



# University of Baltimore Journal of International Law

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Volume 1 *Reflections On International Responsibility*

Volume I

Article 2

2012-2013

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2012

## Israel and the Palestinian State: Reply to Quigley

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### Recommended Citation

Benoliel, Daniel (2012) "Israel and the Palestinian State: Reply to Quigley," *University of Baltimore Journal of International Law*: Vol. 1, Article 2.

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DANIEL BENOLIEL.

## **Israel and the Palestinian State: Reply to Quigley**

### **ABSTRACT:**

This article replies to Professor John Quigley's recent article on the rather dramatic controversy concerning Palestinian statehood. The present article provides a critical assessment of two pivotal Palestinian Unilateral Declarations of Independence (UDI) initiatives as of 1988 and 2011. It does so both generally and with regard to the territorial and border disputes underplayed by Professor Quigley's supportive Palestinian statehood argument altogether.

In the wake of the codenamed 'Arab Spring' tentative spread of democracy throughout the Middle East, regional law and order commands legal certainty. Thus, while being sympathetic to the secessionist self-determination of Palestine under public international law, this article offers critical assessment of the latter's unilateral bypass of both relevant United Nations Security Council resolutions as well as the Israeli-Palestinian bilateral Oslo Interim Peace Agreements. The article concludes that neither argument to the contrary in support of unilateral Palestinian statehood as put by Professor Quigley is legally assured.

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## Introduction

The implications of future Palestinian statehood are undeniably dramatic. They may impose on the jurisdiction by the International Criminal Court over alleged war crimes by either party to the Israeli-Palestinian conflict; they can fundamentally change the legal status of the Holy Places in Jerusalem and elsewhere in the Holy Land; they may uphold crucial geo-strategic regional and national implications related to Israel's security concerns; or they may otherwise inflict on the geographical continuation of a viable Palestinian state altogether.

In a thought-provoking article, titled *Palestine is a State: A Horse with Black and White Stripes is a Zebra*, Professor John Quigley directly replies to a previous article by Ronen Perry and myself in the same volume 32 of the Michigan Journal of International Law. Both of these articles exchange competing considerations concerning the abovementioned concerns.<sup>1</sup>

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† Assistant Professor, University of Haifa, Faculty of Law. I thank Roy Sheindorf, Emanuel Gross, Ronen Perry, Uri Benoliel, Yaara Winkler and Gal Sion-Dayan for their comments and advice. For further information, please contact: dbenolie@law.haifa.ac.il. Any inaccuracies are my responsibility.

<sup>1</sup> See John Quigley, *Palestine is a State: A Horse with Black and White Stripes is a Zebra*, 32 MICH. J. INT'L L. 749 (2011) [Hereinafter *Quigley, Palestine is a State*]; Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73 (2010).

In his reply article, Professor Quigley tried to rebut our earlier reservations doubting his presumption that a Palestinian state already exists over the West Bank, including East Jerusalem and the Gaza Strip in their geographic entirety.

Professor Quigley most noticeably argues that no later than the Palestinian Unilateral Declaration of Independence (UDI) of November 15, 1988, upon its wide recognition by the United Nations and states worldwide, a Palestinian state came into existence.<sup>2</sup> Quigley's analysis should conceptually refer to the right to effect the secession of Palestine from Israel unilaterally, given the 1988 Palestinian UDI. In particular, it begs the questions whether such a right can derive from the right of self-determination under international law and, if so, under which limitations.

With the commencement of the sixty-sixth session of the United Nations General Assembly last year, a historic admittance of a newly born Palestinian State may occur. That is, given a following 2011 implied Unilateral Declaration of Independence initiative perceived through

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<sup>2</sup> See, e.g., Quigley, *supra* note 1 at 755; John Quigley, *The Palestine Declaration to the International Criminal Court: the Statehood Issue*, 35 RUTGERS L. REC. 4 (2009) [hereinafter Quigley, *The Palestine Declaration*]; JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* (2010); James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L L. 681, 688 (1989); Benoliel & Perry, *supra* note 1, at 81-87; Malcolm N. Shaw, *The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law*, 9 J. INT'L CRIM. JUST. 301 (2011).

the submission of the application for United Nation membership by the Palestinians on September 23, 2011.<sup>3</sup> The following 2011 Palestinian UDI initiative, does not say when exactly Palestine became a state, nor does it declare Palestine's independence anew; rather, it refers to the November 15, 1988 Declaration of Independence.<sup>4</sup>

As no later formal declaration of Palestinian state took place thereafter the critique over Professor Quigley's adherence to the 1988 Declaration of Independence seemingly remains relevant also after the subsequent 2011 Palestinian UDI initiative. Within the confines of this reply article, additional highly questionable considerations set forth in Professor Quigley's reply article are further criticized.

### **I. Palestine Secessionist Self Determination: The Normative Framework**

Professor Quigley's reply article is doctrinally rather challenging and is incomplete on numerous levels. To start, the accurate legal status of the nascent State of Palestine (*statu nascendi*) arguably still remains a colonial territory. This term is found within the definition of "newly independent state" in the Vienna Convention on Succession of States in Respect of Treaties, August 23, 1978. It refers to any geographically separate territories that are dependent upon and subordinate to a metropolitan territory of a state – Israel in this case – in accordance with Article 74 to the

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<sup>3</sup> See generally Application of Palestine for Admission to Membership in the United Nations, U.N. GASC, 66<sup>th</sup> Sess., U.N. A/66/371 (Sept. 23, 2011).

<sup>4</sup> It is noted however that Mahmoud Abbas is not titled there as President of the Palestinian National Authority (PNA), but as President of the State of Palestine instead. *Id.* at 2, 4.

United Nations Charter.<sup>5</sup> Thus, the Palestinian-occupied territories in West Bank, including East Jerusalem and possibly the Gaza Strip, arguably still adhere to the latter definition.

Professor Quigley analytically ignores the pivotal distinction between two classes of colonial territory within the United Nations Charter. In accordance with Chapters XI and XII of the United Nations Charter, the two classes of territories are self-governing and trust, respectively. Both types of territories are referred to as "colonial" according to the General Assembly Resolution 1514 (XV) in the Declaration on the Granting of Independence to Colonial Countries and Peoples of December 14, 1960.<sup>6</sup>

In the present case, the Palestinian right of self-determination distinctively makes a case in point for the second class of such colonial territories, namely "trust territories", as covered by Chapter XII of the United Nations Charter.<sup>7</sup> The West Bank, including East

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<sup>5</sup> Thus a "metropolitan state" is the administering state of a colonial territory. U.N. Charter art. 74.

<sup>6</sup> A shorthand term sometimes used for colonial territories is "dependent" territories. Moreover, none of the Articles of Chapter XI and XII, actually use the phrase "right to self-determination". Their concern was rather with the progress to self-government of the peoples of dependent territories. *See, e.g.*, Vienna Convention on Succession of States in Respect of Treaties, art 2(1)(f), Aug. 23, 1978, 72 AM. J. INT'L L. 971 (defining "newly independent State"); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, art. 2(1)(e), Apr. 7, 1983, 22 I.L.M. 306 (defining "newly independent State"); *see also id.*, arts. 15, 28, 38.

<sup>7</sup> On the right to Self Determination *see* U.N. Charter art. 1, para. 2 ("To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."); Conference on Yugoslavia Arbitration Commission: Opinions on

Jerusalem and the Gaza Strip, is included in the territories formerly covered by the system of mandates under the League of Nations, as provided for in Article 22 of the Covenant of the League. Article 22 of the Covenant mandates fall into three classes. With one exception, the "A Class" mandates (formerly parts of the Ottoman Empire) had become or shortly after 1945 became independent, specifically Iraq, Jordan, Syria, and Lebanon. Unlike what Quigley describes<sup>8</sup> under the Class A mandate, the exception indeed includes Palestine, a British Class A mandate.<sup>9</sup> Following the British withdrawal from Palestine in 1948 and a war with neighboring Arab states, Israel became independent.<sup>10</sup> The remaining parts of Palestine

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Questions Arising From the Dissolution of Yugoslavia, Opinion No. 2, July 4 1992, 31 I.L.M. 1488, 1498 (1992) [hereinafter *Badinter Commission*] (“[T]he principle of the right to self-determination serves to safeguard human rights.”); International Covenant on Economic, Social, and Cultural Rights art. 1(1), Dec. 16, 1988, 993 U.N.T.S. 3 (“All peoples have the right of self-determination.”); International Covenant on Civil and Political Rights art. 1(1), Mar. 23, 1976, 999 U.N.T.S. 171 (“All peoples have the right of self-determination.”); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 122, U.N. Doc. A/RES/2625(XXV) (Oct. 24 1970).

<sup>8</sup> Quigley, *Palestine is a State*, *supra* note 1, at 755.

<sup>9</sup> Article 77 of the UN Charter states that those mandated territories which had not achieved independence were to be brought under the International Trusteeship System through separate agreements. U.N. Charter art. 77. In balance, like with the Palestinian case, the International Court of Justice (ICJ) held that there was no automatic transfer of mandated territories to the trusteeship system. International Status of South West Africa, Advisory Opinion I.C.J. Reports 1950, p. 128 (July 11).

<sup>10</sup> See G.A. Res. 18/1, ¶ 1, U.N. Doc. A/S/RES/18/1 (Apr. 23, 1990); S.C. Res. 652, at 30, U.N. Doc. S/RES/652 (Apr. 17, 1990); See, e.g., Georges Abi Saab, *Namibia and International Law: An Overview*, 1 AFR. Y.B. INT’L. L. 3, 3-11 (1993). The territory became independent as Namibia on March 31, 1990. Of the "B Class" and "C Class" mandates, only one was not brought under the

were not brought under trusteeship, yet they are covered by the rubric of self-determination. The International Court in the 2004 Construction of a Wall Advisory Opinion<sup>11</sup> and many United Nations resolutions note this distinction.<sup>12</sup>

To be sure, the second class of colonial territories covered by the United Nations Charter were non-self-governing territories. These were dealt with in Chapter XI of the Charter. Article 73 of the Charter states they were “territories whose peoples have not yet attained a full measure of self-government”. Beginning in the 1970s, the international law of self-determination expanded the right to independence to the latter class of colonial territories and to people subject to alien subjugation, domination, and

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Trusteeship system under Chapter XII of the Charter, namely, South West Africa (Namibia). Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa). Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, para. 52 (June 21).

<sup>11</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, at 136, 183, 197, 199 (July 9) [hereinafter *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*]. See also, e.g., CASSESE, *infra* note 12, at 90-99.

<sup>12</sup> See, e.g., G.A. Res. 48/94, ¶¶ 3, 5-6, U.N. Doc. A/RES/48/94 (Dec. 20, 1993) (“Reaffirms also the inalienable right of the Palestinian people and all peoples under foreign occupation and colonial domination to self-determination, independence and sovereignty...”). See also, G.A. Res. 58/163, ¶¶ 1-2, U.N. Doc. A/RES/58/163 (Mar. 4, 2004); G.A. Res. 55/85, ¶ 2, U.N. Doc. A/RES/55/85 (Feb. 28, 2001); G.A. Res. 41/100, at 162, U.N. Doc. A/RES/41/100 (Dec. 4, 1986); G.A. Res. 38/16, at 184, U.N. Doc. A/RES/38/16 (Nov. 22, 1983); G.A. Res. 3236 (XXIX), at 4, U.N. Doc. A/3236 (Nov. 5, 1974); See also ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES, A LEGAL REAPPRAISAL 92 (Cambridge Univ. Press 1995).

exploitation. In short, the Palestinians continuously make up part of the former category of colonial territories.

What Professor Quigley largely ignores is that the right to secessionist self-determination by colonial territories is still plagued by genuine uncertainties in public international law.<sup>13</sup> Quigley admittedly takes the rather incomplete factual approbation of the 1988 Palestinian UDI by a large number of states as an indication that these states regard Palestine as a state.<sup>14</sup> Professor Quigley explains that there are precedents of recognition of statehood being extended on the basis of self-determination by aspirant governments before the aspirant government claims effective control. In other instances, he adds that this form of early recognition envisages the attainment of effective control within a foreseeable future.<sup>15</sup>

Different than what Quigley assumes for the Palestinian case in point, there simply is no binding right of secession under public international law.<sup>16</sup> Moreover, no preliminary agreements on the criteria have taken place that might be used in the future to determine when secession

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<sup>13</sup> See e.g., Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 145-46 (2010); Vidmar, *infra* note 31, at 6; *Report Presented by the Council of the League by the Commission of Rapporteurs, The Aaland Islands Question*, League of Nations Council Doc. B7 (1921); Badinter Commission, *supra* note 7, at 1497-99.

<sup>14</sup> Quigley, *supra* note 1, at 752.

<sup>15</sup> *Id.* at 753 (referring to D.A. Raič, *Statehood and the Law of Self-determination* (The Hague: Kluwer Law International, 2002), at 414-415).

<sup>16</sup> See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 234 (Oxford University Press, 2nd ed. 2006).

should be supported.<sup>17</sup> In continuation, Professor Quigley's doctrinal deficiency over Palestinian secession is further challenged by state practice upholding how self-determination arises under one of three legal theories of secession, namely bilateral, unilateral (remedial), or de facto.<sup>18</sup>

The first type of secession that regrettably eludes Quigley's analysis of Palestinian statehood already since 1988—and possibly since 1948—is based on bilateral agreement between the metropolitan state and the dependent territory.<sup>19</sup> Two conditions justify bilateral secession: A “clear expression of democratic will” by seceding peoples and the presence of negotiations between the secessionists and the parent country.<sup>20</sup> The second condition is the presence of negotiations between the

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<sup>17</sup> See Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 777 (1998).

<sup>18</sup> See e.g., CASSESE, *supra* note 12; CRAWFORD, *supra* note 16; HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION THE ACCOMMODATION OF CONFLICTING RIGHTS* (Univ. of Pa. Press, 2nd ed. 1996); MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE THE NEW DOCTRINE IN THE UNITED STATES* (Martinus Nijhoff Publishers, 1982); A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION, A STUDY OF UNITED NATIONS PRACTICE* (A.W. Sijthoff Int'l Publ'g Co., 1973).

<sup>19</sup> James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, Report to the Government of Canada concerning unilateral secession by Quebec (1997), reprinted in ANNE F. BAYEFKY, *SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED* 31 (Martinus Nijhoff Publishers 2000) [hereinafter, Crawford, *State Practice Report*], para. 17.

<sup>20</sup> Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 264-65 (Can.).

secessionists and the parent country.<sup>21</sup> In this way and dissimilar to the Palestinian case, the parent country grants independence in response to democratic pressure, thereby justifying the secession.

Professor Quigley's assertion deemphasizes the fact that a lack of bilateral secession will result in only two alternative means of unilateral secession: winning a war of independence or negotiated independence. The first method is by traditional means of winning a war of independence, which Palestine has not done. Two rather successful examples for the alternative model are Bangladesh<sup>22</sup> in the early 1970s backed by India's foreign military assistance, and Chechnya to a limited degree during the 1990s.<sup>23</sup>

The second method is to negotiate independence provided that the central government, in this case Israel, agrees to engage in negotiations.<sup>24</sup> Surely, an archetypical central government, like Israel's is not obliged by international law to comply.<sup>25</sup>

Especially after the adoption of the Declaration on the Granting of Independence to Colonial Countries and

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<sup>21</sup> *Id.* at 265-66.

<sup>22</sup> See S.C. Res. 307, U.N. Doc. S/Res/307 (Dec. 21, 1971); *see also* India-Pakistan, Simla Agreement on Bilateral Relations and Statement on its Implementation, 3 July 1972, 11 ILM 954 (1971); *see also* VP Nanda, Self-Determination in International Law: The Tragic Tale of Two Cities – Islamabad (West Pakistan) and Dacca (East Pakistan) 66 AJIL, 321 (1972) (on Bangladesh).

<sup>23</sup> Diana Draganova, Chechnya's Right of Secession under Russian Constitutional Law, 3(2) CHINESE J. OF INT'L L. 571 (2004).

<sup>24</sup> Crawford, State Practice Report, *supra* note 19, para. 17.

<sup>25</sup> *Id.*

Peoples of 1960, the United Nations General Assembly urged that rapid decisions be made as to the self-government or independence of colonial territories, such as with the Palestinian case. Yet, there is only one exception of the United Nations advocating or supporting unilateral rights of secession. The exceptional practice – rather irrelevant to the Palestinian case - has been for non-self-governing territories, where self-determination was effectively opposed by the colonial power. This became state practice in the case of the Portuguese African territories namely in Angola, Mozambique, and Guinea-Bissau.<sup>26</sup> In the vast majority of cases, self-government or independence was always been achieved peacefully and by agreement with the administering authority.<sup>27</sup> State practice depicts that nearly a hundred territories designated as colonial under Chapters XI and XII have become independent, and have been admitted to the United Nations.<sup>28</sup>

Unlike with the Israeli government, when the parent state is unwilling to negotiate the outcome is less clear.<sup>29</sup> As illustrated with the Palestinian UDI of 1988, there remain two additional non-binding types of secessionist self-determination which Professor Quigley fails to qualify

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, para. 19. (citing note 21 listing all the countries admitted to the United Nations).

<sup>29</sup> See Milena Sterio, *supra* note 13, at 145-46; Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 809 (2009); Report Presented by the Council of the League by the Commission of Rapporteurs, *The Aaland Islands Question*, *supra* note 13; Badinter Commission, *supra* note 7, at 1497-99.

adequately. The first of two is remedial secessionist self-determination. It corresponds to the varying degrees of oppression inflicted upon a particular group by its governing state, whereby public international law may recognize secession as the ultimate remedy.<sup>30</sup>

The Aaland Islands case in 1921<sup>31</sup> articulated the requirements for justifiable secession when the parent state, such as Israel in our case, may oppose it, assuming those wishing to secede are legally considered “a people”, such as the Palestinians.<sup>32</sup> Yet, state practice herein adds two additional requirements, which neither Professor Quigley nor the Palestinians have elaborated or established. The first additional requirement is that the secessionist people, such as the Palestinians, were subject to very serious violations of human rights at the hands of the parent state. The second additional requirement is that absolutely no

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<sup>30</sup> See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 31, para. 82 (July 22) (The Court finds that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law); see also LEE C. BUCHHEIT, 40 SECESSION 222 (1978); Vidmar, *supra* note 29, at 814-18; Cf. ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 351-53 (2004).

<sup>31</sup> See Report Presented by the Council of the League by the Commission of Rapporteurs, *supra* note 13, at 21. (League of Nations denying the right of the people in a collection of these islands living historically under Finnish control to have right to secede from Finland and be annexed by Sweden).

<sup>32</sup> The definition of “people” is somewhat ambiguous. See Vidmar, *supra* note 29, at 810-12. But see Christopher J. Borgen, *The Language of the Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 7-8 (2009).

other remedies were available to them.<sup>33</sup> Recently, the Supreme Court of Canada noticeably applied an equivalent standard in its decision on the final denial of secession of the Province of Quebec in 1998.<sup>34</sup> To be sure, the interpretation given to these requirements is strict and certainly was not upheld in the present Palestinian case. In the background of this are the ongoing bilateral Oslo Interim Accords setting, continuously backed by the Quartet forum incorporating the United Nations, The United States, the Russian Federation and the European Union.

The second comparable non-binding type of secession is *de facto* secession, which is either remedial or non-remedial. In such cases, a population secedes unilaterally, thereby leaving the international community as arbiter of its ultimate success, namely its recognition by other states.<sup>35</sup> Both remedial and *de facto* unilateral

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<sup>33</sup> See Borgen, *supra* note 32, at 8.

<sup>34</sup> Reference re Succession of Que., [1998] 2 S.C.R. 217, 281, 284-86 (Can.) (describing the threefold requirements for secession: that the seceding group are a “people,” “governed as part of a colony, or subject to alien subjugation, domination or exploitation,” and when it is deprived of “the meaningful exercise of its right to self-determination”).

<sup>35</sup> Reference re Secession of Que., [1998] 2 S.C.R. 217, 284-86. To illustrate, in the latest case of Chechnya's *de facto* secession, the Russian Federation has implicitly recognized *de facto* secession of the former by concluding the Treaty on Peace and the Principles of Interrelations with the Chechen Republican of Ichkeria in 1997. See Peace Treaty and Principles of Interrelation between Russian Federation and Chechen Republic Ichkeria, May 12, 1997, <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/rus2.pdf>. See generally Draganova, *supra* note 23, at 572-537, 583-87 (inquiring whether “a constituent part of a State has the right to external self-determination.”).

secessions may uphold a joint mechanism, questionably practiced through the 1988 Palestinian UDI. In both forms of secessionist self-determination, a UDI is used to refer to the unilateral act by which a group declares that it is seceding to form a new state. Yet, different than as perceived by Quigley, although usually declaratory in form, a UDI is not a self-executing act and may not lead necessarily to self-governance, sovereignty, or statehood.<sup>36</sup> The main obscurity with Quigley's analysis is that the independence of a state is established by both territorial control and recognition of statehood by other states and the parent state itself. That is, especially recognition by the state on whose territory the secession is occurring, namely the parent state being Israel. An interrelated analytical framework offered by Professors Oppenheim,<sup>37</sup> Crawford,<sup>38</sup> Shaw,<sup>39</sup> and others,<sup>40</sup> reiterated the criterion of

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<sup>36</sup> See Crawford, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 16, at 123. *But see* Quigley, *Palestine is a State*, *supra* note 1, at 751-53 (arguing Palestine's statehood is a "matter of fact" and that recognition by other countries is not a pre-requisite to achieving statehood; recognition merely indicates acceptance). *See also* discussion *Infra* Part II.A. (explaining that for decades Palestine has lacked sovereignty as Israel has exercised control over and held possession of the area in which Palestine allegedly self-governs).

<sup>37</sup> L. Oppenheim, *INTERNATIONAL LAW: A TREATISE* 114-15 (Hersch Lauterpacht ed., 6th ed. 1947) (listing the four preconditions of statehood: a people, a territory, a government, and sovereignty).

<sup>38</sup> See Crawford, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 16, at 447 (explaining that even the exercise of external self-determination need not result in independence, "and where serious issues remain to be resolved about the constitution and boundaries of the putative State... statehood should not be regarded as existing already, as it were, by operation of law").

<sup>39</sup> See also Malcolm N. Shaw, *The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law*, 9 J. INT'L CRIM. JUST. 301, 305 (2011).

state independence. The latter alternative criterion refers to effective sovereignty through self-governance as a central prerequisite for statehood. Even in cases where belligerent occupation is present, such as in Israel, self-governance is required to obtain statehood.<sup>41</sup> Thus, it is required that a declaration of independence be present, yet it is not a satisfactory condition for unilateral secession, as is the case with Palestine”.<sup>42</sup>

Moreover, decolonization state practice clearly shows that only where there has been international legitimization by the United Nations may the operation of the secessionist self-determination principle be altered,

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<sup>40</sup> See *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 838 (1928) (statement by Arb. Huber on “...sovereignty in its relation to territory”); see also *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 288 (1st Cir. 2005); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: PERSONS IN INTERNATIONAL LAW § 201 note 5 (A.L.I. 1987) (“Some writers add independence to the criteria required for statehood. Compare the Austro-German Customs Union case ... in which the Court advised that a proposed customs union violated Austria's obligation under the Treaty of St. Germain to retain its independence.”).

<sup>41</sup> See Crawford, *THE CREATION OF STATES IN INTERNATIONAL LAW*, *supra* note 16, at 447. See J. Crawford, *The Creation of Palestine: Too Much Too Soon?*, 1 EUR. J. INT’L L. 307, 309 (1990). See also Benoliel & Perry, *supra* note 1, at Part II.B.2 (discussing the independence criterion concerning the Palestinian statehood question). *But see* Memorandum from John Quigley on the Recognition of Palestinian Statehood 1 (May 20, 2010) (on file with author) (arguing that a state may be created even in the absence of independence or without independence have “materialized” into self-governance thereby implicitly including territories subject to competing title claims); Michael Kearney, *Palestine and the International Criminal Court: Asking the Right Question*, UCLA HUMAN RIGHTS AND INT’L CRIM. L. ONLINE FORUM, <http://uclalawforum.com/gaza#Kearney> (last visited Nov. 2, 2012).

<sup>42</sup> See Crawford *supra* note 16, at 123.

mostly by means of border modifications. However, this would be dependent upon an internationally accepted threat to peace and security, which is dissimilar to our case in point. This rationale led the United Nations Security Council to repeatedly call for a bilateral negotiated peace agreement instead.<sup>43</sup>

Lastly, Professor Quigley's analytical framework falls short on an additional fundamental aspect concerning the issues of territorial integrity over border disputes, which is derived from the secessionist principle.<sup>44</sup> Once groups are allowed to exercise self-determination through secession, border disputes may prove more contentious than secession. This grim scenario has eluded Quigley's analysis completely, whereby his assumption seems to remain that Palestinian self-declaration unfolds their complete sovereignty over disputed parts of the occupied territories, such as the holy places in East Jerusalem, the strategically vital Jordan Valley, or the few settlement blocs. Part II.B.2 of this article will examine that Israel argues for a competing title and a possibly negotiated land swap, backed by its interpretation of United Nations Security Council Resolutions 242 and 338.

To illustrate how crucially important border disputes are within the overall secessionist self-determination, one is reminded that the blood-spattered

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<sup>43</sup> See G.A. Res. 1746 (XVI), ¶ 16, U.N. Doc. A/1746 (June 27, 1962); Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BRIT. J. INT'L. L. 75, 148 (1996). See discussion *infra* Part II.B.2.

<sup>44</sup> See *infra* Part II.A for a detailed depiction of these disputed territories.

Yugoslav wars in the 1990s were related mostly to borders issues. The reason for that has been possibly similar to the present Palestinian one, whereby a version of the *Uti Possidetis Juris* (UPJ) doctrine was upheld in creating international borders while transforming existing internal ones of the various Yugoslav republics regardless of the ethnic groups' conflicts therein.<sup>45</sup> In 1991 to resolve problems in the Balkans,<sup>46</sup> the Badinter Commission utilized the UPJ doctrine to manage the dissolution of Yugoslavia.<sup>47</sup>

In the Palestinian case, Professor Quigley only implicitly refers to equivalent borders disputes over competing titles by the Israelis and Palestinians. Instead, he incorporates at least all of the occupied West Bank and East Jerusalem wholly within a Palestinian state. Indeed, the principle of UPJ is a critical doctrine that offers a very strong presumption that a colony or federal or other distinct administrative unit, such as the Palestinian Authority (PA), will come to independence within the borders that it had in the period immediately prior to independence.<sup>48</sup> There are

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<sup>45</sup> See Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22), for a broader discussion of *Uti Possidetis Juris*.

<sup>46</sup> See generally Richard Falk, *Self-Determination under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in THE SELF-DETERMINATION OF PEOPLES: COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD 31, 52 (Wolfgang F. Danspeckgruber, ed. 2002).

<sup>47</sup> See Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22), for a broader discussion of Badinter Commission, *supra* note 7, at 1498 (interpreted the *Uti Possidetis Juris*. doctrine in the Yugoslav opinion broadly, to include instances of self-determination).

<sup>48</sup> Tomas Bartoš, *Uti Possidetis: Quo Vadis?*, 18 AUSTL. Y.B. INT'L L. 37, 39-40 (1997); Shaw, *supra* note 43, at 148. See also

two exceptions to this doctrine that Professor Quigley again never discusses. This article is an analysis of the two exceptions to the UPJ doctrine that Professor Quigley did not address.

Part II.A defines the Israeli-Palestinian territorial dispute over segments of the occupied West Bank and East Jerusalem. In so doing, it questions Professor Quigley's assertion that Palestinians sufficiently self-govern the occupied territories in the West Bank and East Jerusalem while proclaiming statehood over the entire territory. This article is a specific response to Quigley's assertion of implied adherence to Palestinian statehood. Furthermore, it identifies the two primary exceptions to the territorial integrity principle of the UPJ doctrine and explains why neither exception has been successfully established by Palestine. The first exception, discussed in Part II.B, upholds that parties themselves may agree to alter the UPJ rule, both during the process of acquisition of independence and afterwards, such as possibly within the Oslo Interim Accords.<sup>49</sup>

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Continental Shelf (Tunis v. Libya), 1982 I.C.J. 18, 65-66 (Feb. 24) (discussing the doctrine's historical application in settling decolonization issues in America and Africa). Badinter Commission, *supra* note 7, at 1500. *See* Frontier Dispute, 1986 I.C.J. at 566 (explaining that the fundamental aim of the doctrine of *uti possidetis juris* is to underline the principle of stability of state boundaries, but it also provides the new state with territorial legitimization).

<sup>49</sup> Shaw, *supra* note 43, at 141; G.A. Res. 1608 (XV), ¶ 15, U.N. Doc. A/1608 (Apr. 21, 1961). Beagle Channel Arbitration (Arg. v. Chile), 17 I.L.M. 632 (1977); Badinter Commission, *supra* note 7, at 1498. Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 351, 408 (Sept. 11).

The second exception discussed in Part II.C, may uphold the need for acceptance of this bilateral agreement by the United Nations.<sup>50</sup> Both, as said, are presently highly debatable in considering Professor Quigley's territorial criteria altogether.

## **II. The Territorial Integrity Intricacy**

### **A. Defining Palestinian Disputed Self Governance**

Professor Quigley underplays the mere fact that the territory under Palestinian self-governance corresponds to a minor segment of the occupied territories. Moreover, Quigley ignores Israel's competing titles backed by its own governance over most territories therein.<sup>51</sup> Arguably, although Israel's competing titles do not incorporate most of the West Bank and East Jerusalem, they, nevertheless, bring into question possible Palestinian independence over the West Bank and East Jerusalem as long as Israel is governing those areas.

Put differently, if Palestinian statehood is declared over the entire occupied territory, then Israel's competing titles over sections of the West Bank and possibly East Jerusalem, coupled with Israeli governance over the region as a whole may withstand Palestinian independence over the rest of the region in which Israel has no competing title. Professor Quigley's analysis is, regrettably, overly

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<sup>50</sup> Shaw, *supra* note 43, at 141.

<sup>51</sup> See Crawford, *The Creation of Palestine: Too Much Too Soon*, *supra* note 41, at 309 (upholding that this requirement incorporates effective governance over territory that otherwise could be regarded as competed in title by a different party, and thus lacking the criteria of independence over such disputed territories).

generalized concerning the diminutive Palestinian self-governance of these territories, as explained below.

By and large, the type of governance adopted by occupying-Israel in the West Bank following the 1967 Six Day War was military government subject to the international law of occupation.<sup>52</sup> A separate military administration was established basing itself on the law in force immediately prior to the occupation.<sup>53</sup> In doing so, Israel noticeably adhered to Jordan's existing laws, notwithstanding Israel's nonrecognition of the Jordanian pre-1967 annexation of the West Bank.<sup>54</sup>

What is important to date, however, is that following the Oslo I Interim Accord of 1995, and growingly until the Sharm el-Sheikh Memorandum of 1999, Israeli military governance over the West Bank left the Palestinians with effective self-governance only over 17.2% of the West Bank known as Area A, where Palestinians assumed full civil and internal security

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<sup>52</sup> Moshe Drori, *The Legal System of Judea and Samaria: A Review of the Previous Decade with a Glance at the Future*, 8 ISR. Y.B. HUM. RTS. 144, 146-47 (1996) (for more on the legal system in the West Bank during the first decade).

<sup>53</sup> See PROCLAMATION NO. 2, PROCLAMATION REGARDING REGULATION OF ADMINISTRATION AND LAW, issued by Commander of IDF Forces in the West Bank Region (June 7, 1967) available at <http://nolegalfrontiers.org/en/military-orders/mil03>.

<sup>54</sup> See Kathleen A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 FORDHAM INT'L L.J. 934, 944-45 (2002) (citing H.C. 61/80, Ha'etzni v. State of Israel, 34 (3) P.D. 595 [1980] (Isr.) (upholding the rationale of maintain public order).

responsibilities.<sup>55</sup> In addition, the Palestinians were left with effective self-governance conceivably in the part of Area B in which the Palestinians assumed civil control, leaving security responsibility in the hands of the Israeli army, with additional 23.8% of the overall occupied West Bank.<sup>56</sup> The main point herein, which has been flatly ignored by Quigley, is that, as officially admitted by the Palestinian Authority itself, Area C, which is comprised of the majority of the West Bank (about 59%) remains exclusively under Israeli military government control, subject to the international law of occupation, instead of a Palestinian self-governing alternative.<sup>57</sup>

In an archetypical, national Development Plan recently submitted by the Palestinian National Authority (PNA) to the World Bank, a detailed depiction by the Palestinians of what is titled "Lack of Sovereignty" illustrates a minority scale of 17.2% of full control by the PNA in the West Bank altogether.<sup>58</sup>

Moreover, and much to the Palestinians' dismay, the PNA is also, admittedly, lacking control over external borders.<sup>59</sup> PNA does not possess control over the movement and access of people, goods, and services within

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<sup>55</sup> See *Palestinian Reform and Development Plan 2008-2010*, PALESTINIAN NATIONAL AUTHORITY 15-16 available at [http://www.jmcc.org/documents/development\\_plan.pdf](http://www.jmcc.org/documents/development_plan.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (admitting that in Area C Israel presently retains full control of civil and security matters).

<sup>58</sup> *Id.* (depicting a continuous albeit slow growth in the size of Area A).

<sup>59</sup> *Id.* at 16.

and between the West Bank and Gaza Strip,<sup>60</sup> nor has jurisdiction over natural resources, airspace and the sea.<sup>61</sup>

The treatment of the occupied eastern part of Jerusalem similarly foretells the lack of any Palestinian self-governance. Soon after the Six Day War, on June 28, 1967, the Israeli Government extended Israeli “law, jurisdiction[,] and administration” by incorporating this area within the existing Israeli municipality of the western part of the city.<sup>62</sup> To the international community this act was explained not as an annexation but as an administrative measure, aimed both at extending the same municipal services to all residents of the now-single municipal area and at ensuring the protection of the Holy Places through Israeli laws.<sup>63</sup>

In the enactment in 1980 of Basic Law, Jerusalem was named the Capital of Israel and Israel asserted that a “[u]nified Jerusalem is the capital of Israel.” Surely, this Act did not create any change in the internal legal situation in East Jerusalem, but did express unequivocally Israel’s claim to the right to exercise its sovereignty over the area.<sup>64</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See LAW AND ADMINISTRATION ORDINANCE (Amendment No. 1), Knesset (June 27, 1967) available at [www.geocities.com/savepalestinenow/israelaws/fulltext/lawandadministrat670627.htm](http://www.geocities.com/savepalestinenow/israelaws/fulltext/lawandadministrat670627.htm).

<sup>63</sup> *Abu Salakh v. Minister of the Interior*, 37(2) P.D. 718 [1983] (Isr.) (approving Justice Cohen’s opinion in *Ruweidi v. Military Court of Hebron*, 24(ii) P.D. 419 [1970] (Isr)). Basic Law: Jerusalem the Capital of Israel, 5740, 34 LSI 209, ¶ 1.

<sup>64</sup> Basic Law: Jerusalem the Capital of Israel, 5740, 34 LSI 209, ¶ 1; *Ne’emaney Har-Habait v. Attorney General*, 47(5) P.D. 221 [1994] (Isr.); See S.C. Res. 252, ¶¶ 2-3, U.N. Dec. S/RES/252 (May 21,

What matters herein is that East Jerusalem continuously remained in Israeli control instead of Palestinian.

To conclude, with less than a fifth of territories over which the Palestinians practice self governance in the West Bank, including East Jerusalem (excluding the separately Hamas-governed Gaza Strip), and with some segments over which Israel has competing titles; it is highly questionable whether the Palestinians present claim for statehood withstands Israel's present territorial integrity. This is based on a twofold set of arguments which further weaken Quigley's analysis of Palestinian statehood altogether, referring to arguable Palestinian violations of United Nations resolutions as well as the violation of United Nations resolutions as well the violation of the bilateral Oslo Interim Agreement.

## **B. First Disintegration: Violation of United Nations Resolutions**

The first of two sets of arguments refer to the

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1967); S.C. Res. 267, ¶¶ 2-5, U.N. Doc. S/RES/267 (July 3, 1969); S.C. Res. 298, ¶¶ 2-4, U.N. Doc. S/RES/298 (Sept. 25, 1971); S.C. Res. 446, ¶¶ 2-3, U.N. Doc. S/RES/446 (Mar. 22, 1979). S.C. Res. 476, ¶¶ 1-5, U.N. Doc. S/RES/476 (June 30, 1980); G.A. Res. 2253 (ES-V), ¶¶ 1-2, U.N. Doc. A/RES 2253 (Jul. 4, 1967); G.A. Res. 2254 (ES-V), ¶¶ 1-2, U.N. Doc. A/RES 2254 (Jul. 4, 1967); G.A. Res. 31/106, ¶¶ 1-4, U.N. Doc. A/RES/31/106A (Dec. 16, 1967); G.A. Res. 33/113, U.N. Doc. A/RES/22/113 (Dec. 18, 1978); Per the condemnation of the 1980 Basic Law, *see also* S.C. Res. 478, ¶¶ 1-5, U.N. Doc. S/RES/478 (Aug. 20, 1980); G.A. Res. 36/120, ¶¶ 1-5, U.N. Doc. A/RES/36/120E (Dec. 10, 1981); G.A. Res. 37/123, ¶¶ 1-2, U.N. Doc. A/RES/37/123C (Dec. 16, 1982); G.A. Res. 39/146, ¶¶ 1-4, U.N. Doc. A/RES/39/146C (Dec. 14, 1984).

complex and rather contradictory adherence by the Palestinians to the United Nations resolutions, which the Palestinians have operated under in order to establish statehood. The reservations to Quigley's analysis concerns the first exception to the UPJ doctrine; a state practice of a need for acceptance of any deviation from the doctrine by the United Nations.<sup>65</sup> Additional support is found in the European Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, adopted by the European Community and its Member States on December 16, 1991. These provided for a common policy on recognition of states emerging from the former Yugoslavia and former USSR in particular, which required inter alia “respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement”.<sup>66</sup> Yet the Palestinian PNA's narration of both its 1988 and 2011 UDI's initiatives are possibly inconsistent.

In particular, the present analysis refers to a set of specialized and late United Nations Security Council Resolutions, 242, 338, and 1850, which were ignored at least in part by the Palestinians. However relevant adherence to Israeli competing land titles on sections of the West Bank possibly proves East Jerusalem exists. These considerations, presently missing from Quigley's analysis, are threefold. First, they refer to the inconsistent Palestinian 2011 United Nations application for membership, which took place in September 2011, manifesting a rather

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<sup>65</sup> *Supra* note 49.

<sup>66</sup> ILM *supra* note 49, at 1509 (emphasis added).

challenging Palestinian territorial criterion narration. Secondly, this part offers a detailed critique of Quigley's analysis of United Nations Resolutions concerning the territorial aspect, with special emphasis on Security Council resolutions 242, 338 and 1850. Lastly, this part offers a third group of reservations per Quigley's analysis, while considering the probable lack of good faith practiced by the Palestinians in their treatment of these seminal United Nations Security Council resolutions.

### **1. The Inconsistent 2011 Palestinian United Nations Application**

To begin, the first of three sets of argument refers to the complex and rather contradictory adherence by the Palestinians to United Nations resolutions, through which the Palestinians have operated to establish full territorial rights. At the outset, the Palestinian position was reiterated in a historical speech by Palestinian President Mahmoud Abbas. The speech by President Abbas was addressed to the United Nations General Assembly on, September 23, 2011. This was soon after submitting the official application by Palestine for United Nations membership to United Nations Secretary-General Ban Ki-moon. In his speech, President Abbas reiterated the will of the Palestinian people for statehood on the West Bank and the Gaza Strip, in their entirety, with East Jerusalem as its capital.<sup>67</sup> President Abbas indirectly referred to the two-state solution model in support of a “full 1967 borders”

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<sup>67</sup> See *Full Transcript of Abbas Speech at UN General Assembly*, Haaretz (September 23, 2011), available at <http://www.haaretz.com/news/diplomacy-defense/full-transcript-of-abbas-speech-at-un-general-assembly-1.386385>.

proposition.<sup>68</sup> He presumably backed this position through a letter annexed to the application dated September 23, 2011, from the President of Palestine to the Secretary-General Ban Ki-moon. The letter effectively refers to a present-day consensus within international law to the 1967 borders model.<sup>69</sup>

Yet, per the issue at stake, namely Israel's competing title over strategic segments of the territories and the remaining issue of limited Palestinian self-governance over the 1967 occupied territories, that position remains highly questionable. Thus, regrettably, the Palestinian President's speech and supportive letter is inconsistent with the Palestinian Authority's application for United Nations membership that followed.<sup>70</sup> In contrast to the Presidential speech and letter, the formal Palestinian application is based on two constituting documents referred to therein. Both documents further depict fundamental inconsistency with the overarching Palestinian avoidance of Israel's competing territorial claims for title. The first document is the General Assembly's Resolution 181(II) dated November 29, 1947, standing for the United Nations Partition Plan for Palestine.<sup>71</sup> The second document

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<sup>68</sup> The Official Palestinian Application, *supra* note 3, at 2.

<sup>69</sup> *Id.*

<sup>70</sup> The Official Palestinian Application, *supra* note 3; Rabbie Sabel, *The Palestinians and the Application for Admittance as State: Where is the State?* 184 *Inns Insight*, October 2, 2011, The Institute for National Security Studies at Tel-Aviv University, available at [http://www.inss.org.il/upload/\(FILE\)1317728523.pdf](http://www.inss.org.il/upload/(FILE)1317728523.pdf).

<sup>71</sup> The Resolution served as a recommendation for partition by the United Nations Special Committee on Palestine in 1947 to replace the British Mandate for Palestine with "Independent Arab and Jewish States." It further called for a "*Special International Regime for the City of Jerusalem*" administered by the United

referred to in the aforementioned Palestinian application is the Palestinian Declaration of Independence of November 15, 1988.<sup>72</sup>

Officially, the Palestinians are allowed to refrain from offering exact national borders with their application of admittance as members with the United Nations. Yet the two documents, upon which their Palestinian application is based, systematically ignore any adherence to the above-mentioned 1967 borders, to the remaining criterion of effective self-governance, and to lack of competing title by another state given the latter's claim for territorial integrity.<sup>73</sup>

The first of two documents, namely the United Nations General Assembly Partition Plan Resolution 181(II) recommended a distinct border model, whereby the Arab state to be established within the former British mandate borders of Palestine would engulf any possible Israeli or other claim for even the 1967 borders to begin with. In particular, the Partition Plan Resolution historically offered much of present day Israel to be considered part of the Arab state. Such is the recommendation that the latter incorporates present-day Israel's Galilee region almost in its entirety to the metropolitan area of the city of Be'er Sheva in Israel's southern Negev region. This is while extracting the entire

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Nations. U.N. G.A. Res. 181(II) at 133 (emphasis added). See also Future Government of Palestine, available at <http://domino.un.org/unispal.nsf/0/7f0af2bd897689b785256c330061d253>. [hereinafter the Partition Plan].

<sup>72</sup> See Palestine National Council: Declaration of Independence (15 November 1988), in THE ISRAEL-ARAB READER at 542-46 (Walter Laqueur & Barry Rubin, eds., 5<sup>th</sup> ed. 1995).

<sup>73</sup> Sabel, *supra* note 70, at 1-2.

city of Jerusalem from Israeli and Arab sovereignty towards a "Special International Regime for the City of Jerusalem".<sup>74</sup>

Equally relevant, adherence to the Partition Plan with the Palestinian application request further failed to mention the fact that like with all Arab states at the time when the Partition Plan was recommended, no Palestinian leadership or the Palestinian Authority ever acknowledged the borders offered in the Partition Plan. Nor did the Palestinians offer recognition of it or willingness to act accordingly. The record by the Palestinians themselves was to the contrary. Thus, on February 16, 1948, the United Nations Palestine Commission reported to the Security Council: "[p]owerful Arab interests, both inside and outside Palestine, are defying the resolution of the General Assembly and are engaged in a deliberate effort to alter by force the settlement envisaged therein."<sup>75</sup> Palestinian leadership, as well as neighboring Arab states historically left the newly established State of Israel as a sole regional supportive party to the Partition Plan. Soon after, they launched a war of aggression against it in the hope to nullify the Plan and defeat the nascent State of Israel altogether.<sup>76</sup> Israel was not admitted conditionally or

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<sup>74</sup> The Partition Plan, *supra* note 71, at 133.

<sup>75</sup> U.N. Palestine Comm'n First Special Report to the Security Council: The Problem of Security in Palestine, U.N. SCOR, 3rd Sess., U.N. Doc. A/AC.21/9 at 3 (Feb. 16, 1948).

<sup>76</sup> See Crawford, *supra* note 16, at 313. On the approach by Arab states and the Palestinian leadership towards the Partition Plan in the eve of the establishment of the State of Israel is, stands a terrifying threat of genocide made by the first Secretary-General of the Arab League Azzam Pasha who declared "[t]his will be a war of extermination and a momentous massacre which will be spoken of like the Mongolian massacres and the Crusades." BENNY MORRIS, *RIGHTEOUS VICTIMS* 218-19 (1999). *But see* Alexander H. Joffe & Asaf Romirowsky, *A Tale of Two Gallows: Notes on the Early*

unconditionally to the United Nations based on the Partition Resolution or upon its recommended borders.<sup>77</sup>

Lastly, the 1949 Armistice Agreements entered into force by Israel and its Arab neighbors, establishing the Armistice Demarcation Lines, clearly stated that these lines “are without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto.” Accordingly, they cannot be accepted or declared to be the international boundaries of a Palestinian state in reliance on the Partition Plan or post-1948 war derivatives thereof. That is while incorporating the wordings of pivotal Security Council Resolutions 242 and 338, which are discussed hereinafter<sup>78</sup> as well as in the Interim Israeli-Palestinian Oslo Accords.<sup>79</sup>

The second document upon which the Palestinian application is inconsistently based, vis-à-vis the issue of the two parties’ competing territorial titles, is the unilateral Palestinian Declaration of Independence of November 15, 1988.<sup>80</sup> A careful read of the 1988 Declaration of Independence portrays what has been an intentional Palestinian avoidance of any affirmation of its requested

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*History of UNRWA and Zionist Historiography*, 46 MIDDLE EASTERN STUDIES (2010) 655, 671 (discussing the doubtful historical observation concerning the exact quote by Pasha).

<sup>77</sup> See Crawford, *supra* note 16, at 442.

<sup>78</sup> Even the abovementioned Security Council Resolutions 242 and 338 in continuation, did not specify the boundaries of Israel or endorse the 1949 Armistice Demarcation Lines as permanent borders. See, S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967); S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973).

<sup>79</sup> Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, art. I, Sept. 13, 1993, 32 I.L.M. 1525 [hereinafter Oslo I], (recognizing Resolutions 242 and 338 will be implemented during negotiations of permanent status).

<sup>80</sup> See, Palestine National Council: Declaration of Independence, *supra* note 72.

borders, permanent or temporary alike. In its place, the Declaration vaguely refers to “on our Palestinian territory” implying the inclusion of the whole of Israel's territory, whilst mentioning Jerusalem at large (Al-Quds Ash-Sharif).<sup>81</sup> And so, dissimilar with the Palestinian presidential speech and annexed letter to the United Nations Secretary General, the 1988 declaration offers a much broader and controversial Palestinian territorial title claim altogether.

Moreover, the 1988 unilateral Declaration of Independence offers further inconsistency given the map of the “Palestinian State” offered by the Palestine National Authority (PNA) at the time of the Declaration proceedings. Such a map offers even further competing claims to territory as it not only integrates the entirety of the West Bank, the Gaza Strip, and the whole of Israel; but in fact also parts of the Hashemite Kingdom of Jordan.<sup>82</sup> Given these troublesome territorial title claim inconsistencies with the 1967 two-state solution model, it is of no surprise that Israel is not included on the map of the Middle East on the official web site of the Palestine Authority.<sup>83</sup> Instead, the entire land of Israel is labeled Palestine.<sup>84</sup>

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<sup>81</sup> *Id.* at 356.

<sup>82</sup> Mr. *Khalil* Tufakji, Head of the Palestinian Geographical *Maps* Department at Jerusalem's Arab Research Society was commissioned to produce the map. See PALESTINE NET PORTAL, <http://www.palestine-net.com/geography/gifs/palmap.gif>.

<sup>83</sup> *Id.*

<sup>84</sup> Similarly, in Palestinian Authority's geography page, Palestine is described as encompassing Israel and the occupied territories. See PALESTINE: GEOGRAPHY, <http://www.palestinenet.com/geography/> (defining Palestine as "currently under occupation...located on the East Coast of the Mediterranean Seas, West of Jordan and to the South of

## 2. Evasion of United Nations Security Council resolutions

There is a second set of arguments that concerns incomplete Palestinian title claims per their larger statehood claim (again ignoring Israel's competing titles thereof). It refers to a set of specialized and late United Nations Security Council Resolutions (Resolutions 242, 338, and 1850) that were simply ignored, at least partly, by the Palestinians whereby relevant adherence to Israeli competing land titles can be possibly upheld. It concerns the conflict of law between the Partition Plan Resolution 181(II) on the one hand, and the prevailing Security Council Resolutions 242, 338, and 1850 on the other; thereby possibly upholding Israel's competing title claims over Palestinian ones.

The term “occupied territories” originally derived from Security Council Resolution 242 (1967), which ended the Six Day War of 1967 between Israel and its neighboring Arab states, upon the occupation of present day competing title territories.<sup>85</sup> Among other things, this Resolution “[a]ffirm[ed] that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the . . . [w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict.”<sup>86</sup> Upon its adoption, Resolution 242 failed to achieve consensus about whether Israel could maintain any land title over some of the West

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Lebanon. The territory of Palestine covers around 10,435 square miles..”).

<sup>85</sup> S.C. Res. 242, *supra* note 78, § 1(i).

<sup>86</sup> *Id.* § 1.

Bank and possibly occupied East Jerusalem.<sup>87</sup> In continuation, Security Council Resolution 338, adopted on October 22, 1973, after the Yom Kippur War, called upon all parties concerned (soon after the cease-fire between them) to start immediately “the implementation of Security Council Resolution 242 (1967) in all of its parts.”<sup>88</sup>

A prime illustration of the incomplete analysis presented by Quigley, concerning the Palestinian territorial claims, concerns the area of the Jordan Valley running across the eastern border between Israel and Jordan. In fact, the vast majority of the Jordan Valley is to date self-governed by Israel as it falls within Area C under the Oslo Accords.<sup>89</sup> The primary formal justification by consecutive Israeli governments has seen the Jordan Valley as a

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<sup>87</sup> See Benoliel & Perry, *supra* note 1, at 93. See also Documents 537-41 (Nov. 21, 1967), in FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968 VOLUME XIX, ARAB-ISRAELI CRISIS AND WAR, 1967 (Harriet D. Schwar & Edward C. Keefer eds., 2004); Eugene Rostow, *The Intent of UNSC Resolution 242*, in UN SECURITY COUNCIL RESOLUTION 242: THE BUILDING BLOCK OF PEACEMAKING 5, 15 (1993) (narrating the interpretation in support of Israel’s right for territorial ‘security boundaries’ within the West Bank and possibly East Jerusalem). But see Nabil Elaraby, *Legal Interpretations of UNSC 242*, in UN SECURITY COUNCIL RESOLUTION 242: THE BUILDING BLOCK OF PEACEMAKING 35, 35-44; Glenn E. Perry, Security Council Resolution 242: The Withdrawal Clause, 31 THE MIDDLE EAST JOURNAL 413, 415 (Autumn 1977).

<sup>88</sup> S.C. Res. 338, *supra* note 78, § 2.

<sup>89</sup> Total area under Palestinian control as Area A (including Jericho and Al-Uja) is 5.34%, or as Area B (including numerous villages) is 2.08%, reaching 5.62%. Contrary, the territory left under the Oslo agreements under Israeli control as Area C (including Border line, military bases, natural reserves and numerous settlements) is 94.37%. See MA'AN DEVELOPMENT CENTER & JORDAN VALLEY POPULAR COMMITTEES, EYE ON THE JORDAN VALLEY 3 (2010).

security buffer against an eastern Arab invasion.<sup>90</sup> That is, within the confines of the United Nations Security Council Resolutions 242 and 338, Israel's vital need for "secure and recognized" boundaries in the region upon achieving a comprehensive peace agreement with its Arab neighbours.<sup>91</sup> As a consequence, the Jordan Valley is surrounded with an electronic fence running the length of the eastern border. The fence faces Jordan, based on past experience of three separate armed attacks or threats thereof by joint Arab armies from that front against the State of Israel.<sup>92</sup> To be sure, the Palestinians envision the Jordan Valley as a core part of a future Palestinian state.

Israel's justification for its competing titles, flatly

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<sup>90</sup> See Lee Cahaner et al., *Future of the Jordan Valley – Keeping It under Israeli Sovereignty – Pro and Con* (Reuven Chaikin Chair in Geostrategy, University of Haifa, February 2006), available at <http://geo.haifa.ac.il/~ch-strategy/publications/books/yarden/yarden.pdf> (in Hebrew), at 20; Tzvi Ben Gedalyahu, *IDF Must Remain in Jordan Valley, Vows Netanyahu*, ARUTZ SHEVA (Mar. 9, 2011, 10:41 AM), <http://www.Israelnationalnews.com/News/News.aspx/142772#.TxbHvaVa5Vk> (for the Israeli claim). *Contra* Tzvi Ben Gedalyahu, *PA Rejects Compromise on Jordan Valley Sovereignty*, ARUTZ SHEVA, (Mar. 9, 2011, 11:57 AM) <http://www.israelnationalnews.com/News/News.aspx/142773#.TxbHK6Va5Vk> (for the Palestinian rejection of the Israeli claim thereof).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 26 (describing the three separate Arab armed attacks and threats thereof against Israel directed from the eastern Jordan Valley during: 1) The War of Independence of 1948, following the joint attack by the armies of Syria, Iraq and Jordan over Israel; 2) The Six Day War of 1967 when Jordan attacked Israel backed by Iraqi army based in Jordan; 3) The Yom Kippur War of 1973 when the armies of Jordan and Iraq mobilized for attack in the eastern Jordan Valley against Israel's northern defensive campaign against Syrian surprise attack over Israel).

ignored by Professor Quigley's analysis, was that Resolution 242, backed by Resolution 338, called on Israel to withdraw from "territory," decidedly not "all territory." The borders of such a withdrawal were surely meant to reflect both Palestinian and Israeli right to live in "secure and recognized" boundaries in the region, while considering possible land concessions possibly in favour of Israel, as is the case concerning the Jordan Valley or segments thereof.<sup>93</sup> Surely the provision on the establishment of "secure and recognized boundaries" would have been meaningless had there been an obligation upon Israel to withdraw from all the territories, regardless of a comprehensive peace agreement between the belligerent parties.<sup>94</sup> Professor Quigley regrettably ignores these territorial implications. Instead, he mistakenly suggests that Israel simply has not claimed for competing titles, with the possible exception of East Jerusalem or parts thereof.<sup>95</sup> There is much evidence that critically questions Quigley's assertion, proving Israel claimed competing titles and a possibly negotiated land swap. Thus, Israel has evidently claimed title and a possibly negotiated land swap of the Jordan Valley<sup>96</sup> and major settlement blocs bordering Israel.<sup>97</sup> Israel similarly claimed title of East Jerusalem,

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<sup>93</sup> *Id.* at 20.

<sup>94</sup> See Ruth Lapidot, Resolution 242 at 25, 26 *ISR. L. R.* 295, 310 (1992).

<sup>95</sup> Quigley, *supra* note 1, at 758.

<sup>96</sup> See Cahaner, *supra* note 90, at 20; Gedalyahu, *supra* note 90 (for the Israeli claim); Gedalyahu, *supra* note 90 (for the Palestinian claim).

<sup>97</sup> See Letter from George W. Bush, President of the United States, to Ariel Sharon, Prime Minister of Israel (April 14, 2004), *available at*

including the holy places therein, as Quigley possibly admits himself.<sup>98</sup>

In balance, flexibility on borders offered within Resolution 242 arguably cannot be applied to any pre-1967 borders model. The reason for the inapplicability being that any such early borderlines were neither secured nor recognized. Both the relevant Arab states, as well as the United Nations, seemed to have adhered in part to this Israeli stand. A case in point is the systematic wordings of the ambassadors of Egypt, Jordan, and Syria in the preliminary debates before the Security Council on May 1967, whereby they emphasized the fact that these “were no borders” and these were only “armistice lines.”<sup>99</sup> In continuation, neither the Security Council nor the General Assembly called upon Israel to withdraw to the armistice lines established in 1949 following the Six Day War.

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<http://www.defensibleborders.org/apx2.htm> (adhering to Israel's claim for "*major Israeli population centers*" bordering both Israel and the West Bank, a.k.a settlement blocks would remain Israeli); *see also* U.S. Senate and House of Representatives Approve Commitments to Israel in President Bush's Letter of April 14, 2004 (H. Con. Res. 460), *available at* <http://www.defensibleborders.org/apx3.htm>; *See also* US recognize settlement blocs, PM says, Israel Hayom, August 2, 2011 (for President Obama's presumable adoption of this assurance), *available at* [http://www.israelhayom.com/site/newsletter\\_article.php?id=562](http://www.israelhayom.com/site/newsletter_article.php?id=562).  
<sup>98</sup> Basic Law: Jerusalem, the Capital of Israel, 5740-1979/80, 34 L.S.I. 209 (1979-1980) (Isr.) (reflecting Israel's resumption of sovereignty over unified Jerusalem); *Ne'emaney Har-Habait v. Attorney General*, 47(v) P.D. 221 (1994); *See sources in supra* note 65; *see also* Benoliel & Perry, *supra* note 1, at 92-93; *But see* the United Nations critique over what was interpreted by both measures as attempts to annex East Jerusalem unilaterally and illegally.  
<sup>99</sup> Lapidoth, *supra* note 94, at 296-97.

Regrettably, it should be added, the ICJ's Advisory Opinion of 2004 concerning the wall in the Occupied Palestinian Territory provided no analytical answer to these demanding concerns.<sup>100</sup> To be sure, in full support by the Palestinian and Israeli parties to the Oslo Accords, neither the Palestinian Liberation Organization (PLO) nor the Palestinian Authority (PA) established a defined territory for the future Palestinian state.<sup>101</sup> Palestine's borders were one of the permanent status issues left unresolved by Oslo I Accord subject to Resolution 242's borders model.<sup>102</sup> Article I titled "Aim of Negotiations" within the Israeli-Palestinian Oslo I Accord clearly upholds a Palestinian commitment to comply with Resolutions 242 and 338. In particular, Article I reads that the Oslo Accords would lead to "a permanent settlement based on Security Council Resolutions 242 and 338."<sup>103</sup> Furthermore, Article I reemphasizes that "[i]t is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338."<sup>104</sup>

The Oslo II Accord, to follow, also considered the borders of the West Bank and the Gaza Strip as an unresolved permanent status issue, with Israel retaining control of external borders.<sup>105</sup> Given that additional

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<sup>100</sup> See generally *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 11.

<sup>101</sup> See *Id.* at 1086. Oslo I, *supra* note 79, 32 I.L.M. at 1529.

<sup>102</sup> See Oslo I, *supra* note 79, at 1529.

<sup>103</sup> *Id.* at 1527.

<sup>104</sup> *Id.*

<sup>105</sup> See *Israeli-Palestinian Interim Agreement on West Bank*

reiteration of Resolution 242's borders model, the Oslo II agreement states: "**Neither side shall initiate or take any step that will change the status of the West Bank and Gaza Strip pending the outcome of permanent status negotiations.**"<sup>106</sup>

Further support by both parties as well as the Quartet members; namely the United Nations, the United States, the Russian Federation, and the European Union, was established in 1999. It occurred through the Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments. The Sharm el-Sheikh Memorandum restated the validity of Resolution 242's borders model once again, whereby: "Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement."<sup>107</sup>

Soon after, in a letter of guarantees initiated by the President of the United States George W. Bush to Israeli Prime Minister Ariel Sharon in 2000, Israel was over and again reassured that Resolution 242's borders model was to

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*and the Gaza Strip*, Sept. 28, 1995, 36 I.L.M. 557, 561, available at <http://www.jewishvirtuallibrary.org/jsource/Peace/interimtoc.html> (hereinafter, *Oslo II*).

<sup>106</sup> *Id.* at 568.

<sup>107</sup> Memorandum from the Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations to the Gov't of Isr. and PLO, (Sept. 4, 1999), Jewish Virtual Library (October 27, 2012), <http://www.jewishvirtuallibrary.org/jsource/Peace/sharm0999.html>. [hereinafter Sharm el-Sheikh Memorandum].

remain intact henceforth; thereby: “As part of a final peace settlement, Israel must have secure and recognized borders, which should emerge from negotiations between the parties in accordance with United Nations Security Council Resolutions 242 and 338.”<sup>108</sup>

The United Nations Security Council Resolution 1850 of 2008 reaffirmed its support for the agreements and negotiations resulting from the 2007 Middle East summit in Annapolis, Maryland, by declaring “its support for negotiation...and its commitment to the irreversibility of the bilateral negotiations...” In support of the Oslo bilateral contractual framework adhering to the 242 and 338 resolutions borders model, it then further “supports the parties agreed principles for the bilateral negotiating process”, thereby reassuring, once again, the validity of the 242 and 338 Security Council Resolutions.<sup>109</sup>

As of 2008, the Palestinians’ initial adherence to United Nations Security Council resolutions is most noticeably comparable with the Kosovarian Unilateral Declaration of Independence (UDI) of 2008. In upholding Kosovo's UDI, done in the backdrop of failing negotiations between the involved parties,<sup>110</sup> the ICJ nevertheless

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<sup>108</sup> See *Letter from George W. Bush to Ariel Sharon* (Apr. 14, 2004), Jewish Virtual Library, (October 27, 2012), <http://www.jewishvirtuallibrary.org/jsourc/US-Israel/bushletter.html>.

<sup>109</sup> *Id.* para. 2. (It further “Calls on both parties to... refrain from any steps that could undermine confidence or prejudice the outcome of negotiations.”).

<sup>110</sup> See *Accordance with International Law of the UDI in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 141, para. 85 (July 22). “Preamble of the declaration refers to the “*years of internationally-*

unmistakably reemphasized the binding standard of compliance with the United Nations Security Council resolutions. In the latter case, it has been Security Council Resolution 1244, adopted on June 10, 1999, concerning the situation in Kosovo.<sup>111</sup> The Court analyzed in detail whether this unilateral secessionist self-determination violated international law.<sup>112</sup> Probably dissimilar to the Palestinian case, the Court concluded that the Kosovar UDI did not violate the Resolution's call on maintaining the sovereignty and territorial integrity of Serbia (then Federal Republic of Yugoslavia) and the other states of the region, as set out in the Helsinki Final Act and annex 2 of UNSCR 1244 (an annex that envisions, inter alia, a Kosovo status process).<sup>113</sup> The Court also upheld that the Kosovar UDI did not violate the authorization of the Security Council in Resolution 1244 of an international civil or military

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*sponsored negotiations between Belgrade and Pristina over the question of our future political status*” and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that “*no mutually-acceptable status outcome was possible*.” *Id.* para. 105. (quoting Kos. Declaration of Independence, 47 I.L.M. 467, paras. 10-11 (2008).

<sup>111</sup> *Id.* para. 85.

<sup>112</sup> *Id.* (finding that (a) Kosovo's declaration of independence does not violate international law, (b) Kosovo's declaration of independence does not violate UN Security Council Resolution 1244, and (c) independence does not violate the Constitutional Framework for Provisional Self-Government).

<sup>113</sup> See International Commission on Missing Persons (ICMP), Republic of Serbia, <http://www.icmp.org/icmp-worldwide/southeast-europe/republic-of-serbia/> (upholding that Serbia is the "successor state to what was the Federal Republic of Yugoslavia and then Serbia and Montenegro").

presence in Kosovo (part of Serbia, and then called the Federal Republic of Yugoslavia).<sup>114</sup>

The United Nations General Assembly upheld a similar adherence to Resolution 242, paraphrased “Dispute-Occupied” territorial model proposition, for the Palestinian secessionist self-determination claim. The United Nations specifically call upon Palestine to “regain its right to self-determination and independence in accordance with the Charter of the United Nations” in archetypical Article 6 to General Assembly Resolution 48/94 of December 20, 1993, initiated three months after the first Oslo Interim Accord, within “Importance of the universal realization of the right of people to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights.”

Given their continuous and well-established validity, any ignorance of these resolutions' borders model upon Israeli competing titles thereof, should be considered truly questionable.

Instead, these Resolutions could most probably be considered *lex specialis* and *lex posterior*, whereby overruling the former 181(II) Partition Plan Resolution, particularly in concerning both parties' competing land titles. Truly, the maxim *lex specialis derogat legi generali* did not find a place in the Vienna Convention on the Law of Treaties.<sup>115</sup> In fact, it is difficult to assess the exact position or value of *lex specialis* amongst the many existing

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<sup>114</sup> *Id.*

<sup>115</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *The Vienna Convention on the Law of Treaties*].

devices for treaty interpretation in international law.<sup>116</sup> The principle, nonetheless, was systematically practiced both domestically and at the international level, and serves today as means for treaty interpretation.<sup>117</sup> In short, the conflict of laws between Resolution 181(II) and the later Resolutions, 242, 338, and 1850, should be resolved whereby the latter overrule the former. That is, whilst effectively adhering to concerns over unilateralism over these competing titles, as well as other peace negotiations issues between the parties. Both Palestinians and Israelis systematically agreed upon this interpretive inclination, throughout the Oslo Accords, until the 2011 Palestinian Unilateral Declaration of Independence Initiative.

### **3. Lack of Good Faith by Treaty Infringement**

A third group of reservations per Quigley's incomplete statehood analysis concerns the lack of good faith practiced by the Palestinian in their depicted treatment of the abovementioned resolutions. The critique herein bears special emphasis concerning the Palestinian 2011 Unilateral Declaration of Independence initiative which followed Quigley's reply article.

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<sup>116</sup> See, e.g., Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 *Nordic J. Int'l L.* 27, 40-41 (2005). But see Martti Koskenniemi, *Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes'*, International Law Commission, UN Doc. ILC(LVI)/SG/FIL/CRD.1 (2004).

<sup>117</sup> See, e.g., Anja Lindroos, *supra* note 116, at 48-64; Joost Pauwelyn, *Conflict Rules of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* 385-439 (2003). For application of the principle of Lex Specialis, see, ICJ, *North Sea Continental Shelf*, Judgment, 1969 I.C.J. 3, 42 (February 20); *Right of Passage over Indian Territory*, Judgment, 1960 I.C.J. 6, 44 (April 12); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 235-36 (July 8).

Any possible Palestinian rejection of United Nations Security Council Resolutions 242, 338, and 1850 as discussed, would therefore infringe on the international legal custom of good faith (*bona fide*) in their application twofold.<sup>118</sup>

Firstly, there is an infringement of the Palestinians' repeated contractual commitment within the Oslo Accords to abide by Security Council resolution 242 borders model. Secondly, a more provisional Palestinian infringement thereof refers to their effectually dismissive interpretation of Security Council Resolutions 242, 338, and 1850 within their Declaration Plan Application to the Security Council as the nascent State of Palestine (*statu nascendi*).

This possible treaty infringement may arguably be considered equivalent to the applicable duty concerning treaties under articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.<sup>119</sup> The duty to act in good faith herein has been clearly reaffirmed in Preambular paragraph 3 of the Vienna Convention of 1969 and later in Article 300 of the United Nations Convention on the Law

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<sup>118</sup> On the principle of Good Faith in international Law, *see, e.g.*, Ian Brownlie, *Principles of Public International Law* 18 (2008); The Vienna Convention on the Law of Treaties, *supra* note 115, at art. 26. Per possible customary international law application of the principle, *see also* International Whaling Commission, Resolution on Transparency within the International Whaling Commission, <http://iwcoffice.org/cache/downloads/73xlqdrwx0kkkwc8ook0k0gg0/Resolution%202001.pdf> (IWC, constituted by more than 40 member countries, incorporates with the duty of good faith in international conduct “fairness, reasonableness, integrity and honesty.”).

<sup>119</sup> *See, e.g.*, Alexander Orakhelashvili, *The Acts of the Security Council: Meaning and Standards of Review*, 62 *Max Planck Yearbook of United Nations Law* 143 (2008).

of the Sea, 1982 (UNCLOS).<sup>120</sup> Per the latter type of infringement by the Palestinians – as the nascent State of Palestine (*statu nascendi*) - even if Security Council resolutions are not formally binding treaties upon *statu nascendi*, they still might be perceived in substance as agreements between the interested parties thereof.<sup>121</sup>

Thus, Palestinian ignorance of Israel's competing land titles per Security Council Resolution 242 borders model, via both infringement tracks, while adhering solely to United Nations General Assembly Resolution 181(II) in their Declaration Application, should constitute bad faith instead.

To conclude, the first set of critiques concerns the Palestinian imperfect claim over sections of the West Bank and possibly East Jerusalem in the backdrop of United Nations resolutions. Until there is a negotiated solution to these competing land claims and statehood claim altogether, these particular sections of occupied West Bank and East Jerusalem should not be solely regarded as Palestinian territories, but as disputed occupied ones. As such the incorporation of these disputed occupied territories into a Palestinian state, as modeled by Quigley and as done by the Palestinians upon their 1988 and 2011 UDI initiatives, remains questionable.

Furthermore, the Palestinian bid for statehood over the entire West Bank and East Jerusalem casts a legal shadow over their whole statehood claim given their minority self governance over less than a fifth of the land.

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<sup>120</sup> See United Nations Convention on the Law of the Sea, XVI U.N.C.L.O.S. art. 300, [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm).

<sup>121</sup> *Id.*

This land dispute may tentatively question inclusive Palestinian title within the broader territorial criteria per the state recognition doctrine altogether.

Like with other rather exceptional cases, such as with the British Trust Territory of Cameroons, whereby a particular territory was divided for the purposes of the exercise of self-determination, the Palestinian right for self-determination, it being a Chapters XI colonial territory, may possibly uphold certain territorial adaptations.<sup>122</sup> These reservations to the Palestinian narration of their complete territorial claim are ever more challenging given the inconsistency and possibly bad faith they have manifested, particularly within the Palestinian 2011 Declaration of Independence initiative.

### **C. Second Disintegration: Violation of Bilateral Agreements**

There is a second group of exceptions to the rule of territorial integrity and the UPJ doctrine, which Professor Quigley's analysis largely overlooks throughout his statehood analysis.

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<sup>122</sup> *But see* Question of the Comoro Archipelago, G.A. 3161 (XXVIII) (Dec. 14, 1973) (involving the case of the island Mayotte, part of the Comoros Archipelago – a Chapter XI territory which became independent in 1975, in which the General Assembly rejected the wishes of the inhabitants of Mayotte to remain under French Administration). For recent repetition of its position, Question of the Comorian Island of Mayotte, G.A. Res. 49/18, U.N. Doc. A/RES/49/18 (Nov. 28, 1994). *See also* Crawford, State Practice Report, *supra* note 19, at 41 referring to Malyn Newitt, *The Comoro Islands: Struggle Against Dependency in the Indian Ocean* 48-70 (Westview Press 1984).

It upholds that parties themselves may agree to alter the *uti possidetis* line, both during the process of acquisition of independence and afterwards, such as possibly within the Oslo Interim Accords. Yet, instead of admitting unilateral deviation thereof, the parties in our case had systematically agreed until the 2011 UDI initiative to finalize the territorial aspects of Palestinian statehood through bilateral negotiations. This agreement by the parties has been depicted above and bears twofold implications before Palestinian statehood is finalized *ex ante*, and through the possible prospect of Palestinian state succession doctrine *ex post*.

### **1. Palestinian *Statu nascendi* Competing Title**

The international status of the Palestinian Authority or the PLO and its ability to enter into legally binding treaties is not solely dependent on Israel's recognition of alleged Palestinian statehood.<sup>123</sup> Yet it could be seen to be so in part. Put differently, the 2011 Palestinian Unilateral Declaration of Independence initiative, alongside Quigley's earlier analysis of the matter may arguably conflict, at least in part, with the Palestinian Authority's obligations under the Oslo Interim Accords binding the parties to bilateral negotiations over the abovementioned competing territorial claims. However, Israel's recognition may be seen as necessary because the 2011 Palestinian Unilateral Declaration of Independence initiative and Quigley's

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<sup>123</sup> Eyal Benvenisti, *The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement*, 4 EUR. J. INT'L. L. 542, 544 (1993) (arguing accordingly to respect to the P.L.O.'s signing of the Oslo I Accord).

analysis of the matter both conflict with the Palestinian Authority's obligations to engage in bilateral negotiations regarding competing territorial claims under the Oslo Interim Accords.

At the outset, the Vienna Convention on the Law of Treaties of 1969 defines several elements, that if satisfied, would serve to distinguish a legally binding "treaty" such as the Oslo Interim Accords, from nonbinding "agreements" or "memoranda of understanding."<sup>124</sup>

In our case, Israel and the Palestinian Authority have not signed the Vienna Convention. The Vienna Convention nevertheless offers useful depository codified customary international legal rules in determining whether the Oslo Accords are legally binding between these parties.<sup>125</sup> Noticeably, the most controversial requirement in relation to the Oslo Accords embodies the notion that "the Convention does not apply to all international agreements, only those between States."<sup>126</sup> The final requirement by the Vienna Convention explicitly does not cover "agreements between States and 'other subjects of

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<sup>124</sup> The Vienna Convention on the Law of Treaties, *supra* note 115, art. 2(1)(a). For discussion on the binding force of the Oslo accords, see GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* (2000); Seth Benjamin Orkand, Comment, *Coming Apart at the Seamline—the Oslo Accords and Israel's Security Barrier: A Missed Opportunity at the International Court of Justice and the Israeli Supreme Court*, 10 GONZ. J. INT'L L 391, 419-20 (2007).

<sup>125</sup> See JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW*, 40-41 (1996); Watson, *supra* note 124, at 57; MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 16 (2d ed. 1993).

<sup>126</sup> See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 7 (2000).

international law.’<sup>127</sup> Unfortunately, the Vienna Convention leaves the concept of what constitutes a “State” undefined.<sup>128</sup> Even though the Palestinian Authority and the PLO do not seem to satisfy the test of statehood, the Vienna Convention recognizes that agreements between “other subjects of international law” may still be binding.<sup>129</sup> Indeed, Article 3 states that “[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law . . . shall not affect . . . the legal force of such agreements.”<sup>130</sup> Though the Vienna Convention does not define “other subjects of international law,” its history indicates that Article 3 was intended to allow states to enter into legally binding treaties with international organizations and entities such as insurgent groups, without these agreements being precluded from being binding by the Vienna Convention.<sup>131</sup> To be sure, several commentators have claimed that the PLO is a “subject of international law,” thus allowing the possibility that the Oslo Accords are legally binding under the Vienna Convention.<sup>132</sup>

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<sup>127</sup> WATSON, *supra* note 124, at 91 (citing 2 Yb. I.L.C. 162 (1962) (Commentary on draft Article I, sec. 8)). The Convention still recognizes that agreements with other subjects of international law might be binding. See discussion *infra* note 134.

<sup>128</sup> See Vienna Convention, *supra* note 115, art. 3.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> WATSON, *supra* note 124, at 91.

<sup>132</sup> See e.g., Benvenisti, *supra* note 126, at 543-44 (claiming that Israel and the P.L.O.'s mutual recognition of each other in Oslo I “transform[ed] the sides into equal parties . . . In light of this recognition, the Declaration is an agreement between two equal subjects of international law.”).

Professor Geoffrey Watson adds that there is a moment at which a sub-state entity, such as the Palestinian Authority, may yet begin to bind itself by international agreements, even though it may lack complete sovereignty.<sup>133</sup> Like Israel in this present case, when colonies sign agreements with their former governing states, this moment typically occurs prior to complete independence.<sup>134</sup> Professor Quigley again rather disregards this proposition; thereby he fails to incorporate Israel's competing territorial claims over occupied West Bank and East Jerusalem and Palestinian lack of self-governance thereof altogether.

Indeed, binding the Palestinians to the Oslo Accords follows much state practice. Thus, throughout the twentieth century there are plentiful examples of states entering into legally binding agreements with sub-state actors.<sup>135</sup> To illustrate, Great Britain entered into agreements with the National Front for the Liberation of Occupied South Yemen in 1967 and the African National Council in 1979.<sup>136</sup> Likewise, France concluded a treaty with the Front de Libération Nationale Algérien as part of its withdrawal from Algeria in 1962.<sup>137</sup> Moreover, in 1974 Portugal entered a binding agreement with the Mozambique

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<sup>133</sup> WATSON, *supra* note 124, at 92.

<sup>134</sup> *Id.* Professor Watson further explains that as a practical matter, States would have less incentive to enter into agreements with sub-state. State entities if they were not binding, since there would be no legal assurance of mutual performance.

<sup>135</sup> *Id.* at 95.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 96.

Liberation Front.<sup>138</sup> Lastly, even the United States has entered into agreements with the P.L.O., such as the Agreement on Encouragement of Investment, signed in 1994.<sup>139</sup>

Certainly, these treaties are only binding if the parties actually *intended* to be bound.<sup>140</sup> According to the International Law Commission's commentary, the phrase “governed by international law” embraces the element of an “intention to create obligations under international law”.<sup>141</sup> If there is no such intention the instrument will not be a treaty. In the Aegean Sea Continental Shelf case, noticeably, the International Court of Justice considered the terms of a joint communiqué issued by the Greek and Turkish Prime Ministers, and the particular circumstances in which it was drawn up, in order to determine its nature.<sup>142</sup> The Court found that there had been no intention to conclude an agreement to submit to the jurisdiction of the Court.<sup>143</sup>

In the case of the Oslo Accords, and prior to the 2011 Palestinian Unilateral Declaration of Independence

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 98. Watson adds that unlike the Israeli and Palestinian parties to the Oslo Accords, it is conceivable that two subjects of international law could conclude non-binding agreements if the parties chose to draft them that way. *See, e.g.,* WATSON, *supra* note 124, at 101.

<sup>140</sup> *Id.*

<sup>141</sup> Aust, *supra* note 126, at 17.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; *See also* Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. 62 at 39-44; H. Thirlway, *The Law and Procedure of the International Court of Justice*, 1991 BRIT. Y.B. INT'L L., 13-15.

initiative, the parties clearly signaled their intent to be legally bound.<sup>144</sup>

Lastly, neither the Israeli nor the Palestinian parties have terminated the agreements nor have they called for that.<sup>145</sup> In balance, according to the Vienna Convention, parties cannot denunciate or withdraw from a treaty that does not contain a termination provision.<sup>146</sup> The only exception, dissimilar from any official Palestinian narration of the Oslo Accords, is when a party can establish that it intended to admit the possibility of denunciation or withdrawal or if this possibility was implied by the nature of the treaty. Moreover, customary international law of treaties adds that a party, such as the Palestinian one, would be unable to withdraw from a treaty that transfers territory or establishes a boundary, except in the highly unlikely event of the treaty allowing for this.<sup>147</sup> Customary international law clearly establishes that any infringement of the abovementioned customary rule of withdrawal might make little or no legal difference.<sup>148</sup>

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<sup>144</sup> See Orkand, *supra* note 124, at 419 (referring to mutual ratifications, ceremonial and declaratory language by both parties).

<sup>145</sup> Natasha Mozgovaya et al., Following Statehood bid, Abbas seeks to change Oslo Accords, Haaretz, Sept. 25, 2011, <http://www.haaretz.com/print-edition/news/following-statehood-bid-abbas-seeks-to-change-oslo-accords-1.386536>; John Rogin, Israeli Amb.: Palestinian statehood vote could end all PA agreements with Israel and the U.S., The Cable: Foreign Policy, Aug. 30, 2011, [http://thecable.foreignpolicy.com/posts/2011/08/30/israeli\\_amb\\_palestinian\\_statehood\\_vote\\_would\\_end\\_all\\_pa\\_agreements\\_with\\_israel\\_and\\_](http://thecable.foreignpolicy.com/posts/2011/08/30/israeli_amb_palestinian_statehood_vote_would_end_all_pa_agreements_with_israel_and_)

<sup>146</sup> Vienna Convention on the Law of Treaties, *supra* note 115, at art. 56.

<sup>147</sup> Aust, *supra* note 129, at 234.

<sup>148</sup> *Id.* (referring to the United Nations Law of the Sea Conventions art. 317(3), Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261).

In particular, moreover, though the Oslo Accords envisioned resolution of permanent status issues by May 4, 1999, neither of the Oslo agreements contained a termination clause, nor a provision that the agreements would no longer be in effect if a permanent status settlement was not reached.<sup>149</sup> Instead, in both the text of the agreements and the actions of the parties until the 2011 Palestinian UDI initiative, the parties described the Oslo peace process as “irreversible,” thus complying with the contradictory observation.”<sup>150</sup>

Because this is expressed as an exception, the obligation is placed on the party wishing to invoke it, in this case, the Palestinian one.<sup>151</sup> Unless another period is established, that party must give the other party or parties at least twelve months' notice of its intention, as clearly stated in Article 56(2) to the Vienna Convention. Needless to say, the Palestinians did not issue any such statement nor did they announce intentions to do so. Professor Antony Aust further adds that because it is very common to include provisions on withdrawal, when a treaty is silent it may be much harder for a party – such as the Palestinian one - to establish the grounds for an exception.<sup>152</sup>

To conclude, although the 1969 Convention does not apply to treaties between states and international organizations, such as a host country agreement, insofar as the rules of the Convention reflect the rules of customary international law applicable to treaties with international organizations, they continuously apply in the present

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<sup>149</sup> See Oslo I, *supra* note 79, art. I; Oslo II, *supra* note 105, at Preamble; Watson, *supra* note 124 at 23.

<sup>150</sup> Oslo II, *supra* note 105, at Preamble; Oslo I, *supra* note 79, art. I.

<sup>151</sup> Aust, *supra* note 126, at 234.

<sup>152</sup> *Id.*

case.<sup>153</sup> If so, any deviation or withdrawal from the Oslo Interim Accords by the Palestinians, through the 2011 UDI initiative, concerning the territorial criteria for statehood and disputed occupied territories are therefore questionable, but overlooked in Professor Quigley's analysis.

## 2. Of Palestinian State Succession

Within the second group of treaty law exceptions to the rule of territorial integrity and the UPJ doctrine, which Professor Quigley's analysis ignores, exists a second critique. This critique concerns the prospect whereby Palestinian statehood already exists or may soon exist, and a future Palestinian state would dismiss Israel's competing land title *ex post facto*, presumably applying the state succession doctrine.

State succession, surely, is the term used to refer to the complex of legal issues that arise when there is a change of sovereignty with respect to a particular territory.<sup>154</sup> The concern of the law of state succession is with the consequences of a change of sovereignty in fields such as succession to treaties, state property, archives and debt, and the nationality of natural and legal persons.<sup>155</sup> A state which acquires territory, or a new state which comes

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<sup>153</sup> The Vienna Convention on the Law of Treaties, *supra* note 118, at art. 3(b); Aust, *supra* note 129, at 8.

<sup>154</sup> Vienna Convention on Succession of States in Respect of Treaties, *supra* note 6, at art. 2 (1) (b) (defines "succession of States" as the replacement of one State by another in the responsibility for the international relations of territory); *see also* the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *supra* note 6, at art. 2(1)(a).

<sup>155</sup> *See e.g.*, Crawford, *supra* note 19, at 35.

into existence after a succession, such as the Palestinian state, is referred to as a "successor state," and the state which has lost territory, such as Israel, is referred to as the "predecessor state."<sup>156</sup> It should be stressed that the law of state succession assumes that a change of sovereignty has occurred in accordance with international law, which as previously explained would be highly questionable in the present case following the two Palestinian UDI initiatives henceforth.<sup>157</sup>

Yet, even if a Palestinian state is already said to exist, then the new Palestinian state will succeed without any further action to the Oslo Accords. The Palestinian state will arguably succeed at least to the legal situation created by them. This state succession customary principle concerns in particular Israel's effective governance of occupied territories, under competing Israeli title especially according to the United Nations Resolutions 242, 338, and 1850. State succession is a well-established principle, yet its exact extent is not.<sup>158</sup> More particularly, since the Second World War, the practice of newly independent countries replacing former colonies has not been

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<sup>156</sup> *Id.* at note 4 (a cognate term which has recently gained currency is "continuator state" which contrasts with "successor state" and refers to a state which retains its legal identity and existence notwithstanding some significant change in its circumstances).

<sup>157</sup> *See, e.g.*, Vienna Convention on Succession of States in Respect of Treaties, *supra* note 6, at 5; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *supra* note 6, at 3.

<sup>158</sup> Aust, *supra* note 126, at 307 (referring to Oppenheim's International Law 213 (Robert Jennings & Arthur Watts eds., 9<sup>th</sup> ed. 1992)).

consistent.<sup>159</sup> It is therefore impossible to promulgate a set of rules of customary law on state succession applicable in such situations.

With that said, Quigley's 1988 Palestinian statehood argument possibly falters treaty law herein. To begin with, the 1978 Vienna Convention on the Succession of States in Respect of Treaties provides that a successor state will automatically succeed to all of its predecessor's treaties according to Art. 34(1)(a). Importantly, in the case of so-called "newly independent states," defined basically as former colonies,<sup>160</sup> the rule would still apply.<sup>161</sup>

In balance however, two theories of state succession did evolve and led to state practice, which may be applied in our case. The first is the clean slate doctrine,<sup>162</sup> whereby the new state is free to pick and choose which treaties it will succeed to. This approach was followed most famously by the United States when it gained its independence.<sup>163</sup> As explained, the doctrine however did not apply thus far to cases whereby treaties concerned territorial rights, such as Israel's competing territorial titles embodied into the 242 borders' model. In the latter cases, state practice led new states to normally be bound by former treaties thereof.<sup>164</sup>

A second even wider theoretical structure over state succession and practice evolved around the nineteenth

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<sup>159</sup> *Id.* at 309.

<sup>160</sup> *See* Vienna Convention on the Succession of States in Respect of Treaties, *supra* note 6, at 3. (defining "newly independent State").

<sup>161</sup> *Id.* at 8.

<sup>162</sup> Aust, *supra* note 126, at 310.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

century and henceforth is referred to as “universal succession.” It persisted up to the 1960s. Accordingly, the new state inherited all the treaty rights and obligations of the former power in so far as they had been applicable to the territory before independence. For example, this approach was reflected in the devolution agreements entered into by Iraq in 1931 and by some former Asian colonies in the 1940s and 1950s. To further illustrate, from 1955, all former British colonies in West Africa, except for Gambia, concluded devolution agreements with the United Kingdom.<sup>165</sup> These provided that, as from the date of independence, all obligations and responsibilities of the United Kingdom which arose from “any valid international instrument” would be assumed by the new state “in so far as such instruments may be held to have application” to it; and the rights and benefits previously enjoyed by the United Kingdom by virtue of the application of such instruments to the former colony would be enjoyed by the new state.<sup>166</sup> Similarly, most French colonies in Africa regarded themselves as successors to pre-independence treaties, and made declarations to that effect, which they notified to the United Nations Secretary General.<sup>167</sup>

To conclude, a future Palestinian state may not easily ignore its bilateral commitment towards negotiation of secure borders with Israel. That is, given solid state practice applying the state succession doctrine in favour of commitment to the Oslo Accords' borders model as

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<sup>165</sup> *Id.* at 309.

<sup>166</sup> *Id.* at 309-10.

<sup>167</sup> *Id.* at 310 (referring to Tiyanjana Maluwu, *Succession to Treaties in Post-Independence Africa*, AFR. J. INT'L L. 791, 792-93 (1992)).

constituted by the United Nations Security Council Resolutions 242, 338, and 1850.

### **Conclusion**

United Nations Security Council Resolutions 242, 338, and 1850 all provide for the legal framework for a future negotiated two-state solution. The international community steadily supports these legal instruments. This framework also mandates that bilateral direct negotiations achieve a comprehensive peace agreement between all the parties to the Israeli-Arab conflict, including the Palestinians. The 2005 Israeli withdrawal from the Gaza Strip, as well as certain negotiated withdrawals from additional Palestinian territory within the West Bank, may give room for certain confidence that such negotiations may finally lead to a two state solution living side by side in peace and security. Earlier successfully negotiated peace agreements between Israel and its Egyptian and Jordanian neighbours may reiterate that expectation.

Yet, with less than a fifth of the territory over which the Palestinians presently practice self-governance in the West Bank and East Jerusalem, and in the backdrop of Israel's competing title over strategic segments, it remains truly questionable whether a unilateral bypass on Palestinian statehood over the entire alleged Palestinian territory, even including the separate Hamas-governed Gaza Strip, would withstand Israel's territorial integrity and the rule of public international law.

In reply to Professor John Quigley, this article considers two set of arguments which further question

Quigley's justification for Palestinian territorial claims and possibly Palestinian statehood altogether. These refer to arguable Palestinian violations of pivotal United Nations resolutions over territorial aspects. These also refer to Palestinian violation of the bilateral Oslo Interim Agreements, especially in the backdrop of the second Palestinian Unilateral Declaration of Independence initiative in 2011. In conclusion, Quigley's unilateral Palestinian statehood proposition is not only deeply legally questionable, but may further exacerbate existing political controversies to the detriment of both Israelis and Palestinians alike.