

The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine

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I. INTRODUCTION

After decades of bitter conflict in the Middle East,¹ Israel and Palestine have embarked on a historic quest for peace. On Monday,

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1. For a discussion of the history of the conflict in the Middle East, see generally PETER MANSFIELD, *A HISTORY OF THE MIDDLE EAST* (1991). For an analysis of the modern conflicts in the Middle East, see generally DAVID KIMICHE, *THE LAST OPTION* (1991). For an historical perspective of the history of Israel drawn from the Hebrew Bible, see MICHAEL GRANT, *THE HISTORY OF ANCIENT ISRAEL* (1984).

Although the history of the conflict in the Middle East is long and complicated, the following is a brief summary of highlights from the last century:

*1882 - Jewish immigrants in "Lovers of Zion" movement begin to arrive in Palestine from Eastern Europe.

*1896 - Theodor Herzl publishes Zionist treatise outlining the establishment of a state of the Jews.

*1917 - British Balfour Declaration declares that it "views with favor" the establishment of a "Jewish National Home" in Palestine.

*1937 - Spurred by heightened Arab-Jewish tension, British Peel Commission recommends partitioning Palestine into a Jewish and an Arab state.

*1939 - British government issues White Paper backing away from partition idea.

*1945 - World War II ends with attention focused on survivors of Nazi holocaust.

*1947 - UN votes to partition Palestine into Jewish and Arab states.

*1948-49 - State of Israel emerges from fighting in Arab-Israeli war. More than 600,000 Palestinians are expelled or flee their homes during the fighting. Jordan captures West Bank. Israel signs armistices with Egypt, Lebanon, Syria, and Jordan.

*1956 - Israel captures Sinai Peninsula from Egypt; withdraws following year.

*1967 - Israel launches Six Day War and captures old city of Jerusalem, West Bank, Gaza Strip, Golan Heights, and Sinai Peninsula. Annexes East Jerusalem, and in subsequent years, establishes settlements in occupied territories with stated aim of boosting security.

*1973 - Egypt and Syria launch October war, triggering stepped-up US diplomacy in region.

*1977 - Hard-line Likud party leader Menachem Begin elected prime minister in upset of Labor party. Oversees large-scale settlement drive in West Bank (Judea and Samaria).

*1979 - [Israeli Prime Minister] Begin signs peace treaty with Egypt.

*1982 - Israeli troops invade Lebanon in bid to crush PLO.

*1987 - Palestinians launch uprising in occupied territories.

*1992 - Labor Party ousts Likud on platform of "peace with security."

*1993 - Israel and PLO sign Declaration of Principles calling for Palestinian self-rule in Gaza and Jericho.

September 13, 1993, Israeli Prime Minister Yitzhak Rabin and Palestinian leader Yasser Arafat signed a draft Declaration of Principles.² The Declaration provides guidelines for a five-year interim period of autonomy for Palestinians in the Israeli-occupied West Bank and Gaza Strip.³ Further, the Declaration calls for negotiations leading to the implementation of United Nations Security Council Resolution 242,⁴ which provides for the acknowledgment of the sovereignty, territorial integrity, and political independence of every state in the Middle East.⁵

The signing of the Israeli-Palestine Liberation Organization [hereinafter PLO] Declaration of Principles presents questions regarding the legal status of Palestine. Although the traditional view has been that Palestine is not a state,⁶ it is possible that Palestine will meet the requirements of statehood following the interim period provided for in the Declaration.⁷

This Comment argues that the Declaration of Principles falls short of establishing a state of Palestine *during* the interim period provided for in the Declaration. However, this Comment presents the possibility that a state of Palestine will be established *after* the interim period. If a state of Palestine is established, it will have an effect on current United States law regarding Palestine and the PLO's sovereign immunity and standing to sue.⁸

Ben Lynfield, *Highlights of Zionist History*, CHRISTIAN SCI. MONITOR, Jan. 25, 1994, at 7, reprinted by permission from the *Christian Science Monitor*. The Christian Science Publishing Society, all rights reserved.

2. Peter Ford, *Palestinian Self-Rule Pact: What it Will and Won't Do*, CHRISTIAN SCI. MONITOR, Sept. 13, 1993, at 2.

3. *Id.*

4. Declaration of Principles on Interim Self-Government Agreements, September 13, 1993, Isr.-Palestine, art. I, 32 I.L.M. 1525 [hereinafter Declaration].

5. Security Council Resolution 242 was enacted on November 22, 1967 and called for Israeli withdrawal from territories occupied in the recent (1967) conflict, for a just settlement of the refugee problem, and for respect of the territorial integrity and political independence of every state in the area. S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/INF/Rev.2 (1968). For the view that "state" in this Resolution did not include Palestine, see James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L L. 681, 688 (1989).

6. See generally Prince, *supra* note 5.

7. Statehood is advantageous for Palestine because under international law, a state has

- (a) sovereignty over its territory and general authority over its nationals;
- (b) status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies;
- (c) capacity to join with other states to make international law, as customary law or by international agreement.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS].

8. Under United States law, an entity not *recognized* as a state is ordinarily denied access to courts of the United States. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 205. See

The traditional view has been that Palestine is not a state.⁹ International law provides that for an entity to be a state, it must have (1) a defined territory, (2) a permanent population, (3) an authority exercising governmental functions, and (4) a capacity to conduct foreign relations.¹⁰ International law provides two approaches to the impact of recognition on statehood. The declaratory approach to the impact of recognition on statehood is that once an entity has fulfilled these four objective requirements it is a state, without any formal action by other nation states.¹¹ The constitutive approach is that an entity becomes a state through recognition by other states, regardless of whether that entity meets these four objective requirements.¹² Traditionally, Palestine did not meet the objective requirements of the declaratory approach.¹³

First, Palestine could not traditionally meet the requirement of a defined territory. What territory is Palestine remains the source of bitter conflict.¹⁴ Palestinians lost territory in the Arab-Israeli wars of 1948 and 1967.¹⁵ Does the territory of Palestine include only the lands

also id. § 205 cmt. a (explaining that the denial of access to the courts is binding on the fifty states). See *infra* part V. for further discussion concerning the effect of statehood for Palestine on international and United States law.

9. See generally Prince, *supra* note 5.

10. These four requirements are found in the Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, T.I.A.S. No. 881, 165 L.N.T.S. 19. For the United States' view, see RESTATEMENT OF FOREIGN RELATIONS, *supra*, note 7, § 201 (providing the same four requirements of statehood as the Montevideo Convention).

11. For a discussion of the declaratory approach to statehood, see Deborah L. Alexander, Comment, *Recognition in International Law: A Functional Reappraisal*, 34 U. CHI. L. REV. 857, 861-863 (1967).

12. For a discussion of the constitutive approach to statehood, see *id.* at 859-861.

13. The declaratory approach to the impact of recognition on statehood is the approach taken by the *Restatement*. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 202 cmt. b. However, the *Restatement* explains that as a practical matter, an entity would need recognition from a significant number of states to fully enjoy the benefits of statehood. *Id.* The *Restatement* also adopts the view that a state is required to "treat as a state" an entity that meets the requirements of section 201. *Id.* § 202(1). Section 201 of the *Restatement* adopts the four requirements of the declaratory approach to statehood. See *supra* note 8 and accompanying text.

Thus, the distinction between the declaratory and constitutive approaches may have diminished considerably. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 202 reporter's note 1 (explaining that the practical differences between the two approaches have grown smaller and that the duty of states to *treat as a state* entities that meet the formal requirements of statehood has been adopted in several international agreements).

14. See Prince, *supra* note 5, at 686-90 (describing the disagreement, even among Palestinians, concerning whether a Palestinian state should encompass all of historic Palestine or merely include the West Bank and Gaza Strip).

15. The lands Palestinians lost in 1967 are the West Bank, the Gaza strip, and the Sinai Peninsula. JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 163 (1990). For a discussion of the lands lost in the 1948 war, see generally *id.* at 57-65. For an illustration of the 1948 and 1967 boundary lines, see RITCHIE OVENDALE, THE ORIGINS OF THE ARAB-ISRAELI WARS 214 (1984).

lost in 1967? Or does it include those lost in 1948 as well? What does it mean for Israel if part of its land is claimed by Palestine? Because no consensus existed on these issues, Palestine could not satisfy the requirement of a defined territory.

Second, the enormous amount of refugees from the two wars of 1948 and 1967 prevented Palestine from meeting the requirement of a permanent population.¹⁶ Half the Palestinian Arabs became refugees after the 1948 war.¹⁷ Two hundred thousand more Palestinians became refugees after the 1967 war.¹⁸ Whether the population of Palestine included both sets of refugees, or one, or none, was unclear. Thus, Palestine could not define its permanent population.

Third, historically, Palestine could not meet the requirement of an authority exercising governmental functions.¹⁹ The PLO did not govern the basic, daily lives of the Palestinians living in the occupied territories, or those of the refugees from the 1948 and 1967 wars. Israeli occupation forces controlled these functions.²⁰ Thus, Palestine did not have an authority exercising governmental functions.

Fourth, although Palestine had achieved to some degree the capacity to conduct foreign relations,²¹ it could not definitely meet this requirement. For example, the PLO had observer status at the United Nations,²² and recognition by over one hundred nations.²³ However, some commentators have suggested that an entity's capacity to conduct international relations is rendered meaningless if the entity is unable to implement international obligations.²⁴ Even though the PLO may

16. There are 2.2 million registered Palestinian refugees. Eur. Parl. Ass., 40th Sess., Doc. No. 5956 (1988).

17. MANSFIELD, *supra* note 1, at 238.

18. *Id.* at 274.

19. The language of the *Restatement* regarding this requirement states "under the control of its own government." *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 7, § 201. However, comment d to § 201 provides: "A state need not have any particular form of government, but there must be some authority exercising governmental functions and able to represent the entity in international relations." *Id.* cmt. d.

20. For a discussion of the control of government functions in the West bank and Gaza strip after the 1967 war, see Prince, *supra* note 6, at 694 (quoting Evyatar Levine, *A Landmark on the Road to Legal Chaos: Recognition of the PLO as a Menace to World Public Order*, 10 *DENV. J. INT'L L. & POL'Y* 243, 248 (1981)).

21. The capacity to conduct foreign relations includes the competence within an entity's own constitutional system, as well as the political, technical, and financial competence to conduct international relations. *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 7, § 201 cmt. e.

22. See G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31, at 5, U.N. Doc A/9631 (1974) (granting observer status to the Palestinian Liberation Organization).

23. See Anis F. Kassim, *The Palestinian Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 *DENV. J. INT'L L. & POL'Y* 1, 19-20 (1980).

24. For an analysis of the effect of the competence to implement international obligations on the capacity to conduct international relations requirement, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 47 (1979).

have represented Palestine in the international community, it lacked the capacity to bind Palestinians to international obligations. The capacity to bind Palestinians to international obligations is frustrated because Israel controls the territory claimed to be Palestine and the people living there.

Therefore, statehood for Palestine could not be established under the declaratory theory. It is possible, however, to argue for Palestinian statehood based on the constitutive theory, government-in-exile status, or belligerent status. However, to base Palestinian statehood on the constitutive theory presents the problem of a recognized Palestine that could not meet the objective requirements of statehood.²⁵ Government-in-exile status for Palestine is inappropriate because it creates dual loyalties for Palestinian refugees who now reside in another state.²⁶ Belligerent status, derived from the international law of war,²⁷ is also inappropriate because the PLO is not in control of many diverse elements, which indicates a lack of competence to control its own forces.²⁸ Thus, none of these alternative theories provide a satisfactory basis for claiming statehood for Palestine.

However, the Declaration of Principles presents an opportunity to reevaluate the traditional view of Palestine. This Comment examines the Israeli-PLO Declaration of Principles and its effect on the changing legal status of Palestine. Although the provisions of the Declaration do

25. For an analysis of the effects of premature recognition of states, see Prince, *supra* note 5, at 703-705 (quoting HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 7-8 (1947)).

26. Kassim, *supra* note 23, at 32. Dual loyalties would exist because Palestinians would owe a loyalty to the government that "hosts" the refugees, as well as to a Palestinian government in exile. See *id.* Such concerns surfaced in September 1993 when Jordan's King Hussein announced that Jordanians of Palestinian descent would have to choose between practicing their political rights in Jordan or the West Bank and Gaza Strip. Lamis Andoni, *Troubled by Israeli-PLO Peace Plan, Jordan's Ruler to Delay Elections*, CHRISTIAN SCI. MONITOR, Sept. 28, 1993, at 7. For further analysis of the PLO's claim to government-in-exile status, see generally William V. O'Brien, *The PLO in International Law*, 2 B.U. INT'L L.J. 349 (1984).

27. O'Brien, *supra* note 26, at 351, 398-402, provides an analysis of the status of the PLO as a belligerent force. The general requirements of belligerent status are:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

Id. at 399 (citing the 1949 Geneva Convention III, Article 4). Although O'Brien argues that exceptions have been made to this general rule, and that the PLO can be termed a belligerent because its forces receive POW status from Israel, see *id.* at 405, the O'Brien analysis is an example of how difficult it is to claim belligerent status for the PLO because historically the actions of the PLO were more *terrorist* than *military*, and because the PLO had only loose command of its forces. See *id.* at 403.

28. See *id.*

provide steps toward establishing the requirements of statehood for Palestine, the Declaration does not establish a state of Palestine during the five-year interim period of autonomy. However, it is possible that a state of Palestine could exist *after* the interim period.

Part II of this Comment describes the provisions of the Declaration that are relevant to statehood for Palestine and determines the legal classification of the Declaration. Part II concludes that the Declaration is not a treaty because it is not an international agreement between states. However, the Declaration of Principles does have a binding nature. Israel can bind itself to the provisions of the Declaration because international law provides that unilateral statements are binding on states. Part II concludes that the Declaration may require compliance because of reciprocal political obligations.

Part III contains an analysis of how the Declaration of Principles affects the legal status of Palestine during the interim period. Part III concludes that although the Declaration takes significant steps toward establishing a state of Palestine, it falls short of this during the interim period. Part III argues that efforts to establish a defined territory and an authority exercising governmental functions have not been significant or clear enough to establish these two requirements. Further, the refugee problem continues to prohibit Palestine from defining a permanent population. Lastly, although the PLO has represented the Palestinian people internationally, the Declaration is not clear whether the PLO may conduct foreign relations for the territory contemplated in the Declaration of Principles.

Part IV examines the legal status of Palestine after the interim period. Part IV argues that whether a Palestinian state is established after the interim period will largely depend on Palestinian conduct during the interim period. Although the Declaration provides an interim period mechanism, Permanent Status Negotiations, for resolving the problems that remain for Palestinian statehood, the Declaration does not make clear whether Israel and the PLO can agree to solve these problems through that mechanism. Part IV concludes by providing some solutions to the remaining obstacles to Palestinian statehood.

Part V presents areas of United States law that could be affected if a state of Palestine is established. Many United States practices towards the PLO, regarding sovereign immunity or the standing of a government to sue in United States courts, are dependent on the traditional view of Palestine.²⁹ These United States practices require an evaluation of whether an entity is a state under the objective require-

29. For example, a 1991 U.S. Court of Appeals decision, *Klinghoffer v. S.N.C. Achille Lauro*, held that the PLO could not claim immunity under the Foreign Sovereign Immunities Act

ments of the declaratory approach to statehood.³⁰ Because Palestine could not meet the objective requirements of the declaratory approach, it did not receive the benefits of statehood under United States law. A change in the legal status of Palestine, however, would require a change in these traditional practices. Further, a change in the legal status of Palestine will affect political decisions regarding United States involvement with Palestinians and the role of the PLO in the United States.³¹

II. THE DECLARATION OF PRINCIPLES

Part II first describes the provisions of the Israeli-PLO Declaration of Principles relevant to statehood. The provisions of the Declaration relevant to statehood will be important to a subsequent examination of how the provisions affect the changing legal status of Palestine. Part II then examines the legal classification of the Declaration of Principles. The legal classification of the Declaration is important in determining how binding the provisions of the Declaration are, and in determining how the Declaration will change the legal status of Palestine.

A. *The Provisions of the Declaration*

Section A of Part II describes the provisions of the Israeli-PLO Declaration of Principles relevant to Palestinian statehood. The Declaration of Principles provides for Palestinian self-rule, for Israeli withdrawal from the Gaza Strip and Jericho, for a committee to decide the fate of Palestinian refugees, for the establishment of Palestinian Authorities, and for the establishment of an Israeli-Palestinian Continuing Committee for Economic Cooperation.³²

The provisions of the Declaration leading toward Palestinian self-rule include those establishing the Palestinian Interim Self-Government Authority [hereinafter "Council"].³³ Within nine months of the signing of the Declaration, free and general political elections will be held to establish the Council.³⁴ The Declaration provides for a later election agreement to establish the system of elections, the mode of agreed supervision and international observation, and the rules and

because it was not a state. 937 F.2d 44 (2d Cir. 1991). The court used the requirements of the declaratory approach to statehood to make that determination. See *id.* at 47.

30. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 205.

31. Political decisions could include foreign policy decisions regarding negotiations with the PLO, classifying the PLO as a terrorist organization for purposes of trade with Palestinians, or decisions regarding the immigration of Palestinians.

32. Ford, *supra* note 2.

33. Declaration, *supra* note 4, art. I.

34. *Id.* art. III(1-2).

regulations regarding election campaigns.³⁵ The jurisdiction of the Council will cover the West Bank and Gaza Strip territory.³⁶ However, the jurisdiction of the Council will not extend to those issues that will be negotiated in the Permanent Status Negotiations: Jerusalem, settlements, military locations, and Israelis.³⁷

Before the Council is elected, PLO-nominated Palestinians will take responsibility from Israel in the areas of education and culture, health, social welfare, direct taxation, and tourism.³⁸ The Declaration further calls for the building of a Palestinian police force³⁹ to guarantee public order and internal security. Until the Council is elected, Israel will retain power over foreign affairs, external security, and the Jewish settlements.⁴⁰

The Declaration calls for Israeli withdrawal from the Gaza Strip and Jericho beginning immediately, and complete withdrawal in four months.⁴¹ Further, it calls for an agreement within two months of the signing of the Declaration to cover the withdrawal, including comprehensive arrangements subsequent to the withdrawal.⁴²

Provisions of the Declaration address Palestinian refugees. The Declaration provides for a Continuing Committee, in which Jordan and Egypt are invited to participate, to determine the "modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967."⁴³

The Declaration establishes Palestinian Authorities. Upon inauguration, the Council will establish a Palestinian Electric Authority, a Gaza Sea Port Authority, a Palestinian Development Bank, a Palestin-

35. *Id.* annex I(2).

36. *Id.* art. IV. (explaining the jurisdiction of the Council).

37. *See id.* art. V(3). (explaining the remaining issues to be discussed in Permanent Status Negotiations).

38. *Id.* art. VI(2).

39. *Id.*

40. *Id.* annex II(3)(b). Annex II provides for an agreement on the withdrawal of Israeli forces from the Gaza Strip and Jericho area. Section (3)(b) explains that the agreement will include "[s]tructure, powers and responsibilities of the Palestinian authority in these areas, except: external security, settlements, Israelis, foreign relations, and other mutually agreed upon matters." *Id.* This section can be taken to mean that these issues will not be handled in this agreement, as security arrangements and settlements will be discussed in Permanent Status Negotiations. *Id.* art. V(3). However, the Declaration provides that the withdrawal referred to in annex II will not prevent Israel from exercising the powers and responsibilities not transferred to the Council. *Id.* Agreed Minutes to the Declaration of Principles in Interim Self-Government Arrangements, part B, art. VII(5). Thus, it can be inferred that the foreign affairs power referred to in annex II remains with Israel during the interim period. For more discussion on the provisions of the Declaration dealing with foreign affairs see *infra* part III.D.

41. Declaration, *supra* note 4, annex II(2).

42. *Id.* annex II(1).

43. *Id.* art. XII.

ian Export Promotion Board, a Palestinian Environmental Authority, a Palestinian Land Authority and a Palestinian Water Administration Authority.⁴⁴ Finally, the Declaration calls for an Israeli-Palestinian Continuing Committee for Economic Cooperation, focusing on cooperation in the areas of water, electricity, energy, finance, transportation, communication, and trade.⁴⁵

B. *The Legal Classification of the Declaration*

Section B of Part II examines the legal classification of the Declaration of Principles. Section B concludes that the Declaration is not a treaty because it is not an international agreement between states. However, Israel can bind itself to the provisions of the Declaration because international law provides, as this Section shows, that unilateral statements are binding on states. Further, the Declaration may require compliance because of reciprocal political obligations.⁴⁶

International law provides several possibilities for classification of the Declaration of Principles. These possibilities include treaty, international agreement, unilateral statements, and political obligations. Article 2 of the Vienna Convention on the Law of Treaties provides that a treaty is an international agreement that is between states, in written form, and governed by international law.⁴⁷ Article 26 of the Vienna Convention provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.⁴⁸

The Declaration of Principles is not a treaty. The PLO was not a state when the Declaration of Principles was signed.⁴⁹ Further, the Declaration does not clearly provide that it shall be governed by international law.⁵⁰ Thus, the Declaration does not meet the requirements of the Vienna Convention on the Law of Treaties. The Declaration is not an international agreement between states and does not provide that it shall be governed by international law. Because the Declaration does not meet these two requirements, it does not fall under Article 26

44. *Id.* art. VII(4).

45. *Id.* annex III.

46. The phrase "reciprocal political obligations" is not used in this Comment as a legal term of art. The term is used here to describe those situations where parties agree to perform or abstain from activities in exchange for another party's agreement to perform or abstain from activities. Thus, even though a party in such a situation may not believe they are legally bound to perform, they may do so in the hopes that the second party will continue to perform.

47. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 1155 U.N.T.S. 331.

48. *Id.* art. 26.

49. For an analysis of the legal status of Palestine and the PLO before the Declaration of Principles, see generally Prince, *supra* note 5.

50. See Declaration, *supra* note 4, art. XV (providing for disputes to be resolved by Joint Committee or by arbitration).

of the Vienna Convention (which would make the Declaration binding and impose on both parties a good faith standard). Although the Declaration of Principles is not binding on the parties as provided in Article 26 of the Vienna Convention, it does create obligations for the parties under international law.

First, the Declaration contains language indicating that the agreement is intended to be legally binding and to have legal consequences in Article XV concerning the resolution of Israeli-PLO disputes.⁵¹ Article XV contains provisions for disputes to be resolved by the Joint Liaison Committee, or by arbitration.⁵² While these provisions include language that the Declaration is intended to be binding, they do not provide how the decisions of the Joint Liaison Committee or the arbitration panel will be enforced against the PLO or Israel. Article XV of the Declaration states that an Arbitration Committee will be established by the parties to settle disputes that cannot be resolved through the Joint Liaison Committee or through conciliation.⁵³ Article XV does not state how the Arbitration Committee will enforce its decisions. Thus, although it is clear that the parties *intended* the Declaration to be binding because they provided a method of dispute resolution, it is less clear whether any panel requested by the PLO or Israel, will have the *ability* to enforce any obligation the Declaration may create.⁵⁴

Second, international law provides that international agreements do not require consideration.⁵⁵ Binding unilateral statements by states are therefore possible. The International Court of Justice recognized this possibility in its decision in the Nuclear Tests Case.⁵⁶ The court held that "declarations made by way of unilateral acts . . . may have the effect of creating legal obligations."⁵⁷ The court stated that such statements would be binding if made publicly, and with an intent to be

51. *See id.*

52. *Id.*

53. *Id.* art. XV(3).

54. For example, it is unclear whether the PLO would be able to enforce Israeli withdrawal from areas agreed to in the Declaration.

55. For the United States' view see RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 301 cmt. c (explaining that international agreements do not require consideration and may be wholly unilateral).

56. *Nuclear Tests (Aust. v. Fr.)*, 1974 I.C.J. 253, 267 (Dec. 20). *Nuclear Tests* involved the unilateral statements of the French Foreign Minister concerning atmospheric nuclear testing. *Id.* at 268. For a discussion of international law on unilateral statements and *Nuclear Tests*, see generally Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 3-28 (1977).

57. *Nuclear Tests*, *supra* note 56, at 267.

bound.⁵⁸ However, a restrictive interpretation is called for when states make statements that limit their freedom of action.⁵⁹

Because Israel is a state, it can bind itself to the provisions of the Declaration through its unilateral statements, even though the Declaration does not rise to the level of a treaty under the Vienna Convention.⁶⁰ Israel's unilateral statements are binding if Israel manifests an intent to be bound, and does so publicly. Although the provisions of the Declaration are public, the intent to be bound requirement poses a problem. There is language in the Declaration that indicates that Israel and the PLO intended the Declaration to be legally binding, but the language does not indicate how the Declaration will be enforced.⁶¹ If Israel intended the language to be ambiguous, then Israel has not *clearly* manifested an intent to be bound. Israel may have intended that the Declaration not be enforceable, regardless of how binding the language of the Declaration may sound.

The distinction between statements that indicate an intent to be bound and the lack of any enforcement mechanism is important because of the International Court of Justice's language in the Nuclear Test Case. The Court suggested that a restrictive interpretation of unilateral statements should be applied when states make statements that limit their freedom of action.⁶² A restrictive interpretation of the language in the Declaration could lead to the conclusion that, because there is no suggestion of enforcement, Israel never meant to *legally* bind itself. Israel could have intended not to *legally* bind itself, even though it chose to agree to the binding language. However, the language providing for dispute resolution,⁶³ the length and comprehensive nature of the Declaration,⁶⁴ and the negotiations leading to the signing of the Declaration,⁶⁵ all point to the conclusion that the Declaration is binding upon Israel.

58. *Id.*

59. *Id.*

60. Because unilateral statements are binding on *states*, it may be difficult to apply the "unilateral statements" doctrine to the PLO because it was not a state at the time of the signing of the Declaration. The question of whether an agreement to create a state from an entity would serve to make that entity a state for the purposes of the *state-creating agreement* is beyond the scope of this Comment.

61. Declaration, *supra* note 4, art. XV(3). Section 3 contains language concerning dispute resolution but does not provide an enforcement mechanism. *Id.*

62. Nuclear Tests, *supra* note 56, at 267.

63. Declaration, *supra* note 4, art. XV(3).

64. The Declaration of Principles contains seventeen articles and four annexes. It encompasses finance, transport, energy, elections, regional programs, Israeli withdrawal, public order and security, and provides for specific remaining issues to be discussed in Permanent Status Negotiations. See Declaration, *supra* note 4.

65. The Declaration was the result of 14 secret meetings in Norway. Ford, *supra* note 2.

Third, Israel and Palestine may comply with the Declaration because of their reciprocal political obligations. The obligations created by the Declaration are conditional: the land from Israel in exchange for promises by the PLO to denounce terrorism.⁶⁶ Thus, Israel and Palestine have an incentive to maintain their obligations under the Declaration because they want to promote compliance by the other party.

Therefore, the Declaration does have a binding nature. While the Declaration is not between states, it does contain language providing

66. Following are letters from Yasir Arafat, chairman of the Palestine Liberation Organization, to Prime Minister Yitzhak Rabin of Israel and Foreign Minister Johan Jorgen Holst of Norway and from Mr. Rabin to Mr. Arafat. The letters were provided by Mr. Rabin's office [and reprinted in the New York Times].

Rabin to Arafat
Sept. 9, 1993

Mr. Chairman,

In response to your letter of Sept. 9, 1993, I wish to confirm to you that in light of the P.L.O. commitments included in your letter the Government of Israel has decided to recognize the P.L.O. as the representative of the Palestinian people and commence negotiations with the P.L.O. within the Middle East peace process.

YITZHAK RABIN
Prime Minister of Israel

Arafat to Rabin
Sept. 9, 1993

Mr. Prime Minister,

The signing of the Declaration of Principles marks a new era in the history of the Middle East. In firm conviction thereof, I would like to confirm the following P.L.O. commitments:

The P.L.O. recognizes the right of the State of Israel to exist in peace and security.

The P.L.O. accepts United Nations Security Council Resolutions 242 and 338.

The P.L.O. commits itself to the Middle East peace process and to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations.

The P.L.O. considers that the signing of the Declaration of Principles constitutes a historic event, inaugurating a new epoch of peaceful coexistence, free from violence and all other acts which endanger peace and stability. Accordingly, the P.L.O. renounces the use of terrorism and other acts of violence and will assume responsibility over all P.L.O. elements and personnel in order to assure their compliance, prevent violations and discipline violators.

In view of the promise of a new era and the signing of the Declaration of Principles and based on Palestinian acceptance of Security Council Resolutions 242 and 338, the P.L.O. affirms that those articles of the Palestinian Covenant which deny Israel's right to exist and the provisions of the Covenant which are inconsistent with the commitments of this letter are now inoperative and no longer valid. Consequently, the P.L.O. undertakes to submit to the Palestinian National Council for formal approval the necessary changes in regard to the Palestinian Covenant.

Sincerely,
YASIR ARAFAT
Chairman
Palestine Liberation Organization

for dispute resolution. Further, the Declaration is binding on Israel because unilateral statements are binding on states. In addition, the promises of Israel and the PLO are conditional. Therefore, the conditional nature of the Declaration suggests that the parties will seriously attempt to comply. As a result, it is likely that many provisions of the Declaration will take effect. Parts III and IV examine how compliance with specific provisions will affect claims of Palestinian statehood.

III. STATUS OF PALESTINE DURING THE INTERIM PERIOD

Part III contains an analysis of how the Israeli-PLO Declaration of Principles affects the legal status of Palestine during the five year interim period of autonomy provided for in the Declaration. International law provides that to be a state, an entity must have a defined territory, a permanent population, an authority exercising governmental functions and a capacity to conduct international relations.⁶⁷ While the Declaration of Principles does take significant steps toward establishing these requirements for Palestine, it leaves too many issues unresolved to establish a state of Palestine during the interim period. Part III concludes that the requirements necessary to establish statehood under the declaratory theory⁶⁸ are not met during the interim period.

A. *The Requirement of a Defined Territory*

During the interim period, Palestine will be close to satisfying the requirement of a defined territory because the Declaration of Principles contemplates a territory of Palestinian rule in the West Bank and the

Arafat to Holst
Sept. 9, 1993

Dear Minister Holst,

I would like to confirm to you that upon the signing of the Declaration of Principles I will include the following positions in my public statements:

In light of the new era marked by the signing of the Declaration of Principles the P.L.O. encourages and calls upon the Palestinian people in the West Bank and Gaza Strip to take part in the steps leading to the normalization of life, rejecting violence and terrorism, contributing to peace and stability and participating actively in shaping reconstruction, economic development and cooperation.

Sincerely,
YASIR ARAFAT
Chairman
Palestine Liberation Organization

Three Letters That Sealed the Diplomatic Bargain, N.Y. TIMES, Sept. 10, 1993, at A12. Copyright © 1993 by the New York Times Company. Reprinted by permission.

67. See *supra* note 10 for this codification in international law and the United States' view on the requirements of statehood.

68. See Alexander, *supra* note 11, for an analysis of the declaratory theory of statehood.

Gaza Strip.⁶⁹ However, any claim to a Palestinian state in a defined territory of the West Bank and Gaza Strip is frustrated by language in the Declaration that leaves several territorial issues to be discussed in Permanent Status Negotiations, and leaves Israeli withdrawal incomplete.⁷⁰ The remaining territorial issues to be discussed in the Permanent Status Negotiations include Jerusalem, Jewish settlements, security arrangements, and borders.⁷¹ Furthermore, even though the jurisdiction of the Council includes West Bank and Gaza Strip territory, Israeli withdrawal only extends to the Gaza Strip and Jericho areas. Thus, withdrawal does not extend to the entire West Bank.⁷²

The unresolved territorial issues present important jurisdictional problems for any Palestinian state established in the West Bank and Gaza Strip areas for three reasons. First, the Declaration is unclear whether the Jewish settlements in the West Bank and Gaza Strip areas will (1) eventually be turned over to the jurisdiction of the Council, (2) remain areas within the boundaries of a Palestinian territory still governed by Israel, or (3) eventually come under a joint rule arrangement. Thus, the Declaration does not determine whether the territory occupied by the Jewish settlements will eventually become part of the defined territory of Palestine.

The second territorial issue involves resolution of the status of Jerusalem. Although a Palestinian state would not necessarily have to include Jerusalem, an agreement indicating its status would help define the territory contemplated for Palestine.

Third, the issues of security arrangements and borders are significant to any establishment of a defined territory because the Declaration does not rule out maintaining areas of heavy occupation by Israeli forces to enforce a border arrangement or security. Because such occupation is not ruled out, territory to come under the Palestinian Council's jurisdiction could include areas heavily occupied by Israeli forces. Moreover, language in the Declaration calling for Israeli withdrawal only from the Gaza Strip and Jericho supports the possibility of Israeli

69. See Declaration, *supra* note 4, art. IV.

70. See *id.* annex II. Annex II provides only for Israeli withdrawal from the Gaza Strip and Jericho. *Id.* annex II(1).

71. *Id.* art. V(3).

72. *Id.* annex II(1).

occupation.⁷³ Areas heavily occupied by Israeli forces can only loosely be considered part of the territory of a Palestinian state.⁷⁴

The PLO could argue that the territory of a Palestinian state is sufficiently defined during the interim period to satisfy the territorial requirement. Their argument has support from the comment to the Restatement of Foreign Relations Law of the United States, section 201, which states that “[a]n entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state.”⁷⁵ Thus, the United States’ view does not indicate that the boundary issues would have to be finally settled between Israel and Palestine to satisfy the requirement of a defined territory. Thus, the PLO could argue that although the issues of borders, settlements, and Jerusalem remain open, the territory of Palestine is sufficiently defined because the Declaration broadly states that it contemplates West Bank and Gaza Strip territory to come under the jurisdiction of the Council.

However, the *Restatement* is only an expression of the United States’ view.⁷⁶ Further, the language “West Bank and Gaza Strip territory” is far too vague, and far too broad, to supply any indication of what territory is contemplated for a Palestinian state. Lastly, the problems associated with the unresolved territorial issues during the interim period are far too many, and far too significant, to conclude that any defined territory has been established.⁷⁷ The Declaration has taken significant steps towards establishing a defined territory by indicating the territory will be in the West Bank and Gaza Strip. However, the defined territory requirement is not met because a number of issues

73. *See id.* Subsequent negotiations between Israel and the PLO were stalled because of the security arrangements, border issues, and Israeli withdrawal. *See* Jonathan Wright, *PLO- Israeli Talks on Self-Rule Enter Third Day*, REUTERS, Jan. 27, 1994, available in LEXIS, Nexis Library, WIRES File.

74. The *Restatement* proposes the view that military occupation does not terminate statehood. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 201, reporters’ notes 3 (providing the examples of Germany’s occupation of European states during World War II, or the subsequent occupation of Germany). However, unlike the significance of military occupation to the termination of statehood, the significance of military occupation in the Middle East is that occupation makes difficult the determination of the boundaries of any territory belonging to a Palestinian state if that territory is “occupied” by Israel.

75. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 201, cmt. b.

76. The *Restatement* is an expression of the foreign relations law of the *United States*. Thus, the *Restatement* interpretation of the requirement of a defined territory is the view of the United States. International law generally may not interpret the requirements of the Montevideo Convention, *see supra* note 10, in the same way. However, the *Restatement* is an indication of how courts in the United States might interpret this requirement.

77. *See* Wright, *supra* note 73, for examples of delays in the negotiations on these same issues.

regarding a defined territory are left unresolved during the interim period.

B. *The Requirement of a Permanent Population*

The requirement that, to be a state, an entity must have a population that is significant and permanent is not met during the interim period because the problem of the refugees from the 1948 and 1967 wars remains.⁷⁸

The Declaration does not clearly provide whether the refugees from the 1948 and 1967 wars are included in the permanent population of Palestine. Whether "refugees" includes both sets of refugees, or one, or neither, has not clearly been stated in the Declaration.⁷⁹

There is language in the Declaration from which the PLO could argue that the permanent population requirement is satisfied. For example, Article XII of the Declaration includes language that contemplates participation of the 1967 refugees, but not participation of the refugees from 1948. Article XII, which concerns liaison and cooperation with Jordan and Egypt,⁸⁰ states that a Continuing Committee will decide on the "modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967."⁸¹ Annex I of the Declaration, concerning elections, states that the status of "displaced Palestinians who were registered on 4th June 1967 will not be prejudiced."⁸² Thus, Article XII and Annex I appear to include only the Palestinian refugees from 1967 in the population of a Palestinian state.

Because the refugee problem is addressed in Article XII and Annex I without reference to the 1948 refugees, the PLO could argue that the 1948 refugees have been specifically left out of any Palestinian population. Thus, the PLO could argue that the requirement of a significant and permanent population is resolved.

However, this argument fails because it overlooks several sections of the Declaration of Principles which refer to refugees in generic terms without regard to whether the 1948 refugees are included. For example, Article V includes refugees in the remaining issues to be resolved

78. For an explanation of the refugee problem see *supra* text accompanying notes 16-18.

79. See Declaration, *supra* note 4. Examples include Article V, which includes refugees in the remaining issues to be covered by the Permanent Status Negotiations, and Annex II(3)(c), which provides for Palestinians from abroad to be included in the Palestinian police force.

80. Jordan hosts the biggest concentration of Palestinian refugees. Anondi, *supra* note 26. Over one half of the population of Jordan is of Palestinian origin. *Id.* There are also an estimated 120,000 refugees in Egypt. Deborah Pugh, *Palestinians in Egypt Weary of Restrictions*, CHRISTIAN SCI. MONITOR, September 28, 1993, at 7.

81. *Id.* art. XII.

82. *Id.* annex I(3).

by the Permanent Status Negotiations, and does not specifically exclude the 1948 refugees.⁸³ Similarly, Annex II(3)(c) provides for Palestinians from abroad to be included in the Palestinian police force, and does not specifically exclude the 1948 refugees.⁸⁴

Further, the Declaration's reference to United Nations Security Council Resolution 242⁸⁵ leads to the inference that Israel and Palestine did not intend to exclude the 1948 refugees. Security Council Resolution 242, enacted in 1967, refers to a "just settlement of the refugee problem."⁸⁶ This statement does not distinguish between the refugees from 1967 and those from 1948.

In addition, Resolution 242 indicates that the Security Council *could* distinguish between problems arising from the 1967 conflict and the 1948 conflict. Resolution 242 calls for Israeli withdrawal from "territories occupied in the recent conflict."⁸⁷ As it is worded, the Resolution appears to omit territories acquired in the 1948 conflict. In distinguishing between the territories acquired in the 1967 and 1948 conflicts, the Security Council recognized the different territory problems involved in those conflicts. Thus, despite its demonstrated ability to distinguish between the two conflicts, the Security Council chose to call for a settlement of the *refugee problem*, without referring to the refugees from the 1948 conflict or the refugees *from the recent conflict*.

Even if the Security Council did not intend a distinction between the 1967 and 1948 refugees, Resolution 242 was enacted in 1967, when the refugee problem from the 1967 war was just beginning to be understood.⁸⁸ Resolution 242 could be referring specifically to the refugees from 1948 and excluding the 1967 refugees. Thus, by stating that one of the aims of the peace negotiations is the implementation of Security Council Resolution 242,⁸⁹ the refugee language in the Declaration of Principles may refer to "achieving a just settlement of the refugee problem," including the 1948 refugees.

83. *Id.* art. V(3).

84. *Id.* annex II(3)(c).

85. *See id.* art. I. Article I of the Declaration of Principles calls for the implementation of Security Council Resolution 242. *Id.* For an explanation of this Security Council Resolution, see *supra* note 5.

86. S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg., at 8, U.N. Doc. S/INF/Rev.2 (1968).

87. Security Council Resolution 242 was enacted in 1968. *Id.* The "recent" conflict was therefore the 1967 conflict.

88. For an analysis of the Palestinian refugee problem, and its growth after the 1948 and 1967 wars, see generally Eur. Parl. Ass., *supra* note 16.

89. Declaration, *supra* note 4, art. I.

Although the Declaration does appear to include the 1967 refugees in sections that leave out the 1948 refugees, other sections of the Declaration indicate that the question of which refugees are included in the permanent population of Palestine is unresolved.

C. *The Requirement of an Authority Exercising Governmental Functions*

The requirement that, to be a state, an entity must have an authority exercising governmental functions is not met during the interim period.⁹⁰ Some responsibilities are turned over to the Council during the interim period. However, numerous areas of governing are either left open, left to multi-lateral discussion, or left to Israel, indicating that the Palestinians will not assume complete governing authority over Palestinian territory during the interim period.

The areas of authority transferred to the Palestinians during the interim period include education and culture, health, social welfare, direct taxation, tourism, and some police powers.⁹¹ Further, the Council is given power during the interim period to legislate,⁹² and to establish judicial organs.⁹³ The Interim Agreement calls for the establishment of a Palestinian Electric Authority, a Gaza Sea Port Authority, a Palestinian Development Bank, a Palestinian Export Promotion Board, a Palestinian Environmental Authority, a Palestinian Land Authority and a Palestinian Water Administration Authority.⁹⁴ Thus, the PLO could argue that the areas of transferred authority are significant governmental functions, and that the authority transferred under the Declaration alone satisfies the governmental function requirement. However, this argument ignores other specific areas not turned over to the Palestinians.

The first area of government authority not turned over to the Palestinians includes those authorities that are left for further discussion during the interim period. These authorities include security arrangements, borders, and certain police powers.⁹⁵ The ability to make security arrangements, and the ability to monitor borders are necessary governmental functions that an entity claiming statehood should

90. The language in the *Restatement* for this requirement is "under the control of its own government." *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 7, § 201. However, the comment to the *Restatement* provides that "[a] state need not have any particular form of government, but there must be some authority exercising governmental functions and able to represent the entity in international relations." *Id.* cmt. d.

91. Declaration, *supra* note 4, art. VI(2).

92. *Id.* art. IX(1).

93. *Id.* art. VII(2).

94. *Id.* art. VII(4).

95. *See id.* arts. V, VIII.

possess. They are necessary because these powers help promote the territorial integrity of a state. Further, because the territory of Palestine is ambiguous in the Declaration,⁹⁶ any Palestinian authority over these disputed areas, or Palestinian authority necessary to establish rule over these areas, is left unresolved.

The second area of governmental authority not turned over to the Palestinians includes governmental authority left to bi-lateral or multi-lateral discussion or rule. These authorities include refugee decision-making,⁹⁷ international observation of elections,⁹⁸ a temporary international presence with regard to the withdrawal of Israeli forces,⁹⁹ and an Israeli-Palestinian Continuing Committee for Economic Cooperation.¹⁰⁰ The international observation of elections and possible international presence¹⁰¹ regarding Israeli withdrawal present problems for any Palestinian assumption of police powers. While these measures may be temporarily necessary to promote peace and stability, international participation detracts from the Palestinians' ability to provide order, peace and stability themselves. If the Palestinian police force cannot provide internal order, it is questionable whether the Palestinian police force could be effective in exercising police powers.

Although the Palestinians will have authorities established to deal with water, energy, finance, and the sea port,¹⁰² the Declaration states that the Authorities will work with the Continuing Committee for Economic Cooperation in these areas.¹⁰³ Such cooperation raises the question of whether the Palestinian Authorities will actually assume control of water, energy, finance, and the seaport, or whether most matters will be resolved as part of the Continuing Committee's responsibilities. The Palestinian Authorities could assume control over these areas, but must work with the Continuing Committee in ways to promote cooperation between Israel and Palestine. If the Continuing Committee merely promotes cooperation, the Palestinians will have actually assumed the governmental authority necessary in this area. However, the language of the Declaration does not provide a clear answer. Therefore, how this arrangement will work in practice during the interim period remains to be seen.

96. *Id.* art. V(3) (leaving the geographic areas of Jerusalem and the Jewish settlements open to discussion at the Permanent Status Negotiations).

97. *Id.* art. XII.

98. *Id.* art. III(1).

99. *Id.* annex II(3)(d).

100. *Id.* art. XII.

101. *See id.* annex II(3)(d).

102. *Id.* art. VII(4).

103. *Id.* annex III.

A third area of governmental authority not turned over to Palestinians is governmental authority left to Israel by the Declaration. This authority includes the authority (1) to deal with external threats, (2) to maintain the security of Israelis, (3) to deal with foreign relations in the area, and (4) to re-deploy troops outside populated areas.¹⁰⁴ Further, the Declaration contains a clause that states "[t]he withdrawal of the military government will not prevent Israel from exercising powers and responsibilities not transferred to the Council."¹⁰⁵ Any powers not turned over to Palestine remain with Israel. The powers that remain with Israel prevent Palestine from obtaining complete government authority necessary for statehood for two reasons.

First, the re-deployment of Israeli troops in the West Bank and Jericho areas could seriously undermine the Palestinian police power. It would be undermined because Israeli troops could continue to be the force maintaining peace and stability. Further, even if Israeli troops do defer to Palestinian police power in these territories, the Palestinian police power would be undermined because complete Palestinian control would be lacking. Second, foreign affairs power over the West Bank and Jericho areas that is not turned over to Palestinian control is an important governmental power. It is important because without this power, a Palestinian state in these areas would answer to Israel in the area of foreign affairs.

Thus, although some governmental powers are transferred to the Palestinians, the transferred powers do not rise to the level of an authority exercising governmental functions. While the transfer of power presents a significant step towards the type of authority necessary to satisfy the requirement of an authority exercising governmental functions, the powers retained, left open, or transferred to multi-lateral negotiation, prevent that authority from becoming complete.

D. *The Requirement of the Capacity to Conduct Foreign Relations*

An entity, to be a state, must have the capacity to conduct foreign relations.¹⁰⁶ The capacity to conduct foreign relations includes competence within an entity's own constitutional system, as well as political, technical, and financial competence to conduct international relations.¹⁰⁷ The requirement of the capacity to conduct foreign relations

104. See *id.* annex II(3)(b), art. XIII(2).

105. *Id.* Agreed Minutes to the Declaration of Principles on Interim Self Government Arrangements, part B, art. VII(5).

106. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 201.

107. For an explanation of the source of these requirements in international law, see *supra* note 10. This definition of the capacity to conduct foreign relations comes from the United States view, found in the RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 201 (1987).

has traditionally been the least problematic requirement of statehood for Palestine.¹⁰⁸ However, the language in the Declaration could frustrate claims by the PLO that it has the capacity to conduct foreign relations for the territory contemplated to come under Palestinian rule.

Annex II of the Declaration contemplates an agreement between the PLO and Israel concerning Israeli military withdrawal.¹⁰⁹ The text states that the contemplated agreement will include the structure, powers, and responsibilities of the Palestinian authority in these areas, with the exception of foreign relations.¹¹⁰ Removing the subject of foreign relations from the agreement to withdraw presents a problem because it suggests Israeli control of foreign relations power for the area covered by the Declaration. Furthermore, the withdrawal agreement [hereinafter Gaza-Jericho Agreement], signed on May 4, 1994, expressly stated that the Palestinian Authorities will not have powers and responsibilities in the sphere of foreign relations.¹¹¹ Although the PLO has traditionally been the voice for the Palestinian people, its ability to speak for Palestinians in the territory that will come under Palestinian self-rule is restrained by the language of the Gaza-Jericho Agreement.

The ability to conduct foreign relations for the territory covered by the Declaration could be construed to include border disputes with nations other than Israel, presence of foreign troops other than Israeli, and possible international agreements involving use of the territory. Even if this language is interpreted to mean that Israel retains foreign affairs power for that territory covered by the Gaza-Jericho Agreement only, and not the general foreign affairs power of the PLO, the power of foreign affairs for the Palestinians over territory contemplated for their rule is seriously limited.

The language of Annex II of the Declaration, however, points towards Palestine assuming foreign relations power. First, the language of Annex II could be interpreted to mean that Israel retains power over foreign relations in that territory *with regard to the withdrawal or deployment of Israeli forces* because the reservation of foreign relations power is included in that section of the Declaration.¹¹² Second, the language of Annex II could be interpreted to mean that the transfer of foreign

108. For the traditional view of Palestine, see generally Prince, *supra* note 5. For a specific discussion of the capacity of the PLO to conduct foreign relations, see *id.* at 685-98.

109. See Declaration, *supra* note 4, annex II.

110. *Id.* annex II(3)(6). The annex also excludes other subjects, but this analysis is concerned only with foreign relations.

111. Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-PLO, 33 I.L.M. 622 [hereinafter Gaza-Jericho Agreement].

112. The area covered by the Declaration includes the West Bank and Gaza Strip. Declaration, *supra* note 4, art. I. However, the Israeli withdrawal provision only applies to Gaza Strip and Jericho. *Id.* art. XIV.

relations power over the territory contemplated for Palestinian self-rule will not be included in the Gaza-Jericho Agreement because the transfer is expected in a subsequent agreement.¹¹³ Both interpretations of Annex II would be more limited because both approaches would leave within Palestinian control border disputes with nations other than Israel, presence of foreign troops other than Israeli, and international agreements for the use of the territory. The first construction would leave Israel in control of foreign relations with the territory only *with regard to the withdrawal or deployment of Israeli forces*. The second construction would indicate that some further negotiations, or possibly an agreement, on foreign relations is forthcoming.

Either construction of the Declaration would result in more foreign relations power under the control of Palestine. Therefore, Palestine would be closer to establishing the capacity to conduct foreign relations for the territory under its rule.

However, the Gaza-Jericho Agreement explicitly states that the foreign relations power is retained by Israel.¹¹⁴ Therefore, although the PLO has always maintained foreign relations with other nations, and although the PLO speaks in the international community for the Palestinian people, it remains undetermined who speaks internationally for the territory contemplated for Palestinian rule in the Declaration.

For these reasons, Palestine does not meet the requirements of statehood during the interim period. Although significant steps have been taken toward establishing an authority exercising governmental powers, and toward establishing defined boundaries, these steps have not been significant enough to establish the two requirements. Further, the refugee problem prohibits Palestine from defining a permanent population. Lastly, although the PLO has represented the Palestinian people internationally, the Declaration is not clear as to whether the PLO may conduct foreign relations *for the territory contemplated in the Declaration*. Thus, while the Declaration does take significant strides toward establishing the requirements of statehood for Palestine, it falls short of accomplishing those requirements during the interim period.

Part IV provides an analysis of the possibility of a Palestinian state following the interim period.

113. However, this construction is not likely because the subsequent withdrawal agreement *did* contain language concerning Israeli withdrawal. Gaza-Jericho Agreement, *supra* note 111, art. VI(2)(a).

114. *Id.*

IV. STATUS OF PALESTINE AFTER THE INTERIM PERIOD

Part IV analyzes the possibility of Palestinian statehood after the interim period. Whether a Palestinian state is established after the interim period will depend largely on the practices of the PLO and Israel during the interim period. Although the Declaration of Principles provides a mechanism for resolving the problems that remain for Palestinian statehood during the interim period, Permanent Status Negotiations, it remains to be seen whether Israel and the Palestinians can agree to solve the remaining obstacles to Palestinian statehood through that mechanism. Part IV concludes by offering some solutions to help deal with the remaining obstacles to the formation of a Palestinian state.

A. *The Requirement of a Defined Territory*

Palestine could meet the defined territory requirement after the interim period because most of the obstacles to Palestine's satisfaction of this requirement during the interim period involved unresolved territorial issues.¹¹⁵ Although the Declaration contemplates Palestinian jurisdiction over the West Bank and Gaza Strip territory, the Declaration leaves open important issues, namely Jerusalem, Jewish settlements, security arrangements, and borders.¹¹⁶ However, the Declaration provides a mechanism for deciding these remaining issues: negotiations between the Government of Israel and representatives of the Palestinian people. These negotiations are referred to in the Declaration as Permanent Status Negotiations.¹¹⁷

Because the Permanent Status Negotiations will cover these remaining issues, the territory of Palestine will be further defined after the interim period. The remaining issues need not be resolved in favor of the Palestinians for Palestine to satisfy the requirement of a defined territory. There could be a defined territory for Palestine that does not include Jerusalem or the Jewish settlements. However, resolution of this issue would help to satisfy the requirement of a defined territory because it would clarify whether the territory of Palestine includes these areas.

115. For an explanation of this uncertainty over unresolved territorial issues, see *supra* part III.A.

116. Declaration, *supra* note 4, art. V(3).

117. *Id.* art. V(2). The Declaration states that Permanent Status Negotiations should begin as soon as possible, but not later than the beginning of the third year of the interim period. *Id.* The Declaration states that negotiations should be between the Government of Israel and representatives of the Palestinian people. *Id.*

The border issue will also be discussed in the Permanent Status Negotiations.¹¹⁸ Once again, a state of Palestine need not have any *particular* borders to satisfy the defined territory requirement. However, a state of Palestine must *set* borders to meet the defined territory requirement.

On a practical level, considerable compromise will be needed to resolve the remaining territorial issues. Much of the territory contemplated in the Interim Agreement to come under Palestinian rule (the Gaza Strip and West Bank territory) is territory that was lost in the war of 1967.¹¹⁹ Many Palestinians want the territory lost in the war of 1948 to be included in a state of Palestine.¹²⁰ The dispute over how much territory to claim could present two problems. First, a problem may arise in the negotiations if the sides cannot agree on which territory is Palestinian territory. Second, a problem may arise if the Palestinian negotiators agree to less territory than was lost in 1948. The Palestinians could lose credibility and support if the negotiators do not achieve what the majority of Palestinians want.

The territorial problems are enhanced by language in the text of the Declaration of Principles. The Declaration provides for Palestinian jurisdiction over the West Bank and Gaza Strip territories during the interim period. However, the Declaration also provides that "the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached for the interim period."¹²¹ In other words, no defined boundaries can be established along these lines until completion of the Permanent Status Negotiations. Thus, even the steps taken in the interim period to define Palestinian territory could be jeopardized by stalled talks in the Permanent Status Negotiations. Of course, the Declaration's language does not rule out the possibility of more territory for Palestine than the territory contemplated to come under Palestinian rule during the interim period (the West Bank and Gaza Strip). However, even with the possibility of more territory for Palestine, the Declaration's language significantly hinders attempts to establish the defined territory requirement of statehood. Thus, only if the remaining territorial issues are resolved through negotiation will the defined territory requirement of statehood will be met.

The Jerusalem and Jewish settlement issues are difficult ones for the negotiators to contend with because of the sensitive nature of Palestinian rule over Jewish people, and because of the religious significance

118. *Id.* art. V (3).

119. For an explanation of the territory lost in the 1967 war, see QUIGLEY, *supra* note 15, at 163.

120. For an explanation of the territory lost in the 1948 war, see *id.* at 57-65.

121. Declaration, *supra* note 4, art. V(4).

of Jerusalem for both parties.¹²² In 1947 a United Nations General Assembly Special Committee met to decide the Palestinian issue. General Assembly Resolution 181 called for the partition of Palestine into independent Arab and Jewish states, with a Special International Regime for the city of Jerusalem.¹²³ Jerusalem was to come under United Nations rule, with the Trusteeship Council responsible for the city.¹²⁴

The negotiators should look to General Assembly Resolution 181 for guidance when they enter Permanent Status Negotiations. Although neither side may be willing to give up claims to Jerusalem, the city could obtain an international/special status, such as a United Nations trusteeship. If the parties could not agree to international control of Jerusalem, an arrangement of joint rule should be considered.

On a practical level, international supervision or joint rule may be no more acceptable to the parties than the present uncertainty over Jerusalem. Jerusalem is a holy city for both Palestinians and Israelis.¹²⁵ Further, there are particular problems regarding the Israelis accepting international supervision or joint rule. First, Israel has established in its Basic Law that it considers Jerusalem the capital of the Jewish state.¹²⁶ Therefore, Israel is not likely to relinquish its hold on Jerusalem. Second, it is unlikely that Israel will accept United Nations rule, or even United Nations participation, in Jerusalem because of the animosity that has developed between the United Nations and Israel. For example, the Security Council responded to Israel's Basic Law regarding Jerusalem with Security Council Resolution 478, which states that it will not recognize the Basic Law.¹²⁷ Further, the United Nations has adopted numerous Resolutions condemning Israeli actions in the Middle East.¹²⁸ Thus, it is not likely that Israel will consent to any arrangement involving the United Nations in Jerusalem.

122. Jerusalem is the first *gibla* and third holy city of Islam. STEWART SUTHERLAND ET AL., *THE WORLD'S RELIGIONS* 456 (1988). For the religious significance for Israel, see *id.* 181, 214.

123. G.A. Res. 181, U.N. GAOR, 2nd Sess., Supp. No. 11 (1947), reprinted in RUTH LAPIDOTH & MOSHE HIRSCH, *THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS* 33 (1992).

124. *Id.*

125. See *supra* note 122.

126. Basic Law: Jerusalem, Capital of Israel, 30 July 1980 (Israel), reprinted in LAPIDOTH & HIRSCH, *supra* note 123, at 255.

127. S.C. Res. 478, U.N. Doc S/Res/478 (1980), reprinted in LAPIDOTH & HIRSCH, *supra* note 123, at 256 (adopted by 14 votes in favor, none against, with the United States of America abstaining).

128. The most notable UN condemnation is Security Council Resolution 242. For Security Council Resolutions concerning Israeli treatment of refugees see Eur. Parl. Ass., *supra* note 16, appendix.

The PLO, however, may be more receptive to United Nations participation. The 1988 PLO Declaration of Independence included a provision to put the occupied territories, including Arab Jerusalem, under United Nations supervision.¹²⁹ The provision of the 1988 PLO Declaration of Independence providing for United Nations supervision indicates that the PLO would now be willing to submit to United Nations supervision. However, control of Jerusalem will remain a problem if Israel retains its traditional view expressed in Israel's Basic Law.¹³⁰

Even if a joint-rule or international arrangement is reached for Jerusalem, all of the issues regarding this territory would still not be resolved. For example, the problem of jurisdiction over the people of Jerusalem remains. It is unlikely that either side will consent to the other having jurisdiction over its own people. Further, any arrangement regarding Jerusalem is likely to create overlapping jurisdictional problems. Whether the parties can resolve the issues that prevent the establishment of the defined territory requirement remains uncertain. However, attempting international supervision or joint rule for Jerusalem or the Jewish settlements would provide a step toward solving the remaining problems for establishing the defined territory requirement.

B. *The Requirement of a Permanent Population*

To be a state, an entity must have a population that is significant and permanent.¹³¹ The requirement of a permanent population will likely be met after the interim period. The Declaration of Principles does not settle the question of whether the refugees from 1948 are included in the population of Palestine, or only the refugees from 1967 are included;¹³² however, it does establish a multi-lateral committee to decide the question.¹³³ Regardless of what the committee decides, any definite solution resulting from the committee talks could assist Palestinians in defining the exact population of Palestinian.

To satisfy the permanent population requirement, a particular population is not necessary. A state of Palestine would merely require a population that is significant and permanent.¹³⁴ Because no particular population is required, a state of Palestine could satisfy the require-

129. Declaration of Independence by Palestinian National Council, November 18, 1988, 27 I.L.M. 1660 § 2(d).

130. See Basic Law: Jerusalem, Capital of Israel, 30 July 1980 (Israel).

131. For the source of this requirement, see *supra* note 10.

132. For an explanation of the refugee problem, see *supra* text accompanying notes 16-18.

133. Declaration, *supra* note 4, art. XII.

134. For a discussion of the source of this requirement, see *supra* note 10.

ment with or without the refugees from 1948.¹³⁵ The result of the committee talks is therefore immaterial to the satisfaction of the permanent population requirement.

The only situation that would keep Palestine from satisfying the permanent population requirement is if the committee did not come to any conclusion on the refugee issue. If the committee could not resolve the refugee issue, left the issue for further negotiations, or came to a conclusion so vague that it was impossible to determine which refugees were included in the state of Palestine, then the permanent population requirement would not be met.

However, the permanent population requirement probably will be met after the interim period. Because no particular resolution of the refugee problem is necessary, any definite resolution reached by the committee will meet the requirement of a permanent population.

If the committee were to establish a system of immigration to handle the admittance of refugees, it would assist the transition to a situation where the population of Palestine included any set of refugees. Such an immigration system need not be designed to allow all the refugees, or only those from 1967, into Palestine. However, some mechanism to help govern refugee "immigration" is necessary. Such a mechanism for immigration could be used to determine when the refugees should be admitted, and to calculate how many new refugees could be taken into the territory at one time. An immigration mechanism is not critical to the Committee's defining which refugees are part of the Palestinian population, but it could help ease the transition into Palestine for those refugees ultimately included in the State of Palestine. An immigration mechanism could also help ease the tension between Palestine and Israel if the refugees were slowly re-integrated into the territory under Palestinian self-rule.

Thus, because the multi-lateral committee is established to decide the refugee question, a conclusion as to which refugees are included in the population of Palestine is likely. Because no particular conclusion on the refugee issue is necessary, the conclusion reached by the committee will likely satisfy the permanent population requirement of statehood.

C. The Requirement of an Authority Exercising Governmental Functions

The major problem for the PLO in establishing a State of Palestine has historically been the requirement of an authority exercising

135. See *supra* part III.B.

governmental functions.¹³⁶ This requirement could be met after the interim period if all the measures contemplated in the agreement are implemented. The Declaration calls for self-rule during the interim period, including responsibility for education, health, social welfare, direct taxation, tourism, a police force, and elections.¹³⁷ However, the requirement of an authority exercising governmental functions is not met during the interim period because several areas of governmental authority are either left open, left to multi-lateral discussion, or left to Israel.¹³⁸ Nonetheless, several mechanisms established during the interim period, including Permanent Status Negotiations and the Palestinian Authorities, could help Palestine meet the requirement of an authority exercising governmental functions after the interim period.

The first of these mechanisms is Permanent Status Negotiations.¹³⁹ Issues related to governmental authority to be discussed during the Permanent Status Negotiations include: security arrangements, borders, and police powers not turned over to the Palestinian police force.¹⁴⁰ If the results of these negotiations give Palestinians control over security, borders, and the remaining police powers, it could strengthen the Palestinian authority exercising governmental functions.

The second mechanism that could assist Palestinians meeting the requirement of an authority exercising governmental functions is the establishment of Palestinian Authorities in the areas of electricity, development, the environment, land, and water.¹⁴¹ Because the Palestinian Authorities will function within the bounds of the Israeli-Palestinian Continuing Committee for Economic Cooperation,¹⁴² it is uncertain how much actual authority the Palestinian Authorities will exercise.¹⁴³ Whether Palestinians will exercise governmental functions in these territories will be largely determined by the practices of Palestine and Israel during the interim period. However, the Authorities present Palestinians with the opportunity to assume governmental authority in the territories of electricity, development, the environment, land, and water.¹⁴⁴

136. See *supra* part III.C.

137. Declaration, *supra* note 4, art. VI(2).

138. See *supra* part III.C.

139. See Declaration, *supra* note 4, art. V.

140. See *id.* art. V(3).

141. Declaration, *supra* note 4, art. VII(4).

142. The Declaration provides that the Continuing Committee will focus on the areas of water, electricity, energy, finance, transport, trade, and labor. *Id.* annex III. These are some of the same areas to be handled by Palestinian Authorities. See *id.* art. VII(4) (establishing Palestinian Authorities).

143. See *supra* text accompanying notes 89-102.

144. *Id.* art. VII(4).

Although there are significant mechanisms for Palestinians to establish greater authority after the interim period, areas of authority retained by Israel remain during the interim period. These areas include the authority to conduct foreign relations for the territory contemplated to come under Palestinian self-rule, the authority to deal with external threats, and the authority to re-deploy troops outside populated territories.¹⁴⁵ The Declaration does not clearly provide a mechanism to turn these areas of authority over to the Palestinians. It is uncertain whether these obstacles to obtaining governmental authority in the interim period will remain obstacles after the interim period.

Further problems for the establishment of an authority exercising governmental functions involve the PLO. First, the PLO could face an identity crisis following the interim period. What is the PLO? Is it a representative of the Palestinian people? Is it a political party? Is it a government? Concerns about the PLO have already surfaced. In fact, several PLO officials have refused to join the Palestinian National Authority.¹⁴⁶

The opposition to the main branch PLO created by the signing of the Declaration could undermine the power of the PLO.¹⁴⁷ The PLO identity crisis is potentially dangerous because, in the past, Israel has negotiated with the PLO. It is unclear whether the PLO will turn over some of its foreign affairs powers to newly elected officials, or whether much of the "powers" turned over to Palestinian officials will come under the influence of the PLO. A loss of popular support for the PLO could create a power vacuum. Considering how resistant the world community (especially Israel) was historically to the PLO, it is not likely that the world community (or Israel) will successfully negotiate with representatives of more radical Palestinian factions. In addition, Israel, or other parties, might be resistant to turning over power that might end up in the hands of factions more radical than the PLO, a resistance that could frustrate attempts during Permanent Status Negotiations to obtain more authority for Palestinians.

145. See Declaration, *supra* note 4, annex II, arts. VII, XIII.

146. Abdelaziz Barrouhi, *Arafat Has Hard Time Forming Self-Rule Government*, REUTERS, May 9, 1994, available in LEXIS, Nexis Library, WIRES File.

147. Of the fifteen organizations under the umbrella of the PLO, twelve oppose the Israeli-PLO Declaration of Principles. Mark Dennis, *Syrian Leader Urged to Control Palestinian Opposition Groups*, CHRISTIAN SCI. MONITOR, Sept. 17, 1993, at 7. The most influential groups include: the Popular Front for the Liberation of Palestine, the Democratic Front for the Liberation of Palestine, and the Popular Front for the Liberation of Palestine - General Command. *Id.* Sources indicate that the opposition groups' main difficulty with the Declaration is that it does not guarantee a Palestinian state. *Id.* Members of Hamas, the Islamic Resistance Movement, also oppose Arafat's efforts at peace. Mamoun Fandy, *Consolidating Gains of Israel-PLO Accord*, CHRISTIAN SCI. MONITOR, Sept. 16, 1993, at 19.

A second problem preventing Palestine from meeting the governmental authority requirement relates to the binding nature of the Declaration.¹⁴⁸ The requirement of an authority exercising governmental functions is essentially what the Israeli-PLO Declaration of Principles addresses: self-rule. Because Israel was formerly in control of the territory that will now come under Palestinian self-rule (the West Bank and Gaza Strip), any agreement for Palestinian self-rule requires Israel to turn over powers to the Palestinians. The Declaration requires concessions from both sides and is essentially conditional: Israel must turn over powers and territory in exchange for promises by the PLO to denounce terrorism and claim less territory than was originally demanded.¹⁴⁹ However, Israel negotiated with *the PLO*, and the concessions were made by *the PLO*. It is uncertain that similar concessions will result if Israel negotiates with other factions during Permanent Status Negotiations.

Permanent Status Negotiations provide an opportunity for Palestine to acquire the necessary authority to establish the requirement of an authority exercising governmental functions. However, the Declaration does not provide that Permanent Status Negotiations will resolve all of the remaining issues. The status of the PLO could present problems that would prevent reaching agreements during Permanent Status Negotiations. Therefore, while the Declaration provides a framework for Palestine to achieve the requirement of an authority exercising governmental functions through Permanent Status Negotiations, it remains uncertain whether the negotiations will ultimately establish such an authority.

D. *The Requirement of the Capacity to Conduct Foreign Relations*

The Declaration of Principles does not clearly state whether Palestinians or Israelis have the capacity to conduct foreign relations for the territory turned over to Palestinians for self-rule.¹⁵⁰ Who has foreign affairs powers for the territory after the interim period will therefore be determined by practice during the interim period. Practice during the interim period could also establish whether the PLO will continue to represent the Palestinian people internationally, or whether this power will be assumed by some other Palestinian representative.

148. For an explanation of the legal classification of the Declaration of Principles, see *supra* part II.B.

149. See *supra* note 66 and accompanying text for an explanation of the conditional nature of the agreement.

150. For a discussion of the foreign relations capacity for the territory to fall under Palestinian self-rule see *supra* part III.D.

It appears that Palestine is being represented internationally. PLO and Israeli negotiators continue to meet¹⁵¹ to implement the terms of the Declaration. Meetings between Israel and the PLO imply competence on the part of the PLO to continue to represent Palestinians internationally. Second, the Declaration provides for Palestinian representative involvement in agreements with other Arab nations regarding refugees and other matters of common concern.¹⁵² This provision for involvement indicates recognition of the necessity of Palestinian representation in foreign relations.

Recent agreements, however, suggest reluctance on the part of Israel to grant the PLO, or some other Palestinian representative, foreign relations powers.¹⁵³ For example, the Gaza-Jericho agreement states explicitly that the Palestinian Authority will not have foreign affairs powers.¹⁵⁴ Israeli resistance in granting foreign affairs power to a Palestinian representative could hinder efforts to achieve the requirement of the capacity to conduct foreign relations.

Although the requirement of the capacity to conduct foreign relations has been the least problematic for the PLO, just how this capacity will be implemented by a state of Palestine is unclear. Whether the proper group to represent the Palestinians is the PLO, or some other Palestinian representative,¹⁵⁵ is also uncertain.

Elected or appointed Palestinian representatives may be more legitimate or credible than the PLO in matters of foreign policy. An elected body that would conduct foreign affairs would also lend credibility to the peace process. However, the PLO appears better able to negotiate with foreign countries than are other more radical Palestinian factions.¹⁵⁶ Several compromises are available. First, the PLO could work in conjunction with Palestinian representatives in foreign affairs until elected representatives could assume foreign relations functions. Alternatively, appointed or elected officials could represent the Palestinians in foreign affairs with the assistance of the PLO.

The PLO appears to be the best Palestinian representative to negotiate with the outside world. If the PLO makes too many conces-

151. Deborah Pugh, *Cairo Talks Stumble Over Who Controls The Borders*, CHRISTIAN SCI. MONITOR, Dec. 31, 1993, at 1 (explaining current stumbling blocks in the ongoing Israeli-Palestinian negotiations).

152. See Declaration, *supra* note 4, art. XII (concerning cooperation with Jordan and Egypt).

153. Gaza-Jericho Agreement, *supra* note 111, art. VI (2) (a).

154. *Id.*

155. The other alternative bodies to represent Palestinians could include elected Palestinians, Palestinian negotiators not connected to the PLO, or another organized Palestinian group.

156. The PLO negotiated the Declaration of Principles. Ford, *supra* note 2.

sions, it could lose support from the Palestinian people.¹⁵⁷ The international community would then be forced to negotiate with some other faction representing Palestinians. Perhaps the international community could work with the PLO in such a manner that would demonstrate sensitivity to Palestinian concerns.¹⁵⁸ The PLO could then garner more support from Palestinians for its more moderate view. Such support might alleviate the potential problem of a more radical group assuming power. The international community should be sensitive to other Palestinian factions and should support the PLO out of respect for what they have accomplished: an unprecedented peace agreement with Israel.

Once the problem of support for Palestine is resolved, and if support for a more moderate view is available from Palestinians, then both sides could worry about the "legitimacy" of the PLO. To help with the legitimacy problem, the PLO could slowly turn over its foreign affairs power to Palestinian representatives. Transfer could be accomplished by slowly replacing the PLO personnel at existing PLO missions and embassies with elected or appointed representatives of the Palestinian people.

Achieving the objective requirements of statehood will be closer to being met *after* the interim period if everything contemplated in the Declaration of Principles is actually accomplished. Accomplishing everything the Declaration provides for is, however, very optimistic. To establish the necessary requirements of statehood will largely depend on practice during the interim period and the outcome of the Permanent Status Negotiations.

Further, any Palestinian claim to statehood after the interim period cannot be established using any of the alternative approaches. An analysis under the constitutive approach,¹⁵⁹ that an entity becomes a state through recognition by other states, is not changed by the Declaration of Principles. Any changes could affect only the number of states that recognize Palestine. Under the constitutive approach, the same problem remains: a government which is recognized *before* it meets the requirements of statehood.¹⁶⁰ Therefore, Palestinians should concentrate on establishing the requirements of statehood according to the declaratory theory rather than the constitutive approach.

157. See *supra* note 147 for a discussion of organizations within and without the PLO that oppose the concessions of the Declaration.

158. See Fandy, *supra* note 147 (explaining that the Palestinian infrastructure should be financed by Western dollars).

159. See Alexander, *supra* note 11, at 859-61, for an analysis of the constitutive approach.

160. See *supra* text accompanying note 25.

The other alternative theories for asserting Palestinian statehood, government-in-exile status,¹⁶¹ or belligerent status,¹⁶² are not furthered (or perhaps even hurt) by the Declaration of Principles. Belligerent status (a term more apt for revolutionary forces) is difficult to claim if Israel and the PLO are negotiating solutions to Palestinian self-rule. Government-in-exile status is difficult to claim if a Palestinian representative government is in existence and is attempting to establish rule over a defined territory.¹⁶³

However, Palestine can still claim statehood under the declaratory approach if practice during and after the interim period establishes the four objective requirements of that approach.¹⁶⁴

V. THE EFFECTS OF PALESTINIAN STATEHOOD ON UNITED STATES LAW REGARDING THE PLO

The creation of a state of Palestine will have an effect on several areas of United States domestic law regarding the PLO. Part V briefly identifies some of those areas of United States law that could be affected if a state of Palestine is established. These areas include sovereign immunity, standing to sue, and anti-terrorism laws.

A. *Sovereign Immunity of Palestine or the PLO*

The first area of United States law that could be affected by the establishment of a Palestinian state is sovereign immunity. The Foreign Sovereign Immunities Act governs situations in which a foreign state is immune from the jurisdiction of U.S. courts.¹⁶⁵ To fall under this act an entity must meet the requirements of statehood. In the 1991 case *Klinghoffer v. S.N.C. Achille Lauro*, the U.S. Court of Appeals, Second Circuit, held that the PLO did not fall under the Foreign Sovereign Immunities Act because it was not a state.¹⁶⁶ The court used the objective Restatement requirements of the declaratory approach to statehood in making its determination.¹⁶⁷

The objective Restatement requirements are essentially the same four requirements used in international law to determine whether an

161. See *supra* text accompanying note 26 for a definition of government-in-exile status.

162. See O'Brien, *supra* note 27 for a definition of belligerent status.

163. For a discussion of the claim of the PLO to government in exile status, see generally O'Brien, *supra* note 26.

164. For the source of the four requirements of statehood, a defined territory, a permanent population, an authority exercising governmental functions, and the capacity to conduct foreign relations, see *supra* note 10.

165. 28 U.S.C. § 1604 (1994).

166. 937 F.2d 44 (2d Cir. 1991).

167. See *id.* at 47.

entity is a state.¹⁶⁸ If a state of Palestine is established under the Restatement requirements, the status of Palestine under the Foreign Sovereign Immunities Act would also change. Courts will likely reevaluate the status of Palestine under the four requirements of statehood after the interim period, rather than merely accepting the traditional view of Palestine. If Palestine meets the objective requirements after the interim period, it will fall under the terms of the Foreign Sovereign Immunities Act as a state because the objective requirements govern the determination of statehood under the Act.¹⁶⁹

The Foreign Sovereign Immunities Act provides immunity for representatives or organs of a foreign state.¹⁷⁰ If Palestine becomes a state, can the PLO be separated from Palestine and be sued as an entity? In order to be immune, would it be necessary for the PLO to act as a representative of Palestine? Is the PLO an organ of the government of Palestine similar to the U.S. Department of State? Or is it similar to an American political party? Like the answers to the questions presented when determining whether Palestine is a state, the answer to these questions will be determined largely by practice during the interim period.¹⁷¹ This is especially true regarding the role of the PLO. The conduct of the PLO during the Interim Period will likely be that of the representative of Palestine.¹⁷² Thus, the PLO would fall under the Foreign Sovereign Immunities Act as well.¹⁷³ However, if the status of the PLO after the interim period changes to that of a political party, then the PLO will not fall under the terms of the Act as a representative or subsidiary of Palestine.

B. *The Standing of the PLO or Palestine*

The arguments surrounding the standing of an unrecognized government's ability to sue in United States' courts concern similar arguments to those involved in sovereign immunity. An unrecognized government does not have standing to sue in the courts of the United

168. See *supra* note 10 and accompanying text for the source of these objective requirements.

169. See *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir. 1991).

170. 28 U.S.C. § 1603 (1994).

171. After the interim period there may exist a clearer picture of what role the PLO will play in the future of Palestine because there will be evidence of that role *from* practice during the interim period.

172. See *Pugh*, *supra* note 151 (discussing challenges the PLO faces while representing Palestinian interests).

173. The PLO, as a representative of Palestine, would fall under the Foreign Sovereign Immunities Act because the Act applies to representatives of a foreign state. See 28 U.S.C. § 1603 (1988).

States.¹⁷⁴ Recognizing a government is not the equivalent of meeting the requirements of statehood. However, the two are often closely tied.¹⁷⁵ A problem will likely arise if Palestine meets the requirements of statehood but the United States is slow to recognize its government. However, the United States is not likely to know whether to recognize the PLO or some other entity. If the United States is slow to recognize the government of Palestine, there may be ramifications for the ability of Palestine, the PLO, or another representative of Palestine, to sue in U.S. courts.¹⁷⁶

C. The Anti-Terrorist Act

Further problems for a State of Palestine concern the Anti-Terrorism Act of 1987.¹⁷⁷ Can U.S. businesses establish ties with the new territory under Palestinian self-rule now that the PLO has denounced terrorism?¹⁷⁸ It is important not to restrict U.S. involvement in Palestine because American investment can support the development of Palestinian economic infrastructure. However, the U.S. should realize the risk to private parties investing in Palestine during the interim period because investors cannot be sure they will be dealing with the same parties after the interim period.

VI. CONCLUSION

The traditional view of Palestine is that it does not meet the requirements of statehood.¹⁷⁹ The Israeli-PLO Declaration of Principles presents an opportunity to reevaluate this traditional view. Although significant obstacles to the creation of a Palestinian state remain during the interim period, there are mechanisms in place that could establish a Palestinian state following the interim period. The success of these mechanisms depends on practice during the interim period. However, the Declaration of Principles presents significant

174. See Edwin L. Fountain, Note, *Out from the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts*, 29 VA. J. INT'L L. 473, 482-84 (1989) (standing contingent upon government recognition). See also Alexander, *supra* note 11, at 882.

175. See *supra* note 13 (explaining the relationship between the four requirements of the declaratory approach to recognition and the effect of recognition on statehood).

176. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 7, § 205 (explaining that an unrecognized government is ordinarily denied access to courts of the United States).

177. 22 U.S.C. §§ 5201-5203 (1988).

178. At the time of the Declaration at least 15 different measures (statutes and executive measures) existed that criminalized PLO activities and associations in the United States. Jane Friedman, *In Reversal, PLO May Get Diplomatic Outpost in U.S.*, CHRISTIAN SCI. MONITOR, Sept. 29, 1993, at 7. Legislation has been introduced subsequent to the Declaration to repeal some of the restrictions. *Id.*

179. See Prince, *supra* note 5, for a discussion of the traditional view of Palestine.

steps toward establishing a Palestinian state. If the outcome of the Permanent Status Negotiations leaves Palestinians with more governmental powers, and if negotiations produce definite results on issues regarding population and territory, a state of Palestine could be established.