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Jeffrey Weiss

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Terminating the Israel-PLO Declaration of Principles: Is It Legal Under International Law?

JEFFREY WEISS*

I. INTRODUCTION

In September 1993, Israel and the Palestine Liberation Organization (PLO) made history when they executed the Declaration of Principles on Interim Self-Government Arrangements (DOP). The DOP, as its title suggests, sets forth basic principles for future talks between Israel and the PLO. These negotiations are to decide the final status of territories, other than the Golan Heights, controlled by Israel since the 1967 Six Day War. Israeli Prime Minister Yitzhak Rabin, Israeli Foreign Minister Shimon Peres, and PLO Chairman Yasser Arafat received the Nobel Peace Prize for their efforts on the DOP agreement.¹

Negotiated in secret, the peace plans as outlined in the DOP elicited hostility both from Israel's conservative Likud bloc and from opposition elements among the Palestinians. Subsequent developments poured fuel on the controversy, until it finally erupted November 4, 1995. On that day, an Israeli Jewish gunman opposing the peace process assassinated Israeli Prime Minister

* Attorney, Harry M. Weiss & Associates, Scottsdale, Arizona, practicing in the areas of international law, commercial litigation and intellectual property. LL.M, with honors, in International and Comparative Law, Georgetown University Law Center; J.D., *magna cum laude*, Arizona State University College of Law; Bar Ilan School of Law, Israel. I wish to express my gratitude to Professor Jonathan Strum.

1. Arafat's receipt of the peace prize generated substantial controversy within Israel. Sarah Honig, *Peres Joins Rabin and Arafat as Nobel Prize Winner*, JERUSALEM POST, Oct. 16, 1994, at 1, available in LEXIS, World Library, ALLNWS File (describing Israeli domestic opposition to Rabin's and Peres's decision to accept the award with Arafat). Indeed, the Nobel committee found itself in conflict over this issue. Minutes after the committee announced the award, one of its members, Kaare Kristiansen, resigned to protest the choice of Arafat as a co-recipient. *Id.*

Rabin, the man seen as the DOP's chief architect.² From the inception of the peace process with the PLO, Likud-affiliated Knesset members intimated a willingness to disown the DOP, should their party win Israel's next election. Indeed, Likud leader Binyamin Netanyahu later announced that the Likud Party, if elected, would move to freeze the peace process.³ Before the assassination of Rabin, Israel's Labour-led government had expressed reservations over the DOP, notably, in response to increased violence against Israelis. Before his death, Prime Minister Rabin repeatedly delayed redeployment of Israeli forces in the territories, contrary to the DOP's contemplated course.⁴ Following the tragedy in Tel Aviv, observers are asking whether Shimon Peres, who succeeded Rabin as Prime Minister, but who lacks his predecessor's popular credibility on security issues, can marshal the broad support needed to continue what Rabin began.⁵

Faced with a chance that this or, more likely, a future Israeli government could move to suspend or even terminate Israeli performance under the DOP, the question arises: How would international law view such an action? The first step in the analysis is to characterize the DOP as a matter of international law. If the DOP is a binding bilateral agreement between subjects of international law, any Israeli cancellation of that agreement should comport with international law governing treaty termination, to wit, the Vienna Convention on the Law of Treaties. If, on the other hand, the DOP's status falls short of an agreement between two subjects of international law, the Vienna Convention would not apply. Between these two extremes lies a middle road:

2. Serge Schmemmann, *Rabin Is Slain at a Peace Rally in Tel Aviv; Israeli Extremists Make Claim for Attack*, N.Y. TIMES, Nov. 5, 1995, at A1.

3. Christopher Walker, *Threat to PLO Deal by Likud*, THE TIMES (London), Mar. 3, 1995 ("Outlining what could happen after next year's general election if he comes to power, Netanyahu said Israel would break off talks with the PLO, reinstitute the right of 'hot pursuit' into Gaza and Jericho and offer the Palestinians a new form of autonomy limited to municipal affairs."); Martin Sieff, *Likud Leader Hits PLO*, WASH. TIMES, Feb. 7, 1995, at A13. Netanyahu has reaffirmed his opposition to the Israel-PLO agreement since the Rabin assassination. Binyamin Netanyahu, *McCarthyism in Tel Aviv*, N.Y. TIMES, Nov. 10, 1995, at A19.

4. According to one published report, Rabin believed that the agreement may suffer from a 'logical flaw' regarding the requirement that Israeli troops redeploy before Palestinian elections. Barton Gellman, *Israel Weighs Changes in Peace Accord*, WASH. POST, Dec. 4, 1994, at A1, A3.

5. Serge Schmemmann, *For New Leader Shouldering the Job, Huge Task and an Uneasy Mandate*, N.Y. TIMES, Nov. 6, 1995, at A7.

although an agreement between subjects of international law, the parties never intended the DOP to bind them fully, envisioning it instead as an "agreement to agree." This Article examines the international legal prospects and consequences of each alternative.

II. NEGOTIATION AND RATIFICATION OF THE DOP

Israel and the PLO concluded the DOP on August 20, 1993.⁶ The agreement's signing followed several years of negotiation between Israel and the PLO dating back to October 1991 and the Madrid Conference.⁷ Initially, the PLO was not a direct participant in the Madrid Conference talks with Israel. Direct talks between the PLO and Israel issued from secret negotiations in Norway, culminating in the DOP agreement.⁸

The 1978 Camp David accords first addressed many of the DOP's ideas.⁹ The Camp David agreements contemplated full autonomy for the residents of the West Bank and the Gaza Strip, withdrawal of the Israeli military government upon the territories' residents' election of a self-governing authority, deployment of a Palestinian police force, and a five-year transitional period leading to resolution of the final status of the territories.¹⁰ Each of these ideas reappears in similar form in the DOP.¹¹

On September 9, 1993, following agreement on the terms of the DOP, Israel and the PLO exchanged letters of recognition. For its part, the PLO recognized "the right of the State of Israel to exist in peace and security," accepted United Nations (U.N.)

6. See JOHN KING, *HANDSHAKE IN WASHINGTON* 125 (1994). Formal execution of the DOP did not take place, however, until September 13, 1993, in Washington, D.C.; Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, *ISRAEL-PLO*, 32 *I.L.M.* 1525 (1993) [hereinafter DOP].

7. Warren Christopher, Speech Delivered on the Signing of the Israel-PLO Accord, in *ISRAEL INFORMATION CENTER, DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS* 13 (1993) [hereinafter *ISRAEL INFORMATION CENTER*].

8. See Clyde Haberman, *How Oslo Helped Mold the Mideast Pact; The Secret Peace*, *N.Y. TIMES*, Sept. 5, 1993, at A1. For a thorough discussion of the Oslo process, see KING, *supra* note 6; JANE CORBIN, *GAZA FIRST* 6 (1994).

9. Prime Minister Rabin referred to the link between the DOP and the Camp David accords in an address to the Knesset shortly after announcing the DOP agreement. See generally DOP, *supra* note 6. See also Raja Shihadeh, *Can the Declaration of Principles Bring About a "Just and Lasting Peace?"*, 4 *EUR. J. INT'L L.* 555, 556 (1993).

10. See A Framework for Peace in the Middle East Agreed at Camp David, *ISRAEL-PLO*, Sept. 17, 1978, 1136 *U.N.T.S.* 196 [hereinafter A Framework for Peace].

11. See DOP, *supra* note 6.

Security Council Resolutions 242 and 338, and committed itself "to a peaceful resolution of the conflict between the two sides."¹² These aspects of the PLO's agreement did not break new ground; in opening an exchange with the United States, the PLO previously had made similar promises.¹³ Nevertheless, the PLO's letter did contain one new item that was a clear response to an oft-repeated Israeli demand. According to Arafat's September 9 letter:

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 PLO 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 PLO undertakes to submit to the Palestinian National Council for formal approval the necessary changes regarding the Palestinian Covenant.¹⁴

For its part, and "in light of the commitments" in Arafat's September 9 letter, Israel recognized the PLO "as the representative of the Palestinian people."¹⁵ Significantly, howev-

12. ISRAEL INFORMATION CENTER, *supra* note 7, at 38.

13. In December 1988, Arafat promised each of these things in order to achieve an official, open dialogue with the United States. KING, *supra* note 6, at 58. That dialogue ended when the PLO refused to repudiate a PLO terrorist attack against Israel. *Id.*; see also Elaine Sciolino, *Washington to Restart Talks with PLO*, N.Y. TIMES, Sept. 10, 1993, at A14.

14. ISRAEL INFORMATION CENTER, *supra* note 7, at 38. In a second letter dated September 9, 1993, addressed to Norwegian Foreign Minister Johan Jorgen Holst, Arafat confirmed that in his public statements, he would call upon the Palestinians to reject violence and terrorism. *Id.* at 40. Evidence shows that, from the very beginning, Israel did not expect the PLO to actually obtain formal approval from the Palestinian National Council of the changes in the Palestinian Covenant. Yitzhak Rabin, *Prime Minister Rabin Defends the Israel-PLO Accord, Address to Labour Knesset Faction* (Kol Yisrael radio broadcast, Sept. 9, 1993), in PEACE WATCH, THE ARAB-ISRAELI PEACE PROCESS AND U.S. POLICY, DOCUMENTS AND ANALYSIS, JANUARY 1993-MARCH 1994, at 84, 85 (Judith Wrubel ed., 1994) [hereinafter PEACE WATCH]. Referring to Yasser Arafat's September 9, 1993 letter to Israel, Prime Minister Rabin said,

[T]his is a commitment to carry the change in the PNC, because Clause 33 of the Palestinian Covenant states that only a two-thirds majority of the PNC can change the Covenant. I am not convinced that the party that is making the arrangement with us enjoys such a majority in the PNC. This is the same PNC that approved, albeit not unanimously, the Madrid Conference

Id.

15. ISRAEL INFORMATION CENTER, *supra* note 7, at 39.

er, Israel did not recognize the PLO, in the manner historically preferred by PLO supporters, as the "sole representative" of the Palestinians.¹⁶

The text of the DOP remained a closely guarded secret until after its execution in Washington, D.C. Indeed, as of September 9, 1993, the day that the Knesset began debating the DOP and only four days before the signing ceremony, the Israeli government had not yet released the text of the DOP to either the Israeli opposition or members of the ruling coalition without cabinet status.¹⁷ The Labour government's failure to consult with the opposition may have contributed to some of the apparent inconsistencies in the DOP.¹⁸

Even before the parties executed the DOP, some within the Likud discussed whether provisionally to disclaim any international obligations to the PLO that the Labour-led government had created.¹⁹ During the Knesset debate, Likud leader Binyamin

16. See, e.g., *PLO Executive Committee Statement on Accord*, (Algiers Voice of Palestine radio broadcast, Sept. 12, 1993), in PEACE WATCH, *supra* note 14, at 91 [hereinafter PLO Statement] ("The PLO has arrived at the first agreement in our contemporary history with Israel that ensures the recognition of the legitimate rights of our Palestinian people and the Palestinian Liberation Organization as its sole representative.").

17. Dan Izenberg, *Knesset to Debate Still-Secret "Gaza/Jericho First" Agreement*, JERUSALEM POST, Sept. 9, 1993, available in LEXIS, World Library, ALLNWS File. The government may have concealed the DOP from the opposition because it recognized that the opposition parties would contest the DOP in any event. It is interesting in this regard to contrast Menachem Begin's handling of the Camp David accords with Yitzhak Rabin's handling of the DOP. Before departing for the conference at Camp David, Begin met with Labour leader Shimon Peres to report on the positions the Israeli delegation would present at Camp David. YAACOV BAR-SIMAN-TOV, *ISRAEL AND THE PEACE PROCESS, 1977-1982: IN SEARCH OF LEGITIMACY FOR PEACE* 111 (1994). While Begin's preparatory work did not prevent Peres from criticizing the extent of Begin's concessions at Camp David, the Labour and opposition parties overwhelmingly supported the Camp David accords. *Id.* at 147-48. See also MOSHE DAYAN, *BREAKTHROUGH: A PERSONAL ACCOUNT OF THE EGYPT-ISRAEL PEACE NEGOTIATIONS 193-94* (1981).

18. For example, the DOP appears to set up both a transitional period, beginning with withdrawal of Israeli forces from Jericho and the Gaza Strip, and an interim period, beginning with establishment of an elected Palestinian Council for the territories. Each phase triggers critical deadlines in the DOP. See generally DOP, *supra* note 6, at arts. V and VI. For a discussion of the DOP's transitional and interim periods, see *infra* note 56. Additionally, the DOP provides for initial redeployment of Israeli forces in the West Bank and Gaza before elections for the Palestinian Council. Prime Minister Rabin may have believed this provision incapable of being fulfilled. See Gellman, *supra* note 4. One wonders whether prior review by opposition members may have led to timely clarification of these issues before the DOP took effect.

19. Dan Izenberg, *Knesset Okays Accord With PLO, 61-50: Vote Gives Rabin "Freedom of Action,"* JERUSALEM POST, Sept. 24, 1993, at 1, available in LEXIS, World

Netanyahu vigorously denounced the agreement, avowing that the DOP would lead inexorably to the creation of a Palestinian state.²⁰ Yet the day after the Knesset approved the DOP, Netanyahu implied that the Likud would, if it came to power, abide by the DOP.²¹

On September 23, 1993, ten days after the Washington, D.C., signing ceremony, the Knesset approved the DOP by a vote of sixty-one to fifty.²² Knesset members voting for approval included those whom opposition leader Netanyahu derisively called the "PLO votes," that is, members of the Democratic Front for Peace and Equality and the Democratic Arab Party.²³ Eight members abstained from the historic vote, including three members of the Likud.²⁴

The PLO's internal approval of the DOP followed a more tortuous path. Arafat did not submit the DOP to the Palestinian National Council for its approval. Instead, he first presented the DOP to the PLO Executive Committee, and then to the Palestine Central Council.²⁵ After Arafat submitted the DOP to the Executive Committee, six of its eighteen members resigned.²⁶ A majority of those remaining approved the accord, as did the members of the Palestine Central Council.²⁷

The Executive Committee members' mass resignation was one of a series of internal PLO protests against the peace process. A number of prominent members of Arafat's own Fatah faction dissented from the DOP. Faruq Qaddumi, the head of the PLO's political section, and the organization's second in seniority after

Library, ALLNWS File.

20. *Likud Leader Binyamin Netanyahu's Knesset Speech Opposing Israel-PLO Accord* (Kol Yisrael radio broadcast, Sept. 21, 1993), in *PEACE WATCH*, *supra* note 14, at 88-90.

21. Izenberg, *supra* note 19.

22. *Id.*

23. *Id.*

24. *Id.* The Likud Knesset members who abstained, in the face of a party decision to oppose the DOP, were Assad Assad, Ronni Milo, and Meir Sheerit. Additionally, Sheerit claimed that a large number of Likud Knesset members supported the agreement but were afraid to act on their beliefs. *Id.*

25. PLO Statement, *supra* note 16; *see also* KING, *supra* note 6, at 128-29.

26. PLO Statement, *supra* note 16, at 91-92.

27. KING, *supra* note 6, at 129; PLO Statement, *supra* note 16, at 91-92. The Executive Committee's approval was grudging; in addition to approving the DOP, the Executive Committee "stress[ed] that stopping all activities of settlement, particularly in Holy Jerusalem, constitutes a main element for ensuring the success of the transitional arrangements." PLO Statement, *supra* note 16, at 92.

Arafat, was among those abstaining from the Executive Committee vote.²⁸ Other prominent PLO representatives opposing the accord included Haida Abdelshafi, head of the Palestinian delegation to the bilateral peace talks in Washington, D.C., and Hanni al-Hassan, a member of the Fatah Central Committee.²⁹

Of course, the PLO's Fatah faction did not comprise the sole opponents to the accord. Four rival PLO factions joined with six other groups, including Hamas, in forming the "National, Democrat and Islamic Front" to contest the accord.³⁰ On October 9, 1993, the opposition alliance issued a statement in Damascus, Syria, vowing to "continue the struggle and jihad against the Zionist enemy to achieve all our Palestinian people's objectives."³¹

Israel's decision to seal an agreement with Yasser Arafat stemmed not from any recognition of the legitimacy of his leadership. Indeed, some observers believe that Israel chose to deal with Arafat because the PLO was in crisis and Arafat's political base was eroding, apparently in the belief that these events would make Arafat a more willing partner.³² At the time the DOP took effect, "the PLO's political organization and infrastructure in the territories barely exist[ed]," with Hamas and other Islamic radicals winning most of the PLO's lost authority in Gaza, Judea, and Samaria.³³

In another development bearing on Israel's continuing inability to suppress the intifada, Arafat's reputation as a terrorist appears to have served as a positive factor in Israel's decision to deal with him. Speaking to the Labour faction at the start of Knesset's DOP debate, Rabin proclaimed that the PLO probably

28. Judith Wrubel, *Palestinian Opposition to the Israel-PLO Accord*, in PEACE WATCH, *supra* note 14, at 125. Qaddumi's abstention also may have been attributable to the fact that he was kept unaware of the Oslo discussions. See KING, *supra* note 6, at 129.

29. Wrubel, *supra* note 28, at 126.

30. *Id.* at 126-27.

31. *Statement by Ten Palestinian Opposition Factions* (Al-Quds Palestinian radio broadcast, Oct. 9, 1993), in PEACE WATCH, *supra* note 14, at 129.

32. According to Ehud Ya'ari, a respected Middle East analyst and Israel Television's commentator on Middle East affairs: "[T]he Oslo agreement was made possible by the internal crisis in the PLO, which was at its nadir immediately prior to the agreement. Recent months had seen mounting challenges to Yasser Arafat: There was open talk of assassination and his political base was steadily eroding." Ehud Ya'ari, *The Crisis in Palestinian Politics and the Oslo Agreement*, in PEACE WATCH, *supra* note 14, at 75.

33. *Id.* at 76.

could preserve law and order in the territories under its control without the "constraints imposed by the Supreme Court and other bodies."³⁴ Rabin's statement seemed to predict that the PLO would be more effective in quelling the intifada than was Israel.³⁵ On yet another occasion, Rabin brushed off Arafat's failure to condemn post-DOP acts of terrorism against Israelis with this blunt remark: "I do not expect them to show such chivalry at this time. We know whom we are dealing with."³⁶

Among the Israeli public, the DOP initially enjoyed strong support. As of September 27, 1993, shortly after the signing ceremony and Knesset approval, sixty percent of Israelis supported the "Gaza-Jericho First" plan, while thirty-eight percent opposed it.³⁷ It did not take long for the numbers to change; by November 19, 1993, less than two months later, the percentage of Israelis approving the autonomy plan had dropped to forty-eight percent, while the percentage opposing the plan had jumped to forty-seven percent.³⁸ Voters expressed their declining support for the DOP in more concrete terms: in November 1993, Likud candidates prevailed in several local elections, including the one in Jerusalem.³⁹ Rabin had encouraged Israelis to link their local election votes to confidence in the accord with the PLO.⁴⁰

34. Rabin, *supra* note 14, at 84.

35. *Id.*

36. Interview with Prime Minister Yitzhak Rabin on Terror, Peace Process (Kol Yisrael radio broadcast, Oct. 25, 1993), in PEACE WATCH, *supra* note 14, at 227. Nevertheless, in his September 9, 1993 letter to Rabin, Arafat pledged that the PLO "renounces the use of terrorism." ISRAEL INFORMATION CENTER, *supra* note 7, at 38.

37. Tracking Poll of Israelis Inside the Green Line, August 29, 1993-December 13, 1993, in PEACE WATCH, *supra* note 14, at 73.

38. *Id.* The results of a December 1993 poll showed that Israeli voter preferences also had changed. *Israeli Opinion Poll: Changes In Voter Preferences, December, 1993*, in PEACE WATCH, *supra* note 14, at 230. Voter preference for the Labour and Meretz coalition parties had declined, while preference for the Likud and Tsomet, both opposition parties, had increased. *Id.*

39. Anton La Guardia, *Israeli Peace Talks Go On After Poll Loss*, DAILY TELEGRAPH, Nov. 4, 1993, at 14 ("Israel's Prime Minister, Mr Yitzhak Rabin, pledged yesterday to continue peace negotiations with the Arabs despite the setbacks suffered by his ruling Labour Party in municipal elections, including defeat of Jerusalem's veteran mayor, Mr. Teddy Kollek."); Linda Gradstein, *Kollek Voted Out as Mayor of Jerusalem*, WASH. POST, Nov. 3, 1993, at A28 ("After 28 years as mayor, Jerusalem icon Teddy Kollek was defeated by right-wing Likud candidate Ehud Olmert today in an election that could have implications for the Israel-Palestinian accord.").

40. Gradstein, *supra* note 39, at A28.

Support for the accord among the Palestinian Arab residents of the territories declined in a similar fashion. While in September 1993, sixty-five percent of the residents of the territories expressed support for the accord, in January 1994, that number had dropped to forty-one percent in January 1994.⁴¹

Despite declining enthusiasm for the accord within their domestic constituencies, both Israel and the PLO continued taking steps to carry out the DOP. On May 4, 1994, Israel and the PLO executed in Cairo an Agreement on the Gaza Strip and the Jericho Area (Cairo Agreement), providing for withdrawal of Israeli forces from the Gaza Strip and Jericho, transfer of authority in those areas to a Palestinian Authority, and deployment of a Palestinian police force.⁴² Under the Cairo Agreement, Israeli forces in Gaza and Jericho have redeployed, a Palestinian police force has entered the area, and Arafat himself has taken up residence in Gaza. Later, on August 29, 1994, Israel and the PLO executed an Agreement on Preparatory Transfer of Powers and Responsibilities, providing for the transfer of powers to the Palestinian Authority in the following five spheres: education and culture, health, social welfare, tourism, and taxation.⁴³

Recently, Israel and the PLO signed an interim agreement in Washington, D.C.⁴⁴ The agreement, signed under DOP auspices and before the Knesset had approved the new document, provides for Palestinian elections and the redeployment of Israeli troops from seven major towns and cities in the territories, Jenin, Tulkarm, Nablus, Qalquilya, Ramallah, Bethlehem and Hebron, by March 10, 1996.⁴⁵ As with the DOP, members of the Likud bloc, including Likud leader Binyamin Netanyahu and former defense

41. *Opinion Poll: Palestinian Voter Preferences, January 16, 1994*, in PEACE WATCH, *supra* note 14, at 139.

42. Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-PLO, 33 I.L.M. 622 (1994) [hereinafter Cairo Agreement]. Execution of the Cairo Agreement did not proceed smoothly. During the televised signing ceremony, Arafat initially refused to sign the maps implementing the Cairo Agreement, contending that the PLO had not agreed to the borders sketched out on them. Marie Colvin, *Arafat Saw a Ghost as the World Watched*, SUNDAY TIMES (London), May 8, 1994, at 18. Arafat finally relented and agreed to sign the maps, but wrote in Arabic above his signature: "My signature is made on the condition that these maps are still under discussion." *Id.*

43. Agreement on Preparatory Transfer of Powers and Responsibilities, Aug. 29, 1994, Isr.-PLO, 34 I.L.M. 455 (1995) [hereinafter Early Empowerment Agreement].

44. Serge Schmemmann, *Lives Are at Stake; So Are Postal Services and Gas Tanks*, N.Y. TIMES, Sept. 29, 1995, at A13.

45. *Id.*

minister Ariel Sharon, have expressed opposition to the interim agreement. Some opposition leaders openly declared the new agreement invalid.⁴⁶ On September 28, the Knesset approved the agreement by the narrowest of margins, sixty-one to fifty-nine.⁴⁷ These developments further reflect the sharp divisions between the two major Israeli parties, Likud and Labour, regarding the wisdom of the current path embarked on with the PLO. Moreover, Israel and the PLO have not scheduled concluding negotiations concerning the final status of the territories until the turn of the century.⁴⁸ Under these circumstances, the question posed by this Article retains its relevance and vitality: Under international law, can Israel legally terminate the DOP, the framework for both interim agreement and permanent status negotiations?

III. THE DECLARATION OF PRINCIPLES

Israel and the PLO executed the DOP, while the United States and the Russian Federation witnessed. The DOP contains seventeen articles and comprises two additional categories of documents: (1) four annexes that address elections, withdrawal of Israeli forces from Gaza and Jericho, cooperation in economic and development programs, and regional development programs; and (2) agreed minutes amplifying the DOP and annexes.⁴⁹

The DOP placed two operative obligations on the parties: to establish a Joint Israeli-Palestinian Liaison Committee (Article X), and an Israeli-Palestinian Economic Cooperation Committee

46. Joel Greenberg, *Settlers Angrily Protest Accord in Hebron*, N.Y. TIMES, Sept. 29, 1995, at A13.

47. Serge Schmemmann, *Arafat, Backed by Israel, Offers an Olive Branch to Militants*, N.Y. TIMES, Oct. 7, 1995, at A2; Batsheva Tsur, *President Weizman: Oslo II "is not an agreement"*, JERUSALEM POST, Nov. 4, 1995, available in LEXIS, World Library, ALLNWS File.

48. Alison Mitchell, *Arafat and Rabin Sign Pact to Expand Arab Self-Rule*, N.Y. TIMES, Sept. 29, 1995, at A1.

49. Supplementing the DOP is the September 9, 1993, exchange of correspondence between Israel and the PLO, according to Joel Singer, Legal Adviser of the Israel Ministry of Foreign Affairs. See Joel Singer, *The Declaration of Principles on Interim Self-Government Arrangements* (Nov. 1, 1994) (unpublished manuscript, on file with author). While the DOP itself neither references nor incorporates any of the September 9 correspondence, subsequent agreements between Israel and the PLO appear to bear out Singer's assertion. Thus, in both the Cairo Agreement and the Early Empowerment Agreement, the parties "reaffirm[] their adherence to the mutual recognition and commitments expressed in the letters dated September 9, 1993." See Cairo Agreement, *supra* note 42, at pmb.; Early Empowerment Agreement, *supra* note 43, at pmb.

(Article XI and Annex III).⁵⁰ The DOP also provided that the parties would negotiate a number of agreements, including some relating to: (1) the withdrawal of Israeli forces from Gaza and Jericho (Annex II, Article XIV); (2) elections to the Palestinian Council (Article III, Annex I); and (3) interim period arrangements (Article VII).⁵¹ Since the execution of the DOP, Israel and the PLO successfully negotiated only the Cairo Agreement, relating to Israeli withdrawal from Gaza and Jericho, and an interim agreement.⁵²

Drawing on the Camp David Agreements between Israel and Egypt, the DOP sets forth two overarching time deadlines. First, it provides for a five-year "transitional period,"⁵³ after which permanent status arrangements will follow.⁵⁴ The five-year transitional period begins upon Israel's withdrawal from Gaza and Jericho, which, pursuant to the Cairo Agreement, was May 4, 1994.⁵⁵ Second, the DOP further provides that negotiations concerning the territories' permanent status are to commence no

50. Antonio Cassese views two other DOP articles as imposing operative obligations on the parties upon the accord's entry into force: (a) Article XIII(1) and (2), relating to the redeployment of Israeli military forces in the West Bank and Gaza Strip "outside populated areas"; and (b) Article VI, relating to the commencement of the transfer of "powers and responsibilities" from the military government and Civil Administration to the "authorized Palestinians." See Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT'L L. 564, 565 (1993). The redeployment of Israeli forces, however, other than from the Gaza Strip and Jericho pursuant to the Cairo Agreement, is not required pending agreement, pursuant to Article III and Annex I on "the exact mode and conditions" of elections to the Palestinian Interim Self-Government Authority. *Id.* Article VI provides for preparatory transfer of powers and responsibilities *after* the withdrawal from the Gaza Strip and the Jericho area; that obligation is itself conditioned on the successful negotiation of an agreement for Israeli withdrawal from the Gaza Strip and Jericho. DOP, *supra* note 6, at art. VI.

51. Cassese argues that each of these three provisions of the DOP is a *pacta de contrahendo*, a legal obligation to conclude an agreement. Cassese, *supra* note 50, at 566. As Cassese concedes, however, Article VII, relating to the agreement on the interim period, uses the term "negotiate" rather than the term "conclude" to describe the parties' obligation under that article. Contrary to Cassese, Joel Singer takes the view that the DOP requires the "negotiation" of further agreements. See Singer, *supra* note 49, at 2.

52. Israel and the PLO executed the Cairo Agreement on May 4, 1994. See Cairo Agreement, *supra* note 42, at art. XXIII.

53. DOP, *supra* note 6, at art. V; A Framework for Peace, *supra* note 111, § A(1)(c).

54. Singer, *supra* note 49, at 14.

55. DOP, *supra* note 6, at art. V; Cairo Agreement, *supra* note 42, at art. XXIII.

later than the beginning of the third year of the "interim period."⁵⁶

The DOP also sets forth two subsidiary deadlines, which neither party met. Pursuant to Article XIV and Annex II of the DOP, the parties were to conclude and sign an agreement on the withdrawal of Israeli forces from Gaza and Jericho within two months from the date of entry of the DOP, that is, by December 13, 1993.⁵⁷ In fact, Israel and the PLO finally concluded an agreement on Israeli withdrawal from Gaza and Jericho on May 4, 1994, nearly five months behind schedule. The DOP also contemplates an Israeli-PLO agreement on Council elections, targeting an election date no later than the ninth month following the DOP's entry into force, that is, July 13, 1994.⁵⁸ The interim

56. DOP, *supra* note 6, at art. V. Articles I and V(1) use the term "transitional period" to refer to the five-year period that commences upon Israeli withdrawal from the Gaza Strip and Jericho, while Article V(2) refers to the third year of the "interim period" as the deadline for commencing permanent status negotiations. *Id.* Article XXIII(3) of the Cairo Agreement provides that May 4, 1994, is the commencement date of the "interim period" referred to in the DOP. At first glance, it appears that the terms "interim period" and "transitional period" are interchangeable and refer to the same five-year period. Article I of the DOP, however, provides:

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council ("the Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years

Id. at 1527. A reasonable interpretation of Article V(2), in light of Article I, is that permanent status negotiations need not commence until the beginning of the third year following establishment of the Council, regardless of the date of Israeli withdrawal from the Gaza Strip and Jericho. This is consistent with the Camp David accords, which formed the basis for this portion of the DOP. *See A Framework for Peace, supra* note 10, § A(1)(c). According to that section:

When the self-governing authority (administrative council) in the West Bank and Gaza is established and inaugurated, the transitional period of five years will begin. As soon as possible, but not later than the third year after the beginning of the transitional period, negotiations will take place to determine the final status of the West Bank and Gaza and its relationship with its neighbors.

Id.

57. The DOP entered into force on October 13, 1993, one month after its execution on September 13, 1993. *See DOP, supra* note 6, art. XVII.

58. *Id.* at art. III(2). The DOP does not expressly provide a deadline or goal for concluding the Interim Agreement. Because the Interim Agreement, however, shall deal with, among other things, the structure and authority of the Council, the parties apparently contemplated that they would negotiate the Interim Agreement before the elections or within nine months of the entry into force of the DOP.

agreement between Israel and the PLO, finally signed under the DOP in Washington, D.C., was fourteen months late.⁵⁹

IV. PLO VIOLATIONS OF THE DOP AND CAIRO AGREEMENT

Since execution of the DOP and the Cairo Agreement, Israel and the PLO both have voiced repeated accusations that the other is violating the agreements or otherwise engaging in conduct inconsistent with their spirit.⁶⁰ From the Israeli point of view, or, perhaps more pointedly, from the point of view of Israel's DOP critics, examples of PLO conduct inconsistent with either the DOP or the Cairo Agreement include the following:

1. The PLO has refused to amend its charter to eliminate provisions inconsistent with the recognition of Israel's right to exist.⁶¹

59. Schmemmann, *supra* note 47, at A2.

60. Israeli government spokesmen more than once have levied charges of DOP violations against the PLO. On December 13, 1994, Israel's Chief Military Judge Advocate issued a report on PLO violations of both the DOP and the Cairo Agreement Chief Military Judge Advocate Report on PLO Violations, *available in* INTERNET, at (<http://haven.ios.com/~likud/other.html>) [hereinafter the Judge Advocate Report]. The Judge Advocate Report drew on information from the Office of the Coordinator for Activities in the Territories, the Command for Supervision, Coordination and Control for the Gaza Strip Area, and by Military Intelligence. In other instances, political opponents of the DOP also have charged the PLO with violations; indeed, domestic political DOP opponents have seemed more willing to denounce perceived PLO violations than the Israeli government. Judith Wrubel, *The Gaza-Jericho Negotiations: Unresolved Issues*, in PEACE WATCH, *supra* note 14, at 202-03. One can speculate that the government eschews the political consequences of attacking the conduct of the PLO with which it so recently concluded the DOP agreement. Cf. Fred Charles Iklé, *After Detection-What?*, 39 FOREIGN AFF. 208, 211 (1961). According to Iklé:

[I]f evidence of the violation is equivocal or based on secret intelligence, the government may be reluctant to acknowledge the evasion or feel unsure of its ability to convince public opinion. For example, an admission that the control agreement had failed might be exploited at home by the political opposition, particularly if the agreement had been made originally by the party in power.

Id.

61. See, e.g., *PNC Speaker on Conditions for Convening Session* (Al Sha'b radio broadcast, Aug. 24, 1994), as translated in NEAR EAST AND SOUTH ASIA DAILY REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-NES-94-164, Aug. 24, 1994, at 6, *microformed on* JPRS Reports (National Technical Information Service) (reporting statements by Salim al-Za'nun, acting speaker of the Palestine National Council (PNC) and a member of Fatah's Central Committee, that a new session of the PNC to discuss amendments to the PLO Charter should await, among other things, an extension of Palestinian authority to east Jerusalem); *Qaddumi on Right to Resistance, PLO Charter* (Radio Monte Carlo radio broadcast, Aug. 16, 1994), as translated in NEAR EAST AND SOUTH ASIA REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-NES-94-159, Aug. 17, 1994, at 6, *microformed on* JPRS Reports (National Technical Information

2. The PLO has ineffectively responded to terrorism against Israelis and generally has faltered in prosecuting suspected terrorists.⁶² As a result, since the DOP's execution, attacks on Israelis have increased substantially.⁶³

3. The PLO has refrained from confiscating unauthorized weapons in areas under its control.⁶⁴

Service) (reporting a statement by Faruq Qaddumi, head of the PLO's political department, that the PLO cannot amend its charter before an Israeli withdrawal and a comprehensive peace agreement between the Arabs and Israelis); *Modification to Palestinian Charter Ruled Out* (Tunisian Republic radio broadcast, Aug. 12, 1994) as translated in NEAR EAST AND SOUTH ASIA REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-NEW-94-157, Aug. 15, 1994, at 12, *microformed on JPRS Reports* (National Technical Information Service) ("A high-ranking Palestinian official ruled out any modification to the Palestinian charter before the organization of elections and Israel's withdrawal from the rest of the West Bank.").

62. U.S. DEP'T OF STATE, REPORT PURSUANT OF TITLE VIII OF PUBLIC LAW 101-246 FOREIGN RELATIONS AUTHORIZATION ACT 2 (1994) [hereinafter STATE DEP'T REPORT]. According to the State Department Report:

The Palestinian police clearly have not been completely effective in halting violence and terrorism. In most cases, the police have arrested activists associated with the faction claiming responsibility for any given act of violence, but have failed to bring any suspects to trial. Most of those detained have been released with no charges filed. Acting on information from the Israeli security forces, the Palestinian police detained three members of the PIJ who were suspects in the murder of two Israeli soldiers near the Erez checkpoint. The suspects were released without charge. In many of these cases, the Palestinian Authority has claimed it had insufficient evidence to prosecute those detained.

Id.

63. Between June 30, 1994, and November 30, 1994, 39 Israelis were killed, including six in areas under the PLO's control. *Id.* at 3. Peace Watch, a non-partisan group monitoring Israeli and PLO compliance with the DOP and related agreements, reported that terror incidents claimed the lives of 123 Israelis during the 18 months following the DOP's execution, 85% more than during the 18-month period preceding the agreement. *Suicide Bombings Almost Double Terror Toll Since Oslo*, JERUSALEM POST, Mar. 13, 1995, at 2, available in LEXIS, World Library, ALLNWS File. Peace Watch also reported that during 1994, the number of unprovoked attacks by settlers against Palestinians "dropped sharply." *Attacks by Settlers on Palestinians Decrease*, JERUSALEM POST, Feb. 26, 1995, at 2, available in LEXIS, World Library, ALLNWS File. Section XVIII of the Cairo Agreement provides that the two sides will take the necessary steps to prevent terrorist activities and will take appropriate legal action against transgressors. Cairo Agreement, *supra* note 42, at 635.

64. Judge Advocate Report, *supra* note 60, § 21. In one instance, Arafat ordered the Palestinian police to return to their owners weapons confiscated from Hamas members. STATE DEP'T REPORT, *supra* note 62, at 7. Pursuant to the Cairo Agreement, the PLO agreed that only members of the Palestinian police force lawfully would possess firearms, and the PLO agreed to enforce this prohibition on civilians subject to its authority. Cairo Agreement, *supra* note 42, at art. IX; and annex I, art. 1.

4. The PLO has armed more police than authorized under the DOP.⁶⁵

5. In May 1994, Arafat, by declaration, purported to cancel all Israeli legislation enacted since June 5, 1967.⁶⁶

6. Over a period of several months, the PLO murdered many Palestinians accused of having collaborated with Israel.⁶⁷

7. The PLO has engaged in hostile propaganda against Israel.⁶⁸

65. While the Cairo Agreement authorizes 8,000 armed Palestinian police, Doré Gold of the Jaffee Center for Strategic Studies in Tel Aviv estimates that there are 17,000 Palestinian police officers. John Donnelly, *Suicide Bombers Kill 6 Israelis 3 Americans Among 45 Hurt in 2 Attacks*, ARIZ. REPUBLIC, Apr. 10, 1995, at A7. In one instance, Arafat created an unauthorized armed force: Preventive Security Apparatus. John West, *We Can Stop Hamas If PLO Lets Us, Commander Says*, Reuters World Service, Aug. 24, 1994, available in LEXIS, News Library, Wires File. The Cairo Agreement expressly prohibits the formation of armed forces, other than the Palestinian police, in areas under the PLO's control. Cairo Agreement, *supra* note 42, at art. IX.

66. Judge Advocate Report, *supra* note 60, at § 27; Sources: *Arafat Constitution Plan Accord Violation* (Ha'aretz radio broadcast, May 27, 1994), as translated in NEAR EAST AND SOUTH ASIA DAILY REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-NES-105, June 1, 1994, at 47 [hereinafter *Constitution Plan*], microformed on JPRS Reports (National Technical Information Service). Israel official Joel Singer called Arafat's action a violation of the DOP. *Id.* ("Foreign Ministry Legal Adviser [Joel] Singer, who played a crucial role in drafting the agreement with the PLO, reacted sharply to Arafat's reference to jihad and his announcement to annul the military government's decrees in the territories . . . [calling] Arafat's action a violation of the agreement.") Pursuant to Article VII of the Cairo Agreement, legislation that was valid at the time of the agreement's execution is to remain valid unless amended or changed by Israel and the PLO in accordance with specified procedures. Cairo Agreement, *supra* note 42, art. VII.

67. *Rabin Suspends Talks on Release of Palestinians*, (Kol Yisrael radio broadcast, Aug. 15, 1994) as translated in NEAR EAST AND SOUTH ASIA REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-NES-94-159, Aug. 17, 1994, at 6, microformed on JPRS Report, (National Technical Information Service).

68. For example, in a November 15, 1994, address in Gaza, Arafat referred to Israel as the "Zionist enemy." STATE DEP'T REPORT, *supra* note 62, at 2. In an earlier speech in a mosque in Johannesburg, South Africa, Arafat had called for a "jihad" over Jerusalem. *Main Battle Is Jerusalem*, JERUSALEM POST, May 18, 1994, available in LEXIS, World Library, ALLNWS File. According to reports, Faruq Qaddumi, head of the PLO's political department, called publicly for Israel's elimination. STATE DEP'T REPORT, *supra* note 62, at 2-3; *Rabin To Pressure Arafat on Covenant, Terrorism* (Ha'aretz radio broadcast, Aug. 16, 1995), as translated in NEAR EAST AND SOUTH ASIA REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-NES-94-158, Aug. 16, 1994, at 33, microformed on JPRS REPORT (National Technical Information Service). In the Cairo Agreement, the PLO had agreed to "abstain from incitement, including hostile propaganda, . . . [and to] take legal measures to prevent such incitement by any organizations, groups or individuals within their jurisdiction." Cairo Agreement, *supra* note 42, at art. XII.

8. When Arafat arrived in Gaza in July 1994, his motorcade included four terrorists wanted for the Ma'alot massacre.⁶⁹

9. The Palestinian Authority is operating at least seven institutions in East Jerusalem: the Religious Affairs Ministry, the Energy Centre, the Bureau of Statistics, the Office of the Mufti of Jerusalem, the Palestinian Economic Council for Development and Reconstruction, the Palestinian Broadcasting Cooperation, and Orient House.⁷⁰

10. The Palestinian Authority refused formal Israeli requests to extradite suspects in the murders of three Israelis.⁷¹

The PLO, for its part, claims that Israel, too, has violated terms of the parties' agreements. Israeli violations, the PLO alleges, include: cordoning off the Gaza Strip and the West Bank, collective punishment of Palestinians by Israel, Israeli confiscation of land, West Bank settlement activities, and an Israeli threat to cease negotiations with the PLO.⁷²

V. THE LEGAL EFFECT OF THE DOP

Since Israel and the PLO executed the DOP, legal commentators have disagreed over the agreement's status as a matter of international law. One commentator argues for treating the DOP

69. David Makovsky, *Arafat 'Sneaks in' Terrorists, Israel Expels Them, but Allows Them Back in After PLO Threat*, JERUSALEM POST, July 23, 1994, at 1, available in LEXIS, World Library, ALLNWS File.

70. *Seven Palestinian Self-Rule Institutions in Jerusalem*, Agence France Presse, Mar. 7, 1995, available in LEXIS, News Library, Wires File (citing the Israeli watchdog group, Peace Watch).

71. According to the Judge Advocate Report, the formal Israeli requests were for the suspected murderers of Uri Megidish, Gil Rave, and Shlomo Kapach. Judge Advocate Report, *supra* note 60, § 4; see also Evelyn Gordon, *PA Refuses to Hand Over Killers of Uri Megidish*, JERUSALEM POST, Jan. 2, 1995, at 1, available in LEXIS, World Library, ALLNWS File. Israel made its requests pursuant to Article II (7) of Annex III to the Cairo Agreement, providing the right to demand extradition from the Palestinian Authority of anyone suspected of committing, within Israeli jurisdiction, a crime with at least a seven-year penalty. Cairo Agreement, *supra* note 42.

72. *Palestinian Meetings in Tunis*, BBC Summary of World Broadcasts, Mar. 21, 1995, available in LEXIS, World Library, ALLNWS File; *U.S. Secretary of State's Visit*, BBC Summary of World Broadcasts, Mar. 7, 1995, available in LEXIS, World Library, ALLNWS File; *Arafat Set to Continue Mideast Discussions with Peres in Paris*, Agence France Presse, Feb. 18, 1995, available in LEXIS, World Library, ALLNWS File. Israel defends certain of these actions, including the closing off of the autonomous areas, as legal Israeli responses to "relatively minor violations" of the DOP. For a discussion of Israel's response to Palestinian DOP violations, see *supra* notes 60-71 and accompanying text.

as a treaty between two full-fledged subjects of international law.⁷³ Another urges that the DOP is a “soft law” instrument, and not a treaty, because Palestine is not a state.⁷⁴ According to a third, Antonio Cassese, the DOP is “a mixture of various types of legal undertakings”: obligations that become operative when the DOP enters into force, obligations to conclude additional agreements, and obligations to negotiate future agreements.⁷⁵ In the opinion of Joel Singer, Legal Adviser of the Israel Ministry of Foreign Affairs and a drafter of the DOP, the pact is a “statement of agreed principles” between Israel and the PLO, an “agreement to reach agreement.”⁷⁶

The position with the most support is that against viewing the DOP as a legally binding international agreement. Full analysis of the issues points to an inexorable conclusion: at most, the DOP is a binding agreement to continue bilateral negotiations.⁷⁷ Three

73. Eyal Benvenisti, *The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement*, 4 EUR. J. INT'L L. 542, 545 (1993). In Benvenisti's view, the PLO acquired status as a subject of international law even prior to Israeli recognition and the DOP's signing. *Id.* at 544-45. While Benvenisti acknowledges that the 1969 Vienna Convention on the Laws of Treaties, applicable to international agreements between states, does not apply to the DOP, he argues that the DOP is still a valid international agreement subject “to the customary laws of treaties, some of which are reflected in the [Vienna] Convention.” *Id.* at 545. Benvenisti, however, undercuts his own argument that the DOP is binding when he characterizes the agreement as a “framework for negotiations . . . [and] establishes basic principles only.” *Id.* at 546.

74. Katherine W. Meighan, Note, *The Israel-PLO Declaration of Principles: Prelude to a Peace?*, 34 VA. J. INT'L L. 435, 448-51 (1994) [hereinafter *Prelude to Peace*].

75. Cassese, *supra* note 50, at 565. According to Cassese, an obligation to conclude a further agreement (*pacta de contrahendo*) makes it “incumbent upon the parties to agree upon a specific legal regulation of the matter outlined in generic terms in the *pactum*.” *Id.* at 566. An obligation to negotiate future agreements (*pacta de negotiando*), in Cassese's view, also imposes a binding legal obligation: the parties are “dutybound to enter into negotiations,” and they may not “(1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and the purpose of the future treaty.” *Id.* at 567.

76. Singer, *supra* note 49, at 276.; CORBIN, *supra* note 8, at 6. Raja Shihadeh, a former legal adviser to the Palestinian delegation at the Israeli-Palestinian negotiations, has described the DOP as “only the preamble to the first phase [of resolving the Israeli-Palestinian conflict] which shall begin with the limited withdrawal of Israeli forces from the Gaza Strip and Jericho.” Raja Shihadeh, *Can the Declaration of Principles Bring About a “Just and Lasting Peace”?*, 4 EUR. J. INT'L L. 555, 561 (1993).

77. As discussed below, even a nonbinding agreement may generate domestic or international political pressure on the parties to adhere to the agreement's terms. See *Prelude to Peace*, *supra* note 74, at 449 (“[S]oft law instruments may hold substantial consequences for domestic and international political processes, and the likelihood of repercussions may exert a compelling influence toward compliance.”).

factors particularly bear closer scrutiny: the PLO's status; the DOP terms and the circumstances surrounding the DOP's execution; and a comparison of the DOP with other peace agreements between Israel and its Arab neighbors.

A. *The PLO's Legal Status*

Generally, treaties enforceable under international law are those concluded between states. Thus, the 1969 Vienna Convention on the Law of Treaties applies only to "treaties between States."⁷⁸ Article 38 of the Statute of the International Court of Justice sets forth what the international community generally regards as the four traditional sources of international law.⁷⁹ These include "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states."⁸⁰

Whether the PLO is a state under international law is a question that has provoked considerable and vociferous debate.⁸¹ Before the DOP, and despite its November 1988 declaration of statehood, the PLO met none of the traditional criteria of statehood: a defined territory, a permanent population, a government, and a capacity to conduct international relations.⁸²

78. Vienna Convention on the Law of Treaties, *done* May 23, 1969, art. 1, 1155 U.N.T.S. 33. *See also id.* art. 2(1)(a) ("For the purposes of the present Convention 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.").

79. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 38, 59 Stat. 1055, 1060; *Prelude to Peace*, *supra* note 74, at 450.

80. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 79, art. 38(1)(a) at 1060.

81. For pre-DOP analysis, *see, e.g.*, Frederic L. Kirgis, Jr., *Admission of "Palestine" as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response*, 84 AM. J. INT'L L. 218, 219 (1990); James L. Prince, Note, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L L. 681 (1989); 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, 18-25 (1980). For a discussion of the PLO's status under international law following the execution of the DOP, *see Prelude to Peace*, *supra* note 74, at 451.

82. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT] (setting forth the criteria of statehood); Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 156 L.N.T.S. 25 (1936) ("The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states."). *See also* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991) ("It is quite clear that the PLO meets none of these [Restatement

Undoubtedly, the DOP and its auxiliary agreements have added impetus to PLO assertions of statehood. Following the Cairo Agreement's entry into force, the PLO could claim a defined territory (the Gaza Strip and Jericho),⁸³ a permanent population (the residents of those areas), and a government (the Palestinian Authority). The DOP and subsequent agreements, however, limit control exercised by the autonomous PLO, and nullify any PLO authority to conduct international relations. Thus, the PLO possesses neither unilateral legislative authority,⁸⁴ nor personal jurisdiction over Israelis.⁸⁵ The PLO further lacks functional jurisdiction over internal security, military installations,⁸⁶ external security,⁸⁷ and foreign relations.⁸⁸ Moreover, the text of the DOP parallels Israel's stated opposition to the creation of an independent Palestinian state in the territories.⁸⁹ Without meeting the statehood criteria, recognition by other countries of the state of Palestine is insufficient to confer such status on the PLO under international law.⁹⁰

Some scholars contend that, even if the PLO is not a state, precedent exists for according legitimacy to international

Section 201] requirements"); Kirgis, *supra* note 81, at 219. The 1974 decision by the General Assembly of the U.N. to grant the PLO observer status may have granted the PLO some limited rights under international law, but it did not confer statehood on the PLO. G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31, at 3, U.N. Doc. A/RES/3237 (1974); HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 120 (1988).

83. One can define territory sufficiently so as to satisfy the criteria for statehood even where the parties have not finally settled the boundaries because of a territorial dispute. RESTATEMENT, *supra* note 82, § 201 cmt. b (1987).

84. Cairo Agreement, *supra* note 42, art. VII.

85. Cairo Agreement, *supra* note 42, art. V(1)(c).

86. *Id.*

87. *Id.*

88. *Id.*; see also Cairo Agreement, *supra* note 42, art. VI(2)(a). Article VI(2)(a) provides:

In accordance with the Declaration of Principles, the Palestinian Authority will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the Gaza Strip or the Jericho Area, the appointment or admission of diplomatic and consular staff, and the exercise of diplomatic functions.

Id.

89. Indeed, the Preamble to the DOP states that it is entered into by "the Government of the State of Israel" and the "PLO Team." DOP, *supra* note 6, at pmb1.

90. See Prince, *supra* note 81, 698-705. Indeed, improper recognition of statehood may violate international law. RESTATEMENT, *supra* note 82, § 202 cmt. f.

agreements between states and national liberation organizations.⁹¹ Although treaties and customary international law grant recognition to agreements between states,⁹² and between states and national organizations,⁹³ agreements between states and national liberation organizations are a different story. No multilateral treaty like the Vienna Convention bestows status on such agreements. Additionally, the few pacts between states and national liberation organizations delineate no general practice sufficiently accepted to constitute international customary law.⁹⁴ Indeed, with respect to the PLO, there appears to have been no general acceptance of its competence to conduct international relations.⁹⁵

91. See Benvenisti, *supra* note 73, at 544-45. Benvenisti cites three examples of national liberation organizations entering into international agreements: the Algerian F.L.N., the African Independence Party of Guinea and the Cape Verde Islands, and the Polisario in the Western Sahara. *Id.* at 544. Benvenisti's reliance on the Algerian example is problematic because France and the F.L.N. did not conclude the agreement following French constitutional procedure and the parties never registered it under Article 102 of the U.N. Charter. SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, at 90 (1989). In any event, Benvenisti's view does not represent a consensus of opinion among international legal scholars on this subject. See, e.g., B. SEN, DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 549 (1988) (stating that agreements with the PLO, even if binding, are not treaties).

92. See Vienna Convention, *supra* note 78, at 333.

93. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543 (1986).

94. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(b), *supra* note 79, at 1060; see also MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 27-28 (1983). According to Akehurst:

Major inconsistencies in the practice (that is, a *large* amount of practice which goes against the rule in question) prevent the creation of a customary rule. Minor inconsistencies (that is, a *small* amount of practice which goes against the rule in question) do not prevent the creation of a customary rule . . . although in such cases the rule in question probably needs to be supported by a *large* amount of practice, in order to outweigh the conflicting practice.

Id. at 28. Isolated instances of governments entering into international agreements with national liberation organizations are not sufficient to establish customary law, particularly given the fact that those agreements appear inconsistent with general practice. See WILSON, *supra* note 82, at 122 (noting that national liberation organizations recognized by the U.N. may express the views of the people in their respective territories, but may not conduct international relations).

95. For example, for most of the PLO's existence, the U.S. has refused to engage it in a formal dialogue, based on its status as a terrorist organization. See, e.g., International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 1302, 99 Stat. 190 (1985) (codified in scattered sections of 22 U.S.C.). The Act provides:

[N]o officer or employee of the United States Government and no agent or other individual acting on behalf of the United States Government shall negotiate with the PLO or any representatives thereof (except in emergency or humanitarian

B. The DOP's Text & Circumstances Surrounding Its Execution

Even where subjects of international law competent to execute treaties reach a written understanding, that pact rises to the level of a treaty only if it aims to create legal rights and obligations between the parties.⁹⁶ Important criteria in this regard include: "(1) intention of the parties to be bound under international law, (2) significance of the agreement, (3) specificity of the agreement, and (4) form of the agreement."⁹⁷ An agreement lacking any intent of creating legal rights and obligations between the parties similarly lacks legal effect (it is *sans portée juridique*).⁹⁸

An agreement's text is unlikely to state expressly that its signatory authorities invest it with no binding intent.⁹⁹ Thus, to ascertain the parties' underlying aims, one must examine the instrument's language, and the circumstances of its conclusion and adoption.¹⁰⁰ The following are indicia of agreement language lacking a binding intent: (1) lack of precision, or generality of terms, (2) statements of general intention or aims, and (3) broad declarations of principles.¹⁰¹ Relevant circumstances of an agreement include: (1) whether the agreement is registered

situations) unless and until the PLO recognizes Israel's right to exist, accepts United Nations Security Council Resolutions 242 and 338, and renounces the use of terrorism.

Id. The Middle East Peace Facilitation Act of 1994 requires the President as a condition to suspension of U.S. laws prohibiting the U.S. government from negotiating with the PLO, to report to Congress every six months concerning the PLO's compliance with its commitments in the two September 9, 1993 letters signed by Arafat. Middle East Peace Facilitation Act of 1994, Pub. L. No. 103-236, § 583, 108 Stat. 488 (1994).

96. B. SEN, *supra* note 91, at 548; see also Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977) ("[A] treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law.").

97. SENATE COMM. ON FOREIGN RELATIONS, 103D CONG., 1ST SESS., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 25-26 (Comm. Print 1993) (prepared by Cong. Research Service).

98. Schachter, *supra* note 96, at 296-97.

99. *Id.* at 297. A notable exception is the Helsinki Final Act, which states that parties are not to register it with the U.N. as a treaty pursuant to Article 102 of the U.N. Charter. See Conference on Cooperation and Security and Cooperation in Europe: Final Act, Helsinki, 1975, 14 I.L.M. 1293 (1975).

100. Schachter, *supra* note 96, at 297.

101. On the other hand, a document's title generally is useless in determining its binding effect. *Id.* at 298. Thus, the DOP's title does not necessarily suggest that Israel and the PLO intended the agreement as a nonbinding statement of principles.

pursuant to Article 102 of the U.N. Charter;¹⁰² and (2) whether submissions to national parliaments or courts characterize it as a treaty.¹⁰³

The DOP's language, in many respects, is inconsistent with binding intent. Israel and the PLO limited the pact's primary obligations to the creation of two committees, a Joint Israeli-Palestinian Liaison Committee and an Israeli-Palestinian Economic Cooperation Committee.¹⁰⁴ These panels provide forums for further debate between parties after the DOP takes effect.¹⁰⁵ Israel and the PLO left for future agreements issues at the heart of the DOP: autonomy, withdrawal from Gaza and Jericho, elections to the Palestinian Council, and the territories' permanent status. Joel Singer, Legal Advisor of the Israel Ministry of Foreign Affairs, accurately characterized the DOP as a "statement of agreed principles" between Israel and the PLO; in other words, it is an "agreement to reach agreement."¹⁰⁶

As a preliminary agreement that lays down principles for future negotiations, the DOP resembles the Camp David accords. While the latter set up a framework for future Israel-Egypt talks and ultimately led to a peace treaty, it stopped short of obligating Israel to withdraw from any territory before the subsequent

102. Article 102 of the U.N. Charter provides as follows:

(1) Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

(2) No party to any treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

U.N. CHARTER article 102. The purpose of treaty registration, as required by Article 102, is "to give effect to the principle and policy of 'open covenants'—enunciated by as the first of President Wilson's Fourteen Points—in lieu of secret diplomacy." Mala Tabory, *Recent Developments in United Nations Treaty Registration and Publication Practices*, 76 AM. J. INT'L L. 350 (1982).

103. Schachter, *supra* note 96, at 298.

104. DOP, *supra* note 6, arts. X, and XI.

105. See *supra* notes 50 and 51 and accompanying text.

106. Singer, *supra* note 49. While Antonio Cassese has argued that the provisions in the DOP relating to the negotiation of future agreements create binding legal obligations, he acknowledges that the provision requiring the negotiation of a final status arrangement leaves much "to the goodwill of the two Parties," and an agreement "is to a large extent contingent upon the future *political* attitude of the Parties and their continuing desire to come to terms and strike substantive deals on this intricate web of problems." Cassese, *supra* note 50, at 568.

treaty's conclusion.¹⁰⁷ At most, such international "agreements to agree" obligate parties to conduct future negotiations in good faith.¹⁰⁸ Such agreements commit the parties "to the principle of cooperation in the area in question," and "can provide an institutional framework for and facilitate such future cooperation, while permitting the parties to work out the specific terms and details of their cooperation over time or in the light of developing conditions."¹⁰⁹ One critical difference exists between the DOP and Camp David agreements. Unlike Egypt, the PLO is not a state.¹¹⁰

The Camp David accords, like the DOP, failed to create effective dispute resolution provisions or establish sanctions for noncompliance. Pursuant to Article XV of the DOP, dispute resolution is to be by negotiation, or, if the parties agree, by conciliation or arbitration.¹¹¹ Plainly, this mechanism breaks down if one or both of the parties ceases its commitment to negotiating the future agreements that the DOP envisions.¹¹²

Circumstances surrounding execution of the DOP are also instructive. Unlike Israel's peace agreements with Egypt and Jordan, and Israel's unratified agreement with Lebanon, the DOP contains no provision requiring registration of the agreement with the U.N. Secretariat pursuant to Article 102 of the U.N. Charter.¹¹³ Significantly, the Camp David accords also contained no

107. A Framework for the Conclusion of a Peace Treaty Between Egypt and Israel, Sept. 17, 1979, Isr.-Egypt, 1136 U.N.T.S. 200.

108. See RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT 34 (1981) (agreements to agree "involve only a commitment to future negotiation"). Moshe Dayan, then Israel's foreign minister, and William Quandt, a member of Jimmy Carter's National Security Council staff during the Camp David negotiations, both appear to have viewed the Camp David accords as an agreement to agree, that is, as an agreement binding Egypt and Israel to conduct future negotiations. See WILLIAM B. QUANDT, CAMP DAVID: PEACEMAKING AND POLITICS 254 (1986) ("The Camp David accords were essentially one more step, but an extremely important one, in the continuing process of negotiations."); see also DAYAN, *supra* note 17, at 194. Dayan characterizes the Camp David accords as "the basis for negotiating a peace treaty with Egypt."

109. BILDER, *supra* note 108, at 35.

110. See *supra* notes 81-90 and accompanying text.

111. DOP, *supra* note 6, art. XV.

112. *Prelude to Peace*, *supra* note 74, at 459.

113. Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Mar. 26, 1979, Egypt-Isr., art. IX(4), 1136 U.N.T.S. 116, (1979) [hereinafter Egypt-Isr. Peace Treaty]; Agreement Between the Government of the State of Israel and the Government of the Republic of Lebanon, May 17, 1983, Isr.-Leb., art. 12, 22 I.L.M. 715 (1983); Treaty

registration provision, although Egypt and Israel did register that agreement *after* conclusion of the Egypt-Israel peace treaty.¹¹⁴

During Knesset debate on the DOP, Israeli officials implied that the DOP was not binding or, at a minimum, created no substantive commitments on Israel's part. Prime Minister Rabin, for example, described the DOP as a starting point in negotiations with the PLO, asserting that "some 80% remains for the negotiations on the implementation."¹¹⁵ Aryeh Deri of the Shas faction, a member of the ruling coalition who abstained during the DOP vote, asserted that the agreement was not a treaty.¹¹⁶

On the other hand, the fact that the Knesset debated the DOP may reflect an Israeli belief that the agreement represents a political landmark, regardless of whether the DOP is binding. Israeli domestic law does not require parliamentary approval to ratify an international agreement; the Government (Cabinet) may enter on international agreement on its own authority.¹¹⁷ Never-

of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, Isr.-Jordan, art. 30, 34 I.L.M. 53 (1995).

114. Egypt registered the Camp David accords and the Egypt-Israel treaty on May 15, 1979. See Egypt-Isr. Peace Treaty, art. IX(4), *supra* note 113; see also A Framework for Peace, *supra* note 10, at 196. Israel registered the Camp David accords shortly thereafter, on June 14, 1979. See Framework for the Conclusion of a Peace Treaty, Isr.-Egypt, Sept. 17, 1978, 1138 U.N.T.S. 53 (1979).

115. Rabin, *supra* note 14, at 84.

116. Izenberg, *supra* note 19, at 1 ("[W]e are not talking about a peace treaty here; we are talking about a declaration of principles regarding which most of the details have not yet been resolved . . . The (outcome) depends upon the steadfastness of the negotiators.") (alterations in original).

117. At a first glance, Israeli law would appear to *require* Knesset approval of treaties. See BASIC LAW: PRESIDENT OF THE STATE § 11(a)(5). That provision of Israeli constitutional law states: "The President of the State shall sign such conventions with foreign states as have been ratified by the Knesset." *Id.* Despite this apparently clear language, successive Israeli governments have taken the position that only where a treaty is, in fact, submitted to the Knesset for approval, shall the President sign it. KATE HOLLOWAY, MODERN TRENDS IN TREATY LAW 376-77 (1967). Holloway cites from a 1951 memorandum the Government of Israel sent to the U.N., setting forth the division of authority between and among the Knesset, the Government, and the President in the treaty-making power area:

(a) The legal power to negotiate, sign and ratify international treaties on behalf of Israel is vested exclusively in the Government of Israel and is in the charge of the Minister for Foreign Affairs;

(b) Where the Knesset has given its approval to the ratification of the treaty, the act of ratification is signed by the President of the State;

(c) Where the President of the State performs acts connected with the treaty-making power, the documents have to bear the attesting signature of the Minister for Foreign Affairs acting on behalf and under the authority of the Government;

theless, Israel has submitted a number of significant agreements to the Knesset for approval, among them the Genocide Convention, the Camp David accords, and the peace treaty with Egypt.¹¹⁸ Given that Israel submitted the Camp David accords, also an agreement to agree, to the Knesset, Knesset approval represents ambiguous evidence of an intent to bind Israel to an agreement's substantive legal obligations.

VI. WHAT RECOURSE IS AVAILABLE TO ISRAEL FOR PLO BREACHES OF THE DOP?

Any recourse available to Israel for PLO violations of the DOP depends on the DOP's legal status.¹¹⁹ If it is a nonbinding agreement, it "does not engage" Israel's legal responsibility; the state is free to terminate without legal consequences.¹²⁰ If it is an agreement to agree that binds Israel to continuing negotiations—a *pacta de negotiando* in Cassese's schematic—an Israeli wish for redress excuses neither acts intended to defeat the agreement nor a prolonged suspension in negotiations.¹²¹ Conversely, a binding international agreement requires that Israeli

(d) General parliamentary control over the actions of the Government in the sphere of treaty-making power is exercised by means of the procedure of proposing motions of non-confidence;

(e) If the international treaty necessitates changes in the domestic law, the Government will not normally ratify the treaty until it is appraised of the attitude of the Knesset.

Id. at 377-79. See also Yehuda Z. Blum, *The Ratification of Treaties in Israel*, 2 ISR. L. REV. 121 (1967). On the other hand, even if not legally required, Israel has made Knesset approval a precondition to an agreement's international effectiveness. See DAYAN, *supra* note 17, at 194 (stating that Israel "made it clear at Camp David that the agreement was subject to Knesset approval").

118. *Opinions*, 19 ISR. L. REV. 294 (1984).

119. Israel in 1992 amended its BASIC LAW: THE GOVERNMENT to provide for direct elections for the Prime Minister. BASIC LAW: THE GOVERNMENT §§ 4-6. Even that change, however, is unlikely to result in the sort of political stalemate where the elected Prime Minister holds one view of the DOP, and a majority of the Knesset holds another. BASIC LAW: THE GOVERNMENT still contemplates that the Government, consisting of the Prime Minister and the Cabinet, will continue to chart a cautious course when faced with divisive foreign policy decisions. Even though directly elected, the Prime Minister still must summon enough broad support to form a government; otherwise, new elections must take place. See *id.* §§ 14-15.

120. Schachter, *supra* note 96, at 300.

121. Cassese, *supra* note 50, at 567.

responses to PLO violations must comport with customary international law and especially with the Vienna Convention.¹²²

A. *The DOP as a Nonbinding Agreement*

A nonbinding agreement in general "does not engage [the] legal responsibility" of the parties; noncompliance provides grounds for neither reparation nor judicial remedies.¹²³ A nonbinding agreement, however, can sustain legal consequences; contracting parties may regard the pact as controlling.¹²⁴ The DOP, at least at first, kindled both domestic and international expectations that its parties would achieve the goals set forth.¹²⁵ The potential for international and domestic political consequences in the event the agreement fails "may exert a compelling influence toward compliance."¹²⁶

Continuing PLO violations of the DOP, of its September 9, 1993 pledges, and of the Cairo Agreement, especially PLO failure to stem anti-Israel terrorism, could dampen any domestic political consequences from Israeli noncompliance. In the months before the November 1995 assassination of Rabin, domestic enthusiasm for the DOP had plunged so low that observers viewed fresh DOP overtures toward peace with the Palestinians as jeopardizing the Rabin government's chances in the forthcoming election.¹²⁷ Regardless of the circumstances, some international criticism would likely greet any Israeli noncompliance. The backlash might lack force; however, the United States, for example, on at least one occasion, voiced understanding of Israel's hesitation to redeploy more troops.¹²⁸ Still, an Israeli repudiation of the DOP triggered

122. *International Law and the United States Action in Grenada: A Report*, 18 INT'L LAW. 331, 361 (1984) [hereinafter *Grenada Report*].

123. Schachter, *supra* note 96, at 300.

124. *Id.*

125. After the attack by Kiryat Arba resident Baruch Goldstein at the Tomb of the Patriarchs in Hebron, the U.N. Security Council passed a resolution supporting the DOP and calling on the parties to implement it. S. C. Res. 904, U.N. SCOR, 49th Sess., 3351st mtg., U.N. Doc. S/RES/904, reprinted in 33 I.L.M. 548 (1994).

126. *Prelude to Peace*, *supra* note 74, at 449.

127. Gellman, *supra* note 4 ("Some cabinet ministers say openly that public outrage at a two-month surge in terrorist attacks, which is expressing itself as disapproval of the peace pact with the PLO Chairman Yasser Arafat, could cost Labour the 1996 election.").

128. Daniel Williams, *Arafat Pledges to Crack Down on Hamas Terror*, WASH. POST, Dec. 8, 1994, at A36. According to Williams,

Israeli officials . . . have raised the possibility of a retreat from the accord on West Bank troop pullouts on grounds that Arafat has failed to crack down on the

by electoral changes in the ruling coalition most likely would provoke an especially hostile international reaction.¹²⁹

B. *The DOP as an Agreement to Agree*

If one views the DOP as a binding agreement to agree, it obliges Israel to negotiate in good faith with the PLO. Thus, the international community could construe any Israeli moves to defeat a future treaty or to confound talks as breaching a promise to negotiate.¹³⁰ To avoid breaching a promise to negotiate in good faith, parties to such an agreement ought to refrain from “an unjustified breaking off of the discussions, abnormal delays, disregard[ing] of agreed procedures, [and] systematic refusals to take into consideration adverse proposals or interests.”¹³¹

According to this standard, Israeli actions to terminate post-DOP negotiations, or otherwise to engage in reprisals toward the PLO, must comply with good faith and avoid the appearance of pretext. To the extent that Israel takes good “faith” action against PLO violations of the DOP and the Cairo Agreement, it could justify its conduct as within the scope of its obligations under an agreement to agree. On the other hand, an Israeli decision to terminate negotiations based solely on a political change of heart would contravene Israel’s obligations under a DOP viewed as a binding agreement to agree.

C. *The DOP as a Binding Treaty*

Considering the DOP a binding international agreement would constrain Israel to international treaty law. The Vienna Convention explains the conditions under which a treaty party may invalidate or withdraw its consent. Under that multilateral agreement, a state may legally invalidate or terminate a treaty (1)

Islamic Resistance Movement, or Hamas, which has taken responsibility for several terrorist attacks on Israelis in recent weeks. In a statement issued Tuesday [Dec. 6, 1994], [U.S. Secretary of State Warren] Christopher expressed sympathy with the Israelis’ hesitation.

Id.

129. Believing that the DOP was bad policy, the Likud initially opposed it, even before its approval by Knesset. See *supra* notes 19-21 and accompanying text. At least at first, one could not characterize the Likud’s opposition as reaction to PLO violations of the DOP.

130. Cassese, *supra* note 50, at 567.

131. In the Matter of the Utilization of the Waters of Lake Lanoux (Fr.-Sp. Arb. Trib.), 12 R.I.A.A. 281 (1957), quoted in BILDER, *supra* note 108, at 35.

in response to a material breach by the other party to the agreement, or (2) based on a fundamental change of circumstances.¹³²

1. Material Breach

The Vienna Convention defines a material breach as a "repudiation of the treaty not sanctioned by the . . . Convention," or "the violation of a provision essential to the accomplishment of the object or purpose of the treaty."¹³³ Under that meaning, the PLO to date has breached a number of its obligations under the DOP. These include: failure to amend the PLO's Charter; failure to act to prevent violence against Israelis; arming of nonauthorized forces; failure to enforce prohibitions against unauthorized possession of weapons; failure to refrain from hostile propaganda against Israel; and unilateral enactment of legislation within the autonomous regions.¹³⁴ For Israel to invoke PLO violations in canceling the DOP, the critical inquiry is whether PLO breaches are sufficiently "material" to justify termination.

PLO violations of the DOP are material within the meaning of the Vienna Convention: that is, they are violations of "provision[s] essential to the accomplishment of the object or purpose" of the agreement.¹³⁵ At its most basic level, the parties intended

132. Vienna Convention, *supra* note 78, arts. 46-52. The mere fact of a change in governments, such as the substitution of a Likud-led government for the one now headed by Labour, provides no legal basis to terminate a treaty. LORD MCNAIR, *THE LAW OF TREATIES* 668 (1961). According to Lord McNair:

Governments are the agents or representatives of States; they constantly figure as the parties to international agreements of the less formal type, but those agreements bind their States. The statement that, in the eye of the law, the parties to treaties are States so that treaties remain in force in spite of changes in the form of Governments, is supported by ample textbook authority and is indeed obvious.

Id. Similarly, no legal basis seems to exist for terminating a treaty solely based on its loss of public support, regardless of whether a prior or incumbent government executed the treaty.

133. Vienna Convention, *supra* note 78, art. 60(3). The drafters of the Vienna Convention rejected a proposal to limit the right of unilateral termination to cases of "fundamental breach." Grenada Report, *supra* note 122, at 361. The drafters employed the term "material breach" to clarify that a breach of a provision considered by a party to be essential to the effective execution of the treaty may be "material," even if the provision is "of an entirely ancillary character." *Id.*; *Second Report on the Law of Treaties* (Sir Humphrey Waldock, Special Rapporteur) [1963] 1 Y.B. Int'l L. Comm'n 36, U.N. Doc. A/CN.4/156/1963.

134. See *supra* notes 61-71 and accompanying text.

135. Vienna Convention, *supra* note 78, art. 60(3).

the DOP to promote peaceful relations between Palestinians and Israelis.¹³⁶ PLO violations of DOP provisions relating to Israelis' security impede Israel's attempts to fulfill the agreement's most basic purpose: ending civil bloodshed.¹³⁷ Because the PLO has materially violated the DOP, the Vienna Convention sanctions Israeli withdrawal of consent under the DOP.¹³⁸

Even for treaties governed by the Vienna Convention, international law sustains rights of reprisal for violations, even for those lesser offenses deemed insufficiently material to justify termination.¹³⁹ In exercising those rights, the aggrieved party may suspend its obligations under the agreement or take proportionate measures against the offending party.¹⁴⁰ The late Prime Minister Rabin's legal advisers favored this approach. They are reported as believing that sanctions like closing off the autonomous areas and canceling safe passage from Gaza to Jericho

136. See, e.g., Rabin, *supra* note 14, at 85. ("[T]his government decided to put an end to the terror and war, to try to build a new world in the state, at home, in the family which did not know even one year or one month of its life in which mothers did not cry for their sons"). See also DOP, *supra* note 6, at pmbl. According to the Preamble of the DOP:

The Government of the State of Israel and the PLO team . . . agree that it is time to put an end to decades of confrontation and conflict, recognize their mutual and legitimate political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.

Id.

137. PLO violations of the DOP directly or indirectly relating to Israeli security, include: the failure to take effective steps to prevent attacks against Israelis or to punish the perpetrators of such attacks and the creation of unauthorized armed forces.

Certainly, not every PLO violation of the DOP is "material," thereby justifying termination under principles of the Vienna Convention. With respect to the Israel-Egypt peace treaty, Israel appears to have taken the view, as a practical matter, that Egyptian violation of the normalization provisions of that treaty are nonmaterial, given Egypt's adherence to the security provisions of that agreement. See, e.g., Moshe Sasson, *Has the Peace Proved Itself?*, JERUSALEM POST, Mar. 25, 1994, at 7, available in LEXIS, World Library, ALLNWS File. Were the PLO complying with the security obligations in the DOP, observers might consider certain of its actions, such as its unilateral repudiation of Israeli legislation in the territories, as violations falling short of materiality.

138. Pursuant to Article 70 of the Vienna Convention, when a treaty is terminated, the parties are relieved from any further obligation to perform. Vienna Convention, *supra* note 78, art. 70.

139. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 190 (1991); T.O. ELIAS, THE MODERN LAW OF TREATIES 114 (1974) ("It is generally agreed that the breach of a treaty obligation by one party entitles the other party to retaliate by means of peaceable reprisals.").

140. SCHACHTER, *supra* note 139, at 190-91.

constitute appropriate Israeli responses to "relatively minor violations" of the DOP.¹⁴¹

2. Fundamental Change of Circumstances

The Vienna Convention also permits termination based on a fundamental change of circumstances, formerly known as the doctrine of *rebus sic stantibus*.¹⁴² The Convention defines a fundamental change of circumstances as follows:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.¹⁴³

Under this definition, a "fundamental change of circumstances" probably means something more than mere noncompliance with an agreement. Therefore, PLO breaches of the DOP alone could not themselves support a legal termination.¹⁴⁴ Moreover, a termination based on a fundamental change of circumstances could not, by definition, turn on conditions known to Israeli government leaders at the time the parties signed the agreement.

While PLO violations of the DOP are irrelevant to the doctrine of fundamental change of circumstances, that doctrine still may provide a basis for an Israeli termination of the agreement. The PLO, in negotiating the DOP, acted as the "representative" of the Palestinian people.¹⁴⁵ An apparent erosion of popular support for the PLO, however, combined with the organization's inability to control Hamas or other rejectionist groups, raises

141. Yitzhak Rabin, *Sources on PLO Violation of Agreement*, (IDF radio broadcast, May 25, 1994), as translated in NEAR EAST AND SOUTH ASIA DAILY REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-NES-94-102, May 26, 1994, at 34, microformed on JPRS Reports (National Technical Information Service); see also *Constitution Plan*, *supra* note 66, at 47 (statement by Joel Singer that "Israel has the right to respond with a violation for each violation").

142. *Grenada Report*, *supra* note 122, at 362-63.

143. Vienna Convention, *supra* note 78, art. 62.

144. *Grenada Report*, *supra* note 122, at 363.

145. See DOP, *supra* note 6, at pmbl.

questions whether the PLO still "represents" the Palestinians. PLO representation of Palestinians appears to have constituted "an essential basis of the consent of the parties to be bound by the treaty." Thus, its absence could lay the groundwork for the agreement's termination.¹⁴⁶

D. Consequences of an Israeli Termination of the DOP

An Israeli government repudiation of the DOP would raise nettlesome issues concerning the fate of concessions granted and rights accruing to the PLO since the DOP's execution. Most conspicuous among these are withdrawal of Israeli forces from the Gaza Strip and Jericho, deployment of thousands of armed Palestinian police there, and creation of a Palestinian Authority with limited self-rule.

With respect to binding international agreements, a termination "does not affect the validity of rights acquired in consequence of the performance of obligations stipulated in the treaty."¹⁴⁷ Based on this rule, at least one commentator argues that the DOP has already created a Palestinian entity with defined borders and jurisdiction, and that terminating the agreement would nonetheless

146. As discussed above, Israel may have been aware that Arafat's power was in decline at the time the parties executed the DOP, a fact militating against applying the doctrine of fundamental change of circumstances. Israel, however, appears to have believed that, either because of benefits flowing from the execution of the DOP, or based on Arafat's strong arm tactics, the PLO would be able to control the Palestinians in its areas. See *supra* notes 32-34 and accompanying text.

147. MCNAIR, *supra* note 132, at 532. According to McNair:

It is an accepted rule of treaty law that the termination of a treaty, for whatever cause and in whatever way, can only affect its continuing obligations, and cannot *per se* affect or prejudice any right already definitively and finally acquired under it, or reverse anything effected by any clause of an executed character in the treaty. Thus, a payment made under the treaty does not become repayable; a settlement of a dispute effected by a treaty does not become reopened because the treaty terminates or is denounced; demarcated frontiers are not rendered indeterminate; cessions of territory are not canceled, etc.

Id. The Vienna Convention provides expressly for the preservation of rights already created under a terminated bilateral treaty:

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

- (a) releases the parties from any obligation further to perform the treaty;
- (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

Vienna Convention, *supra* note 78, art. 70.

leave intact the new geopolitical unit.¹⁴⁸ This proposition, however, appears to go too far. For example, while Israel has redeployed troops outside the autonomous areas, permanent arrangements following a five-year transitional period shall determine the final status of those areas.¹⁴⁹ Thus, Israel's initial deployment does not predestine those autonomous areas' transfer to the Palestinians, nor even Israel's permanent exclusion from them. Indeed, the DOP provides expressly that "the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached for the interim period."¹⁵⁰

The DOP appears to contemplate that Palestinian autonomy will survive the permanent status negotiations.¹⁵¹ Nevertheless, an Israeli termination might leave intact fewer "rights" created for the PLO than one might suppose. Viewing the issue from the PLO's most favorable position, only one "right" would remain intact. Thus, if the DOP is indeed a binding international agreement, the probable surviving right would entail creation of limited self-rule in Gaza and Jericho.

An actual Israeli repudiation, however, could overpower even that straitened right of self-rule. Far from rising to the level of a binding international agreement, the DOP, at most, carries the lesser legal weight of an agreement to agree. As such, one could argue that the rule regarding preservation of previously created rights is inapplicable.

VII. CONCLUSION

Israel's perception of serious PLO violations of the DOP, and the real possibility of political change in Israel's government, enlarges the prospect of Israel severing its obligations under the

148. Benvenisti, *supra* note 73, at 545. Benvenisti relies in this regard on Article 70 of the Vienna Convention. *Id.*

149. *See supra* notes 54-56 and accompanying text.

150. DOP, *supra* note 6, art. V(4).

151. *See* DOP, *supra* note 6, art. I. The DOP provides as follows:

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council, for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on [U.N.] Security Council Resolutions 242 and 338.

Id. Likud leader Binyamin Netanyahu's proposal to freeze the peace process, but to continue allowing limited autonomy in Jericho and the Gaza Strip, seems consistent with this view. *See supra* note 2.

DOP. As a matter of international law, suspension or termination would be within Israel's rights.

Because the PLO is not a state, and because the text of the DOP and circumstances surrounding its execution support a claim that the pact is nonbinding or, at most, an agreement to agree, the DOP imposes no substantive legal obligations on Israel. Of course, any Israeli decision to terminate the DOP would have international political consequences, though not perhaps from its ally, the United States, and might trigger domestic Israeli political repercussions as well.

Even assuming the DOP is a binding international agreement, one could still justify suspension or termination. PLO violations have denied Israel the fundamental security benefits that were to attend execution of the DOP. Thus, the violations are material, and justify Israeli termination or reprisals. Moreover, to the extent the PLO no longer serves as de facto representative of the Palestinians, a fundamental change of circumstances has occurred since the DOP took effect. That would also justify Israeli termination.

International law, however, ultimately may exert little influence on any forthcoming Israeli decisions on the DOP's fate. For if a new government of Israel strongly believes its state's welfare compels termination of the DOP, one presumes it will act accordingly. Former U.S. Secretary of State Henry Kissinger may have delineated both the extent of the state's dilemma and the force of its resolve when he said: "Israel cannot commit suicide for the sake of clauses in an agreement."¹⁵²

152. *Kissinger Sends Message to Nobel Prize Winners*, Xinhau News Agency, Dec. 9, 1994, available in LEXIS, News Library, Wires File.

