termination of the Oslo accords in their entirety presumably would also erase the multitude of rights acquired, and duties incurred, by the parties under those agreements. The status of areas A and B -- in which graduated levels of autonomous authority have passed to the PA accompanied by graduated degrees of withdrawal of Israeli authority -- would become unclear. The parties' contractual undertakings to resolve their conflicts by negotiation, and their corollary obligation to refrain from taking any step to change the status of the West Bank and Gaza Strip pending the outcome of those negotiations, likewise would be in a precarious state.

There is no code of governing law, no body of precedent, no legal scholarship, nor any court of law or other adjudicatory body to which the parties can turn for definitive resolution of the conflicting interpretations of the May 4 provisions. The applicability of international law, or of any of the national legal systems that have applied to these

territories at various periods in the past, is ambiguous and dubious.

A neat resolution of the legal conundrum regarding the post-May 4 existence of Palestinian self-governing institutions is impossible. Yet, it is difficult to believe that the parties could have intended that the entire legal structure they so laboriously established would self-destruct on May 4. Having made as much progress as they have, the parties seem clearly to have passed beyond the point at which they might have contemplated return to any pre-Oslo legal regime, of whatever form. On balance, the interpretation that the Oslo agreements terminate seems so at odds with the language of the accords, and with the spirit of the extended legal regime the parties have constructed, that no interruption in the performance of the Oslo agreements could be based on that interpretation. From a legal perspective, either party may claim a right to repudiate the accords if the other party has definitively breached or failed to perform its essential obligations under the accords; reciprocally, each is obligated to continue to perform its contractual promises so long as the other is doing so. But there can be no tolerance for abuse of the repudiation power.

One overriding principle will govern the legal survival of the Oslo regime: the obligation to resolve final status issues by negotiation. Unwarranted repudiation of that obligation on the part of either party -- whether by an express declaration, a military occupation, or other similarly disruptive unilateral action, such as a declaration of statehood -- would expose the repudiator not only to potential retaliatory steps by the other party but also to the opprobrium of the international community for having destroyed the Oslo regime.

NICHOLAS ROSTOW The Palestinians have the power to proclaim a state, though the practical significance of such a declaration is open to doubt. The PLO proclaimed statehood in 1988 without thereby changing realities; indeed, the Palestinians have achieved far more through agreement with Israel than through unilateral action.

In the October 1998 Wye River Memorandum, Israel and the Palestinians agreed immediately to resume permanent status negotiations and not to "initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement." Thus, the Wye River Memorandum affirms Oslo's intention not to circumvent the process of negotiation, as a unilateral declaration of statehood would seem to do.

The Middle East is not famous for rational behavior, as continuing terrorism attests. It is not implausible, therefore, that Oslo may fail. Success depends on mutual respect and the commitment of both sides. Whatever the fate of the Oslo accords, the United Nations Charter and United Nations Security Council (UNSC) Resolution 242 will continue to provide the framework for a peaceful settlement.

NASSER AL-KIDWA The Israel-PLO Declaration of Principles and subsequent interim agreements do not and cannot negate, substitute for, or supersede relevant instruments of international law. Until a final Israeli-Palestinian settlement is reached, final status issues remain subject to international law. The right of the Palestinian people to establish their own state emanates from their national right to self-determination, consistent with international law, the Charter of the United Nations, and relevant UN resolutions. Because the Palestinian people are a long-established and indigenous people, this right is not dependent on and does not emanate from the existing Oslo agreements. An important challenge will be the degree of recognition the Palestinian state will receive, including the ability of the Palestinian state to acquire full membership in the United Nations.

JOEL SINGER The Oslo accords do not expire on May 4, 1999. In fact, the Oslo accords do not contain any expiration clause. One carefully negotiated provision of Oslo states that the status quo in the West Bank and Gaza will prevail pending the outcome of permanent status negotiations. Until a permanent status agreement is reached -- and even if the five-year interim period has ended -- no party is permitted unilaterally to change the status of these areas: There may be no unilateral declaration of a Palestinian state and no action by Israel to annex these areas, pending the outcome of the permanent status negotiation. Indeed, a statement now that the Palestinians intend to declare a state

unilaterally at the end of the five-year transitional period is tantamount to an anticipatory repudiation of the Oslo accords.

The territory of the PA is an autonomous region functioning under supreme Israeli authority, not an independent state. In legal terms, Israel continues to be the source of authority throughout PA territory. Thus, Israel could make a strong argument that, if no accord is reached by the end of the five-year transitional period, and if one accepts the Palestinian argument that the Oslo accords expire on that date, then the result should be a return to the status quo ante: All the authority that Israel has transferred to the Palestinians reverts to Israel.

In practical terms, given the current territorial configuration, it would be impossible for the Palestinian side to establish, as opposed to merely declare, an independent state. PA territory lacks contiguity between the West Bank and Gaza and between different parts of the West Bank. Palestinians and foreigners cannot travel between these parts, except through Israeli checkpoints. A unilateral Palestinian declaration would merely be another empty declaration on paper, causing problems and violating the agreement, but not really accomplishing anything positive for the Palestinians. More important, the Palestinian side would thereby provide the Israeli government with reason to take serious countermeasures that would be difficult to undo. If they unilaterally declare a state, the Palestinians may be acting in a manner contrary to their own best interests and sending the entire Middle East down a very slippery slope.

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