Policy Focus

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Special Studies
on Palestinian Politics
and the Peace Process

Legal Implications of May 4, 1999

Herbert Hansell
and Nicholas Rostow

The Washington Institute
for Near East Policy

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Preface

Signed in September 1993, the Israel–PLO Declaration of Principles provided for a transitional period during which negotiations would be held on "final status" issues. The negotiations were to be completed within five years from the May 4, 1994, implementing agreement. Yet, hampered by terrorism and mutual recriminations over non-fulfillment of obligations, the once-promising Oslo process has slowed significantly in recent years. Final status talks opened ceremonially in May 1996 but have not convened substantively.

It is unclear what the legal status of the Oslo process will be after May 4, 1999—the date originally envisaged for the end of the interim regime. Do the Palestinians have the right to declare a state? Will the numerous Israeli–PLO agreements derived from Oslo have any legal standing on May 5? Will Palestinian interim-regime institutions retain legitimacy?

The essays here analyze numerous complex legal issues inherent in an unfinished Oslo process. The two essays addressing these issues are by former legal advisers to the State Department and National Security Council, respectively, Herbert Hansell, now partner and senior counsel at the law firm of Jones, Day, Reavis & Pogue, and Nicholas Rostow, now staff director of the Senate Intelligence Committe. Also included in this publication, for added perspective, are the views of Nasser al-Kidwa, the permanent representative of the PLO observer mission to the United Nations, and Joel Singer, an Israeli legal expert who helped negotiate the original Oslo accords.

In late 1993, on the eve of the first of what was to be many missed deadlines in the Oslo process, Israeli prime minister Yitzhak Rabin declared that "no dates are sacred." Hansell and Rostow seem to agree with Rabin's view that negotiations, rather than unilateral actions, are the highest priority of the Oslo accords.

Executive Summary

There is a widespread view that on May 4, 1999, the Oslo accords between Israel and the Palestinians will terminate. Palestine 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. The essays in this volume examine, from a legal viewpoint, the "May 4 issue," including the durability of the Oslo accords and the right of the Palestinians to make a unilateral declaration of statehood. Addressing these and related issues are 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 and George Bush administrations. An annex provides the presentations on these issues made at The Washington Institute's October 1998 policy conference by the permanent representative of the PLO's UN observer mission Nasser al-Kidwa and former Israeli government legal adviser and Oslo negotiator Joel Singer. What follows is The Washington Institute's summary of their views.

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 Palestinian Authority (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 a 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.

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.

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.

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, Is-

rael 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.

Herbert J. Hansell

THE EXPIRATION OF THE OSLO TRANSITIONAL PERIOD: A LEGAL PERSPECTIVE

> "In Heaven there will be no law. . . . In Hell there will be nothing but law . . . ."
>
> Grant Gilmore, *The Ages of American Law*

There is a widespread impression that on May 4, 1999, the Oslo accords between Israel and the Palestinians will terminate. That understanding derives from one interpretation of those accords' provisions. An alternative interpretation holds that the accords, or at least key elements of them, will continue in force beyond May 4, 1999. This essay examines the legal legitimacy of those alternative views and related legal issues concerning the parties' performance with respect to the accords.

An appropriate threshold inquiry is whether such an examination of legal issues is of any importance or utility. The controversies between Israel and the Palestinians have profound political and security—and even biblical—dimensions; their legal differences, however, are not typically thought to be important to their conflicts.

Yet, a legal analysis of the May 4, 1999, issue could be important to governments, international bodies, financial institutions and other nongovernmental organizations that might need to react to Palestinian or Israeli positions or actions concerning May 4. The attitudes of some—perhaps many—observers toward either side's actions on or concerning May 4 could be conditioned by views of the legitimacy of those actions, as measured by consistency with the parties' contractual

commitments and accepted legal norms. For the United States in particular, its understanding of the legal issues may influence, or possibly even control, how it reacts to events occurring around May 4, especially if Washington deems either party's actions to be inconsistent with its legal obligations.

The Oslo Agreements

The peace process undertaken by Israel and the Palestine Liberation Organization (PLO) at Oslo in 1993 has been remarkable in the volume and scope of agreements forged during a period permeated by mistrust and suffused in acrimony. Their contract-making has produced a greater number of legal pacts, of broader effect, than most observers might reasonably have anticipated when Israel and the PLO undertook their first contractual relationship in September 1993 by exchanging letters committing each to recognize and negotiate with the other.

It is instructive to survey how far the two parties have traveled in establishing a regime of reciprocal legal rights and obligations. Between September 1993 and October 1998, they entered into the following substantive agreements, a few of which (designated by asterisks) have been superseded by subsequent pacts:

- Letters of September 9, 1993, exchanged between the parties, recognizing each other and agreeing to negotiate resolution of their differences.
- Declaration of Principles (DOP) on Interim Self-Government Arrangements, September 13, 1993, contemplating interim self-government arrangements through the creation of a Palestinian Authority (PA) and ultimately an elected council and obligating the parties to commence permanent status negotiations for a settlement based on United Nations (UN) Security Council Resolutions 242 and 338. (The DOP and the Interim Agreement, mentioned below, are frequently referred to respectively as "Oslo I" and "Oslo II" and collectively as the "Oslo accords." That terminology is adopted here; the term "Oslo agreements" is used to refer to all of the Oslo-related agreements identified in this paper.)
- Agreement on the Temporary International Presence in Hebron,

March 31, 1994, establishing such a presence for three months.

- Protocol on Economic Relations, April 29, 1994, establishing Palestinian economic jurisdiction and the framework for Israeli–Palestinian economic ties.*
- Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, undertaking the first stage of implementation of the DOP by mandating withdrawal of Israeli military forces from Gaza and Jericho and transferring authority in those areas from Israeli administration to the PA.*
- Agreement on Preparatory Transfer of Powers and Responsibilities, August 29, 1994, representing the second stage of implementation of the DOP known as the "early empowerment" phase, providing for a transfer of power to the PA in five specified spheres: education and culture, social welfare, tourism, health, and taxation.*
- Protocol on Further Transfer of Powers and Responsibilities, August 27, 1995, transferring power in eight additional spheres: labor, trade and industry, gas, insurance, postal services, statistics, agriculture, and local government.*
- The Interim Agreement on the West Bank and the Gaza Strip, September 28, 1995, comprising the third stage of implementation; providing for the election of a Palestinian Council and a *ra'ees* (commonly translated in this case as chairman or president; the Arabic word means chief or ruler); establishing arrangements regarding security, civil affairs, jurisprudence, economic relations, cooperation, and release of Palestinian prisoners; renewing the parties' pledges for prompt commencement of final status negotiations to implement UN Security Council Resolutions 242 and 338; and prohibiting changes in the status of the West Bank and Gaza Strip pending outcome of the negotiations.
- Israeli–PLO Permanent Status Negotiations Joint Communiqué, May 5–6, 1996, reporting on the first session of permanent status negotiations.

- Agreement on the Temporary International Presence in Hebron, May 9, 1996, restablishing such a presence.*
- Agreed Minute, January 7, 1997, regarding renovation and reopening of al-Shuhada Street in Hebron.
- Note for the Record, January 15, 1997, prepared by U.S. Special Middle East Coordinator Dennis Ross at the parties' request, reaffirming their commitments under the Interim Agreement.
- Protocol Concerning the Redeployment in Hebron, January 17, 1997, addressing security issues and civil arrangements regarding the redeployment of Israeli military forces in Hebron.
- Agreement on the Temporary International Presence in Hebron, January 21, 1997, specifying detailed arrangements for that presence.
- Wye River Memorandum, October 23, 1998, providing for further redeployment by Israel, security commitments by Palestinians, other cooperative arrangements, resumption of permanent status negotiations, and commitments against unilateral actions.

These agreements have created a complex web of transitional relationships between the parties encompassing, among other matters, military withdrawals, the establishment of Palestinian self-governing organs and elections thereto, security arrangements and cooperation in relation to water rights, economic relations, and other mutual interests. Above all, the parties have committed themselves to resolve these and other features of their relationship, including Jerusalem, settlements, refugees, borders, security arrangements, and relations with neighboring countries, through negotiation of a permanent settlement based on UN Security Council Resolutions 242 and 338.

Given the historical antagonisms, pain, and emotions involved, this web of mutual understandings is not an insignificant accomplishment. Surmounting daunting difficulties, the peace process has worked, on a legal level at least, to an impressive extent; the results to date afford a basis for hope that the long-sought, negotiated final settlement of the core issues is in fact achievable.

THE MAY 4 DILEMMA

The May 4 dilemma emerges because of the following DOP and Interim Agreement provisions for a "transitional period" of five years expiring May 4, 1999:

> *DOP, Article I:* "The aim of . . . negotiations . . . is . . . to establish a Palestinian . . . elected Council . . . for a transitional period not exceeding five years. . . ."
>
> *Interim Agreement, Preamble:* ". . . the aim of . . . negotiations . . . is . . . to establish a Palestinian . . . elected Council . . . , and the elected Ra'ees . . . , for a transitional period not exceeding five years from . . . May 4, 1994. . . ."
>
> *Interim Agreement, Chapter 1, Article III, para. 4:* "The Council and the Ra'ees . . . shall be elected for a transitional period not exceeding five years from . . . May 4, 1994. . . ."

The accords also proclaim that the parties will endeavor to achieve the contemplated agreement on permanent status issues by May 4, 1999, but are silent as to what happens if they do not succeed.

The probability is high that the parties may arrive at the expiration of the transitional period on May 4, 1999, having neither consummated permanent status negotiations nor achieved a permanent settlement. It is also possible that they will not have made any other understandings to extend the transitional period. In those circumstances, the question of the ongoing status of the Oslo accords will loom large.

The May 4 provisions of the Oslo accords quoted above clearly establish a limit on the terms of office of the interim Palestinian self-governing institutions created by the accords. The belief that the accords and the other Oslo agreements will come to an end on May 4, 1999, derives largely from the view that functioning self-governing organs are integral—and crucial—to the continued legitimacy of the legal regime created by the parties. Accordingly, in that view, the regime—and the agreements that have given rise to it—necessarily would collapse when the contractually established transitional self-government ceases to exist.

Taken at its maximum impact, this formulation would lead the

parties into uncharted territory. Termination of the Oslo accords in their entirety presumably would also erase the multitude of rights acquired and duties incurred by the parties vis-à-vis each other under those agreements. The status of Areas A and B—in which graduated levels of autonomous authority have passed to the Palestinian Authority accompanied by graduated degrees of withdrawal of Israeli authority—would become unclear, as would various cooperative endeavors established by the Oslo agreements. The parties' contractual undertakings to resolve their conflicts definitively 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.

The countervailing view regarding May 4 is that the expiration of the term limits of the self-governing organs would not have the consequence of obliterating the remainder of the parties' obligations under the accords and the legal regime they have established. Rather, most of the parties' legal rights and duties will continue to exist, but the mandates providing for the legislative and executive authority of the Palestinian Council and the ra'ees will have expired.

The legal effects of this perspective on May 4 also veer into unexplored ground. For example, there would be uncertainty whether the Palestinians, in the absence of an explicit or tacit agreement with Israel, could undertake unilaterally to extend or reelect the expired organs of self-government, or whether, on the other hand, Israel could undertake to replace these organs. Nevertheless, under this view of the May 4 issue, the parties would continue to be bound contractually to resolve their disputes through negotiation and to refrain from "any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations."[1]

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 a 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. The Oslo accords do contain dispute resolution machinery to which the parties have promised to resort, but that procedure is an unlikely

route toward disposition of the May 4 issue, because it provides for neither binding arbitration nor other obligatory adjudicatory procedures.

Absent an agreement between the parties, a neat resolution of the legal conundrum of May 4 is impossible. The object of the Oslo enterprise has been self-government, and it is difficult to believe that the parties contemplated that the Oslo regime should go forward after May 4 in a self-governmental vacuum. Yet, the Oslo accords and other Oslo agreements do not by their provisions call for their dissolution when the terms of the council and ra'ees expire; and it is also difficult to believe that the parties could have intended at Oslo in 1993, or on any of the subsequent occasions when they have entered into further agreements implementing the DOP, that the entire legal structure they were so laboriously establishing would self-destruct on May 4.

On balance, the conclusion seems inescapable that having come so far, the parties have passed beyond any point at which they might have contemplated return to any pre-Oslo legal regime, of whatever form The interpretation that the Oslo agreements terminate because of the expiration of the council's and ra'ees's terms seems so at odds with the language of the accords and the other Oslo agreements, and with the spirit of the extended legal regime the parties have constructed, that no interruption in the performance of the Oslo agreements or interference with adherence to the legal regime they have created could reasonably be based on that interpretation.[2]

'. . . NOTHING BUT LAW. . .'

The above conclusion does not end the inquiry as to the legal survival of the Oslo agreements. The legal fate (and, indeed, the political fate) of the Oslo regime does not depend upon whether the self-government organs continue after May 4; of course they can continue if the parties so desire or acquiesce. The true legal issue confronting the parties is not whether the contractual language contemplates continuation; rather, it is whether either party is legally entitled to turn its back on the Oslo agreements, before or after May 4, because the other party has failed to adhere to its fundamental commitment under the accords to pursue final settlement of the parties' disputes through negotiation—and only through negotiation.

From a legal perspective, irrespective of the term limit provisions, 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.[3]

The commitments to persevere in negotiating a settlement of final status issues, and to avoid upsetting the agreed interim Oslo legal regime while negotiations continue, certainly are the two parties' most compelling obligations under the Oslo accords.[4] Unjustified and continuing failure of either party to respect and perform those commitments would afford the other a basis for ultimate rejection of the accords.[5]

Of course, there can be no tolerance for abuse of the repudiation power. A party cannot resort to that power in response to actual or perceived nonperformance by the other of commitments, unless those commitments go to the essence of the contract; nor can a party choose to repudiate the accords in retaliation for behavior which, although less than required, does not amount to definitive and persistent rejection by the other party of its contractual duty. In circumstances such as those, the parties may seek remedies or accommodations less drastic than repudiation. Indeed, the Oslo agreements are replete with provisions designed to resolve or mediate disagreements between the parties concerning the sufficiency of performance of prior undertakings between them. The parties' ability, during the six years since the DOP, to resolve dissatisfactions with past performance has been an important element in the evolution of the Oslo legal regime as it has emerged to date. One may hope that the parties will continue to follow this pattern with respect to existing and future disputes about the adequacy of each other's contractual performance.

On the other hand, some accusations that have been hurled between Israel and the Palestinians claiming violation of, or failure to perform, important commitments have not been resolved. At times, each party—by threats and by conduct arguably not compatible with its Oslo obligations—has come perilously close to creating circumstances in which repudiation by the other might be legally justified. But thus far neither party has definitively abrogated its contractual responsibilities.

Avoidance of permanent status negotiations cannot be legitimized by objections that they will be unproductive or futile. Any such assertions clearly are premature, as the parties have not as yet really tried to undertake permanent status negotiations as contemplated by Oslo. So far as the public record discloses, there has been only one permanent status negotiating session. The parties' perseverance in negotiating the transitional legal regime overcame grave doubts and reservations; they have not so far shown comparable determination to proceed with permanent status talks.

CONCLUSION

One overriding principle will govern the legal survival of the Oslo regime: the obligation to resolve final status issues by negotiation. Neither party would be justified in repudiating the accords, or in acting contrary to them, unless confronted with clear and total refusal by the other to perform its essential Oslo obligation to resolve permanent status issues in—and only by—ongoing, good-faith negotiations. Unilateral repudiation of that obligation on the part of either party—whether by an express declaration, a military occupation or other similarly disruptive action, or by deliberate nonperformance or grossly insufficient performance—would expose the repudiator not only to potential retaliatory steps by the other party but also to the opprobrium in the eyes of the international community for having destroyed the Oslo regime. Every interested foreign ministry and other interested international observer would thereupon have to determine for itself whether it believes such repudiation was legally justified, and respond to that determination in whatever manner it deems appropriate.

NOTES

1 Interim Agreement, art. XXXI, paras. 5, 7; see also Wye River Memorandum, paras. IV, V.

2 Many legal systems allow for the termination of or withdrawal from an agreement if surrounding circumstances have so changed that the mandated performance has been radically altered or become impossible; see, for example, Restatement (Third) of the Foreign Relations Law of the United States, (1987) ("Restate-

ment"), at §336. Expiration of the Oslo transitional period seems not to be such a change, because much of the Oslo agreements would be unaffected by the expiration, the self-governing organs almost surely can continue, and the parties can continue to negotiate for a final settlement. See also Restatement §338, comment f, concerning separability of non-continuing and continuing agreement provisions.

3 See Restatement, §335(1).

4 The mutual promises to negotiate a final settlement require good faith effort by each side to reach agreement; they cannot be satisfied by perfunctory or less than full participation in the negotiation process; see Restatement, §321.

5 There are, of course, other extremely important obligations imposed by the Oslo agreements; provisions to deter and control terrorist and hostile activities, and to redeploy troops in the occupied areas, are perhaps the most vociferously controverted. Continuous failure to perform those and other significant commitments would be serious challenges to the viability of the Oslo regime, but they would not be lethal from a legal perspective if the parties nevertheless were faithfully adhering to their contractual duty to pursue final status negotiations.

Nicholas Rostow

THE MAY 4 PROBLEM AND THE OSLO PROCESS: A LEGAL ANALYSIS

The two Oslo accords of 1993 and 1995 were supposed to herald a new era in Israel's relations with the Palestinians and the larger Arab world. In some cases, criticism of these accords has been severe, and some of the criticism has been merited. For one thing, there have been serious gaps in the performance of important obligations under the accords—"violations" is not too strong a word, and it has been used frequently. Repeated terrorist acts have threatened the Oslo promise by sapping confidence between Israelis and Palestinians.

At the same time, the accords have fulfilled their billing in significant respects. They have provided the constitutional framework for the establishment of Palestinian governmental institutions and have created a context for Israeli–Palestinian discussion, negotiation, and collaboration on a range of issues at various governmental and nongovernmental levels. Above all, the process of which the Oslo accords are a part now has left relatively few outstanding issues to be resolved by Israel and the Palestinians. Whereas these matters are contentious and details are thorny, in principle they no longer include existential questions for either side. Indeed, one may view Oslo and its progeny as creating the possibility to determine the borders between Israel and the Palestinians by means of Israeli military redeployments—withdrawals—in the West Bank and Gaza Strip. Among the matters still at issue are settlements, Jerusalem, water, and property claims. Functional or other practical approaches ought not to be out of reach, pro-

vided they are based on the realities of the situation.

Such solutions are not predetermined. The question of the day is where do the Oslo process achievements lead, and the anxiety of the moment is what happens if the answer is "nowhere" or at least not to an agreement on outstanding issues—final status—by May 4, 1999. That is the date to which the Palestinians point as decisive; a substantial number of commentators appear convinced that if there is no agreement on final status by then, the Oslo accords will disappear. Various scenarios, as extreme as one's imagination or nightmares allow, have been offered as predictions in the event of diplomatic failure. Visions of Israeli tanks smashing through Palestinian population centers compete with images of a new, virulent *intifada* (uprising), the termination of the Israel–Egypt peace treaty, and other dire events. Certain events offer hope that Israel and the Palestinians have carried the Oslo process toward agreement on final status and real peace: among these are the Wye River Memorandum of October 23, 1998, and the vote by the Palestine National Council on December 14, 1998, to remove parts of the Palestine National Charter incompatible with Israel's existence and rights. But peace as the final outcome is still uncertain.

As the following examination of the Oslo accords and the Wye River Memorandum suggests, nothing in those texts requires that one treat May 4, 1999, as the defining moment seen by some commentators. Like all political agreements, the Oslo accords depend for their viability ultimately on the common interests, even the shared fears, of the participants. That such common points between Israelis and Palestinians exist made the Wye River Memorandum possible. Even if the parties turn their backs on the accords and the memorandum, they are not free: They will remain bound by United Nations (UN) Security Council Resolution 338 to negotiate peace in accordance with Resolution 242.

Framework for Arab–Israeli Peace: UN Security Council Resolutions 242 and 338

The UN Security Council established the legal framework for the Oslo accords in 1967 with Resolution 242. This resolution, alone among efforts to shape a settlement, has commanded sustained international

consensus. UN Security Council Resolution 338 (1973) established the ceasefire after the October War and commands, as a matter of international law, that "all parties concerned" implement Resolution 242 through negotiations. It has the force of law because it was a Security Council "decision," and, under Article 25 of the UN Charter, UN members are obligated to carry out Security Council decisions.

Until the end of the Cold War, such binding actions were rare; this very rarity highlighted the importance of what the Security Council did with respect to Resolution 242. It also distinguished both Resolutions from others that followed. They alone carried and carry real legal weight. In this context, Egypt and Israel negotiated and concluded a peace treaty in 1978. The Palestine Liberation Organization (PLO) has publicly accepted both resolutions as binding. Since at least the 1991 Madrid Conference, all parties to the Arab–Israeli conflict have accepted these two crucial resolutions. From a legal point of view, the parties—whether or not "states" as a matter of international law—may not avoid their obligation under the resolutions to negotiate a settlement of the Arab–Israeli conflict in accordance with Resolution 242.

Resolution 242 (1967) accepts Israel's right to hold the land conquered in the June 1967 war as a gage of peace. What land Israel might hold after peace agreements were achieved would depend on the negotiations; at a minimum, the new boundaries were to be "secure and recognized" and could be different from the 1949 Armistice demarcation lines. The latter were accepted under the armistice agreements "without prejudice to future territorial settlements or boundary lines or claims related thereto."[1]

Resolution 242 further affirms the necessity for "a just settlement of the refugee problem" created by repeated Arab–Israeli wars. Over the thirty years since the adoption of Resolution 242, the Arab refugee problem has been subsumed in the larger question of Israeli–Arab relations in general and then Israeli–Palestinian relations in particular. In the latter context, one can imagine various solutions to the problem of competing Israeli and Palestinian legal claims, including autonomy as it currently exists; autonomy within an Israeli–Jordanian economic union; autonomy within a larger Jordan; autonomy within an Israeli–Jordanian condominium; or statehood, limited or unlimited. The minimum under applicable law going back to the Balfour Declaration is

Jewish statehood and respect for the civil and religious rights of every other community. And, of course, there will inevitably be property claims to adjudicate.

Whatever emerges—including a unilateral Palestinian claim to statehood—the final borders and other permanent status issues—Jerusalem, about which nonregional parties historically interested in the question will have something to say; refugees; claims; settlements; foreign relations; and so forth—will remain subject to negotiation, according to international law. Thus, unless the Palestinians do more than make another declaration of statehood on May 4, 1999, they will not have concluded the peace process. A unilateral declaration of this sort may even fail to dictate that a Palestinian state is part of the ultimate resolution; after all, many Palestinians today carry Jordanian passports.

The Oslo Accords

In 1993, for the first time, Israel and the Palestine Liberation Organization (PLO) committed themselves in writing to unconditional mutual recognition. Simultaneously, they entered into an agreement setting forth principles to guide future negotiations.[2] That agreement is the Oslo Declaration of Principles on Interim Self-Government Arrangements (DOP). Legally, it has been superseded, although its requirements regarding subsequent agreements were retained in the 1995 Interim Agreement on the West Bank and the Gaza Strip (the second Oslo accord, or Oslo II), which the Wye River Memorandum reaffirmed.

The Declaration of Principles

The 1993 DOP defines the framework for the 1995 Interim Agreement. Under the DOP, the goals of negotiations are the establishment of "[i]nterim" self-government "for the Palestinian people in the West Bank and Gaza Strip,"[3] and conclusion of agreements on elections,[4] government in areas from which Israeli armed forces redeploy and withdraw, public order and security, liaison, economic cooperation, and related matters. Prior to the end of the five-year transitional period, the Israeli government and the authorized representatives of the Palestinians were to reach agreement on final status—that is, the "re-

maining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest."[5] Such agreement would be reached after "a transitional period not exceeding five years."[6] This transitional period formally began with the signing of the Israel–PLO "Agreement on the Gaza Strip and Jericho" on May 4, 1994; and therefore it is scheduled to end on May 4, 1999. In addition, three years prior to May 4, 1999, the parties were to have commenced "[p]ermanent status negotiations,"[7] that is, the negotiations on the remaining issues defined in the above quotation. Oslo II, executed in September 1995, provided that permanent status negotiations would begin not later than May 4, 1996. Although the parties met briefly to start such negotiations, they were derailed from their purpose by near-term problems such as the withdrawal from Hebron issue and delays in additional Israeli redeployments. The Interim Agreement—Oslo II—however, remained operative.

The Interim Agreement

The Interim Agreement is massive—twenty-three pages of main text (not including table of contents), with 282 pages (not including maps or tables of contents) of protocols. All parts are integral to the whole. The subjects covered include both the structure of a "Palestinian Interim Self-Government Authority"—or council—and measures to be taken by Israel and the Palestinian council vis-à-vis each other as well as Egypt and Jordan. Thus, provisions address the transfer of power from Israel to the council, the phased withdrawal of Israeli armed forces from areas in the West Bank and Gaza Strip (Israeli "redeployments"), security arrangements, the division of jurisdiction between Israel and the council, Israeli–Palestinian cooperation, and other matters.

The Interim Agreement reflects the difficulties of Israeli–Palestinian negotiations. Some articles are unclear or represent incomplete thoughts. Some subjects are addressed in different ways in different places. For example, the Interim Agreement specifies that the Palestinian council's official name includes the word "interim" and refers to language in the Declaration of Principles stating that "[t]he aim of the Israeli–Palestinian negotiations within the current Middle East peace process is, among other things, to establish [a Palestinian council] for

a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338."[8] On the other hand, one could reasonably read the Interim Agreement not to require that it itself or the council it creates disappear if a permanent status agreement is not achieved by May 4, 1999: Article III(4) provides that "[t]he Council and the [chairman] of the Executive Authority of the Council shall be elected for a transitional period not exceeding five years from the signing of the Gaza–Jericho Agreement on May 4, 1994."[9] This language suggests that, at a minimum, new elections need to be held on or before that date; it may mean that the council and chairmanship must disband. Using the language of the Declaration of Principles quoted above, the preamble suggests, but does not require, this result.[10] One could construe the language as referring only to the first council elected, thus allowing subsequent elections and subsequent councils to keep the process going beyond the Oslo deadlines.

Apart from such language, in other respects the Interim Agreement appears to launch a government with open-ended jurisdiction, from a temporal point of view. Such a result makes sense: Ordinary government decisions and adjudications—whether scheduling road repairs or determining rights to property—would be made, and presumably are made, without regard to the May 4, 1999, date or the "interim" character of the government making them. Similarly, the Interim Agreement's silence on the consequences of failure to meet its deadlines does not seem to require that institutions established under the council, such as the Palestinian Security Services, disappear in the absence of a final status agreement by May 4, 1999. After all, many Oslo deadlines have been missed while the parties continued to negotiate and the peace process continued. According to the DOP, an agreement on withdrawal of Israeli forces from Gaza and the Jericho area was to have been signed by December 13, 1993.[11] Yet, the actual agreement was not signed until May 4, 1994. Similarly, the parties met the deadline for commencing final status talks ceremonially but not substantively. Nevertheless, all agreements continued in force. It is therefore fair to view these deadlines as, at least in part, hortatory.

The Interim Agreement describes the subjects that fall within the council's jurisdiction in broad terms. Apart from subjects specifically excluded and reserved for resolution in permanent status negotiations—

"Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis;" and "powers and responsibilities not transferred to the Council"[12]—the council has jurisdiction over all other matters.[13] Some are attributes of statehood.[14] For example, under the Interim Agreement, the council disposes of a police force, exercises territorial jurisdiction over territorial waters, and flies a national flag.[15] In short, nothing in the Interim Agreement or the Declaration of Principles seems to require that, absent an Israeli–Palestinian permanent status agreement, the council and its chairman (*ra'ees*) be disbanded on May 4, 1999.

In taking account of the realities of the Israel–Palestinian relationship, the Oslo accords faced the facts of proximity of Israelis and Palestinians, the coexistence of the two communities, and Palestinian national feeling. Unstated was the recognition that, with the disappearance of the Soviet Union and the defeat of Iraq in 1991, the strategic context had changed. The Oslo process has offered an approach compatible with Resolution 242 and Israeli rights, including the right to determine Israel's own security requirements. In addition, Oslo has helped to transform into reality the promise of self-government for the Palestinians set forth in the Camp David accords.

POLITICS AND LAW: WYE RIVER AND BEYOND

May 4, 1999, looms large in discussions of the Oslo process. This fact will remain true so long as the council threatens to proclaim statehood for "Palestine" on that date if the Oslo process has not reached completion. Observers in many countries worry that such a step would lead to even more violence and perhaps force Israel to annex at least those parts of the West Bank and Gaza it still controls.

None of these results—or others more serious—are necessary. Of course, the council has the power to proclaim a state. The PLO did so in 1988 without thereby changing realities; indeed, it has achieved far more through agreement with Israel than through unilateral action. The fact that Israelis and Palestinians live in close proximity and economic interdependence, and the additional fact that hostility has a high price, should make clear the benefits of peace. Viewed most hopefully, the 1998 Wye River Memorandum is one more such benefit.

The Wye River Memorandum

If implemented, the Wye River Memorandum will have broken the Oslo process logjam blocking final status talks. One of its virtues is brevity: together with its timeline, it prints at fewer than eight pages. Fully one-third of the main text is devoted to security measures the Palestinians and the Israelis, with American assistance, will take. The Palestinians agreed to take additional measures against terrorism and the accumulation of weapons in numbers exceeding Oslo limits. The Israelis agreed to withdraw from an additional 13 percent of the occupied territories and to fight terrorism, crime, and hostilities against Palestinians. The Palestinians agreed to change the PLO Charter by affirming Arafat's letter to President Bill Clinton of January 22, 1998, declaring null and void provisions that are inconsistent with letters exchanged by Arafat and Prime Minister Rabin on September 9–10, 1993.[16] On December 15, 1998, President Clinton announced that the Palestinians formally had voted this step.[17]

Israel and the Palestinians further agreed to energize mutual cooperation in economic and other matters. Thus, they executed a protocol on an international airport in Gaza and agreed to push ahead on port development and "safe passage" between the Gaza Strip and the West Bank.[18] Furthermore, they 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."[19] This provision expresses an intention not to circumvent the process of negotiation, which a unilateral declaration of statehood would seem to do. The timeline contemplates implementation and completion of the permanent status negotiation by May 4, 1999.

Yet,the Middle East is not famous for rational behavior, as continuing terrorism attests. Oslo and its Wye River corollary, therefore, may fail; success depends on real mutual respect and the commitment of both sides to find ways to nurture confidence. It requires not only enhanced efforts against terrorists, but also a commitment to educate young Israelis and young Palestinians to respect each other.[20] Just as Resolution 242 provided the framework for Oslo (and Wye River), it will—whatever the fate of the Oslo accords—remain the framework for a settlement.

CONCLUSION

The Arab–Israeli conflict has plagued international politics for more than two generations; on four occasions it has erupted in substantial war. During the Cold War, it risked causing military confrontations between the Soviet Union and the United States. For an equally long time, the international community has devoted substantial resources to trying to broker real peace. After the June 1967 War, the third of the major eruptions since World War II, the United Nations fashioned a framework for peace in Security Council Resolution 242. More than thirty years later, it remains the only such document; its implementation has been the *leitmotif* of every diplomatic effort. UN representative Gunnar Jarring's mission (1969), the Rogers Plan (1971), Security Council Resolution 338 (1973), Secretary of State Henry Kissinger's shuttles and the disengagement agreements (1974), the Sinai II agreement (1975), Camp David and the Israel–Egyptian peace treaty (1978), the Madrid summit (1991), the 1993 and 1995 Oslo accords, the Israel–Jordan peace treaty (1994), and the Wye River Memorandum (1998)—all constituted efforts to bring about peace based on Resolution 242.

The Oslo accords went further than these other agreements, in a political context immeasurably improved by the dissolution of the Soviet Union and the defeat of Iraq. Whatever the parties achieve on the road to peace—if that is the road they really choose—will remain within the framework of Resolution 242. And if they conclude that a different approach from Oslo's is required, they still must operate within the law of the UN Charter and Resolution 338's command to all parties to accomplish whatever is left to do under Resolution 242. There is no escape.

NOTES

1 The quotation is from the agreement with Jordan. *Armistice Agreement with Jordan, Art. VI (9),* reprinted in John Norton Moore, ed., *The Arab–Israeli Conflict: Documents* (Princeton University Press, 1974), p. 401. Similar language appears in the armistice agreements between Israel and Egypt and Israel and Syria. This language makes clear that the pre-June War borders of Israel were

not international, legal boundaries. Further, the language of the armistice agreements recognized that the international law of the League of Nations Mandate for Palestine persisted because no authoritative act had terminated it. Article 80 of the UN Charter brought forward that law unchanged; the British withdrawal from mandatory Palestine did not constitute the authoritative act that brought the legal regime of the Mandate to an end. Nor did UN General Assembly Resolution 181 (II) (1947), which recommended, among other things, the partition of Palestine and the internationalization of Jerusalem. The General Assembly lacked the power to command on this subject; Resolution 181 was a recommendation on which the Security Council did not act. Finally, the Mandate codified the Balfour Declaration and the right of Jews to settle in the territory of the Mandate (what is now Israel, the West Bank, and the Gaza Strip). Israel, therefore, has a strong legal basis for its existence and settlement in the West Bank and Gaza and any discussion of competing claims will find itself drawn to examine relevant legal rights recognized during and after World War I.

2 The first Oslo agreement, the "Declaration of Principles on Interim Self-Government Arrangements," was concluded September 13, 1993, between the government of Israel and "the PLO team (in the Jordanian–Palestinian delegation to the Middle East Peace Conference)." Letters, dated September 9, 1993, from Israeli prime minister Yitzhak Rabin to PLO chairman Yasir Arafat, from Arafat to Rabin, and from Arafat to Norwegian foreign minister Johan Jorgen Holst, contain Israel's recognition of the PLO as the representative of the Palestinian people as well as the PLO's recognition of Israel, its acceptance of UN Security Council Resolutions 242 and 338, its renunciation of terrorism and violence as instruments of policy, and its commitment to amend the Covenant of the PLO to remove clauses calling for the destruction of Israel.

3 Declaration of Principles, Article I.

4 Article III(1) of the DOP provides: "These [Palestinian] elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements." ("Their" presumably refers to "Palestinian rights," not "elections.") The language is repeated in Article

II(2) of Oslo II.

5 Declaration of Principles, Art. III(1) and Art. II(2).

6 Declaration of Principles, Art. I.

7 Ibid., Art. V, para. 2.

8 Declaration of Principles, Art. I.

9 Interim Agreement, Art. III, para. 4.

10 Ibid., Preamble, para. 5.

11 Declaration of Principles, Annex II, para. 1.

12 Interim Agreement, Art. XVII, paras. a–b.

13 "Accordingly, the authority of the Council encompasses all matters that fall within its territorial and personal jurisdiction . . ." Ibid., Art. XVI, para. 2.

14 "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in formal relations with other such entities." Restatement 3rd of the Foreign Relations Law of the United States, sec. 201 (1987).

15 Interim Agreement, Arts. XIV (police); XVII, para. 2a (territorial waters), Annex I; Art. VIII, para. 3a ("At the entrance to the Palestinian Wing there will be a Palestinian policeman and a raised Palestinian flag.").

16 Wye River Memorandum Art. I.A.

17 The vote by the Palestine National Council took place on December 14, 1998.

18 Wye River Memorandum, Art. III.2.

19 Ibid., Art. V.

20 The goal of educating the youth of both nations may be among the hardest to achieve. The Center for Monitoring the Impact of Peace, a newly formed organization in New York, has issued a report on Palestinian Authority school textbooks showing how such books portray Israel and Jews in consistently negative ways. For example, such books deny that Israel exists by not showing it on any maps.

Appendix A: Remarks from The Washington Institute's Annual Policy Conference, October 18, 1999

NASSER AL-KIDWA

To speak about the legal implications of May 1999, all applicable existing international agreements must be specifically identified, as opposed to the generic descriptions usually heard about the Oslo agreements. The first agreement is the 1993 Declaration of Principles on Interim Self-Government Arrangements. The declaration was followed by partial implementation agreements that were superseded by the Interim Agreement on the West Bank and Gaza Strip, which was signed in 1995. At a later stage, limited agreements were also reached on specific issues, such as redeployment from Hebron. Thus, existing agreements refer essentially to two documents, the Declaration of Principles (DOP), and the Interim Agreement of the West Bank and Gaza Strip.

The DOP contains a mutual recognition between the two sides, specifies the aim of the negotiations, and lays out the framework for the interim period, whose duration is specified as five years. This time period is the same length as was specified in the Camp David framework for peace in the Middle East, to encourage the Palestinians to accept this gradual phase-by-phase process. The Interim Agreement details the transfer of powers and responsibilities and the implementation of the transition, including the redeployment of Israeli forces. These two agreements expire on May 4, 1999. The parties are expected before or on that date, however, to reiterate their commitments to the underlying principles and to mutual recognition, which is the crux of the Israeli–Palestinian peace process.

Existing instruments of international law must also be examined. By their very nature, the DOP and the Interim Agreement do not and

cannot negate, substitute for, or supersede relevant instruments of international law. For example, the purposes and principles of the Charter of the United Nations remain valid and complete as the charter relates to the Palestinian issue. Other examples would be the continued applicability of the fourth Geneva Convention of 1949 to all territories occupied by Israel since 1967 and of relevant UN Security Council resolutions. Considering that the parties did not attempt to reach agreement on specific issues such as the fate of Israeli settlements and the status of Jerusalem among others—the final status issues leading to the negotiations on final settlement—those issues remain subject to international law until such a settlement is reached.

What will occur from the present until May 1999? The parties to existing agreements should implement those agreements in good faith and adhere to agreed-upon deadlines. Although others may disagree, I submit that these deadlines have not been met by Israel since the government of Binyamin Netanyahu took office.

Theoretically, the parties are still able to give new impetus to the process, speed up the implementation, and reach a final settlement as specified before May 4, 1999, although this prospect has recently been thrown into doubt. Another possibility, however, involves the two parties giving new impetus to the process, speeding up the implementation, and creating a different relationship between the two sides, possibly leading to an agreement on the extension of the validity of existing agreements by a certain period of time, perhaps six months. Under a third scenario, little or no progress will be achieved. Needless to say, the results of the Wye plantation meetings will be decisive in indicating which of these three possibilities will come to pass.

What will happen on May 4? The Palestinian leadership has repeatedly indicated that on May 4 it will reiterate Palestine's declaration of independence and begin exercising Palestinian sovereignty. The decision to pursue this option will not be a surprise and will become apparent prior to that date if the other options cease to be options. With regard to different aspects of this matter, one can say the following:

(a) The declared Palestinian intention is not a threat. It is not a threat specifically to the parties and should not be considered as a challenge or provocation. If the Palestinians have no other option except submission to the unilateral Israeli will, however, the Palestinian leadership must

fulfill its duties and responsibilities to the Palestinians.

(b) It would be much better for the Palestinians, at least for political and practical reasons, to establish their state in agreement with the Israelis. Accordingly, the first scenario is not the preferred Palestinian scenario.

(c) 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 agreements.

(d) The Palestinian reaffirmation of independence is expected be coupled with several specific, internal measures, including a declaration to transform the existing institutions of the PA into the national institutions of a state—institutions such as the legislative council, the parliament, and similar organizations. The declaration is also expected to be accompanied by an announcement of new general elections held within a reasonable time.

(e) The Palestinian reaffirmation of independence is expected to be accompanied by reaffirmation of the commitment to mutual recognition, an invitation to the Israeli government to withdraw its forces and to solve the many existing or remaining problems through a dialogue between the two states, and a declared readiness to enter into a peace treaty with Israel. Naturally, the two biggest problems the parties must address will be Israeli settlers and the crossing points on the national borders.

(f) An important challenge will be the degree of recognition the Palestinian state will receive, including the ability of this state to acquire full membership in the United Nations.

(g) An important question remains as to how Israel will react to the reaffirmation of Palestinian independence. Presumably, their reaction will depend on Palestinian actions and the international reaction to those actions.

Appendix B: Remarks from The Washington Institute's Annual Policy Conference, October 18, 1999

JOEL SINGER

What will happen on May 4, 1999, if an agreement on the permanent status of the West Bank and Gaza is not reached by that date? Ambassador Nasser al-Kidwa said that the Oslo accords expire on that date. He also said that, as a result, although the Palestine Liberation Organization (PLO) prefers a mutually agreed-upon solution, the option of establishing a Palestinian state unilaterally is legally available to the PLO. I do not accept this proposition. The Oslo accords do not expire on May 4, 1999. The Oslo accords contain no expiration clause.

The Oslo accords consist of a number of agreements that are arranged in a multilayer, pyramid-like shape, with a hierarchy among them. At the very top of the hierarchy stands the mutual recognition agreement, which came into being through an exchange of letters between the late Prime Minister Yitzhak Rabin and Chairman Yasir Arafat. The mutual recognition agreement does not have an expiration clause. It is a solemn agreement signed by both parties. In one of its clauses, the two sides agreed that the Israeli–Palestinian dispute will be resolved through negotiations and only through negotiations. This short statement has three important implications:

First, it means that the parties agreed to use negotiations as opposed to force. They undertook a commitment to turn from the battlefield to the negotiating table.

Second, it means that they agreed to rule out a third-party adjudication of their dispute, such as through the World Court, the United Nations, or the United States. Thus, only bilateral negotiations are considered a valid option.

Finally, the third implication of this clause is that permanent sta-

tus will be determined through negotiations, and not through unilateral actions. Therefore, if the parties cannot reach agreement on permanent status before the time set for the conclusion of the negotiations, they should extend the negotiation time rather than take unilateral steps.

In the second layer, below the mutual recognition agreement, we find the Declaration of Principles, which establishes a mechanism for implementing the goal of reaching a negotiated settlement of the dispute in four steps: (1) the Gaza–Jericho agreement; (2) the early empowerment agreement, in which some powers and authorities in the West Bank were transferred to the Palestinian side; (3) the Interim Agreement, which encompasses the remaining parts of the West Bank; and (4) a permanent status agreement. These are all implementing steps, intended to put into place the mutual recognition agreement's primary goal that the future relationship between the two parties will be resolved through negotiations. These implementing agreements are time-limited.

Within that context, Israel and the PLO agreed to have a five-year transitional period in the West Bank and Gaza, but that period is only one aspect of the Oslo accords. The expiration of the five-year transitional period in May does not in any manner diminish the solemn commitment undertaken by the two sides to negotiate a permanent settlement agreement. That commitment will not expire on May 4, 1999.

What will happen if Israel and the PLO continue to negotiate but the five-year transitional period has ended without a permanent status agreement? What will happen the next day? The Oslo accords explain that Israel has transferred powers to the Palestinian Authority, that the Palestinian Authority exists, and the powers delegated to it are exercised, but under overall Israeli jurisdiction; this is an autonomy—an autonomous region—functioning under supreme Israeli authority, not an independent state. In this regard, the Oslo accords say that Israel will transfer specific powers and authorities, which are enumerated and described in these agreements, to the Palestinians, but that the Israeli military government is not terminated during this period. The Oslo accords state clearly that the civilian administration of the military government will be terminated, but the military government itself will not be terminated. On the contrary, it will continue to exist and to exercise all the powers and re-

sponsibilities not transferred to the Palestinians.

Under the terms of the Oslo accords, Israel continues to exercise supreme control over Area B and Area C. Even in Area A, where Israel has delegated to the Palestinian Authority important powers in civilian spheres as well as in terms of public order and internal security, Israel continues to be responsible for foreign affairs and external security. These are the two major indications that the overall responsibility over these areas continues to be in Israeli hands, even though the majority of powers and authorities have been transferred to the Palestinian side. In legal terms, Israel continues to be the source of authority even in Area A.

One carefully negotiated provision in the Oslo accords states that the status quo in the West Bank and Gaza will prevail pending the outcome of the permanent status negotiations. In other words, 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.

In fact, Israel has a stong 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. If the five-year limitation has any meaning, it is that Israel has transferred authorities and powers to an autonomous body managed by the Palestinians for a five-year period, with the expectation that, during this period, an agreement about the future of these areas will be concluded. If such agreement has not been concluded, all these powers should revert back to Israel, because Israel is the source of authority.

In sum, a unilateral declaration of a Palestinian state or an Israeli annexation of the West Bank and Gaza at the end of the five-year transitional period will be a violation of the Oslo accords. Further, 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. A party to a contract cannot say to the other party, "I am telling you now that I will not give you the

car that I promised to sell you under the contract in return for your money. Now, give me the money that you owe me under this contract." Under established legal doctrines, the other person can say, "I want a written assurance that you will not breach this contract. Until you give me this assurance, I am not giving you the money." If I were the legal adviser to the Israeli delegation at the Wye plantation, I would advise the delegation to ask for this assurance. After all, why would Israel want to give the Palestinians more territory, when the Palestinians are saying that they will use these territories immediately to establish a Palestinian state in violation of the most fundumental provision of the Oslo accords?

Moreover, in practical terms and given the current territorial configuration, it would be impossible for the Palestinian side to truly establish, as opposed to merely declare, an independent Palestinian state. There is at this point no contiguity between the West Bank and Gaza or between different parts of the West Bank. Palestinians or 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 will provide the current government of Israel the reason to take serious countermeasures that will be difficult to undo. In unilaterally declaring a state, the Palestinians may be acting in a manner absolutely contrary to their own best interests and thereby sending the entire Middle East down a very slippery slope.

I think that Chairman Arafat understands these implications and does not really want to undertake unilateral steps. He is, however, very cleverly using this threat to extract Israeli concessions. I can only hope that he will not lose control over this situation, because, in this very risky game of brinksmanship, one uncalculated step may send both sides sliding over the edge.

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