

setzung in eine sich entwickelnde Politikwissenschaft als innovativ und herausfordernd zu bewerten ist.

VIII. Was bleibt?

Insgesamt wäre es sicher einfach, Magdalene Schoch auf ihr konsequentes Verhalten nach der nationalsozialistischen „Machtübernahme“ zu reduzieren oder auf das Potential, welches durch ihre Emigration verloren ging, die verlorene Möglichkeit, die erste Juraprofessorin in Deutschland zu sein. Diese Sichtweise wird ihrer bemerkenswerten Persönlichkeit und ihrem erfüllten Leben aber kaum gerecht: Als Pionierin ihrer Disziplin bestritt sie zielstrebig die Etappen der wissenschaftlichen Karriere über das mühsam als Externe errungene Abitur, ihr vielfältiges und interdisziplinär gestaltetes Studium und die Promotion bis zur ersten und mehr als ein Jahrzehnt lang einzigen Habilitation einer Juristin in Deutschland. Als Wissenschaftlerin schlug sie einen weiten intra- und interdisziplinären Bogen in ihren Veröffentlichungen,

trug unter dem Primat der Völkerverständigung zur Internationalisierung von Forschung und Lehre an der Hamburger Rechts- und Staatswissenschaftlichen Fakultät bei und war wesentlich am Aufbau des ersten politikwissenschaftlichen Instituts in Deutschland beteiligt. Als gesellschaftlich engagierte Bürgerin zeichnete sie sich durch ihren frauenpolitischen Einsatz und ihre loyale und unbeirrte Haltung nach der nationalsozialistischen „Machtübernahme“ aus. Als Praktikerin machte sie nach ihrer Emigration in den Vereinigten Staaten Karriere im US-Justizministerium. Als Freundin und Familienmitglied war sie besorgt und zugewandt und unterstützte andere, wo immer sie dies konnte. Das couragierte⁸⁶ Leben von Magdalene Schoch war in so vielfältiger Hinsicht wegweisend, dass uns diese besondere Frau auch heute noch als Vorbild dienen kann.

⁸⁶ So bezeichnet von *Rainer Nicolaysen*, Für Recht und Gerechtigkeit. Über das couragierte Leben der Juristin Magdalene Schoch (1897–1987), Zeitschrift des Vereins für Hamburgische Geschichte 92 (2006), S. 113–143.

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The Israeli-Palestinian Conflict – Discussing the Two-State Solution

Long-lasting and yet to be solved, the Israeli-Palestinian conflict has already produced an enormous history of violence and international negotiations. At least since World War Two, the confrontation of the two peoples in the territory of the former British Palestine Mandate has been powered by religion, ideology, hate and practical issues alike. The long sequence of failed negotiations causes some authors to think about dropping the whole peace negotiation process.¹ However, only a negotiation process can lead to a solution which both sides accept and to sustainable peace. Establishing a sovereign Palestinian state next to Israel is a frequently debated suggestion, which lately came to increased international attention when Palestine applied for full membership in the UN on September 23, 2011. What could be the details of a two-state solution?

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¹ *David F. Pustilnik*, How the Development of the Palestinian State can be Effectively Initiated: Implementing a Plan for a Two-State Solution while Fostering Palestinian Growth and Maintaining a Viable Peace, 9 *Chi.-Kent J. Int'l & Comp. L.*, 2009, p. 1 (9).

Most of the various issues involved in the conflict will not be addressed in this paper, such as questions concerning the future of Palestinian refugees or the vital water dispute. Instead, this legal analysis will concentrate on border lines, Israeli settlements, and Jerusalem (II), introduced by a short overview of the history and background (I). This paper aims to point out to certain legal implications of a possible two-state solution – in an attempt to leave the manifold political dimensions of the Israeli-Palestinian conflict aside and in awareness of the need for additional approaches reaching beyond any legal analysis.

I. History and Background

Instead of reaching back to the origins of the Abrahamic religions, where the earliest sources of dispute over the territory of present-day Israel and Palestine might be found, the Balfour Declaration of 1917 could be regarded as a starting point, as an early arguably binding British document in the recent conflict, promising “the establishment in Palestine of a national home for the Jewish people [...] being clearly understood that nothing shall be done which may prejudice the civil and religious rights

of existing non-Jewish communities in Palestine².² But due to its ambiguity and due to conflicting documents showing vague British support for the independence of an Arab federation³, neither Israel nor Palestine can conclude any strong claim. Attention will now be drawn to the UN Partition Plan, the Arab-Israeli War, the Six Day War, and the Intifadas.

1. 1947 UN Partition Plan

Following the Holocaust, during which approximately six million Jews were killed,⁴ the freshly founded UN framed plans to establish a Jewish state in Palestine, resulting in the 1947 UN Partition Plan adopted by the General Assembly.⁵ Whereas it provided for a Jewish state, this state was supposed to cover only 57% of the Palestinian territory.⁶ The remaining parts were supposed to constitute an independent Arab state, leaving much more territory to the Palestinians than they inhabit today,⁷ with a larger Gaza area and a larger West Bank than known today plus an area in the northern Palestinian territory.⁸

Thus, the UN Partition Plan clearly proposed a two-state solution, granting almost equal amounts of territory to both the Jewish and the Arab state, and granting Jerusalem to none of the two states, but establishing an international zone (*corpus separatum*) instead. However, as a General Assembly resolution the Plan only had the legal nature of a recommendation, and therefore no binding effect.⁹ Whereas the Plan was accepted by the Jewish community, the Palestinians were the ones who rejected the Plan¹⁰ – nowadays, Arab claims for a two-state solution along the proposed borders of the Plan seem rather one-sided and such enormous territorial concessions of Israel seem unrealistic.

2. 1948 Arab-Israeli War

Despite the non-binding nature of the UN Partition Plan, the UK would have had the actual power to implement it, but the UK rather hastened to leave the territory even before the end of the mandate, and the UN itself did not have any means to implement the Plan.¹¹ Thus, when Is-

rael declared its independence on May 14, 1948,¹² the invasion of five neighboring Arab states promptly followed on the next day, marking the beginning of the Arab-Israeli War.¹³ Ultimately, the War caused between 500,000 and 1 million¹⁴ Palestinians to become refugees leaving the territories controlled by Israel, which is called *Al-Naqba* (Catastrophe) in Arabic nations.¹⁵

Israel prevailed,¹⁶ and the 1949 Armistice Agreements with Jordan, Syria, Egypt and Lebanon granted Israel 73% of the territory, rather than merely 57% as proposed by the UN Partition Plan.¹⁷ The Armistice Demarcation Lines became known as the Green Line.¹⁸ They were created not with the intent to proclaim final frontiers, but to allow alterations as far as agreed upon by mutual consent.¹⁹ The Green Line²⁰ will later be discussed as one option for a future border.

3. 1967 Six Day War

The crucial result of the 1967 Six Day War was Israel's control over the territories of the Gaza Strip, the Golan Heights, the West Bank including the whole city of Jerusalem, and the Sinai Peninsula (the latter was subsequently returned to Egypt).²¹ Since then, Israel has kept control of the territories with Palestinian population, until it unilaterally withdrew its forces from the Gaza Strip in 2005, resulting in the Gaza War 2008/09.²²

4. Intifadas

Two Palestinian movements of increased violence were directed against the Israeli control: the First and Second Intifada. Compared to the First Intifada (1987–1993), the Second Intifada (since 2000, officially ended in 2005) was the more violent phase of riots, similar to an armed conflict and including frequent terrorist attacks.²³

Among the Nations, 1998, p. 137 (142–143).

¹² Declared by *David Ben-Gurion*, who later became the first Prime Minister of Israel.

¹³ *Yoram Dinstein*, in: Kellermann/Siehr/Einhorn (Eds.), *Israel Among the Nations*, 1998, p. 137 (143).

¹⁴ *Mitchell Bard*, *The Refugees*, Jewish Virtual Library, <http://www.jewishvirtuallibrary.org/jsourcemyths/mf14.html#2> (May 22, 2012).

¹⁵ *David F. Pustilnik*, *Development of the Palestinian State*, 9 *Chi.-Kent J. Int'l & Comp. L.*, 2009, p. 1 (3).

¹⁶ *Yoram Dinstein*, in: Kellermann/Siehr/Einhorn (Eds.), *Israel Among the Nations*, 1998, p. 137 (142).

¹⁷ *Geoffrey R. Watson*, *Oslo Accords*, 2000, p. 26.

¹⁸ Due to the green pencil used during the negotiations, *Eli E. Hertz*, *A Secure Israel – Security: A Condition for Peace*, in: *Myths and Facts*, http://www.mythsandfacts.com/Conflict/1/A_secure_israel.htm (May 22, 2012).

¹⁹ *Yoram Dinstein*, in: Kellermann/Siehr/Einhorn (Eds.), *Israel Among the Nations*, 1998, p. 137 (144).

²⁰ The route of the Green Line as well as the territories gained by Israel during the 1967 Six Day War can be derived from the map in: *Geoffrey R. Watson*, *Oslo Accords*, 2000, p. 28.

²¹ *Geoffrey R. Watson*, *Oslo Accords*, 2000, pp. 27–30.

²² For a legal evaluation, see *Justus Reid Weiner/Avi Bell*, *The Gaza War of 2009: Applying International Humanitarian Law to Israel and Hamas*, 11 *San Diego Int'l L. J.*, 2009, pp. 5–42.

²³ See Captain *Gal Aseal* (Israel Defense Forces), *The Law in the Service of Terror Victims: Can the Palestinian Authority be sued in Israeli*

² See *Jonathan Schneer*, *The Balfour Declaration: the origins of the Arab-Israeli conflict*, 2010, p. 341.

³ During the Hussein-McMahon Correspondence in 1915, see *Jonathan Schneer*, *Balfour Declaration*, 2010, pp. 64 et seqq.

⁴ *Alvin H. Rosenfeld*, *The end of the Holocaust*, 2011, p. 51.

⁵ UN GA Res 181 (II) *Future Government of Palestine*.

⁶ *Geoffrey R. Watson*, *The Oslo Accords*, *International Law and the Israeli-Palestinian Peace Agreements*, 2000, p. 20.

⁷ *David F. Pustilnik*, *Development of the Palestinian State*, 9 *Chi.-Kent J. Int'l & Comp. L.*, 2009, p. 1 (47).

⁸ The borders of the proposed states pursuant to the UN Partition Plan can be derived from the map in: *Geoffrey R. Watson*, *Oslo Accords*, 2000, p. 21.

⁹ *Yoram Dinstein*, *The International Legal Dimensions of the Arab-Israeli Conflict*, in: Kellermann/Siehr/Einhorn (Eds.), *Israel Among the Nations*, 1998, p. 137 (142).

¹⁰ *David F. Pustilnik*, *Development of the Palestinian State*, 9 *Chi.-Kent J. Int'l & Comp. L.*, 2009, p. 1 (47).

¹¹ *Yoram Dinstein*, in: Kellermann/Siehr/Einhorn (Eds.), *Israel*

II. Towards a Two-State Solution

Initiated with the Camp David Accords (1978) the negotiation process showed a first success during the Oslo Peace Process (beginning in 1993), when Israel and the Palestinians agreed to “recognize their mutual legitimate and political rights”²⁴ and when the Palestinian Authority was established by the Palestine Liberation Organization (PLO) to execute some political powers over the Gaza Strip and the West Bank.²⁵ However, agreeing in general on a two-state solution and acknowledging each other’s right to exist is merely the starting point. Among the most disputed issues are border lines, the future of Israeli settlements and solutions for Jerusalem.

1. Borders

Of which parts of Mandate Palestine could the future Palestinian territory be composed? With regard to the population structure and the dispute history, the obvious answer seems to be: West Bank and Gaza Strip. However, the answer is not that simple, especially regarding the Gaza Strip, in which Hamas is in power, the opposition to the Fatah faction predominantly ruling in the West Bank.²⁶ In the US, Hamas is listed as a terrorist organization, prohibiting direct negotiation talks,²⁷ and Israeli as well as Fatah leaders might prefer not to negotiate with Hamas. While from an Israeli perspective, a Palestinian state could encompass only to the West Bank, excluding the Gaza Strip,²⁸ the Palestinians will not give up the Gaza Strip with its 1.4 million Palestinians as they are mostly supported by the 2.3 million Palestinians of the West Bank (besides various other reasons such as the importance of having access to the Mediterranean Sea); further, Hamas could become an important partner in returning to calm and in rebuilding the Palestinian economy.²⁹ Thus, despite their geographical separation, negotiations will not result in decoupling the two parts.³⁰ While the Gaza Strip borders could remain as present after Israel has unilaterally withdrawn from the Gaza Strip and evacuated all its settlements,³¹ determining the bor-

der between Israel and the West Bank territory of the future Palestinian state is complicated:

a) UN Partition Plan

One solution could be to refer to the 1947 UN Partition Plan, as those borders were once agreed upon by the UN, granting them some legitimacy. Still, as mentioned above, the Plan was a General Assembly resolution and hence lacks any legally binding effect.³² Politically, this solution seems very remote, because the Plan grants considerably larger territories to the Palestinians, with a West Bank border reaching into current Israeli territory – even the PLO does not call for those borders.³³

b) Green Line

Instead, the PLO calls for the Green Line, as established in the 1949 Armistice Agreements, to become the line of the border.³⁴ In support of that position, the Palestinians invoke UN Security Council Resolution 242 passed in 1967, directly after the Six Day War.³⁵ Bearing in mind that Israel expanded its territory in the course of the Six Day War, although it entered into the war relying on its right to self-defense (Art. 51 UN Charter), Resolution 242 emphasized the “inadmissibility of the acquisition of territory by war” and ordered the “withdrawal of Israeli armed forces from territories occupied in the recent conflict”. The conclusion, that Israel is obliged under international law to withdraw from all West Bank territories beyond the Green Line is further supported by UN Security Council Resolution 338, passed in 1973 after the Yom Kippur War.³⁶ It calls on the parties to “start immediately after the cease-fire the implementation of Security Council Resolution 242 (1967) in all of its parts”. Despite differing Israeli and Palestinian interpretations of Resolution 242,³⁷ both parties later accepted Resolu-

L., 2010, p. 501.

³² Jack L. Goldsmith/Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev., 1999, p. 1113 (1117). The authors criticize the frequent citation of and reliance on non-binding General Assembly Resolutions in scholarly work.

³³ PLO Negotiations Affairs Department, *Borders, Position*, as of May 22, 2012, <http://www.nad-plo.org/etemplate.php?id=10&more=1#4>.

³⁴ PLO Negotiations Affairs Department, *Borders, Position*, as of May 22, 2012, <http://www.nad-plo.org/etemplate.php?id=10&more=1#4>.

³⁵ UN SC Res 242 (S/RES/242), November 22, 1967.

³⁶ UN SC Res 338 (S/RES/338), October 22, 1973.

³⁷ Because Resolution 242 obliges Israel to withdraw “from territories occupied in the recent conflict”, without referring to “the” territories or “all” territories, Israelis interpreted Resolution 242 to merely call for withdrawal from some of the territories, and to require such a withdrawal not immediately, but rather as a part of a comprehensive peace agreement; *Victor Kattan*, *The Legality of the West Bank Wall: Israel’s High Court of Justice v. the International Court of Justice*, 40 Vand. J. Transnat’l L., 2007, p. 1425 (1461) in fn. 190. The Palestinians and most of the international community understand Resolution 242 to oblige Israel to withdraw immediately from all occupied territories; *Sara Roy*, *Failing Peace – Gaza and the Palestinian-Israeli Conflict*, 2007, p. 237.

Civilian Courts for Damages Caused by its Involvement in Terror Acts During the Second Intifada?, *Army Lawyer*, July 2008, p. 1 (2).

²⁴ Oslo Accords, Declaration of Principles on Interim Self-Government Arrangements, September 13, 1993, Preamble.

²⁵ David F. Pustilnik, *Development of the Palestinian State*, 9 *Chi-Kent J. Int’l & Comp. L.*, 2009, p. 1 (4).

²⁶ Avraham Sela, *Non-State Peace Spoilers and the Middle East Peace Efforts*, 2005, pp. 17–18.

²⁷ US Department of State, *Current List of Designated Foreign Terrorist Organizations*, November 24, 2010.

²⁸ Andrew Winnick, *The Prospects for a Two-State Solution Between the Israelis and the Palestinians Given the Current Situation in Gaza*, in: Salinas/Abu Rabi, *Resolving the Israeli-Palestinian Conflict – Perspectives on the Peace Process*, 2009, p. 43 (51).

²⁹ Avraham Sela, *Non-State Peace Spoilers*, 2005, p. 70.

³⁰ Andrew Winnick, in: Salinas/Abu Rabi (Eds.), *Perspectives on the Peace Process*, 2009, p. 43 (51).

³¹ Solon Solomon, *The Great Oxymoron: Jus in Bello Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures Towards Gaza as a Case Study*, 9 *Chinese J. Int’l*

tions 242 and 338 as the basis for future negotiations.³⁸ Thus, the Green Line seems to be the appropriate border under international law.

However, political and practical matters are hindering the implementation of a two-state solution providing for the Green Line as the line of the border: Since 1967, numerous Jewish settlements have been erected within the West Bank, which are often placed in the vicinity of the Green Line, but also frequently in the middle of the West Bank or even close to the Jordan river.³⁹ More than 300,000 Jewish settlers live in the West Bank⁴⁰ and the Israeli government is unwilling to remove (all) those settlers and to demolish the settlements.⁴¹

c) West Bank Barrier

The Green Line as the result of the negotiation process became even more unlikely when Israel built the West Bank Barrier (beginning in 2002) to hinder further attacks. Israel did not adhere to the Green Line but chose a route which on 80% of its length reaches into Palestinian areas, encompassing a total of 10% of the West Bank territory.⁴²

d) Possible Solution

Nonetheless, it has to be recalled that under international law, the Green Line would probably be the (most) legitimate border between Israel and a new Palestinian state. Hence, whenever Israel prevails during the negotiations, for example by using its powerful position to determine the West Bank Barrier as the new border, the Palestinians will have a strong position to press for concessions on other issues in return. One suggestion meeting several needs of the parties includes the Palestinian consent to a border east of the Green Line, and provides for Israeli land concessions elsewhere. Such land to be conceded might be a peripheral area of the Negev desert. If the area is located directly next to the Gaza Strip, this would offer an enormous relief for its high population density. Such transferred territory could be situated parallel to the coast, directly bordering the Gaza Strip and thus “doubling” today’s Gaza Strip. In this way, all transferred territory would consist of peripheral areas of the Negev, though such a solution would be subject to scientific verifications concerning minimum fertility and usability with regard to agriculture. However, this suggestion might fail due to the inner-Palestinian con-

flikt between Hamas and Fatah, because Fatah might not accept permanently losing parts of the West Bank to Israel, whereas its opponent Hamas takes the profit of the bargain.⁴³ Although the conflicting Palestinian parties signed a reconciliation agreement in 2011,⁴⁴ recent developments of the conflict hinder its implementation.⁴⁵ In any case, a solution for the border issue can only be developed in connection with the other issues in dispute.

2. Israeli Settlements

Closely related to the border issue is the future of the numerous Israeli settlements in the West Bank. In order to understand the proposed options, one needs to address questions concerning the legality of the Israeli settlements under international law.

a) Israeli Settlements and International Law

Art. 49 (6) of the Fourth Geneva Convention⁴⁶ stipulates that an “occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.” Although Israel contests the applicability of the Fourth Geneva Convention, the ICJ decided (in an advisory opinion) that Israel is bound by this Convention.⁴⁷ Another question is whether the West Bank territories (as well as the Gaza Strip and East Jerusalem) are “occupied” within the meaning of the provision. The Israeli Ministry of Foreign Affairs expresses its position that the West Bank and the Gaza Strip are “disputed” territories rather than “occupied” territories.⁴⁸ Meanwhile, international law, as defined in Art. 42 of the Hague Regulations, states that a territory “is considered occupied when it is actually placed under the authority of the hostile army”. No requirement exists for the occupier to declare any intent to occupy the territory or to have any specified motives for being present within the territory in question. Hence, under international law, Israel “occupies” the Palestinian territories,⁴⁹ so that the Israeli settlements were erected, and are currently being erected, in violation of international law, especially as the ICJ concluded that the term “transfer” in Art. 49 (6) of the Fourth Geneva Convention includes “measures” by the occupying pow-

³⁸ See for this land exchange suggestion: *Andrew Winnick*, in: Salinas/Abu Rabi, *Perspectives on the Peace Process*, 2009, p. 43 (55).

³⁹ As shown in: http://en.wikipedia.org/wiki/File:West_Bank_%26_Gaza_Map_2007_%28Settlements%29.png#file (May 22, 2012).

⁴⁰ *Chaim Levinson*, IDF: More than 300,000 Settlers live in West Bank, in: *Haaretz*, July 27, 2009.

⁴¹ *Carolynne Wheeler*, Israel Fails to Demolish West Bank Buildings, in: *The Telegraph*, December 5, 2007.

⁴² *Elin B. Hilwig*, The Barrier in the Occupied Palestinian Territory – Protection of Private Property under International Humanitarian and Human Rights Law, 2005, pp. 6–7.

⁴³ *Elin B. Hilwig*, The Barrier, 2005, p. 22.

⁴⁴ *Elin B. Hilwig*, The Barrier, 2005, p. 22.

⁴⁵ *Elin B. Hilwig*, The Barrier, 2005, p. 22.

⁴⁶ Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949.

⁴⁷ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, July 9, 2004, para. 1 and 90–101 presenting elaborate arguments.

⁴⁸ Israeli Ministry of Foreign Affairs, *Disputed Territories – Forgotten Facts About the West Bank and Gaza Strip*, February 1, 2003, http://www.mfa.gov.il/MFA/MFA_Archive/2000_2009/2003/2/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We.

⁴⁹ *Elin B. Hilwig*, The Barrier, 2005, p. 22.

³⁸ The Camp David Accords, September 17, 1978, Preamble.

³⁹ As shown in: http://en.wikipedia.org/wiki/File:West_Bank_%26_Gaza_Map_2007_%28Settlements%29.png#file (May 22, 2012).

⁴⁰ *Chaim Levinson*, IDF: More than 300,000 Settlers live in West Bank, in: *Haaretz*, July 27, 2009.

⁴¹ *Carolynne Wheeler*, Israel Fails to Demolish West Bank Buildings, in: *The Telegraph*, December 5, 2007.

⁴² *Elin B. Hilwig*, The Barrier in the Occupied Palestinian Territory – Protection of Private Property under International Humanitarian and Human Rights Law, 2005, pp. 6–7.

er “to organize or encourage transfers of parts of its own population into the occupied territory”.⁵⁰

The illegality of the Israeli settlements was confirmed by UN Security Council Resolution 446 (1979) which called on Israel to refrain from building settlements in the “occupied” territories as establishing such settlements has “no legal validity.”⁵¹ Consequently, the draft resolution submitted to the Security Council on January 18, 2011, reaffirming “that the Israeli settlements established in the Palestinian territory occupied since 1967, including East Jerusalem, are illegal and constitute a major obstacle to the achievement of a just, lasting and comprehensive peace”⁵², would not have changed the situation legally. Politically, however, a reaffirmation of the UN Security Council’s position more than three decades after Resolution 446 during which Israel continued to establish new settlements, could have influenced the negotiation process. The draft resolution was vetoed by the United States.⁵³

b) Potential Solutions for the Israeli Settlements

The illegality of the Israeli settlements will influence the negotiations concerning a two-state solution, strengthening the Palestinian position and probably requiring Israel to give in on certain issues. In the following, several proposals for handling the Israeli settlements while implementing a two-state solution will be discussed.

aa) Eviction of Israeli Settlers

Firstly, all settlers residing in Israeli settlements could be forcibly evicted, moving more than 300,000 settlers out of the West Bank into Israeli territory, just as Israel did regarding the Gaza Strip, even demolishing the settlements after the eviction. This would be in accordance with Palestinian demands as well as with the view of the Security Council, calling on Israel to “dismantle the existing settlements”⁵⁴. Because Art. 17 (2) of the Universal Declaration of Human Rights protects the individual from being “arbitrarily deprived of his property,” such a removal of settlers could probably only occur in connection with monetary compensation to be paid by Israel to the settlers.⁵⁵ Further, the removal of Israeli settlers might interfere with their right to self-determination

granted by Art. 1 (1) of the International Covenant on Civil and Political Rights (to peoples, not to individuals). However, as the removal would only occur as part of a two-state solution with the consent of the Israelis, the removal would be rooted in the right of self-determination, rather than interfering with it.⁵⁶ In any case, Israeli consent to a total removal of all the Israeli settlements is highly unlikely.⁵⁷ From an Israeli perspective the settlements near the Green Line could even be regarded as a buffer against future aggressions from the Palestinian side.⁵⁸

bb) Israeli Sovereignty or Extraterritorial Jurisdiction

The other extreme solution would be to grant Israel complete sovereignty over the Israeli settlements within the Palestinian territory. In this case the territory of the newly created Palestinian state would be frequently disconnected by the numerous Israeli settlements, leaving Palestinian sovereignty only for separated areas and streets between them. Although there is no requirement under international law for a state to be composed of a contiguous territory, such a solution would not be desirable.⁵⁹

Another solution, close to the one just described, is to grant Israel extraterritorial jurisdiction over the Israeli settlements, which would be permissible under international law. (Although Art. 2 (1) UN Charter stipulates the principle of “sovereign equality” of all its members, this does not require “judicial equality” of all its members.⁶⁰) However, due to practical problems and due to critical aspects of identification of Palestinians with the state to be created, this solution also seems unrealistic, at least in the long term. It could nonetheless frame an option for a first phase of implementing a two-state solution.

cc) Palestinian Sovereignty

Finally, the new Palestinian state could be granted sovereignty over the Israeli settlements. Despite the refusal expressed by the respective settlers, this solution is not unthinkable for Israelis in general.⁶¹ As part of a final peace agreement, it would not violate international law concerning self-determination, but rather be an expression of such self-determination of the Israeli people, even though this would require an exchange of populated territory.⁶² In order to protect the residents of the Israeli settlements from atrocities perpetrated via the territory of

50 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, July 9, 2004, para. 120; *David F. Pustilnik*, *Development of the Palestinian State*, 9 *Chi.-Kent J. Int’l & Comp. L.*, 2009, p. 1 (39); however, advisory opinions of the ICJ are not binding.

51 UN SC Res 446 (S/RES/446), March 22, 1979.

52 This wording of the draft was cited by *DPA*, *ADL Petitions US to Veto Draft Resolution Calling Settlements Illegal*, in: *Haaretz*, January 29, 2011.

53 See Reuters, *U.S. Vetoes U.N. Draft condemning Israeli settlements*, February 18, 2011.

54 UN SC Res 465 (S/RES/465), March 1, 1980.

55 See for this paragraph: *Geoffrey R. Watson*, *Oslo Accords*, 2000, pp. 293–295.

56 Compare: *Yoram Rabin/Roy Peled*, *Transfer of Sovereignty over Populated Territories from Israel to a Palestinian State: The International Law Perspective*, 17 *Minn. J. Int’l L.*, 2008, p. 59 (95).

57 *Geoffrey R. Watson*, *Oslo Accords*, 2000, p. 293.

58 *David F. Pustilnik*, *Development of the Palestinian State*, 9 *Chi.-Kent J. Int’l & Comp. L.*, 2009, p. 1 (38).

59 *Geoffrey R. Watson*, *Oslo Accords*, 2000, pp. 295–296.

60 *Geoffrey R. Watson*, *Oslo Accords*, 2000, p. 292.

61 *Geoffrey R. Watson*, *Oslo Accords*, 2000, p. 296.

62 *Yoram Rabin/Roy Peled*, *Transfer of Sovereignty*, 17 *Minn. J. Int’l L.*, 2008, p. 59 (95–96).

the new Palestinian state there could be a time table with interim phases of decreasing Israeli control.

3. Jerusalem

Finding a solution for Jerusalem is one of the most complicated challenges of the peace negotiations. In Jerusalem there are several holy places of Judaism, Christianity and Islam rendering the discussions highly emotional. The Green Line divides the city into West and East Jerusalem, with the religiously and historically most relevant Old City being part of East Jerusalem. While only a few Arabs live in the Jewish West Jerusalem, considerable numbers of Jews live in the Arabic East Jerusalem, since Israeli settlements were continuously established in that part of the occupied Palestinian territory.⁶³

The two extreme positions of granting complete sovereignty over the whole city of Jerusalem to either Israel or to the new Palestinian state will not be acceptable to the respective other side. A third solution concerning the whole city would be to declare Jerusalem an international zone (*corpus separatum*), as suggested in the 1947 UN Partition Plan (see above). However, Israel has a strong claim to West Jerusalem, because UN Security Council Resolution 242 only called on Israel to withdraw from occupied territories, which includes East Jerusalem, but which can be read as implicitly acknowledging Israeli sovereignty over West Jerusalem.⁶⁴ It has become the PLO's position to claim only East Jerusalem seriously, proposing joint solutions for West Jerusalem.⁶⁵ Thus, possible solutions for Jerusalem would grant West Jerusalem to Israel and probably include a form of shared sovereignty over East Jerusalem.⁶⁶

a) Shared Sovereignty

Since solutions involving extraterritorial rights might not be able to meet the interests of the parties sufficiently (see above), possibilities of shared sovereignty should be considered. Nothing in international law prohibits states from exercising shared sovereignty over territories – such an option was chosen several times before in history: For example Austria and Prussia decided to govern Schleswig-Holstein as a condominium in 1864.⁶⁷ *Watson* describes options for a “condominium” solution⁶⁸ as follows:

⁶³ As demonstrated by the map of Jerusalem in: *Geoffrey R. Watson*, Oslo Accords, 2000, p. 50.

⁶⁴ *Geoffrey R. Watson*, Oslo Accords, 2000, p. 268.

⁶⁵ PLO Negotiations Affairs Department, Jerusalem, Position, as of May 22, 2012, <http://www.nad-plo.org/etemplate.php?id=59&more=1#4>.

⁶⁶ *Andrew Winnick*, in: Salinas/Abu Rabi, Perspectives on the Peace Process, 2009, p. 43 (56).

⁶⁷ *Joel H. Samuels*, Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution, 29 Mich. J. Int'l L., 2008, p. 727 (743–744).

⁶⁸ *Marshall J. Breger*, The Future of Jerusalem: A Symposium – An Introduction, 45 Cath. U. L. Rev., 1996, p. 653 (657).

Basically, one could consider a “territorial”, “personal” or “flexible” approach. A territorial approach would lead to a division of East Jerusalem into different parts, to be governed either by Israel or by the Palestinian state depending on its population structure. Taking a personal approach, the Palestinian state would have jurisdiction over each Palestinian individual and Israel would have jurisdiction over each Israeli individual. This approach bears uncertainties as to which law applies in which situations as it connects sovereignty to the statehood of individuals which move and interact throughout the city (and might even be dual nationals). Hence, *Watson* recommends the more clear-cut territorial approach, though acknowledging that during the previous negotiation process, the parties tended towards a rather flexible approach with territorial jurisdiction in general, except for personal jurisdiction under certain circumstances.⁶⁹ Possible conflicts over jurisdiction should not hinder a solution. Given the complexity of the Israeli-Palestinian conflict, a more complex judicial system resulting in frequent disputes about jurisdiction could be acceptable as long as the chosen solution meets the interests of the parties as well as possible. The importance of how sovereignty over East Jerusalem is exercised might become clear when compared to the Palestinians' readiness to offer concessions: Despite their claims that East Jerusalem should be the capital of a new Palestinian state, the Palestinians would abstain from establishing their government within the municipal borders of East Jerusalem, possibly accepting a site in the suburbs instead.⁷⁰

b) Old City

Finally, it is essential to find a viable solution for the Old City with its holy places. Even if the solution for East Jerusalem will not grant complete sovereignty to the Palestinian state but rather provide for a form of shared sovereignty, the Old City will have to be treated separately, because Israel will not accept Jews visiting the holy places to be subjected to any Palestinian authority unless controlled by Israel. One possibility could be to transfer the authority over the Old City to a committee composed of all affected religious groups, which on the downside might result in permanent disagreement. Another solution could be to establish the Old City as a completely sovereign state like the Vatican, but again, doubts might arise concerning the ability of religious leaders of such a state to keep a peaceful environment around the holy places. Finally, the UN could get involved.⁷¹ At this point, one could consider once more the suggestion of the UN Partition Plan: While it suggested an international zone

⁶⁹ Description as in *Geoffrey R. Watson*, Oslo Accords, 2000, pp. 275–276.

⁷⁰ *Andrew Winnick*, in: Salinas/Abu Rabi, Perspectives on the Peace Process, 2009, p. 43 (55–56).

⁷¹ See for this paragraph: *Geoffrey R. Watson*, Oslo Accords, 2000, pp. 276–277.

for the whole city of Jerusalem – which might cause too much loss for both sides – today, an international zone under UN control could be reconsidered for the Old City.⁷² This could be the most secure solution guaranteeing that both Palestinians and Israelis can live up to their religious needs.

Under international law, all these proposals would be possible as part of a mutual agreement. One requirement is to comply with international obligations to maintain and respect the historical status quo of diverse holy places.⁷³

III. Conclusion

Regarding the complexity of the Israeli-Palestinian conflict, its long history and its emotionality, any solution will be much more elaborate and feature more specific concessions than anything described above. In summary, the interests of both the Israelis and the Palestinians could be met by a two-state solution with the West Bank Barrier as the border (maybe subject to several changes to simplify and rationalize its actual route), granting Israel 10% of the West Bank to keep the settlements within that area. In return, Israel could transfer peripheral territory of the Negev which borders on the Gaza Strip, relieving the Gaza Strip's problem of population density to some extent. While West Jerusalem could remain the capital of Israel, East Jerusalem could be subject to a form of shared sovereignty at the expense of not becoming the capital of the new Palestinian state. The Old City with its holy places could be governed by the UN as an international zone. One further crucial issue to be negotiated are security arrangements aiming for permanent protection of the Israeli population against attacks from the Palestinian side, which might especially occur after a withdrawal of Israeli forces from Palestinian territories and the creation of the new Palestinian state due

⁷² This might be supported by US president Barack Obama, see Obama Plan to Include Jerusalem Old City International Zone, in: *Globes*, May 20, 2009; however, the official US position seems to be that (all of) Jerusalem is subject to negotiations, Spokesperson *Victoria Nuland*, U.S. Department of State Daily Press Briefing, March 28, 2012, http://www.youtube.com/watch?v=t8jra_mPKXQ (May 22, 2012).

⁷³ Convention Concerning the Protection of World Cultural and Natural Heritage, 1972; *Geoffrey R. Watson*, *Oslo Accords*, 2000, pp. 277–278.

to disappointment about the concessions to be made by the PLO.

From a legal perspective, any establishment of a sovereign Palestinian state should derive from a mutual agreement of Israel and the Palestinian authority, in order to respect the right to self-determination. In this regard, the attempt of the Palestinian authority in 2011 to unilaterally establish statehood by requesting full membership in the UN seems inappropriate to realistically promote the peace process. Another unilateral step could be a Palestinian declaration of independence, as in the case of Kosovo, which was successful in terms of receiving recognition from the most relevant states.⁷⁴ However, Palestine has already declared its independence twice, in 1948 and 1988. Although 114 states have since then recognized Palestine as a state,⁷⁵ it lacks support of the most influential countries.⁷⁶

Once an agreement is reached, in order to ensure a sustainable peace, substantially improve the living conditions of the Palestinians and avoid further attacks on Israel, the disastrous Palestinian economy, as well as the civil society, need to be built up: The transportation and connection concept “The Arc” which connects the West Bank and the Gaza Strip could be a starting project.⁷⁷ (To the contrary, an Arabic-Jewish Economic Union as proposed in the UN Partition Plan⁷⁸ seems unfeasible even in the medium term.) Further, a Truth and Reconciliation Commission could be established to investigate the conflict and appease the conflicting parties.⁷⁹

⁷⁴ *Alexander Orakhelashvili*, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, 12 *Max Planck Y. UN. L.*, 2008, p. 1 (25–26).

⁷⁵ *Daniel Benoliel/Ronen Perry*, *Israel, Palestine and the ICC*, 32 *Mich. J. Int'l L.*, 2010, p. 73 (82). The State of Palestine was proclaimed by the Palestine National Council on November 15, 1988. The declaration of 1948 was not even undisputed among the Palestinians and did not obtain considerable acceptance.

⁷⁶ *Daniel Benoliel/Ronen Perry*, *Israel, Palestine and the ICC*, 32 *Mich. J. Int'l L.*, 2010, p. 73 (82).

⁷⁷ Designed by the RAND group, http://www.rand.org/pubs/research_briefs/RB9119/index1.html (May 22, 2012).

⁷⁸ UN GA Res 181 (II) *Future Government of Palestine*, D. Economic Union and Transit.

⁷⁹ *Ariel Meyerstein*, *Transitional Justice and Post-Conflict Israel/Palestine: Assessing the Applicability of the Truth Commission Paradigm*, 38 *Case W. Res. J. Int'l L.*, 2006–2007, pp. 281–361.