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INTRODUCTION

Especially following the unilateral Israeli withdrawal from the Gaza Strip during the summer of 1995, legal scholars and policy makers have increasingly turned to the question of the viability of the future Palestinian state. Terms such as 'territorial contiguity,' 'territorial continuity,' 'territorial connectivity,' 'a viable state,' and 'safe passage' are commonly employed in references to the future state of Palestine, which will comprise two territorial areas. One area of the state will be in the Gaza Strip and the other will be in the West Bank. Approximately twenty miles of the Negev, the southern region of Israel, will separate the two territories. The usage of terms such as 'territorial contiguity,' 'territorial continuity,' and 'territorial connectivity' can imply that some form of a territorial link between the Gaza Strip and the West Bank is necessary and/or desirable. Before reaching any conclusions on this weighty and controversial issue, international law ought to be considered carefully. Is a territorial link indeed required as one of the characteristics of statehood under international law?

The idea of a territorial link between Gaza and the West Bank, commonly called the issue of 'safe passage,' is often overlooked among the vitally important issues addressed by peace process diplomacy. It is understood that such issues as the political status of Jerusalem, the question of refugees, the Jewish settlements, the borders, and security arrangements locally and against long-range missiles (and weapons of mass destruction) are key elements to any political agreement. Regrettably, little or no emphasis has been placed on safe passage, which is an additional dispute that must be addressed if the peace process is ever to reach a successful conclusion. The question of safe passage raises legal, economic and security concerns for Israel as well as for the Palestinians.

Although ignored in international legal literature, the subject of safe passage has increasingly come to the fore. Since Israel's disengagement from the Gaza Strip, it has entered negotiations with the Palestinians over the Rafiah crossing checkpoint between Egypt and the Gaza Strip. A US-brokered agreement provides for 'Gaza-West Bank Convoys' for the movement of goods and people between the West Bank and the Gaza Strip.[3] These developments bolster the credibility of the Palestinian entity as a nascent state. However paradoxically, these same events could threaten Israel with increased terrorism. The same provisions for the movement of civilians and goods could be employed by terrorists and weapons smugglers.

This threat has already materialized at the Rafiah crossing with Egypt.[4] In December 2005, the United States, European Union, and Israel expressed concern

3. Op-ed, *"Unsafe passage,"* JERUSALEM POST, Dec. 12, 2005, *available at* http:elliotjager.com/2005/12/Jerusalem-post-editorial-december-12.html.
4. *Id.*

over the entry of up to 15 militants, among them the brother of Hamas leader Mahmoud Zahar, into Gaza.[5] The Palestinians launched an investigation in response to these concerns. On March 29, 2006, a *Jerusalem Post* article declared that a Katyusha rocket fired into Israel from the Gaza Strip was smuggled through the Egyptian border. The Rafiah border crossing, according to military officials, was "left 'wide open' by European observers and the Palestinians, allowing for the entry of senior Iranian and Syrian terror suspects" along with increasingly dangerous weapons.[6]

During the Second Lebanon War in 2006 both Hamas and Fatah demonstrated support for Hezbollah's missile attacks against the civilian population centers in northern Israel. The authors suspect that longer-range missiles, such as those fired by Hizbullah at the civilian populations of Haifa, Tiberias and Hadera, have been smuggled from Egypt into Gaza via the Rafiah crossing.[7] Fired from Gaza and, all the more so from the West Bank, these missiles would be able to strike almost everywhere in Israel, including the Tel Aviv and Jerusalem metropolitan areas, not to mention Israel's industrial, commercial and military infrastructures.

The Philadelphia Corridor, which is a thirteen-kilometer-wide military zone that runs along the Egyptian border, separates the Palestinian-controlled Gaza Strip from Egyptian towns, making it a crucial area for the transfer of arms into Gaza.[8] On September 1, 2005, Egypt and Israel signed the Agreed Arrangements Regarding the Deployment of a Designated Force of Border Guards along the Border in the Rafiah Area (the Agreed Arrangements), which allowed Israeli forces to evacuate the corridor through the deployment of Egyptian border patrol forces on the Egyptian side of the border.[9] Several months later Yuval Diskin, head of the Shin Bet (Israel's domestic security agency), told the Knesset Foreign Affairs and Defense Committee that "[t]he amount of explosives smuggled into the Gaza Strip from Egypt has grown drastically, by more than 300 percent."[10] On the basis of these statistics, Diskin said that "[i]t is clear that our withdrawal from the

5. UN Division of Palestinian Rights. *Chronological Review of Events Relating to the Question of Palestine* MONTHLY MEDIA MONITORING REVIEW December 2005 *available at,* http://domino.un.org/UNISPAL.NSF/e9abb7dfb6e319c90525675900535dba/c7c0604aaf2d4d32852570dd004fd9a7!
6. Yaakov Katz, *Katyusha fired for first time from Gaza*, JERUSALEM POST, Mar. 29, 2006, *available at* http://www.jpost.com/servlet/Satellite?cid=1143498754886&pagename=JPost%2FJPArticle%2FshowFull.
7. *Cf.* Khaled Abu Toameh, *Terrorist Threaten to Upgrade Missles?* JERUSALEM POST, Dec. 27, 2005, *available at* http://www.jpost.com/servlet/Satellite?cid=1134309652347&pagename=JPost%2FJPArticle%2FshowFull.
8. Brooke Neuman, *A New Reality on the Egypt-Gaza Border (Part I): Contents of the New Israel-Egypt Agreement,* Sept. 19, 2005, http://www.washingtoninstitute.org/templateC05.php?CID=2374.
9. *Id.*
10. Yaakov Katz, *Weapons Smuggling Into Gaza Rising,* JERUSALEM POST, Jan. 10, 2006, *available at* http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1136361053159.

Philadelphia Corridor and our reliance on the Egyptians has proven to be a failure."[11]

Further, the Shin Bet has reported that to its knowledge between September 12 and 18, 2005, over five tons of explosives, 200 anti-tank grenades, 350 anti-tank rockets, and an unspecified number of anti-aircraft missiles were smuggled into Gaza from Egypt.[12] This occurred despite the self-declared 'truce' announced by the Palestinian terrorist organizations in January 2005.[13] Were this amount of smuggled arms to remain constant over the period of a year, 240 tons of explosives, 9,600 anti-tank grenades, and 16,800 anti-tank rockets would be smuggled into Gaza. Additionally, these figures make no allowance for weapons manufactured in Gaza, such as Qassam rockets.

The acid test of Palestinian President Abu Mazen's leadership will be if he effectively demonstrates that he can prevent the smuggling of weapons and explosives into Israel from Gaza through the Karni.[14] The amount of explosives typically required for a suicide belt is estimated to be between seven and ten kilograms. These explosives are typically mixed together with an array of metal objects such as nails and ball bearings.[15] On February 25, 2005, five people were killed and 50 wounded[16] when a suicide bomber carrying twenty pounds of explosives blew himself up in a crowd of young Israelis waiting outside a nightclub on the Tel Aviv beachfront.[17] On July 12, 2005, five people were killed and approximately 90 were wounded when a suicide bomber carrying approximately 22 pounds of explosives blew himself up on a pedestrian crossing near the entrance to the Hasharon Mall in Netanya.[18] The deadliest suicide bombing, which occurred at the Park Hotel in Netanya in March 2002, killed 30 and wounded 140, including 20 seriously, when a terrorist detonated a 10 kilogram-explosive device in the middle

11. *Id.*
12. Margot Dudkevitch, *2,990 Terror Attacks During 2005 'Truce,'* JERUSALEM POST, Jan. 2, 2006, *available at* http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1136102653775.
13. *Id.*
14. Dan Izenberg & Yaakov Katz, *'Karni crossing is an acid test of Abu Mazen's Capabilities,'* JERUSALEM POST, Jan. 5, 2007, at 3.
15. Palestinian Teen Stopped With Bomb Vest, CNN.com, http://www.cnn.com/2004/WORLD/meast/03/24/young.detainees/index.html
16. Israel Ministry Of Foreign Affairs, Suicide Bombing at Tel Aviv Stage Club, (Feb. 25, 2005), www.mfa.gov.il/MFA/MFAArchive/2000_2009/2005/Suicide+bombing+at+Tel+Aviv+Stage+Club+25-Feb-2005.htm
17. CBS News Bombing Snags Mideast Peace Plan, (Feb. 7, 2005) http://www.cbsnews.com/stories/2005 /02/26/world/main676667.shtml
18. Israel Ministry Of Foreign Affairs, Suicide Bombing at Netanya Shopping Mall, (July 23, 2005) http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2005/Suicide+bombing+at+Netanya+shopping+mall+12-July-2005.htm.

of a Passover Seder.[19] Given the smuggling of explosives from Egypt into Gaza, the number of explosives that Palestinian terrorist groups could detonate is frightening. Indeed, car bombs can be even more devastating. Thus, for example, on October 21, 2002, fourteen Israelis were killed and some 40 were wounded by a car that had been packed with approximately 220 pounds of explosives.[20]

With (Palestinian) Islamic Jihad, the Popular Resistance Committees, and the Al Aksa Martyrs Brigade (an arm of the Palestinian Fatah party) announcing an end to the self-declared 'truce' (in Arabic, 'tahdia,' meaning period of calm) of January 2005, under which they pledged to refrain from attacking Israeli targets, the number of arms smuggled on the Philadelphia corridor, between Egypt and the Rafiah crossing in Gaza, will likely increase.[21]

The use of the Philadelphia Corridor, and the possible use of a future 'safe passage,' raises serious security concerns for Israel. Entry into the West Bank effectively amounts to entry into Israel, at least until the completion of the security fence, since large parts of the West Bank security fence are yet to be completed. Thus, with arms and terrorists being smuggled from Egypt into Gaza, and safe passage enabling transit to the West Bank, all forms of attacks on Israel are likely to increase.

The prospect of increased attacks is formidable: 309 attacks employed Qassam rockets in 2004[22] and there were 1,231 mortar attacks in the same year.[23] Recently, the Shin Bet reported that during 2005 the number of Qassam attacks increased to 337 although mortar shelling fell to 848 incidents. Due to Israeli vigilance and the partially effective Palestinian truce, bombings including suicide bombings, declined from 592 in 2004 to 199 in 2005.[24] There were also 1,133 shooting incidents in 2005 as compared to 1,621 during the previous year.[25] Despite these decreases in the overall number of attacks in the year 2005, no country would tolerate this risk to its civilian population centers or strategic infrastructure. In light of these security considerations and the violations of the Rafiah 'agreement' reached between the parties, Israel has halted the plans to escort Palestinians and goods from the Gaza Strip to the West Bank in bus and truck convoys,

19. Israel Ministry Of Foreign Affairs, Passover Suicide Bombing at Park Hotel in Netanya - 27-Mar-2002, http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/3/Passover+suicide+bombing+at+Park+Hotel+in+Netanya.htm
20. Israel Ministry Of Foreign Affairs, Suicide Bombing of Egged Bus No 841 at Karkur Junction, (Oct. 21, 2002), http://www.mfa.gov.il/MFA/MFAArchive/200_2009/2002/10/suicide+bombing+of+Egged+bus+No+841+at+Karkur+junc.htm
21. Dudkevitch, *supra* note 12.
22. Margot Dudkevitch, *2,990 Terror Attacks During 2005 'Truce'*, JERUSALEM POST, Jan. 2, 2006, at 3.
23. *Id.*
24. *Id.*
25. *Id.*

respectively.[26] As an op-ed in *The Jerusalem Post* explained, "convoys and Qassams[27] cannot flow at the same time."[28]

This security threat has been aggravated in recent months by the Palestinian Authority's (PA's) loss of control, in particular, over the Gaza Strip. Anarchy, chaos, and lawlessness have overtaken the area and according to a senior Palestinian official, "[t]he situation in the Palestinian territories is very dangerous because we (the PA) are no longer in control."[29] Masked Fatah gunmen have occupied various PA government buildings, including the Ministries of Interior, Economy and Communications, demanding jobs and money. Fatah gunmen also blocked the entrance to the Rafiah crossing, preventing passage through the terminal. They even confiscated the diplomatic passport of the PA's ambassador to Pakistan, a Muslim country that has always supported the Palestinian cause, and opened fire on his vehicle, causing him and his wife to flee the scene.[30] Further, approximately 100 PA security officers went on a rampage at the Rafiah crossing on December 30, 2005, forcing the unarmed European monitors to flee to a nearby Israel Defense Forces (IDF) base.[31] That same day a 14-year-old boy was inadvertently killed by dozens of gunmen who attacked a PA police station in Gaza in an attempt to release a friend arrested a day earlier.[32]

On January 5, 2005, this chaos spilled into Egypt, with Fatah gunmen in Gaza opened fire at Egyptian army posts after the gunmen demolished parts of the concrete wall on the border between Egypt and Gaza. The attack was in protest of the arrest of one of their colleagues by the PA security forces on the charge of kidnapping three British nationals. The Fatah gunmen killed two Egyptian border guards and wounded at least thirty.[33]

Indeed, even the media have come under attack. Fatah gunmen threatened to shut the offices of the pan-Arab Al Arabiya satellite TV station in the Gaza Strip and West Bank after accusing it of 'defaming' Palestinian female suicide bombers and their families in a documentary aired on the station concerning female suicide bombers in Iraq, Russia, Afghanistan, and the Palestinian Territories. Leaflets distributed by Fatah's armed wing demanded an apology from the station within 24

26. Hilary Leila Krieger, *Gaza-West Bank Convoys Put on Hold,* JERUSALEM POST, Dec. 16, 2005, at 1.

27. The Qassam Rocket is a simple steel rocket filled with explosives, developed by Hamas. Three models have been used. All three models lack a guidance system and are designed specifically as a terror weapon to be used against civilians.

28. Op-Ed, *Unsafe Passage,* JERUSALEM POST, Dec. 12, 2005, at 13.

29. Khaled Abu Toameh, *PA Official: We're No Longer in Control. 'Situation Similar to Somalian Anarchy,'* JERUSALEM POST, Jan. 1, 2006, at 1.

30. *Id.* at 9.

31. *Id.*

32. *Id.*

33. Khaled Abu Toameh, *Fatah Gunmen Kill 2 Egyptian Border Guards,* JERUSALEM POST, Jan. 5, 2006, at 1.

hours, failing which they threatened to close its offices.[34] Such attacks on the media are common place in the Palestinian territories. For example, Saif Eddin Shaheen, a correspondent for Al Arabiya in the Gaza Strip, was beaten in 2004, and was told by one of his attackers, who identified himself as a member of Fatah, that he would "teach him a lesson in journalism."[35] The situation has deteriorated further with journalists in the West Bank and Gaza having received death threats because of their coverage of the state of lawlessness and anarchy in PA controlled areas.[36] These attacks included the August 14, 2006 kidnapping of Fox News journalists Steve Centanni and Olaf Wiig. They were held in Gaza for two weeks and forced to 'convert' to Islam at gunpoint.[37] Even PA security officials have acknowledged that journalists are being subjected to a vicious campaign of intimidation.[38]

Indeed, Dr. Jamal Majaideh, a prominent political analyst from the Gaza Strip, likened the situation in the Palestinian territories to "Taliban-controlled areas in Afghanistan and farms controlled by Jordanian-born terrorist Abu Musab Zarqawi in Iraq."[39] Perhaps more haunting, however, is the comparison made by Palestinian newspaper editor Hafez Barghouti. He likened the situation in Gaza to that which existed in Somalia in the 1990s. Barghouti stated that "[t]he recurring attacks on PA institutions and kidnappings of foreigners makes it look as if we are competing with the warlords and militias in Somalia over who would win the 'Nobel Prize for Anarchy.'" The ongoing anarchy, most severe in Gaza, coupled with the unwillingness or inability of Palestinian President Abu Mazen to take even the most rudimentary steps to restore order accentuates the venomous impact a safe passage arrangement could have by facilitating the spreading of Gaza's lawlessness into the West Bank and ultimately Israel.

Some have suggested that the presence of European Monitors as part of the Border Assistance Mission could assuage the threat to Israel. The ambitious hope that these monitors could secure the border ignores the fact that they are unarmed and have already come under attack, as discussed *supra* in this Introduction. These European Monitors could further dissipate as other monitoring programs in the region and elsewhere have in the past. Historically, Israel's off-putting experiences with various UN peacekeeping forces have made it wary of relying on these forces. In 1967, United Nations Emergency Force I was withdrawn at the precise moment it was most needed, when Egyptian President Nasser was massing troops in Sinai just before the outbreak of the 1967 War. The United Nations Interim Force in

34. Khaled Abu Toameh, *Fatah Gunmen Threaten Arab TV Station for 'Defaming' Bombers,* JERUSALEM POST, Jan. 8, 2006, at 5.

35. *Id.*

36. Khaled Abu Toameh, *Thugs Threaten Palestinian Reporters,* JERUSALEM POST, Jan. 9, 2006, at 2.

37. FoxNews.com, *Timeline: Steve Centanni and Olaf Wiig's Ordeal,* Aug. 28, 2006, http://www.foxnews.com/story/0,2933,210767,00.html.

38. *See* Toameh, *supra* note 36, at 2.

39. Toameh, *supra* note 29, at 9.

Lebanon (UNIFIL) mission in Lebanon from 1978 onward had a vague mandate that proved impossible to carry out; it too failed.[40] The Temporary International Presence in Hebron (TIPH), which encouraged high hopes at its inception in May 1994, was the first attempt at a unique peacekeeping mission designed to promote stability and normalization in Hebron; the TIPH mission withdrew from Hebron in August 1994 following the failure of the PLO and Israel to reach an agreement on its extension.[41] Although a second TIPH mission with modified goals proved longer-lasting, the difficulty in achieving even minor success with a peacekeeping force in this region is again apparent from the failure of UNIFIL II to stem the flow of weapons from Syria across the Lebanese border to the Hizbullah, as required by U.N. Security Council Resolution 1701.[42] This suggests that one must be realistic about the probable achievements of any monitoring force along Israel's border with Gaza and the West Bank.

Further, PA President Abu's continued characterization of Mazen himself s a moderate who does not support the anarchy in the Palestinian territories has had little, if any, impact. When Yasser Arafat died, many people hoped that Abu Mazen would create a new reality. He encouraged these desperate hopes with his electoral promise of "[o]ne law, one authority, one gun."[43] In fact, the reality on the ground has been just the opposite. When called upon to act against gangs of armed terrorists, thugs, and criminals, Abu Mazen has chosen to attempt to talk them into co-operating with the PA. These efforts have been to no avail, leaving Abu Mazen's promise unfulfilled and his credibility in taters.

Hamas' victory in the Palestinian elections of January 2006, and the changing realities that the election brings to the region, make the subject of safe passage even more essential to the dialogue within policy-making communities today. The creation of a safe passage is controversial in large part because the decisive U.N. Security Council Resolution addressing efforts to resolve the Arab-Israeli conflict, Resolution 242,[44] makes no mention of any safe passage regime. This suggests that such passage may not be required by international law: Resolution 242 was not adopted under Chapter VII of the U.N. Charter as an "action with respect to threats to the peace, breaches of the peace and acts of aggression," meaning it is not legally binding.[45] Rather, it was adopted under Chapter VI, dealing with "pacific

40. U.N. ASS'N OF THE U.S., ISSUES BEFORE THE 37TH GENERAL ASSEMBLY OF THE UNITED NATIONS 12 (Donald J. Puchala & Frederic Eckhand eds., 1982).

41. Justus R. Weiner, *The Temporary International Presence in the City of Hebron: A Unique Approach to Peacekeeping*. 16 WIS. INT'L L.J., 281, 315 (1997).

42. Tom Regan, *US Demands Israeli Air Force Stop Flights into Lebanese Airspace,* THE CHRISTIAN SCIENCE MONITOR, Nov. 3, 2006, http://www.csmonitor.com/2006/1103/dailyUpdate.html?s=rel.

43. Isabel Kershner, *The Prison Guard: The Fatah Primaries Produced Clear Results, but Few Solutions,* Dec. 2005, http://www.passia.org/meetings/2005/Prison-Guard.htm

44. S.C. Res. 242, U.N. Doc S/RES/242 (Nov. 22, 1967).

45. Dr. Meir Rosenne, Understanding UN Security Council Resolution 242 of November 22, 1967, on the Middle East (2005), *available at* http://www.defensibleborders.org/rosenne.htm.

resolution of disputes," which states, "the parties to any dispute...shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration... or other peaceful means of their own choice."[46] Such resolutions set out the situation that the U.N. would wish to see eventually in the country or countries in question, but leave its details and implementation to the states concerned.

The focus of this article will be the oft-ignored issue of 'safe passage.' Part I will examine the doctrine of statehood. It will review the historical development of the doctrine from the time of Grotius[47] until the early twentieth century. It will also analyze the traditional criteria for statehood as set out in the Montevideo Convention of 1933, as well as additional modern criteria. Part II will consider 'safe passage,' and analyze what it and its terminology means, and what the implications of these terms may be. Part III will concentrate on Israel's security considerations in the context of 'safe passage.' Part IV will examine the term 'viability,' and whether a non-contiguous state can indeed be viable, and particularly a Palestinian state. This analysis will be conducted, in part, by considering present and past examples of non-contiguous states; that is, states comprised of territory that is, in part, disconnected.

I. THE DOCTRINE OF STATEHOOD

A. The Development of the Doctrine of Statehood

States are the principle subjects of international law.[48] Despite the fact that states are primary actors in the field of international law, there is no universally accepted definition of the term 'state.' Thus, to gain a comprehensive understanding of the term, one should, as a first step, familiarize oneself with its origins. To Roman orator Cicero a state was a "numerous society united by a common sense of right and a mutual participation in advantage."[49] To Hugo Grotius, considered the father of international law, a state was "a complete association of free men, joined together for the enjoyment of rights and for their common interest."[50] These two examples clearly demonstrate that the term 'state'

46. U.N. Charter art. 33, para. 1.

47. Hugo Grotius, otherwise known as Hugo de Groot, worked as a jurist in the Dutch Republic. He laid the foundation of international law, basing it on natural law.

48. MALCOLM N. SHAW, INTERNATIONAL LAW 139 (4th ed. 1997). The traditional view in international law was that only states are subjects of international law. This view is no longer shared by all. Today, it would appear that entities, such as, the United Nations and NGO's are also full subjects of international law.

49. MARCUS TULLIUS CICERO, DE RE PUBLICA 39 (Jeffrey Henderson ed., The Loeb Classic Library 1928) (51 B.C.).

50. H. GROTIUS, DE JURE BELLI AC PACIS LIBRIS TRES, 44 (Frank W. Kelsey ed. & trans., Oxford 1925) (1646).

in its original sense did not bear a precise legal meaning, and amounted to no more than perhaps what could be described today as a 'nation' or a 'people.'[51]

By the nineteenth century the concept of a state had undergone substantial transformation and began to resemble the modern concept. In 1896, the Swiss writer Alphonse Rivier defined a state as "an independent community organized in a permanent manner on *a certain territory*."[52] The essential elements of the state were therefore: territory, population, collective will, governance, independence, and permanence. Rivier thus excluded nomadic tribes and temporary communities from the family of nations.[53]

The English writer Phillimore went even further than Rivier in his prerequisites for statehood and asserted that a state constituted:

> A people permanently occupying *a fixed territory*, bound together by common laws, habits and customs into one body politic, exercising through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into all international relations with the other communities of the globe.[54] (emphasis added)

The most important of the additions made by Phillimore to the concept of statehood was the ability to enter into "all international relations with other communities of the globe."[55] Membership of the 'Family of Nations' was based solely on recognition. Whereas theorists of natural law had accepted the universality of the law of nations, for the nineteenth century positivists, international law was based on the will or consent of nations. Thus, recognition was constitutive of statehood.[56] Therefore, a state could only enter into international relations with other recognized states.

During the mid-nineteenth century state recognition was based largely on the ethnicity of the residents.[57] The features required of a candidate for statehood and its society were those characteristic of European sovereign entities. Given this, statehood and membership in the Family of Nations was not granted lightly to non-European entities, unless they were modeled on European standards.[58] For

51. NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 21-22 (1994).
52. ALPHONSE RIVIER, PRINCIPES DU DROIT DES GENS, PARIS, 1896, 2 Vol. 1, 45-51(emphasis added).
53. *See* J. A. Andrews, *The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century*, 94 LQR 408, 410 (1978).
54. PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 94 (3rd ed. 1879-1899).
55. WALLACE-BRUCE, *supra* note 51, at 411.
56. *See* WALLACE-BRUCE, *supra* note 51, at 417-18.
57. Andrews, *supra* note 53, at 413. (This ethnocentricity is in contrast to earlier European attitudes of writers such as Grotius and Puffendorf amongst others.)
58. *See* WALLACE-BRUCE, *supra* note 51, at 413.

example, recognition was granted somewhat hesitantly to Turkey, China, Japan and Ethiopia.[59]

B. The Traditional Criteria for Statehood

Given that there is a legal concept of statehood, the law must have a means by which one can identify entities as states. In other words, there must be criteria for statehood. The most definitive formulation of the basic criteria for statehood was established in Article I of the Montevideo Convention on Rights and Duties of States, 1933. This reads as follows, "[t]he State as a person of international law should possess the following qualifications: (i) a permanent population; (ii) *a defined territory*; (iii) a government; and (iv) a capacity to enter into relations with other states.[60] (emphasis added)

There is a fifth criterion that is not specifically mentioned in the Montevideo Convention, but which many academics believe to be implied in the fourth criterion. The argument is that independence is implied from the fourth criterion since without independence, an entity cannot operate fully in the international sphere.[61] These five criteria will each be discussed, but emphasis will be placed on the second (a defined territory).

However, before undertaking such an analysis, it is crucial to note that these criteria are neither exhaustive nor immutable. Other more contemporary factors may also be relevant, such as self-determination and recognition, which will be discussed *infra* in Part I (D). Moreover, the weight placed on the respective criteria may vary in differing situations.[62]

1. Criterion i: A Permanent Population

The first criterion for statehood is that of a permanent population. This connotes a stable community of people who identify themselves with a specific territory. The size of the population is of no consequence.[63] Who actually belongs to the population of a state is determined by the municipal law on nationality.[64]

59. Andrews, *supra* note 53, at 416.
60. Convention on Rights and Duties of States (Inter-American), Dec. 26, 1933..
61. WALLACE-BRUCE, *supra* note 51, at 57.
62. SHAW, *supra* note 48, at 140.
63. *See* WALLACE-BRUCE, *supra* note 51, at 53; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 73 (4th ed. 1990); SHAW, *supra* note 48, at 140.
64. MICHAEL AKENHURSTA MODERN INTRODUCTION TO INTERNATIONAL LAW, 82(7th ed. 1997).

2. Criterion ii: A Defined Territory

The second criterion of statehood (and the one with which we are most concerned) is that of a defined territory. States are quite clearly territorial entities and, as such, need a territorial base from which to function. There are various conflicting theories as to the relationship between a state and its territory,[65] but control of territory represents the essence of a state.

While there is a need for a defined territory, there is no prescribed minimum size of the territory. Indeed, one finds both very large and very small states. Russia is 6,592,771 square miles; 1.8 times the size of the United States. Tuvalu, an island group in the South Pacific Ocean, is only 10 square miles, some 0.1 times the size of Washington, DC. Nauru, an island on the South Pacific Ocean is only 8.2 square miles.[66]

Further, it is not a requirement that the boundaries of the territory be fixed or certain. Although defined territory implies this, it is not the case. This was confirmed by the German Polish Mixed Arbitral Tribunal in the *Deutsche Continental Gas-Gese Uschaft v. Polish State* case. The tribunal held that:

> Whatever may be the importance of the delimitation of boundaries one cannot go so far as to maintain that as long as this delimitation has not been legally effected the state in question cannot be considered as having any territory whatsoever.... In order to say that a state exists....[i]t is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited and that the state actually exercises independent public authority over that territory.[67]

65. The various theories as to the relationship between states and territory will be discussed *infra* in part II .

66. *See* WALLACE-BRUCE, *supra* note 51, at 51.

67. *Deutsche Continental Gas-Gesselschaft v. Polish State,* 5. A.D. NO.5, at 14-15 (1929). The creation of a Polish State was one of the Fourteen Points enshrined in the Treaty of Versailles, following World War I. Article 92 of the Treaty provided that in all the German territory that was to become part of Poland, the property, rights and interests of German nationals should not be liquidated. Further, Article 297 (b) stipulates that the question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and the provisions of the Annex attached. However, this is subject to any contrary stipulations which may be provided for in the Treaty itself. There is also a reservation such that the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests, belonging to German nationals within their territories, colonies, possessions and protectorates, including territories ceded to them by the Versailles Treaty, and at the date of the Treaty's coming into existence. On December 14, 1923, the Polish Committee of Liquidation, ordered the liquidation of property owned by the plaintiff company in Warsaw (former Russian territory acquired by Poland). The object of the litigation was to obtain redress provided for in Article 305 of the Treaty of Versailles on the ground that the liquidation was inconsistent with Articles 92 and 297 (b). The plaintiff contended that it was the intention of the Treaty to restrict Poland's right of liquidation to the territories ceded by Germany, that by the terms of S297 (b) the right of Allied and Associated Powers to liquidate was limited to German property within their territory, and that on January 10, 1920 (the date of the coming into force of the Treaty of Versailles) Poland possessed no other territory than that which Germany had ceded to her. Indeed, it was argued that at the time the territory in which the property was situated belonged to Russia, who had not then ceded it to Poland. In the alternative, even if it were assumed that there was a cession of the territory by Russia to Poland, the frontiers of the territory thus ceded were not yet delimited. The Polish state, it was argued, could not therefore be considered as *de jure* possessing the territory, since the boundaries were not delimited. The court rejected this argument.

Israel further demonstrated this idea: the state was admitted to the United Nations in 1948 despite border disputes that continue even today. Accordingly, alterations to a state's territory, whether by increase or decrease, do not affect the identity of the state or its existence.[68] Lest one be tempted to assume that these disputes are marginal, it is advisable to note that organizations such as Hamas,[69] Hezbollah,[70] Palestinian Islamic Jihad,[71] and even the State of Iran[72] deny Israel's right to exist regardless of its dimensions.

What is vital to note is that the criterion of a defined territory does not require that the state possess geographical unity. Indeed, a state may consist of disconnected territorial areas. Many states are comprised of a mainland and islands, such as Australia, which consists the mainland and islands including Tasmania, Norfolk and very distant islands like Christmas and Keeling. A state can also comprise many islands. The Marshall Islands are two archipelagic island chains of 30 atolls and 1,152 islands. Indonesia is the world's largest archipelago with 17,508 islands. These states are not geographically united.

In addition, and of particular relevance to this article, a state may comprise separated territories between which lies territory of a foreign sovereign entity. For example, the United States and Alaska are separated by approximately 1,200 miles of Canadian territory.[73] In fact for the sake of this article we have identified eleven such examples of non-contiguous states, which will be discussed *infra* in Part IV(C).

The lack of a link between separated territories does not affect whether a new political community should be recognized as a state under international law. In

68. KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN INTERNATIONAL LAW 15 (Droit 1968).

69. The Hamas Covenant.

70. Hizbullah: Views and Concepts, *available at* http://almashriq.hiof.no/lebanon/300/320/324/324.2/hizballah/hizballah-background.htm (last visited Oct. 24, 2006). Hizbullah, a terrorist organization in Lebanon, "views the Zionist Jews' occupation of Palestine, displacing its people and establishing the entity of Israel on its usurped land as the living materialization of the most hideous kinds of aggression and organized terrorism."

71. U.S. Department of State, Patterns of Global Terrorism 2001, Appendix B, *available at* http://www.state.gov/documents/organization/10300.pdf (last visited Aug. 19, 2006). Palestinian Islamic Jihad is "committed to the creation of an Islamic Palestinian State and the destruction of Israel through holy war."

72. Golnaz Esfandiari, Iran: President's Anti-Israel Remarks Spark Internal Criticism, *available at* http://www.globalsecurity.org/wmd/library/news/iran/2005/iran-051101-rfer/01.htm (last visited Nov. 19, 2006). On October 26, 2005, Iranian President Mahmud Ahmadinejad, speaking at a forum called 'The World Without Zionism,' stated that "Israel should be wiped off the map."

73. WALLACE-BRUCE, *supra* note 51, at 51-52; Malcolm. N. Shaw, *Territory in International Law,* 13 NYIL 61, 67 (1982).

addition, based on past and present international practice, a state does not possess an inherent right to a link between its geographically distinct areas. In particular this may be applied to the sovereign link called for by the Palestinians between Gaza and the West Bank.

From 1948 to 1967 the Gaza Strip was controlled by Egyptian military rule and the West Bank was occupied by Jordan. During this time, there was no connection between these two territories. After Israel captured these territories in the Six-Day War, U.N. Security Council Resolution 242, which was adopted in November 1967 to recommend a resolution of the final status of the territories, made no mention of a territorial link between Gaza and the West Bank. What is essential is the control of territory -- that the state constitutes a certain coherent territory that is effectively governed.[74]

Theoretically, it appears as if contiguity, to be discussed *infra* in Part II (A), is not an indispensable prerequisite for statehood, or a state's inherent right. However, legal theory is not the only consideration involved in the issue of 'safe passage.' The possibility of creating a non-contiguous state raises additional concerns to be discussed *infra* in part in Part II (A).

3. Criterion iii: Government

The third criterion cited in the Montevideo Convention is that of a government. Effective government is crucial to an entity's statehood. However, it is uncertain what is meant by the term government, given the various forms of government. It appears that what is required is a complete system of institutions regulating all aspects of life within the territory under government control. Effective governance may be determined by the degree of calm or chaos within the territory. If, for example, a civil war breaks out, the effectiveness of the institutions is doubtful.[75]

The requirement of effective government actually has two aspects: the actual exercise of authority, and the right or title to exercise authority. The distinction can be illustrated by reference to Finland and the Congo respectively. Finland had been an autonomous part of the Russian empire since 1807. After the November Revolution of 1917, Finland declared its independence. Its territory was thereafter the subject of numerous military actions and interventions. Order was only restored some time after the declaration of independence.[76] Given this, the International Committee of Jurists appointed to investigate the status of the islands in the *Aaland Islands* dispute held with respect to Finland that "for a considerable time, the conditions required for the formation of a sovereign State did not exist."[77] The Commission of Rapporteurs disagreed with the finding of the Jurists on this

74. *See* James Crawford, *The Criteria for Statehood in International Law*, 48 BYIL 93, 114 (1976-1977).
75. *See* WALLACE-BRUCE, *supra* note 51, at 54.
76. Crawford, *supra* note 74, at 117.
77. *League of Nations O.J.*, Spec. Suppl. 4 at 8-9 (1920).

point, not because they believed that Finland had an effective government, but because of the importance that they attached to Soviet recognition of Finland, and because of Finland's continuity before and after 1917. In this case, they chose not to apply the rather stringent rule relating to effective government in a new State.[78] Thus, Finland was recognized as a state in 1917, despite a lack of effective government.

With respect to the second element -- the right or title to exercise authority -- reference can be made to the case of the Democratic Republic of the Congo. Prior to 1960, Belgium enjoyed the right to govern the Congo. In 1960, Belgium transferred that right to the new entity -- the Democratic Republic of the Congo -- and granted it independence. No preparations had been made for this transfer; the new government was divided and bankrupt, and was hardly able to control the capital city let alone the entire territory. Therefore, Belgian and other foreign troops were dispatched to intervene, and financial and military assistance was provided by the U.N. Despite this chaos, and the evident lack of effective government in the new entity, the Democratic Republic of the Congo was widely recognized as a state and was granted membership in the United Nations. How was it that the Democratic Republic of the Congo came to be recognized and accepted as a state? The answer could lie in the fact that recognition was premature and unwarranted, or in the fact that recognition was constitutive. On the other hand, and most likely, the answer lies in the fact that the requirement of government is less stringent than previously presumed. Thus, *prima facie* a new state that is granted full and formal independence has the international right to govern the territory and will be considered to have satisfied the requirement of effective government even if, practically speaking, the government has little control over the territory.[79]

Today, nearly universal international acceptance of a future Palestinian state, as discussed *infra* in Part I (E), combined with the rudimentary control enjoyed by the PA, support recognition of Palestinian statehood despite a lack of effective governance. It is interesting to consider how the circumstances of the Palestinian campaign for statehood have changed over the past fifteen to twenty years. The so-called 'State of Palestine' that was declared in Algiers on November 15, 1988 by Chairman Yasser Arafat of the Palestinian Liberation Organization (PLO) as well as in front of Al-Aksa Mosque in Jerusalem[80] did not meet the prerequisites for statehood on account of lack of effective control over the claimed territory.[81] Professor James Crawford discusses this in his article, 'The Creation of the State of Palestine: Too Much Too Soon?' Crawford focuses on the notion of state independence in place of the individual criterion for statehood listed in the

78. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 44-45 (1979).
79. *See* Crawford, *supra* note 74, at 116 -17.
80. Francis A. Boyle, *The Creation of the State of Palestine*, 1 EJIL 301, 301 (1990).
81. MALANCZUK, *supra* note 64, at 77.

Montevideo Convention. Crawford asserts that state independence embodies two elements. The first is the existence of an organized community on a particular territory, exercising self-governing power, either exclusively or substantially. The second is the absence of the exercise of power by another state or even the absence of a right, vested in another state, to exercise such governing power. Crawford acknowledged in 1990 that the PLO exerts considerable influence in the disputed territories, but he held that this influence fell far short of an "organized self-governing community."[82] Since 1990, much has changed in the Palestinian territories. The PLO was replaced by the PA that governed the territories following the Oslo Accords in 1993. Despite the PA's rudimentary control, there were several periods, most notably following the outbreak of the 2000 Intifada, during which time Israel maintained military presence in many areas of the territories for security reasons. The Israeli disengagement from the Gaza Strip in August 2005 marks a new level of authority for the PA in Gaza.

What is worrying is that the rudimentary control that the PA once enjoyed over the Gaza Strip and West Bank seems to have dissipated, as discussed in the Introduction. Specifically since the Israeli disengagement from Gaza, the rule in Gaza has been anarchy rather than any semblance of order. This chaos has been multiplied by the efforts of Hizbollah and al-Qaida to establish a presence in the Palestinian areas. Therefore, although the Palestinian territories satisfy the criterion of a 'defined territory,' there are serious doubts as to whether the Palestinians would in fact satisfy the requirement of governance.

4. Criterion iv: Capacity to Enter Into Relations with Other States

The fourth criterion of statehood referred to in the Montevideo Convention is the capacity to enter into relations with other states. The capacity depends, in part, on the power of the internal government in a territory, without which international obligations could not be effectively implemented. It further depends on whether the entity in question enjoys independence, so that no other entity carries out or is responsible for their international obligations.[83] Practically speaking, an entity must actually engage in foreign relations, rather than merely assert a capacity to do so. The mere assertion of such capacity, without more, would be insufficient to meet international legal requirements.[84]

82. *See* James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EJIL 307, 308-309 (1990).
83. Crawford, *supra* note 74, at 119.
84. WALLACE-BRUCE, *supra* note 51, at 55,56.

5. Independence

Independence has been identified by some scholars as an implied fifth criterion,[85] while others simply view it as equivalent to, and the foundation of, the 'capacity to enter into relations with other states.'[86] In the *Island of Palmas* case, Judge Huber stated that "[i]ndependence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[87] This notion was elaborated upon in the *Austro-German Customs Union* case.[88] In his minority opinion Judge Anzilotti gave what is considered to be the *locus classicus* definition of independence. This definition emphasizes two elements: the first is separate territory, and the second is that such territory must not be subject to the authority of another state.[89]

In demonstrating one's independence, the question arises as to what form it should take. There are two recognized forms of independence. The first is formal independence, which exists where governing power over a territory is vested in the separate authorities of the territory.[90] The second is actual independence, which refers to the effective independence of the putative state -- the real governmental power at the disposal of its authorities.[91]

While seemingly simple, the term operates differently in different contexts. Thus, one must distinguish between independence as an initial qualification for statehood and independence as a criterion for the continued existence of a state. A new state that is created by secession or a grant of power from a previous sovereign will have to demonstrate substantial independence before it will be regarded as existent -- it must demonstrate both formal and actual independence. An existing state is subject to a far less stringent requirement.[92] Thus, the Palestinian entity, to be recognized as a state, must be able to demonstrate both formal and actual independence. It is conceivable that the Palestinian entity could demonstrate the existence of both forms of independence.

C. Additional Criteria for Statehood?

In his 1977 article entitled *The Criteria for Statehood in International Law,* Professor Crawford sets out certain additional suggested criteria for statehood. Crawford discusses five such standards: permanence, willingness and ability to observe international law, a certain degree of civilization, recognition, and legal

85. *Id.* at 57.
86. MALCOLM N. SHAW, INTERNATIONAL LAW 142 (1997).
87. *Reports of International Arbitral Awards,* vol. 2, at 829, 838 (1928).
88. 1931 P.C.I.J. (ser. A/B) No. 70.
89. WALLACE-BRUCE, *supra* note 51, at 58.
90. Crawford, *supra* note 74, at 123.
91. *Id.* at 126.
92. *Id.* at 120.

order. Not all of the additional standards that Crawford sets forth appear to be additional independent criteria:

> *a. Permanence*: The American Law Institute's Draft Restatement provides permanence as a precondition for recognition of statehood.[93] However, states may have a very brief existence during which they satisfy the traditional criteria for statehood, and soon after become failed states. Permanence of such an entity may be a relevant piece of evidence supporting the case for statehood, but not a mandatory criterion for statehood.[94]
>
> *b. Willingness and Ability to Observe International Law*: It is sometimes suggested that willingness on the part of an entity to observe international law is a criterion for statehood. More accurately, failure to observe international law may constitute grounds for a refusal to recognize an entity as a state or even for sanctions that are allowed by the law. However both are distinct from statehood.[95]
>
> *c. A Certain Degree of Civilization*: The practice of the United States has, on occasion, supported the view that for an entity to be recognized as a state it must have attained a degree of civilization. Crawford sees this as part of the criterion of governance and not as a separate criterion.[96]
>
> *d. Recognition*: While recognition is not strictly a criterion for statehood, in cases where an entity does not qualify as a state under the traditional criteria for statehood, recognition can be constitutive. This will be discussed *infra* in Part II. Recognition can therefore be a crucial factor in statehood, and at the least, it can constitute evidence of legal status.[97]
>
> *e Legal Order*: It might be thought that the existence of legal order is a criterion for the existence of a state. While legal order is an important element of the criterion of government, and therefore an indication of statehood, whether it is an independent criterion is questionable.[98]

93. *Restatement (2nd), Foreign Relations Law of the United States* § 100 (1965).
94. Crawford, *supra* note 74, at 140,141.
95. *Id.* at 141.
96. *Id.* at 142.
97. *Id.*

The criteria that Crawford sets out as possible additional standards do not, in the opinion of the authors, constitute additional independent criteria. There are, however, other modern criteria that *do* supplement the traditional criteria for statehood. These criteria are a rule of legality, self-determination, recognition (as discussed above), and assertions of statehood.

D. Additional Criteria for Statehood Suggested as a Result of Modern Developments in International Law

In recent years additional criteria for statehood have been mooted. These criteria have been formulated in response to state practice. There have been entities that seem to meet the traditional criteria for statehood and nevertheless have had their claims to statehood rejected. An example of such a state is Rhodesia.[99] Conversely, there have been entities that seemingly fail to satisfy the traditional criteria for statehood, and yet they have been accepted and recognized as states. An example of such a state is Guinea-Bissau.[100] This suggests that further considerations have been developed and have gained acceptance in this area of international practice.[101]

Modern states appear to share certain characteristics. In 1977, Professor James Crawford enumerated exclusive and general legal characteristics of states. Crawford identified five characteristics, which constitute the foundation of statehood. First, states have plenary competence, *inter alia*, to perform acts in the international arena. Second, states have exclusive competence with respect to their internal affairs, which means that their jurisdiction is plenary and independent of interference by other states.[102] The third characteristic that Crawford identifies is that, in principle, states are not subject to compulsory international process, jurisdiction or settlement. To be so subject the state must actually consent either in a specific situation or generally. The fourth characteristic is that states are regarded as equal, regardless of territorial dimension, population, military capability or

98. *Id.*
99. WALLACE-BRUCE, *supra* note 51, at 79-82. This will be discussed *infra* in Part II.
100. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 260-61 (1979). Guinea-Bissau was colonized by Portugal beginning in the 17th century. The African Independence Party of Guinea and the Cape Verde Islands was formed in 1956. Using armed resistance, in 1970 the Independence Party claimed to have liberated a large part of the country, and in 1973 formally proclaimed independence. By May 1974, the 'state' had been recognized by eighty-four countries, and welcomed by the U.N. Security Council which unanimously recommended its admission to the U.N. However, the Agreement Granting Independence between Portugal and Guinea-Bissau was not concluded until August of 1974. Despite this, and thus despite the fact that Guinea-Bissau did not satisfy the traditional criteria of statehood, recognition as a state was granted to Guinea-Bissau.
101. WALLACE-BRUCE, *supra* note 51, at 66.
102. A state's duty of non-interference will be discussed *infra* in Part II.

economic strength. Fifth and finally, any derogation from these principles must be specifically agreed to. Thus, the state in question must consent to an exercise of international jurisdiction or a derogation from equality. In case of doubt as to whether a state has in fact consented to any such derogation, an international court or tribunal will draw a rebuttable presumption in favor of its freedom of action.[103] For Crawford, these five principles constitute the essence of statehood. Given these common characteristics, one can assess what additional standards for statehood have developed by examining those entities that share these characteristics.

1. The Rule of Legality

This rule states that in satisfying the traditional criteria for statehood, an entity must not have breached any international law or norm. Framed positively, the rule asserts that an entity, in satisfying the traditional standards of statehood, must do so in accordance with international law. If an entity emerges through acts that are considered to be illegal in terms of international law or norm then no matter how effective the entity may be, its claim to statehood cannot be maintained.[104]

International Law Concerning Friendly Relations and Cooperation Among States, in accordance with the Charter of the United Nations, sets forth some basic precepts.[105] These principles give content to the rule of legality. A serious infringement of these standards would bring into question the credibility of an entity claiming statehood, even if it satisfies all of the traditional criteria.[106]

2. Self-Determination and Statehood

The term self-determination was defined in the *Western Sahara* case as the free and genuine expression of the will of the people in a particular territory.[107] According to Professor Crawford, the term has two quite distinct meanings. It can mean the sovereign equality of existing states, and, in particular, their right to choose their own form of government without intervention. It can also mean the

103. Crawford, *supra* note 74, at 108.
104. WALLACE-BRUCE, *supra* note 51, at 66,67.
105. *Id.* at 68. The declaration states that:
1. States shall refrain from the threat or use of force against the territorial integrity or political independence of a state;
2. States shall settle their international disputes by peaceful means;
3. The duty not to intervene in matters within the domestic jurisdiction of any state;
4. The duty of states to cooperate with one another;
5. Principles of equal rights and self-determination of peoples;
6. Sovereign equality of states; and
7. States shall fulfill in good faith the obligations assumed by them under the charter.
106. *Id.*
107. Michael Curtis, *International Law and the Territories* 32 HARV. INT'L L.J. 457, 471 (1991).

right of a specific people to choose its own form of government irrespective of the wishes of the State of which they are a part.[108]

Self-determination has affected the criterion for government in the sense that the standard necessary, as far as the actual exercise of authority is concerned, is substantially lessened. This can be demonstrated by reference to the former Belgian Congo, which became independent in 1960. Despite what could only be described as turmoil within the territory and the virtual breakdown of government, the Congo was recognized as a state in large part due to the effect that self-determination has had on the criterion of government. Since there was attainment of self-determination in the Congo, the requirements for effective government were significantly lessened. Therefore the entity could be recognized as a state despite internal turmoil.[109]

In addition to modifying this traditional prerequisite of statehood, the principle of self-determination is sometimes also considered to be a criterion of its own.[110] On this basis, an entity that lacks the support of the populace, but which purports to be a state, will have its claim to statehood rejected.[111] This can be demonstrated by the case of Rhodesia. Prior to the arrival of the British, the area today known as Zimbabwe was occupied by independent tribes such as the Shona and the Ndebele. In 1890 Cecil Rhodes set up camp in Harare and hoisted the British flag. In 1923 the territory was formally incorporated into the British Empire. In 1953, Southern Rhodesia, Northern Rhodesia (now Zambia) and Nyasaland (now Malawi) joined together to form the Central African Federation under the British Crown. In 1963, the Federation was terminated. Malawi and Zambia gained independence in 1964. Subsequently, Rhodesia demanded her own independence. The United Kingdom made majority rule a prerequisite for independence, such that the 'state' would be acceptable to the people of the country as a whole; this was not achieved. In 1965, Ian Smith unilaterally declared independence. The state, which left power in the hands of Caucasians, was not recognized by the international community, and in fact sanctions were imposed on it because self-determination was not achieved.[112]

It is important to note that a demand for self-determination does not necessarily confer statehood.[113] Self-determination can take various forms and, in the words of Judge Dillard, "it may be suggested that self-determination is satisfied by a free choice, not by a particular consequence of that choice or a particular method of exercising it."[114] The fact that self-determination does not *a fortiori* confer a right to statehood is made clear by Professor Malvina Halberstam who states, "[T]he establishment of an independent state for each group seeking 'self-

108. Crawford, *supra* note 74, at 152.
109. SHAW, *supra* note 48, at 144.
110. *Id.* at 145.
111. WALLACE-BRUCE, *supra* note 51, at 69.
112. *Id.* at 79 & 82.
113. Curtis, *supra* note 107, at 470.
114. *Id.* at 471.

determination' may not be the best solution. The desirability of an independent state depends on its economic, political and military viability and on the effect its independence would have on other states in the region."[115]

3. Statehood as a Claim of Right?

Is it necessary to expressly assert statehood, or alternatively, is statehood a factual circumstance requiring no express assertions or actions?[116] If indeed statehood requires an express assertion, then such a declaration would constitute an additional modern criterion for statehood.

Practically speaking, it would seem logical that before being recognized as a state, an entity must assert statehood. However, the mere fact that an entity claims statehood is not sufficient. All that such a claim will achieve is to invite an assessment by existing states as to whether the entity in question satisfies the criteria for statehood. Thus, in the opinion of the authors, an assertion of statehood as a claim of right does not appear to be a criterion for statehood, despite the fact that it may be required practically.

E. Recognition and Statehood

As discussed by Professor Malcolm N. Shaw, there is a complicated but significant relationship between recognition and statehood. There are two theories of recognition: the constitutive theory and the declaratory theory. The former asserts that recognition is constitutive of a state, such that only through recognition does a state come into existence. Thus, recognition can be crucial in the creation of a state. Conversely, the declaratory theory asserts that recognition is not relevant to the existence of a state, since a state can be said to exist once the factual criteria for statehood are satisfied.[117]

Whichever view of recognition one chooses to adopt, there is a significant inverse relationship between recognition and the existence of an entity as a state for the purposes of international law. The relationship can be explained as follows: the greater the degree of international recognition that an entity enjoys, the less may be demanded in terms of adherence to the criteria of statehood. Conversely, the more sparse its international recognition, the more stringently the entity will have to comply with the criteria for statehood. If an entity is widely recognized as a state, therefore, it will be subject to a lesser burden of proof of the criteria for statehood. On the other hand, if very few states recognize an entity, then it will be subject to a much greater burden of proof with respect to the criteria for statehood.[118]

115. Malvina Halberstam, *Self Determination in the Arab-Israeli conflict: Meaning, Myth and Politics*, 21 N.Y.U J. INT'L L. & POL. 465, 471 (1989).
116. WALLACE-BRUCE, *supra* note 51, at 69.
117. *See* SHAW, *supra* note 48, at 146.
118. *Id.* at 146-47.

Presumably, a future Palestinian state would receive overwhelming international recognition. This can be deduced from several factors. The first is the fact that the PLO has been recognized by Israel "as the representative of the Palestinian people" since 1993.[119] The second is that the PLO was granted observer status in the United Nations under United Nations General Assembly Resolution 3237 (XXIX) of 1975.[120] The third factor is that, although premature, the Palestinian state declared in 1988 was given widespread international support receiving recognition from 114 states[121] and being recognized by the United Nations through the adoption of Resolution 43/177 (the Resolution was adopted by a vote of 104 in favor, the United States and Israel opposing and 36 states abstaining).[122] Moreover, today there is widespread international support for the creation of a Palestinian state. Given the nearly universal recognition that a future Palestinian state would enjoy, and in view of the relationship between recognition and statehood, less will likely be demanded of the Palestinian entity in terms of adherence to the abovementioned criteria for statehood. In light of the complex relationship between recognition and statehood, and the overwhelming recognition a Palestinian entity aspiring to statehood would likely enjoy, it would probably be recognized as a state in spite of its not being territorially contiguous, even *if* territorial contiguity is a requirement for statehood.

The prevailing view today is that recognition is declaratory, and that it is a political rather than a legal act.[123] However, there are situations where even today recognition can be of considerable evidentiary value towards the recognition of a state.[124] Further, the complex relationship between recognition and statehood impacts the degree to which an entity must satisfy the traditional criteria.[125] Therefore, recognition can have a large impact on statehood.

F. The Criterion of 'A Defined Territory' Reconsidered

The modern additions to the criteria for statehood have, in the opinion of the authors, impacted the traditional criteria and the significance of each criterion. Recent developments in the field of international law suggest that the weight of the

119. Letter from Yitzak Rabin, Minister of Israel, to Yasir Arafat, Chairman of the Palestine Liberation Organiation (Sept. 9, 1993) *available at* http://www.mfa.gov.il.. Yasir Arafat sent a letter to then Prime Minister Yitzchak Rabin in which he recognized the right of Israel to exist in peace and security. In response, Rabin sent a letter to Arafat, also dated September 9, 2003, in which Israel recognized the PLO as the representatives of the Palestinian people.
120. G.A. Res. 3237 U.N. GAOR , 29th Sess. On 22 November 1974 the United Nations General Assembly passed Resolution 3237, which conferred on the PLO the status of a permanent observer in the Assembly and other international conferences held under UN auspices.
121. Boyle, *supra* note 80, at 302.
122. G.A. Res. 43/177, U.N. GAOR, 43rd Sess.
123. MAREK, *supra* note 68, at 159 .
124. MALANCZUK, *supra* note 64, at 82-84.
125. The complex relationship between recognition and statehood is discussed *supra* in Section E

traditional criterion of 'a defined territory' has diminished.[126] Indeed, several publicists have postulated the decline of a territorially-based view of international law. For example, Charles De Visscher[127] noted that territory, which has constituted the basis of international relations since the Middle Ages, no longer possesses the same significance. Ludwig Dembinski writes that new technological developments have minimized the importance of the criterion of territory.[128] This appears to be confirmed by the revival of natural law thinking, the growing emphasis on human rights in international law, and the protection of individuals and non-state entities. The principles of human rights enshrined in the Charter of the United Nations, for example, are primarily applicable to non-state entities. This suggests that there has been a shift in modern international law away from territorial dominance.[129]

Despite what many experts now posit, Professor Shaw, correctly asserts that the territorially based view of international law still retains its position as the foundational hypothesis. Even while asserting this, however, Shaw acknowledges that territory might remain dominant, but its pre-eminence has been modified.[130] This acknowledgement, in the authors' opinion, suggests that the criterion of 'a defined territory' fulfils a lesser role today than it once did. This accords with the fact that there are many new criteria for statehood.

II. 'SAFE PASSAGE' AND ITS TERMINOLOGY WITH REFERENCE TO THE ISRAELI-PALESTINIAN CONFLICT

One will often hear phrases such as 'territorial contiguity,' 'territorial continuity,' and 'territorial connectivity' spoken with reference to a future Palestinian state. Concerns arise with reference to this terminology, as the phrases seem to have no clear meaning. Moreover they are used in divergent ways. The concern is not merely academic or pedantic. In fact, determining the meaning of

126. Shaw, *supra* note 73, at 63-64. Territory has traditionally fulfilled two main functions: "the need for a shelter for security and the possibility of acting as a springboard for opportunity." *Id.* at 63. However, Professor Shaw argues that whether territory alone continues to fulfill these two functions is questionable. Modern military technology, such as missiles, demonstrate that while important (as will be discussed *infra* in Part III B) the mere possession of territory cannot alone guarantee security. *Id.* at 64. Even recognized boundaries on a map may not offer total immunity from terrorist infiltration. *Id.* With regard to the second traditional function of territory, the growth of multi-national industry and organizations, and the development of international economic institutions have meant that in this regard too, the function of territory has been much diminished. *Id.*

127. Charles De Visscher was a legal practitioner, who became a member of the PCIJ in the 1930s. This portion of his career ended in 1952 when he was not re-elected to the ICJ. He returned to academic life, and began writing and publishing books. While slightly dated today, his works have received universal praise.

128. Shaw, *supra* note 73, at 64.

129. *Id.* at 65.

130. *Id.* at 72.

these phrases is vital in assessing what it is that policymakers, such as President George W. Bush and Secretary of State Condoleezza Rice, demand of Israel.

The origin of this controversy rests with a provision contained in the final clauses of the second of eight Oslo Interim Agreements,[131] the Agreement on the Gaza Strip and Jericho Area, dated May 4, 1994. Article XXIII (6) of the Oslo Interim Agreement states that "[t]he two parties view the West Bank and the Gaza Strip as a single territorial unit, the integrity of which will be preserved during the interim period."[132] A similar provision is enshrined in the fifth Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed September 28, 1995. Article XXXI(8) states that "[t]he two parties view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period."[133]

Some argue that these provisions imply that the parties in fact agreed in principle to a territorial link of some sort between the Gaza Strip and the West Bank. However, this is based on an erroneous understanding of the two provisions. In fact, the articles were intended to assure the Palestinians that Israel would not reach a separate agreement with either the West Bank or the Gaza Strip, and annex

131. Eight transitional agreements have been concluded between Israel and the Palestinian Liberation Organization ("PLO"). The first was the Declaration of Principles on Interim Self-Government Arrangements. See Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sept. 13, 1993, 32 I.L.M. 1525 (1993) [hereinafter DOP]. The Israel PLO Agreement on the Gaza Strip and Greater Jericho Area was the second agreement, and provides for the partial redeployment of Israeli administration and military forces in the Gaza Strip and Jericho area, and allows the PA to assume most functions of local governance in those areas. See Agreement on the Gaza Strip and the Jericho Area, Isr.-P.L.O., May 4, 1999, 33 I.L.M. 622 (1994) [hereinafter Cairo Agreement]. The third agreement allows for the transfer of authority to the PA in certain limited spheres, such as health, social welfare, direct taxation, tourism, education, and culture in the parts of the West Bank outside of the Jericho area. See Agreement on Preparatory Powers and Responsibilities, Isr.-P.L.O., Aug. 29, 1994, 34 I.L.M. 244 (1995) [hereinafter Eretz agreement]. The fourth agreement, the Protocol on Further Transfer of Powers and Responsibilities, transfers powers in the West Bank to the PA in the following civil spheres: labor, industry and commerce, gas, petroleum, agriculture, local government, statistics and postal services. See Protocol on Further Transfer of Powers and Responsibilities, Isr.-P.L.O., Aug. 27, 1995, Ministry of Foreign Affairs, State of Israel [hereinafter Transfer Agreement]. The fifth agreement, generally referred to as the Interim Agreement or Oslo II, was concluded between the parties on September 28, 1995. See Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., Sept. 28, 1995, 36 I.L.M. 551 (1997) [hereinafter Oslo II]. It comprehensively structures the Israeli PA relationship for the duration of the interim period. See id. The Hebron Protocol was the sixth interim agreement. See Protocol Concerning the Redeployment in Hebron, Isr.-P.L.O., Jan. 17, 1997, 36 I.L.M. 650 (1997) [hereinafter Hebron Protocol or Protocol]. The seventh agreement is the Wye River Memorandum, the subject of this review; See Wye River Memorandum, Isr.-P.L.O., Oct. 23, 1998, 37 I.L.M. 1251 (1998) [hereinafter WRM]. The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments and Agreements Signed and the Resumption of Permanent Status Negotiations of September 4, 1999, is the eighth. See The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Isr.-P.L.O., Sept. 4, 1999, 38 I.L.M. 1465 (1999) [hereinafter Sharm].

132. Cairo Agreement, *supra* note 131, at art. XXIII (6).

133. Oslo II, *supra* note 131, at art. XXXI (8).

the other respectively.[134] Thus, interpreting this provision as necessitating a territorial link of some nature is fallacious.

A. The Historical Meanings of the Terms 'Territorial Contiguity,' 'Territorial Continuity,' and 'Territorial Connectivity'

1. 'Territorial Contiguity'

As defined in *The Oxford English Dictionary*, contiguity has several meanings, three of which are relevant. Contiguity can mean "the condition of touching or being in contact" or "a thing in contact." While these are listed as two separate meanings, they are clearly similar and will therefore be analyzed as one. Presumably, should the first (or second) dictionary definition be adopted, then what would be required for the future Palestinian state, given the fact that the Gaza Strip and the West Bank are territorially separate, would be some sort of territorial link connecting the two.

The third relevant definition of contiguity is "close proximity, without actual contact."[135] Were this third dictionary definition adopted, it would be satisfactory for a future Palestinian state if there was merely close proximity between the Gaza Strip and the West Bank. Given the fact that the West Bank and Gaza Strip are already in close proximity (twenty miles), a demand for contiguity has already been met. Presumably therefore, the meaning that advocates of safe passage attach to the phrase 'territorial contiguity' is that of touching or being in physical contact, calling for a concrete territorial link of some sort.

This assessment is supported by *Black's Law Dictionary*. According to this legal lexicon, contiguity means "the state or condition of being contiguous."[136] Contiguous is further defined as "touching at a point or along a boundary, or adjoining." The example given is that "Texas and Oklahoma are contiguous."[137] This clearly supports the conclusion that the legal meaning to be attached to the phrase territorial contiguity is that of touching or being in physical contact.

2. 'Territorial Continuity'

A phrase that is also frequently employed with reference to the Israeli-Palestinian conflict is that of 'territorial continuity.' As defined in *The Oxford English Dictionary* continuity means "the state or quality of being continuous." With reference to material things this dictionary defines continuity as "a continuous

134. Interview with Danny Taub, Foreign Ministry Legal Affairs Official, in Jerusalem, Isr. (Dec. 20, 2005) (copy on file with the author).
135. THE OXFORD ENGLISH DICTIONARY 822 (2d 1989).
136. BLACK'S LAW DICTIONARY 338 (8th ed. 2004).
137. *Id.*

or connected whole."[138] To understand this definition, one must define the word continuous. Continuous as defined in *The Oxford English Dictionary* means "having no interstices or breaks, having its parts in immediate connection, connected, unbroken, joined continuously to, and forming one mass with."[139] This definition suggests that what is demanded of Israel by the term 'territorial continuity' is some sort of territorial link between the Gaza Strip and West Bank. However, this understanding of the term 'continuity' is not supported by the definition offered in *Black's Law Dictionary,* which in the authors' opinion is to be preferred. *Black's Law Dictionary* defines the term, as used in the field of international law, as "the principle that upheavals and revolutions within a country -- as well as changes in governmental forms and the extent of a country's territory, and measures taken during a military occupation -- do not affect the existence of a country."[140] This definition of 'continuity' as used in the field of international law makes no reference to continuity of a state or continuity as a requirement of statehood. This is interesting as it suggests that the term, in its legal sense, is being used improperly in connection with the Gaza Strip and the West Bank.

3. 'Territorial Connectivity'

A final demand that policymakers have made of Israel is that the Gaza Strip and West Bank enjoy territorial connectivity. Connectivity, as defined in *The Oxford English Dictionary*, means "the characteristic, or order, or degree, of being connected."[141] Connected in turn means "conjoined, fastened or linked together."[142] This also seems to require some sort of physical connection between the West Bank and the Gaza Strip. Territorial connectivity is not defined by *Black's Law Dictionary*. Therefore it appears that the term territorial connectivity might be a newly coined phrase, invented to serve the objectives of Secretary of State Condoleezza Rice.[143]

Given the ambiguous nature of these three terms, particularly as they apply to the Gaza Strip and the West Bank, it is normal to consider the meanings ascribed by the political players. These players, whose views will be examined *infra* in Part II (B) of this article, include then Israeli Prime Minister Ariel Sharon, Condoleezza Rice, the European Union, the Quartet (the US, U.N. EU and Russia), and the U.N.

138. THE OXFORD ENGLISH DICTIONARY 830 (2d. 1989).
139. *Id.*
140. BLACK'S LAW DICTIONARY 340 (8th ed. 2004).
141. THE OXFORD ENGLISH DICTIONARY 746 (2d. 1989).
142. *Id.* at 745.
143. Secretary Rice's use of this term will be discussed *infra* in Part II of the article.

B. The Variable Usage of the Phrases 'Territorial Contiguity,' 'Territorial Continuity,' and 'Territorial Connectivity'

Initially the term 'contiguity' was used to call for a territorial link of some sort between the Gaza Strip and the West Bank. Arafat muddied the waters in his criticism of then Prime Minister Ehud Barak's offer at the failed Camp David negotiations in 2000.[144] Arafat claimed that the Camp David offer was "less than a Bantustan."[145] This claim is not supported by others who were present at the Camp David negotiations. Dennis Ross, Middle East Advisor and Chief Negotiator under Presidents George H.W. Bush and Bill Clinton states:

> To this day, Arafat has never honestly admitted what was offered to the Palestinians -- a deal that would have resulted in a Palestinian state, with territory over 97 percent of the West Bank, Gaza and Jerusalem; with Arab East Jerusalem as the Capital of that state (including the holy place of the Haram al-Sharif, the Noble Sanctuary); with an international presence in place of the Israeli Defense Force in the Jordan Valley; and with the unlimited right of return of Palestinian refugees to their state but not to Israel. Nonetheless, Arafat continues to hide behind the canard that he was offered Bantustans ... Yet with 97 percent of the territory in Palestinian hands, there would have been no cantons. Palestinian areas would not have been isolated or surrounded. There would have been territorial integrity and contiguity in both the West Bank and Gaza...[146]

Despite this, Arafat built on his erroneous analogy to the South African situation and demanded territorial contiguity between the Palestinian areas. Despite the faulty analogy and Arafat's deceitful misrepresentation of the map he

144. ALAN DERSHOWITZ, THE CASE FOR PEACE: HOW THE ARAB-ISRAELI CONFLICT CAN BE RESOLVED 18-24 (2005). In 2000, then Israeli Prime Minister Ehud Barak, offered the Palestinians statehood in all of the Gaza Strip, and more than 95 percent of the West Bank and the adjoining land. *Id.* at 18. Arafat refused the offer and therefore the negotiations failed. *Id.* What is important to note is that countries do not generally enshrine offers made during negotiations that have failed. They do not subsequently maintain an offer if the negotiations of which the offer was part have failed. The offer is not the starting point for future negotiations. So too, the Israeli offer at Camp David should not be enshrined. It was colloquially 'all or nothing.' Had the Palestinians accepted the offer they would have had a state. The fact that they rejected it means that they do not have a state, and that future negotiations will not begin on the premise of the Camp David negotiations. Thus, the Palestinians could at a later date be offered less than they were at Camp David in 2000. This is a view that Professor Alan Dershowitz supports, as he says that to offer the same or more would be tantamount to rewarding terrorism. *Id.* at 24.

145. Deborah Sontag, *Quest for Middle East Peace: How and Why it Failed,* N.Y. TIMES, July 26, 2001, at A1. The creation of Bantustans was an aspect of the South African Apartheid State, which consigned its black population to ten separate homelands or Bantustans. This policy was based on sheer racism. While ostensibly independent entities, the Apartheid regime tightly controlled all the homelands and their external affairs.

146. Dennis B. Ross, *Yasser Arafat; Think Again,* FOREIGN POLICY, July/Aug. 2002, at 19.

was offered, his demand has reverberated worldwide with many, believing his exposition of events, taking up his call for contiguity within the West Bank. For example, the Quartet (the US, Russia, EU and U.N.) stated "a new Palestinian state must be truly viable with contiguity in the West Bank."[147] Even Ariel Sharon spoke of "[a] democratic Palestinian State with territorial contiguity in Judea and Samaria and economic viability."[148]

More recently, the term has been used in a different context, and while still employed with reference to a link between the Gaza Strip and the West Bank, a new term has been coined to call for a passage between the two --territorial connectivity. In Kofi Annan's statement of September 20, 2005, he stated the U.N.'s support for the Quartet's calls for "connectivity to Gaza" and contiguity within the West Bank.[149] Condoleezza Rice was quoted in July 2005 as saying that the US is "committed to territorial connectivity between Gaza and the West Bank."[150] But Rice has to date made no express mention of contiguity, connectivity, or continuity within the West Bank. She has stated more cryptically, "Israel must also take no actions that prejudice a final settlement and must help ensure that a new Palestinian state is truly viable. A state of scattered territories will not work."[151] Therefore, the terms are not used in a uniform manner and can be misleading and difficult to understand. The approach of the European Union shifts between the declarations of the Quartet, which are similar to the American approach, and the declarations in other forums in which the term territorial contiguity is mentioned in a general sense.

This divergent usage of the terms in issue raises concern that those who use these terms have little if any understanding of their meaning, and certainly no consensus exists as to their usage. It therefore remains uncertain what would be required of Israel.

If, however, the phrases used do indeed require some sort of territorial link between the Gaza Strip and the West Bank, questions arise as to the form and characteristics of such a link. It appears as if the term 'safe passage' has been used as shorthand for this proposed link. However, little if any consideration has been given to the meaning of the term safe passage, or whether the agreements within which it is mentioned are still binding.

147. Middle East Quartet Statement, New York, Sept. 20, 2005 *available at,* http://ue.eu.int/ueDocs/ cms_Data/docs/press Data/en/declarations/86284.pdf.

148. Address by Prime Minister Ariel Sharon at the Fourth Herzliya Conference (Dec 18. 2003), *available at,* http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2003/Address+by+PM+Ariel+Sharon+at+the+Fourth+Herzliya.htm.

149. Middle East Quartet Statement; *supra* note 147.

150. Saul Hudson, *Rice pushes for Gaza-West Bank 'Connectivity,'* WASHINGTON TIMES, July 24, 2005.

151. Condoleezza Rice, March 1, 2005.

C. The History of 'Safe Passage'

Before assessing the agreements that make provision for safe passage, it is useful to procure a workable definition of the term. However, no such definition seems to exist. The term does not appear in either *The Oxford English Dictionary* or *Black's Law Dictionary*. It is a term created specifically in the context of the Israeli-Palestinian conflict and has no independent meaning. Therefore, if the term is left undefined in the agreements between the parties, questions could arise as to exactly what safe passage was intended to mean.

The idea of safe passage can be traced back to the peace negotiations that grew out of the Madrid Framework. This framework consists of three basic elements: the opening conference, the bilateral track and the multilateral track. The opening conference was a forum intended to inaugurate the two separate forms of negotiations: the bilateral negotiations track and the multilateral negotiations track. The bilateral negotiations were intended to resolve past conflicts. There were four separate sets of bilateral negotiations between Israel, Syria, Lebanon, Jordan and the Palestinians. The multilateral negotiations were intended to build the future Middle East. These talks comprised five separate forums focusing on water, environment, arms control, refugees, and economic development. These meetings took place in working groups that gathered periodically.[152]

The concern of this article is with the bilateral track, and in particular, the negotiations between Israel and the Palestinians. These negotiations were based on a two-stage formula: five-year interim self-government arrangements to be followed by negotiations on the permanent status issues. These permanent status issues were intended to deal with questions relating to Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors and issues of common interest. All parties to the conflict, and all those involved in finding a solution to the conflict, have emphasized the necessity of finding solutions to these issues of permanent status. Few realize the importance of the issue of safe passage.

The Madrid Conference, under the joint Chairmanship of then-President H. W. Bush and then- Soviet Premier Gorbachev, was attended by all the major states in the region, as well as a joint Jordanian-Palestinian delegation. Although bilateral and multilateral meetings followed the plenary session, no agreements were ever reached. However, secret talks occurring concurrently with the Madrid Conference began what became known as the Oslo Peace Process.

The first major development in this peace process occurred in September 1993, with a letter sent by the late Yasser Arafat to then-Israeli Prime Minister Yitzchak Rabin recognizing the right of Israel to exist in peace and security. In reply, Israel

152. Israel Ministry of Foreign Affairs, Guide to the Peace Process: The Madrid Framework, *available at* http://www.mfa.gov.il. (last visited Apr. 25, 2007).

recognized the PLO as the representative of the Palestinians in the peace process.[153] On September 13, 1993, a joint Israeli-Palestinian Declaration of Principles (DOP) was signed. This outlined the interim self-government arrangements agreed to by the parties. These included immediate Palestinian self-rule in Gaza and Jericho, early empowerment for the Palestinians in the West Bank, and an agreement on self-government and the election of a Palestinian legislative council.[154] Shortly after the Declaration of Principles was signed, negotiations began between the parties concerning the implementation of its first stage, which was Palestinian self-rule in Gaza and Jericho. These negotiations resulted in the Gaza-Jericho Agreement (Cairo Agreement) that was signed on May 4, 1994.[155]

The Gaza-Jericho agreement addresses four main issues: security arrangements, civil affairs, legal matters and economic relations. The notion of safe passage is first mentioned in the article on security arrangements. That is, Article XI deals with safe passage between the Gaza Strip and the Jericho area and specifies that "[a]rrangements for safe passage of persons and transportation between the Gaza Strip and the Jericho area are set out in Annex I, Article IX."[156] Annex I, Article IX of this agreement states that there shall be safe passage between the Gaza Strip and Jericho area for residents and visitors of the Gaza Strip and the Jericho area. Israel was to ensure such passage during daylight hours for persons and transportation. Safe passage was to be effected at the Erez crossing point and the Vered Yericho crossing point, and the three routes to be employed between these points were delineated on one of the attached maps. Every person to use safe passage had to carry a safe passage card or a safe passage vehicle permit in the case of drivers with vehicles. A permit enabling one to enter Israel could be used as a safe passage card, failing which the safe passage permits were to be issued by Israel. However, the modalities for the issuance were to be discussed and agreed upon in a different forum -- the Joint Civil Affairs Coordination and Cooperation Committee (CAC). One's journey on the safe passage could not be interrupted. It was forbidden to depart from the designated route, and a passenger had to complete his/her journey within a designated time. Those using the passage were to be subject to the laws and regulations applicable in Israel and the West Bank.[157] Further, Israel could modify the arrangements for safe passage for security

153. *Id.*

154. Israel Ministry of Foreign Affairs, Main Points of the Declaration of Principles, Sept. 13, 1993, *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles+-+Main+Points.htm. (last visited Apr. 25, 2007).

155. Israel Ministry of Foreign Affairs, Main Points of the Gaza-Jericho Agreement [Cairo Agreement], May 4, 1994, *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Main+Points+of+Gaza-Jericho+Agremeent.htm. (last visited Apr. 25, 2007).

156. *Id.* at Art. XI.

157. Israel Ministry of Foreign Affairs, Gaza-Jericho Agreement, Annex I, Protocol Concerning Withdrawal of Israili Military Forces and Security Agreement, *available at*

or safety reasons. However, at least one route of safe passage had to remain open at all times.[158]

Although it is rather detailed, the Annex does not sufficiently provide a specific description of safe passage. First and foremost, there is no definition of safe passage, and no details as to the form that the safe passage will take, be it a road, tunnel, elevated highway, rail, or air-link. Would the passage be for the use of Palestinians alone, or would it be used by foreign tourists, businessmen, or Israelis as well? Further, there is no agreement or even mention as to who will guard the passage, or what criteria Israel would use in granting safe passage permits. For example, would the sides have to agree on criteria or could Israel make decisions unilaterally? It is unclear where Israeli law or Palestinian law would govern along the route of safe passage.

Safe passage is next mentioned in the Interim Agreement on the West Bank and the Gaza Strip (also known as Oslo II), signed on September 28, 1995. It is important to note that the arrangements made under this agreement incorporate or supersede all provisions in the previous agreements, such as the abovementioned Cairo Agreement.[159]

Article XXIX of Oslo II deals with safe passage, and states that "[a]rrangements for safe passage of persons and transportation between the West Bank and the Gaza Strip are set out in Annex I." Annex I, Article X provides that there shall be safe passage connecting the West Bank with the Gaza Strip for the movement of persons, vehicles and goods. Israel will ensure such passage during daylight hours. Such passage was to be implemented via four crossing points: the Erez crossing point (for persons and cars), the Karni crossing point (for goods), the Tarkumya crossing point, and an additional crossing point around Mevo Horon. Unlike the Gaza Strip-Jericho agreement, those using the safe passage route were subject to Israeli law only. They were not permitted to interrupt their journeys or depart from the designated routes. In a wider provision than previously agreed to, Israel could, for security or safety reasons, temporarily halt the operation of a safe passage route or modify the passage arrangements while ensuring that one of the routes remained open for safe passage.[160]

As under the Cairo Agreement, safe passage permits or safe passage vehicle permits issued by Israel were required. Israel could deny the use of her territory for safe passage by persons who had violated safe passage provisions. Such persons could use shuttle buses which would be escorted by the Israeli police and would operate twice a week.[161]

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http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Gaza-Jericho%20Agremeent%20Annex%20I (last visited Apr, 26, 2007).

158. Erik Schechter, *A History of '"Safe Passage,'"* JERUSALEM POST, Dec. 16, 2005, at 18.

159. Peter Malanczuk, *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law* 7 EJIL 485, 488 (1996).

160. Oslo II, Annex I, Article X.

161. Oslo II, Annex I, Article X.

While Oslo II is slightly more detailed than the Cairo Agreement, it too fails to define safe passage or to elaborate on the mechanisms for its realization. Unlike the Cairo Agreement, Oslo II stipulates those people whom Israel can deny safe passage permits. However, Israel's right to deny use of the safe passage is limited. Israel did not have unilateral discretion with regard to the granting of safe passage permits, which raised security concerns. Perhaps most importantly, Oslo II differs from the Cairo Agreement in that it provides that people using safe passage be subject to Israeli law only. This is a vital provision as it strongly suggests that Israel retained sovereignty over the strip of land used for safe passage.[162]

The issue of safe passage was next addressed in the Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations (the Sharm el-Sheikh Memorandum), signed on September 4, 1999. This Agreement ratifies all previous agreements and asserts that the Government of Israel and the Palestine Liberation Organization commit themselves to full and mutual implementation of Oslo II and all other agreements concluded between the parties since 1993.[163] The agreement refers to safe passage and makes reference to a safe passage Protocol to be concluded between the parties.[164]

The Protocol Concerning Safe Passage between the West Bank and the Gaza Strip was signed on October 5, 1999. The Protocol affirms the commitments made under Oslo II. In fact, the Protocol was entered into with a view to implementing Article X of Annex I to Oslo II. However, the Protocol was broader than the previous agreements in certain respects. It stipulated that the use of safe passage by the residents of the West Bank and the Gaza Strip did not enable them to be present in Israel except along the safe passage routes designated for their use. It further specified that nothing in the Protocol will be construed as derogating from Israel's right to apply inspection measures necessary for ensuring safety and security at the crossing points of the safe passage.[165] These inspection measures were intended to satisfy Israel's security needs.

The Protocol, while in certain respects more detailed than previous agreements, also failed to define safe passage, or to discuss the nature of such passage. Significantly, it did imply that Israel would control the crossing points by asserting that nothing in the Protocol would be construed as derogating from Israel's right to apply inspection measures necessary for ensuring safety and security at the crossing points of the safe passage. Thus, Israel would have

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162. This will be discussed *infra* in Section D.

163. Sharm, *supra* note 133.

164. Sharm, *supra* note 133.

165. Israel Ministry of Foreign Affairs, The Protocol Concerning Safe Passage Between the West Bank and the Gaza Strip, Oct. 25, 1999, *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Protocol+Concerning+Safe+Passage+between+the+West.htm. (last visited Apr. 26, 2007)

sovereignty over the land used for safe passage (as discussed *supra* in Part II (A) of this article) and would also control the crossing points.

Following this, negotiations were held under President Clinton's auspices at Camp David in 2000. During these negotiations, the Palestinians were offered a state in the Gaza Strip and more than 95 percent of the West Bank and the adjoining land. Arafat refused to accept this offer, or even to make a counter offer, and the negotiations at Camp David failed.[166]

After the failed negotiations at Camp David, further negotiations were held in Taba in January 2001. At these negotiations, held under the auspices of then-President Bill Clinton, Clinton made an offer to both sides that would end the conflict. The offer was intended as a final offer, which if refused would fall away. It was not intended to constitute the starting point of future negotiations. This was made clear by Dennis Ross in an interview with Fox News's Brit Hume, on April 21, 2002. In response to a question as to why the Taba offer was never formalized, Ross stated that "We told the Palestinians and Israelis, if you cannot accept these ideas, that is the culmination of the effort, we withdraw them. We did not want to formalize it. We wanted them to understand we meant what we said. You don't accept it, it's not for negotiation, this is the end of it, we withdraw."[167] In the same interview Ross stated that this position had been adopted because the offer was made at the end of Clinton's tenure, once George W. Bush had already been elected to office. Thus, the Clinton administration wanted to ensure that the offer "couldn't be a floor for negotiations. It was the roof."[168]

Despite Taba's overall failure, the sides did agree that there would be a safe passage from the north of Gaza to the Hebron district, and that the West Bank and Gaza were to be territorially linked. This implies that the parties agreed on the creation of some form of safe passage. However, the nature of the regime governing the territorial link and the issue of sovereignty over it was left undecided.[169] Little came of these negotiations, which closely followed the outbreak of the second intifada in September 2000.

In 2003, a major development occurred with the proposal by United States President George W. Bush under the auspices of the Quartet of A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict.

The roadmap specified the steps for the two parties to take to reach a settlement, and it imposed obligations on both parties. The objective of the roadmap was a "settlement, negotiated between the parties" that would "result in

166. DERSHOWITZ, *supra* note 144, at 18.
167. Fred Barnes, "Myths of the Intifada," THE WEEKLY STANDARD, *available at:* http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=1168&R=113679C5
168. Fred Barnes, "Myths of the Intifada," THE WEEKLY STANDARD, a*vailable at:* http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=1168&R=113679C5
169. DERSHOWITZ, *supra* note 144, at 39.

the emergence of an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbours."[170]

There were three phases to the roadmap. In each phase the parties were expected to perform their obligations in parallel, unless otherwise stated. Progress under the roadmap required and depended upon the good faith efforts of the parties and their compliance with each of their obligations. Phase I of the roadmap was directed at ending terror and violence, normalizing Palestinian life, and building Palestinian institutions. Phase II was a transition phase, wherein efforts were focused on creating an independent Palestinian state with provisional borders and attributes of sovereignty, based on a new constitution, as a step towards a permanent status settlement. As part of this process, there was to be implementation of prior agreements to enhance maximum territorial contiguity. This suggests that provisions of safe passage in prior agreements were to be implemented in Phase II of the roadmap. Finally, Phase III dealt with a Permanent Status Agreement and the End of the Israeli Palestinian Conflict.

Ariel Sharon attached fourteen reservations to his acceptance of the roadmap. Despite such reservations, both sides accepted the content of the roadmap in principle and committed themselves to its realization. Although the timetable set by the roadmap has not been complied with, the document is relevant in light of the fact that both parties and international bodies still refer to it. For example, in December 2005 the Secretary General of the UN, Kofi Annan, called for the redoubling of efforts by the respective parties to meet their roadmap obligations.[171] Similar sentiments were expressed by Ariel Sharon in September 2005, when he said that "[t]he State of Israel is committed to the Roadmap."[172] Further, none of the parties involved have renounced, either expressly or tacitly, the provisions of the roadmap or the roadmap in its entirety.

Subsequent to the roadmap's proposal, Ariel Sharon formulated the Disengagement Plan, which he believed created an opportunity for advancing towards peace in accordance with the roadmap. The General Outline was made public in April 2004. The main aspects of this plan were the evacuation of the Gaza Strip, including all existing Israeli towns and villages, and the evacuation of certain areas in the West Bank, including four villages and all military instillations.[173] Post-disengagement, Israel entered into an agreement with the

170. Israel Ministry of Foreign Aggiars, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, Apr. 30, 2003, *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Performance-Based+Roadmap+to+a+Permanent+Two-Sta.htm (last visited pr.67Aug. 21, 2006).
171. The Secretary General in a Message to the Conference on the Question of Palestine Calls for the Redoubling of Efforts to Meet Road Map Obligations, 13/12/2005, SG/SM/10262, pal/2033, *available at* http://www.un.org/News/Press/docs/2005/sgsm10262.doc.htm.
172. Ariel Sharon, Israel: Prime Minister, Address to the to the High Level Plenary Meeting of the 60th Session of the United Nations General Assembly, (Sept. 15, 2005).
173. Israel Ministry of Foreign Affairs, The Disengagement Plan-General Outline, Communicated by the Prime Minister's Office, April 18 2004, Article 2, *available at*

Palestinians concerning the Rafiah crossing on the Gaza-Egypt border. In this agreement, Israel not only committed herself to an international crossing point on the Gaza-Egypt border, but to facilitating the movement of goods and people between the Palestinian territories.

The Agreement Document on Movement and Access from and to Gaza, dated November 15, 2005, speaks not of safe passage, but of convoys. The parties agreed to the establishment of bus convoys, for transit of people, by December 15, 2005, and of truck convoys, for transit of goods, by January 15, 2006. Detailed implementation arrangements were to be devised by a bilateral committee of the Government of Israel and the PA with participation as needed from the Quartet and the United States Security Coordinator (USSC).

There is an important reservation in the Agreement Document on Movement and Access from and to Gaza: it is to be "understood that security is a prime and continuing concern for Israel and that appropriate arrangements to ensure security will be adopted."[174] This provision is phrased such that it is difficult to determine how the link between Gaza and the West Bank will be implemented, and whether in fact it is still the same as the safe passage agreed to previously. In fact, it seems that it is not the same at all.

The Israeli Defense Ministry is calling the newest incarnation of the idea of safe passage "escorted convoys," so as to distinguish the proposed convoys from their Oslo predecessors. Each day, five buses operated by Israeli drivers and escorted by police vehicles will drive the 47km -- approximately 20 miles -- between the Erez checkpoint in Gaza and the Tarkumiya checkpoint in the West Bank. There will be one route only. There will be two levels of security checks for travelers. All travelers must first be issued permits by Israel, following which all passengers will be carefully searched at the two crossing points.[175] The details of this agreement are vastly different from the terms of safe passage provided for by any of the earlier agreements, and seem to mark a shift in the Israeli government's attitude.

Despite Israel's commitment to bus convoys operating between Gaza and the West Bank by December 15, 2005, this promise has not been actualized as of March 2006. This is due to a failure on the part of the PA to fulfill its commitments under the Rafiah Agreement. The agreement required that the PA prevent the movement of weapons and explosives from Egypt into Gaza. Yet, large amounts of weapons and explosives have in fact flowed in from Sinai.[176]

http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm: (last visited Apr. 26, 2007).

174. Israel Ministry of Foreign Affairs, Agreed Documents on Movement and Access from and to Gaza, Nov. 15, 2005, *available at* http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm. (last visited Apr. 26, 2007).

175. Erick Schechter, *A History of Safe Passage,* JERUSALEM POST, Dec. 16, 2005, at 18.

176. Op-ed, *Unsafe Passage,* JERUSALEM POST, Dec. 12, 2005, at 13.

Moreover, terrorists have been allowed to enter Gaza through the Rafiah border with Egypt, as discussed *supra* in the Introduction. In light of the facts on the ground, Ra'anan Gissen, spokesman for then-Prime Minister Ariel Sharon, said that, "[t]he whole discussion of operating this new arrangement (convoys) will be delayed until the Palestinian Authority is serious about fighting terror."[177] The position of the Defense Ministry is that starting the convoys is dependent on the security situation.[178]

The position that has been adopted by the Israelis on this issue of convoys is legitimate. A convoy from the West Bank to Gaza effectively means entry into Israel. In place of attempting to cross the barrier along the border between Israel and Gaza, terrorists will simply use the convoys to the West Bank, and from there cross into Israel. Thus, the convoys ease restrictions on both ordinary Palestinians and Palestinian terrorists,[179] and raise security concerns for Israel. One must consider questions of sovereignty over the territory used for the convoys as well as control of the crossing points.

D. A Staged Approach to the Question of 'Safe Passage'

1. Instrumentalities of a 'Safe Passage' Agreement

The problem of non-contiguity between the West Bank and the Gaza Strip may be addressed through inventive means. One suggested alternative is the building of a secure elevated highway that would connect the two areas. This could be deemed Palestinian territory or an internationally recognized right of way. Indeed, in 1999 then-Israeli Prime Minister Ehud Barak proposed the building of a highway that would connect the two areas, and would consist of four lanes, a railway line, a water pipe and a communication cable. At the time Barak estimated that this kind of project would cost approximately $200 million U.S.D.[180] In addition to the expensive and prolonged construction necessary, this highway would leave unresolved security threats; it would not be difficult for vehicles traveling on this highway to drop off terrorists or weapons from the road. Another alternative, a subterranean highway, might present fewer security risks but the cost of construction would likely be prohibitive. The Chunnel connecting the United Kingdom and France, built in 1994, ran 31miles long and cost approximately 21

177. Hilary Leila Krieger, *US 'not pressing' for Gaza, W. Bank Convoys,* JERUSALEM POST, Dec. 9, 2005, at 10.

178. Hilary Leila Krieger, *Gaza-West Bank Convoys Put on Hold,* Jerusalem Post, Dec. 16, 2005, at 1.

179. This security consideration will be discussed *infra* in Section III .

180. DERSHOWITZ, *supra* note 144, at 39.

billion dollars.[181] Such suggestions are encouragingly innovative, but important questions about sovereignty of the passage and control of the crossing points still remain. It is to these concerns that we now turn.

According to a paper prepared by the World Bank Technical Team in September 2005, convoys operated prior to the second intifada. Security concerns following the outbreak of the intifada caused this unfettered movement to be terminated. The probability of a future Palestinian state and the demand for territorial contiguity suggest that such passage will be re-established in the future. The reestablishment of such passage should take the form of a bilateral agreement that addresses Israel's security concerns. The negotiation of such an agreement will likely take time given the array of issues the agreement must necessarily address.[182]

The agreement must establish basic conditions for cross border movement. These include driver license requirements, an approach to the certification of vehicles, a manner in which to determine who will be liable for taxes and duties on the cargo transported, the location of the crossing points that the driver may use, and the routes available to the vehicle within Israel. The agreement must further list those goods that cannot be moved in transit, including weapons and other dangerous objects.[183]

Any such transit agreement between the Israeli government and the PA will be complicated by Israel's legitimate security concerns, to be discussed *infra* in Part III. There appears to be a tension between required security standards on the Israeli side, and the free movement of Palestinian goods and passengers. So as to minimize the impact on the commercial viability of the passage and its use by passengers, Israeli security concerns can be addressed through the use of processes and procedures, and modern inspection technology, which lower the possibility of security breaches.[184]

2. Key Elements of All Forms of Safe Passage

There will be certain key elements to any form of passage, which will satisfy Israel's security requirements and simultaneously ensure the commercial viability of the passage. For example, with regard to the transfer of goods, there could be a separation of cargo by types, a layered inspection strategy, advance information concerning cargo arriving at the crossing points, and the use of different channels or locations for different types of goods. In addition, one could require information

181. Rail Europe, *available at:* http://www.raileurope.com/us/rail/eurostar/channel_tunnel.htm (last visited May. 2, 2006).
182. World Bank Technical Team, Door to Door Movement, (2005), *available at* http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/Door_to_Door.pdf (last visited Apr. 26, 2007).
183. *Id.*
184. *Id.*

concerning the identity of the driver, the physical characteristics of both the vehicle and the cargo being transported, details concerning ownership of the vehicle and the cargo, and a history of activity of the vehicle since its last border crossing.[185]

At any border crossing the complexity of the inspection process will depend on the nature of the cargo and the transportation system. With respect to the cargo, the more homogenous the cargo, the less complex the inspection, while the more diverse the cargo, the more multifaceted and detailed the inspection must be. As for the transportation system, should no part of it cross the border into Israel, then the system will be irrelevant. However, should part of the transportation system cross the border into Israel, then a complex inspection process will need to be employed. The inspection process will be most complex where the cargo, truck, and driver cross the border into Israel.[186]

Until now, emphasis has been placed on the movement of goods between the Gaza Strip and the West Bank, and the general requirements of any such passage. However, it is not only goods that are to be transferred between the two Palestinian territories. Indeed, passage must also be provided for Palestinian civilians. Given the current security situation, it is not feasible for free movement for both civilians and goods to be implemented simultaneously. Indeed, as suggested by the World Bank, a phased approach would have to be implemented. The phased approach would involve convoys (of which there are three types) which increase in security-related complexity, from Phase One to Phase Three. Phase One involves the movement of passengers on sterile buses. Phase Two involves the movement of Palestinian cargo truck. Finally, Phase Three involves the movement of Palestinian passenger vehicles. Each phase would provide experience and would allow time to test the infrastructure, and hopefully build confidence between the parties.[187]

There would be several common factors to all of these forms of convoys. The convoys will all operate on three routes connecting Gaza with the Northern, Southern and central West Bank. The routes should be away from built-up areas and heavy traffic areas. A sufficient number of convoys should operate daily, during daylight hours, and on fixed, published schedules. The number of vehicles per convoy should be limited in accordance with security considerations. For example, there should be five buses, fifteen trucks, and 25 personal vehicles. The convoys should be organized and escorted by a private Israeli security firm, and have their movement monitored using GPS and radios. All persons making use of the convoys should be required to have valid identity and security clearance. A refusal to allow a person to make use of the passages should be based on

185. *Id.*
186. *Id.*
187. World Bank Technical Team, Linking Gaza and the West Bank (2005), *available at* http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/MovementbyConvoys.pdf. (last visited Apr. 26, 2007).

transparent criteria and should be subject to review. Travelers should be inspected by modern equipment and proceedings.[188]

3. Bus Convoys

Initially, passage of civilians could be provided for by sterile convoys using dedicated buses that are either specially designated Israeli buses or designated and pre-checked Palestinian buses parked in Israel. The use of such buses will, according to the World Bank, minimize the need for security. The World Bank bases this proposition on the fact that the buses will remain in Israeli territory, and that it will not be possible for passengers to leave the buses while en route.[189] However what the World Bank has overlooked is the important fact that entry into the West Bank is effectively entry into Israel -- at least until the security fence is complete. Thus, while the idea of sterile bus convoys may be acceptable, it is questionable whether such convoys would only require minimal security checks.

Security checks should be placed in the hands of private contractors, who are acceptable to the PA and the Government of Israel. By engaging such private firms for the control of security, performance will be enhanced and the possibility of officials' questionable standards on either side minimized.[190] Further, security checks should not occur for the first time at the border. In fact, all passengers should receive security clearance before traveling. Permission to travel could be denied to those that the PA or the Government of Israel deem to be security risks.[191] Passengers should make advance reservations, and will then be granted permission to travel, and searched at the border. The search, according to the World Bank, should not be too extensive, as the passengers will not alight in Israel. However, as discussed *supra*, this is a technical fallacy, and thus the security check may need to be extensive. Indeed, one must consider that it is not only passengers but their luggage as well, which needs to be checked. This may not only be costly, but also time consuming, and there is therefore a suggestion that frequent travelers be issued with frequent traveler cards which could minimize delays.[192]

Assuming that such bus convoys would have a turnaround time of forty-five minutes for unloading, driver rest time, and time for reloading, a round trip would take approximately three hours on the Southern route, four-and-a-half hours on the

188. World Bank Technical Team, *supra* note 182.
189. World Bank Technical Team, Short Term Improvements for Trade Facilitation and Passages: Improvements to the Karni Border Crossing, Gaza-West Bank Link, and Internal Closures (2005), *available at* http:// siteresources.worldbank.org/INTWESTBANKGAZA/Resources/Short-term_improvements.pdf. (last visited Apr. 26, 2007)
190. *Id.*
191. World Bank Technical Team, *supra* note 187.
192. *Id.*

central route, and six hours on the Northern route.[193] With five buses, having a capacity of sixty people, traveling in each convoy; and with an optimum mix of routes, an estimated 2,100 people could use the convoy on a daily basis in each direction.[194] While this is perhaps a maximum demand, such convoys would clearly meet current demand.

4. Railway

An alternative to bus convoys is a railway linking the Gaza Strip and the West Bank. This form of safe passage was suggested by the Rand Corporation in a report released in 2005. The Rand Corporation concluded that the key to Palestinian statehood could lie in the topography of the West Bank. This is dominated by a North-South Mountain Ridge, which divides the West Bank. The Rand Corporation recognizes that economic development and sustainability requires the creation of rapid North-South transportation links within the West Bank, and between the West Bank and the Gaza Strip. The Rand Corporation argues that one can combine this need with the topography of the land, which lends itself to the creation of a major new project running parallel to the ridgeline. The project would consist of the construction of a railroad and toll road along the ridgeline. This, the corporation posits, would encourage further development along the ridge line of lines for electricity, natural gas, communications and water.[195]

The railway would not only offer rapid transportation links between cities in the West Bank, but would link the West Bank and Gaza Strip. To do so, the railway would run for seventy miles along the West Bank ridges, and then slip like a fishhook through the Negev desert and run for approximately 130 miles to link the Gaza Strip and the West Bank.[196]

The construction of the main section of the railway will cost approximately $3.3 billion USD. This includes the cost of railcars. The total cost will be approximately $6 billion USD. These enormous costs weigh heavily against this type of safe passage. However, there are other factors that offer support to this form of safe passage. First, the construction of just the railway, toll road, and privately funded housing alongside the railway line would employ 100,000 to 160,000 Palestinians per year over a five year period. This, with the level of unemployment so high in the territories, is a crucial consideration. Second, the railway would be more efficient than bus convoys and would link almost all of the primary cities of Gaza and the West Bank in just over ninety minutes. This is an

193. WORLD BANK TECHNICAL TEAM, LINKING GAZA AND THE WEST BANK: CONVOYS 4 (2005), *available at* http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/MovementbyConvoys.pdf.
194. *Id.*
195. RAND Corporation, *Peace Entrenched* (2005), *available at* http://www.rand.org/publications/randreview/issues/summer2005/peace3.html.
196. DERSHOWITZ, *supra* note 144, at 43.

important consideration given the concerns surrounding the commercial viability and sustainability of the future Palestinian state. Finally, and possibly most importantly, this form of safe passage has received qualified support from both Israelis and Palestinians.[197] This marks a major step forward.

Thus, it would appear that as a first step, a future Palestinian state could have either a bus convoy connecting the West Bank and Gaza Strip, or a railway line connecting the two areas. Assuming that these operate without any problems, one could move to the Second Phase of the World Bank outline -- truck convoys for goods.

5. Truck Convoys for Goods

At present, every crossing point between Israel and the Palestinian areas, and even at checkpoints within the West Bank, makes use of back-to-back cargo movement as the mode of cargo transfer. This is generally understood as the transfer of goods from one truck to another, and literally involves the positioning of two trucks back-to-back, and the physical transfer of goods from one to the other. This process is labor intensive, time consuming, and can cause damage to the cargo as a result of the placement of cargo on the ground during transfer.[198]

Back-to-back cargo movement can be improved, and made more efficient, by the use of a process called cross-docking. This involves a coordinated transfer across a level platform using mechanized equipment. This also eliminates direct handling of the cargo, and therefore minimizes the risk of damage to the cargo.[199]

However, the option of even modernized back-to-back cargo movement is not attractive for the large number of trucks that could use the passage on a daily basis. What is suggested in place of this type of cargo movement is a process of cargo movement called door-to-door.

Door-to-door cargo movement is the movement of cargo from its point of origin to its point of destination. This involves the intact movement of a particular cargo, and is often associated with a single transaction where a single logistics service provider assumes responsibility for the cargo for the entire journey. The cargo movement may involve a sequence of movements on different modes of transport, and may even require the storage of cargo while en route.[200] Such a form of door-to-door movement could be acceptable even in light of Israel's security considerations.

However, the door-to-door movement envisioned by the Palestinians is of a different nature entirely. For the PA, the concept refers to the movement of cargo, intact, and in a single overhaul from its point of origin to its point of destination.

197. *Id.* at 44.
198. WORLD BANK TECHNICAL TEAM, THE "DOOR TO DOOR" MOVEMENT OF GOODS 1 (2005), *available at* http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/Door_to_Door.pdf.
199. *Id.*
200. *Id.*

Under this definition, door-to-door movement describes not just the movement of the cargo, but also the movement of the vehicle. This is akin to a right of transit, which is beyond what is envisaged by the international concept of door-to-door cargo movement.[201]

As discussed *supra* in Part III, any form of passage must satisfy Israel's security requirements. As concluded by the World Bank, the door-to-door movement envisaged by the Palestinians does not -- at least not in the current security environment.[202] While Israel has accepted that door-to-door movement will over time replace back-to-back movement, and while it has agreed to initiate discussions on this basis, it is clear that at least in the near future Israel cannot accede to the Palestinian demand for door-to-door movement. Israel could at most implement the international understanding of door-to-door movement.

Regardless of the form that cargo movement takes, it is suggested by the World Bank that convoys consist of a maximum of fifteen trucks. Initially physical inspections of the trucks will be required as at present satisfactory scanning equipment is not available. Such physical inspections will be both time consuming and costly, and it is therefore suggested that initially the convoys should be smaller than fifteen trucks, so as to minimize waiting time.[203] Indeed, initially the convoys could be made available to well established trucking companies only, and pre-cleared drivers. From this it could eventually be expanded to all trucking companies and drivers.[204] With such an expansion there should be an advanced reservation system, where to make a reservation one would have to provide information about the driver, vehicle and cargo aboard.[205] This too could minimize waiting time.

6. Passenger Vehicle Convoys

Once bus convoys are operational, convoys using Palestinian passenger vehicles can be introduced. These pose the greatest security challenge, as each vehicle will have to undergo a security check. As with bus convoys, the security aspect of passenger vehicle convoys should be managed by a private Israeli security firm, which could either simply check the convoys, or could both check and escort the convoys.

Such a system is reminiscent of a recommendation of the 1937 (British Mandatory) Peel Commission, which suggested the partition of mandatory Palestine into two states -- a Palestinian state and a Jewish state. Under this recommendation, the Jewish state would have been non-contiguous. Therefore the Peel Commission recommended some sort of travel corridor that would connect the

201. *Id.*
202. *Id.* at 2.
203. *Id.*
204. *Id.*
205. *Id.*

parts of the state. The Commission asserted that an open travel corridor "would also solve the problem, sometimes said to be insoluble, created by the contiguity of Jaffa with Tel Aviv to the north and the nascent Jewish town to the south. If necessary, Mandatory police could be stationed on this belt. This arrangement may seem artificial, but it is clearly practicable."[206] This arrangement, even if artificial, was accepted by the Jewish Agency but rejected by the Arabs who did not want a 'Jewish passage' running through their territory. Some such similar arrangement could be required of Israel. If it is, then the passage should operate at scheduled times and on the basis of advanced notice and security screening. The drivers must provide information on both the vehicle and the proposed passengers. A priority service should be established for officials and businessmen with frequent traveler identity cards.[207]

Vehicle clearance will involve two stages. The first will be concerned with the roadworthiness of the vehicle, and whether the vehicle meets Israeli vehicle and safety requirements. Once a vehicle passes through this stage, there will also be a physical security check. Only upon completion of both stages will a car be allowed to use the passage.[208]

The actual form that the passage will take is a moot point. Some argue that it should take the form of a tunnel, others an ordinary highway, others an elevated highway, and yet others a subterranean road. Whatever form the passage takes will likely depend both on costs and Israel's security considerations. While the form of the tunnel may not be vital to the concept of safe passage, the question of sovereignty and under whose sovereignty the tunnel will fall is an essential consideration.

E. Questions of Safe Passage and Territorial Sovereignty

1. Territorial Sovereignty

In spatial terms international law recognizes four types of territorial regimes: territorial sovereignty, territory that is not subject to the sovereignty of any state or states and has a status of its own (for example, mandated territories), *res nullius* (territory that is susceptible to acquisition by states but over which no one as yet has sovereignty or control) and *res communis* (communal land belonging to the world population and not capable of being placed under state sovereignty; for

206. WILLIAM PEEL, PALESTINE ROYAL COMMISSION REPORT385 (London: His Majesty's Stationery Office, 1937).
207. WORLD BANK TECHNICAL TEAM, *supra* note 197.
208. *Id.*

example, the seas and outer space).[209] It is with territorial sovereignty that we are concerned.

Territorial sovereignty is not only used as a description of the legal personality of the state. It is also used as a reference to the normal complement of rights that attach to the state -- a state's legal competence. These rights are indefeasible except by special consent of the state concerned.[210] Thus, Brierly defined territorial sovereignty not in terms of the independence of the state, but rather in terms of the existence of plenary rights over a state's territory.[211] Such rights apply primarily with respect to the state's landed territory, but also to the sea adjacent to the land and the seabed and subsoil of the territorial sea.[212]

The essence of territorial sovereignty is title. Title relates to both the factual and legal conditions under which territory is deemed to belong in the hands and under the authority of a particular individual.[213] The concept of title is akin to that of ownership. Indeed, the international rules regarding territorial sovereignty are derived from and based upon the Roman-law concept of ownership. In fact, even the modes of acquiring territory and control thereof are directly descended from the Roman rules dealing with acquisition of property. The difficulty that arises from this is that law is closely connected to contemporary life, and to try and overlay an ancient legal system onto a modern world order is challenging.[214]

In the context of a future corridor connecting the Gaza Strip and West Bank, questions arise as to who will have sovereignty over the safe passage. Both the Palestinians and the Israelis demand sovereignty over the passage. For the Palestinians such sovereignty would go a long way to enhancing the status of their future state, and would allay fears that Israel will choke the future Palestinian state by constantly closing the passage on the basis of security concerns. For Israel, security is a primary and, as will be discussed *infra* in Part III, legitimate concern. The use, as discussed *supra* in the Introduction to this article, of the Rafiah crossing by the Palestinians to smuggle arms and terrorists justifies Israel's security concerns. Israeli sovereignty over the passage would allow Israel to monitor the use of the passage and close the passage should serious security threats arise.

While both parties may demand sovereignty, only one can enjoy it. It would appear that international law requires the sovereign state to be Israel, on the basis of the concept of international servitudes.

209. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 107 (Oxford University Press 4th ed. 1990).
210. *Id.*
211. SHAW, *supra* note 48, at 333.
212. BROWNLIE, *supra* note 209.
213. SHAW, supra note 48, at 334.
214. *Id.* at 333-34.

2. International Servitudes

An international servitude may be defined as "an *exceptional* restriction imposed by treaty on the territorial sovereignty of a particular state whereby the territory of that state is put under conditions or restrictions serving the interests of another state, or non-state entity."[215] Such servitude arises where territory belonging to one state is in some way made to serve the interests of another state. The state enjoying the benefit of the servitude -- the dominant state -- may be entitled to exercise some right on the territory concerned (for example, a right of way, or a right to draw water for irrigation). Conversely, the state burdened by the servitude -- the servient state -- may be under an obligation to refrain from certain activity (for example, an obligation not to station armed forces in certain areas).[216]

The concept of servitudes is relevant to the issue of safe passage, as such a passage could eventually be construed as a 'right of way' or servitude enjoyed by the Palestinian State over the State of Israel. Given this, it is important to analyze the legal concept of servitudes, and the principles thereof, and to assess what impact such legal principles could have on the immediate issue.

The concept of servitudes derives from the Roman law of real property. Under Roman law, a right enjoyed by the owner of one piece of land, the dominant tenement, over land that belonged to another, the servient tenement, was called a praedial servitude. It would be incorrect to view servitudes in Roman law as personal rights terminating upon the death of the holder thereof. Indeed, under Roman law, servitudes were part of the class of real rights -- permanent rights and obligations that were said to 'run with the land.' Thus, servitudes persisted despite changes in ownership.[217] All successors in title to the servient tenement were bound by the servitude; and all successors in title to the dominant tenement could claim the benefit of the servitude.

The doctrine that servitudes are rights that 'run with the land' has been incorporated into the concept of international servitudes. For example, in the *Free Zones of Upper Savoy and District of Gex* case, the Permanent Court of International Justice held that France, which had acquired territory from Sardinia, was obliged to perform a duty undertaken by Sardinia to maintain a customs-free zone in the territory concerned.[218]

While servitudes created real rights -- so called *rights in rem* -- they did not transfer ownership of the territory concerned from the servient to the dominant tenement. Servitudes were only considered to be *jura in re aliena* -- rights in another's property. Thus, ownership of the territory remained vested in the owner of the servient tenement. The servitude constituted a slight derogation from such

215. JOSEPH GABRIEL STARKE, STARKE'S INTERNATIONAL LAW 179 (1994).
216. MALANCZUK, *supra* note 64, at 158-59.
217. *Servitudes,* ENCYCLOPEDIA OF PUB.'L. 389 SERVITUDES (1987).LIC INTERNATIONAL LAW, VOL. 10, at 389, 389 (Ulrich Fastenrath, 1987).
218. MALANCZUK, *supra* note 64, at 159.

ownership. The owner of the dominant tenement merely enjoyed a limited real right over the property of another.[219]

So too, international servitudes are a type of legal right exercisable by states over the territory of other states, which fall short of sovereignty. The existence of an international servitude does not transfer sovereignty over the territory concerned from the servient state to the dominant state. Sovereignty over the territory, like ownership in Roman law, remains vested in the servient state.[220] Thus, were a passage between the Gaza Strip and the West Bank to be created, then under international legal principles, Israel would retain sovereignty over the passage. Therefore, calls by the Palestinians for sovereignty over the passage are not supported by international law. This is essential and will be discussed in more detail *infra* in Part II (E)(4) of this article.

Landlords controlling large tracts developed under the European feudal system. In light of this growth the concept of servitudes was extended to include use of the land of territories under the control of foreign landlords. During the Middle Ages, writers of international law developed the concept of international servitudes.[221] In time, restrictions on territorial sovereignty came to be known as State servitudes.[222] Today, state servitudes are usually created by treaty, although they may derive from local custom. Thus, for a servitude to come into existence it must either be specifically created by the states concerned, or it must be the case that the servitude has long existed informally as part of the custom of the states concerned.[223] With reference to the question of Palestinian safe passage, no such customary passage can actually be said to exist. In fact, as emphasized by Professor Alan Dershowitz, prior to 1967 the West Bank and Gaza were non-contiguous. The West Bank fell under Jordanian control, and Gaza fell under Egyptian control. There was no territorial link of any sort between the two. Therefore, claims calling for such a link cannot base that call on the existence of a customary link between the two areas.[224] In fact, given this, it appears as if some justification needs to be provided as to why the Palestinians are entitled to more than what is viewed as their maximalist demands -- return to the 1949 armistice lines that existed prior to the Six Day War of 1967. This is effectively what a call for safe passage amounts to, given that no such passage was provided for before 1967. For such a passage to exist, it must be formally created by special agreement between the states.

While, as discussed *supra* in Part II (E) (2), servitudes 'run with the land' and are in principle intended to last forever, in fact servitudes can be terminated. Servitudes may be terminated by the merger of the servient and the dominant state,

219. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 141 (1962).
220. SHAW, *supra* note 48, at 366.
221. *See* 10 ENCYCLOPEDIA OF PUB. INT'L L. 389*Servitudes, supra* note 217, at 389. .
222. *Id.*
223. *Id.* at 391.
224. DERSHOWITZ, *supra* note 144, at 39.

by agreement between the states concerned, by express or tacit renunciation on the part of the power in whose interest they were created, by a renunciation by the servient state that is accepted by the dominant state, by expiry of a time limit, or by termination of the treaty creating the servitude because of its breach.[225]

Thus, with reference to passage between the Gaza Strip and the West Bank, Israel would have a right to terminate its use should the Palestinians (the power in whose interest the passage may be created) expressly or tacitly renounce the terms of the passage. Alternatively, should the Palestinians breach the agreement on safe passage, Israel could terminate the use of such passage as explained *supra* in the proceeding paragraph. Since an essential aspect of the agreement would relate to Israel's security concerns, and would, for example, provide that arms could not be smuggled along the route of passage, then should such smuggling occur this would constitute a breach of the agreement, or at the least a tacit renunciation thereof. On this basis, Israel could legitimately terminate the use of safe passage.

While these principles may not be enshrined in the existing agreements between the parties, as discussed *supra* in Part II (A), as principles of international law these options remain open to Israel despite their not being articulated in any of the agreements reached.

3. Types of International Servitudes

State servitudes may be differentiated on the basis of the manner and content of the restrictions imposed on territorial sovereignty. First, on the basis of the manner of the servitude, one can distinguish between positive and negative servitudes. Positive servitudes allow one state to perform certain acts on the territory of another state. Negative servitudes, by contrast, oblige the servient state to refrain from certain activity on its territory. This common distinction is derived from Roman Law.[226]

One can also distinguish servitudes on the basis of their content. Four groups of content-based servitudes can be identified. First, communication regimes, such as rights of transit, the right to place communication lines over the territory of another state and the maintenance of postal servitudes. Second, boundary regimes, such as rules relating to border stations. Third, economic servitudes, such as the granting of fishing or mining rights. Finally, military servitudes, such as the establishment of demilitarized zones, the maintenance of military bases on foreign territory, and the rights to the passage of troops.[227]

225. 10 ENCYCLOPEDIA OF PUB. INT'L L. 389-91 *Servitudes, supra* note 217, at 389-91.
226. *Servitudes, supra* note 217; *Id.* at 389.
227. *Servitudes, supra* note 217; *Id.* at 389-90.; MALANCZUK, supra, note 64, at 159. The various forms of international servitudes can sometimes exist not for the benefit of a single state, but for the benefit of many states, or even for the benefit of the world community as a whole. For example, in 1856 Russia entered a Treaty not to fortify the Aaland Islands in the Baltic. The islands lie near Stockholm. Despite this, Sweden was not a party to the Treaty. In 1918 the islands became part of Finland, which began to fortify them. Feeling threatened by such fortification, Sweden complained to the Council of the League of Nations. In what became known as the *Aaland Islands* case of 1920 a Commission of Jurists, appointed by the Council of the League of Nations, declared that since its independence in 1918 Finland had succeeded to Russia's obligations under the 1865 Treaty not to fortify the islands. The Jurists further held that Sweden could clam the benefit of the 1865 Treaty, despite the fact that it was not a party to the Treaty. The basis of this decision was that the Treaty had been designed to preserve the balance of power in Europe and could therefore be invoked by all states that were directly interested.

A safe passage for the Palestinians would presumably be a positive servitude, conferring a benefit on the Palestinians. The content of the servitude would presumably fall into that of communication regimes, being a 'right of way.'

4. Modern Practice and International Servitudes

While legal theorists embraced the concept of international or state servitudes, states were slow to take it up.[228] There are three cases marking the development and acceptance of the concept.

In the first, the *North Atlantic Coast Fisheries Arbitration*, the Permanent Court of Arbitration concluded that there was no evidence that the doctrine was one with which either American or British statesmen were familiar in 1818.[229]

In a subsequent case before the Permanent Court of International Justice, namely *The Wimbledon* case, it was claimed that the right of passage through the Kiel Canal was a state servitude. The Treaty of Versailles, Article 380, maintained that the canal was to be open to all the ships of all countries at peace with Germany. The majority of the Court did not accept the contention that this Article actually created an international servitude, although the argument did find favor with Judge Schucking.[230]

Thereafter, in the *Right of Passage Over Indian Territory Case*, the question of international servitudes arose again. After India had gained independence from Britain in 1947, some controversy arose over the territories Portugal still held on the Indian subcontinent. Among these territories were Daman and the enclaves of Dadra and Nagar-Avely. Portugal enjoyed transit rights between these territories, but they became somewhat restricted by India in 1953. In 1954, the enclaves were overrun by Indian nationalist groups. When Portugal requested permission to send a certain number of officials and soldiers from Daman to the enclaves to restore its rule, India refused to grant Portugal a right of transit over her territory. In response, Portugal applied to the International Court of Justice to recognize its right

228. STARKE, *supra* note 216, at 179.
229. North Atlantic Fisheries Case (Gr. Brit. V. U.S.), 11 R.I.A.A., 176 (Perm. Ct. Arb., Sept. 7, 1910).The case arose as a result of a treaty signed in 1818 between the United Kingdom and the United States, awarding the inhabitants of the US 'forever … the liberty to take fish of every kind' from the Southern coast of Newfoundland. The argument arose as to whether this was a servitude. The arbitration tribunal found that the treaty did not create a servitude, partly because such a concept was unknown by American and British statesmen of the time (1818). However, the terms of the Award do leave open the possibility of the existence of international servitudes.
230. STARKE, *supra* note 216, at 179.

over the territory, and to declare that India was impeding such right and must stop doing so.[231] In its judgment the Court focused on whether the right of passage claimed by Portugal existed on the eve of the events of 1954. The parties, in their submissions, had placed themselves on the plane of international law, and it was on this basis that the matter was decided. With respect to non-military passage the Court found that a long-standing practice of such passage had existed without restriction other than routine controls and customs security. The Court was satisfied that the long-standing practice had been accepted as law by the parties and therefore found that a Portuguese right of passage existed for civil convoys. With respect to passage by the Portuguese military, the Court found that after 1878 this form of passage had required British permission. The Court held therefore that no such right of passage existed as of its ruling in 1960.[232] In view of the fact that the Court found that there existed a clear practice between the states concerned, the Court found no need to examine further arguments based on general international law and general principles of the law.[233] Despite this, in the authors' opinion it appears that in principle the Court accepted the existence of international servitudes.

This conclusion is the subject of much debate among publicists in the field of international law. The majority consider servitudes as inappropriate in international law. They argue that while it is true that treaties and local custom may create obligations of a nature that survive a change in the sovereignty of one or both parties, these obligations are explicable without reference to the concept of servitudes. The authors of this article disagree with this viewpoint and see the concept of servitudes as both useful and relevant in the field of international law. Indeed, even if the term 'servitude' is ultimately agreed to be inappropriate or legally inexact, nevertheless there ought to be some term to embrace the rights, akin to servitudes, given to states in international law.[234]

Given this, the legal principles associated with servitudes are still relevant, and can be applied to a safe passage between the Gaza Strip and the West Bank. In doing so, what is most relevant, in the context of this article, is that a servitude does not grant the holder thereof (the dominant state) sovereignty. All that the dominant state enjoys is a limited right to use the territory of another state.[235] Thus, the Palestinians, being the dominant state, would not enjoy sovereignty over the passage. Such sovereignty will remain vested in Israel. This means that Israel will control the actual passage exclusively. This is essential from a security perspective. While necessary, such control is not sufficient. From the point of

231. *Right of Passage Over Indian Territory Case,* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOL. 2, at 244, 244 (Ledwig Webber, 1981).
232. *Id.* at 245.
233. *Id.*
234. STARKE, *supra* note 216, at 180.
235. *See* SHAW, *supra* note 48, at 366.

view of security, what is equally if not more important is the question of who will control the crossing points themselves. It is to this issue that we now turn.

F. Control of Crossing Points

1. The Question of Control

From the point of view of security, it is essential that Israel control the crossing points used to access the safe passage so as to detect and prevent the smuggling of arms and terrorists. This necessity has been accentuated recently by the chaos that now characterizes the Rafiah crossing point (this is discussed *supra* in the Introduction to this article). Israel cannot countenance the risk of such disorder at crossing points between Gaza and Israel, or Israel and the West Bank. Given the apparent disinterest of the PA and the ineffectiveness of the unarmed European Border Mission (as discussed *supra* in the Introduction to this article) the only way to avoid such anarchy seems to be through Israeli control of the crossings.

Israeli control will not lead to a cessation of attacks at the crossing points, or even to a decrease in the number of attempted attacks. This is clear from the many terrorist attacks that have occurred at the Erez crossing point. For example, on March 6, 2004, up to six Palestinians were killed and approximately twenty were wounded in an attack at the Erez crossing point.[236] Two Palestinian jeeps, disguised as Israeli military vehicles, drove up to the crossing. One exploded near a Palestinian checkpoint, and the other reached an Israeli position before exploding.[237] On January 5, 2005, a terrorist infiltrated the Erez crossing terminal, activated an explosive device, hurled grenades, and opened fire on Israeli soldiers.[238] Despite the fact that such attacks often claim Palestinians among other victims and result in closures which cost Palestinian workers their salaries, the perpetrators do not refrain from such attacks. In the opinion of the authors, those who sponsor such terrorism are unlikely to refrain from further such attacks on account of European or Palestinian personnel being placed at risk. This disregard could intimidate those conducting the inspections, causing them to enable the passage of forbidden cargo or persons. Once in Israel, a wide range of targets could be vulnerable. Thus, Israeli control of the crossing points appears to be essential for Israeli security. Indeed, in a response to a question at a talk held at the

236. *See Chronological Review of Events Relating to the Question of Palestine*, MONTHLY MEDIA MONITORING REVIEW, March 2004, *available at:* http://domino.un.org/UNISPAL.NSF/fd807e46661e3689852570d00069e918/2405eba57a2059c585256ea1006de76a!OpenDocument (last visited May 2, 2007)
237. *Id.*; *see also Deadly Assault on Gaza Crossing*, BBC NEWS, Mar. 6, 2004, *available at* http://news.bbc.co.uk/2/hi/middle_east/3538607.stm (last visited Feb. 12, 2007).
238. *Terrorist Attack at the Erez Terminal,* ISRAEL MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Terrorist+attack+at+the+Erez+Terminal+5-Jan-2005.htm (last visited Feb127Feb. 12, 2007).

Jerusalem Centre for Public Affairs, on December 19, 2005, Maj. Gen. (res.) Amos Gilad, Director of Military/Political and Policy Bureau, Israel Ministry of Defense, stated that Israel will retain control over the crossing points used to access the safe passage.[239]

While such statements may be reassuring to Israelis, how could they be justified under international law? Is there any law or norm that justifies Israel's retention of control of the crossing points?

2. Doctrine of Basic Rights and Duties of States

Numerous writers, international conferences, and international bodies, have purported to formulate lists of so-called basic (or fundamental) rights and duties of states. While the list of basic rights and duties is long, several such rights and duties have been more frequently asserted than others. The *basic rights* most frequently expressed are those of independence and equality of states, of territorial jurisdiction, and of self-defense and self-preservation. The *basic duties* that have been emphasized are those of not resorting to war, of carrying out treaty obligations in good faith, and of not intervening in the internal affairs of other states.[240]

Some criticize the doctrine: they argue that the rights and duties that are declared to be basic seem no more fundamental than other rights and duties of international law; that the rights and duties are formulated too generally to be at all accurate or to create norms or laws, and that the rights and duties asserted are not in fact independent rights and duties at all but mere restatements of truisms and axioms of international law.[241]

Despite such criticism, international tribunals have in fact invoked certain of the basic rights and duties of states in deciding the cases that come before them. This occurred, for example, in the 1986 decision of the International Court of Justice in *Nicaragua v. United States*.[242] Thus, it would appear that despite criticism, the doctrine is relevant and can be invoked in international legal matters. The doctrine is relevant to the question of control over the crossing points, discussed *supra* in Part II (F) (1). The right that is most important for the purposes of this article is the right to self-defense or self-preservation; while the duty that is most relevant in this context is the duty not to intervene in the affairs of other states. It is to this right and duty that we now turn.

239. Address by Maj. Gen. (res.) Amos Gilad, Director, Military/Political & Policy Bureau, Israel Ministry of Defense, Jerusalem Centre for Public Affairs, Jerusalem, Dec. 19, 2005, *available at* http://http.medi-line.co.il/Jcpa/agilad1311106.mp3 (last visited Feb. 12, 2007).
240. STARKE *supra* note 216, at 89-90.
241. *Id.* at 90.
242. *Id* .The Court expressly upheld the freedom of every state to choose which political, social, economic or cultural system it should adopt. *Id.*

3. The Right of a State to Self-Defense or Self-Preservation

Under international law, every government has the right to self-defense or self-preservation. This right not only extends to the defense of the state, but also to the protection of its citizens. The right was recognized and enshrined in the Oslo Agreements with the Palestinians that gave Israel, "the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order" and granted Israel "all the powers to take the steps necessary to meet this responsibility."[243]

The right appears to be accentuated by terrorism originating in the West Bank and Gaza Strip, which poses a threat not only to the lives of Israeli citizens, but also to the very existence of the State. Such terrorism is only likely to increase with the creation of safe passage. This is discussed *infra* in Parts III (F) and (E) of this article.

This threat of terrorism was aggravated by Hamas' victory in the Palestinian legislative elections held on January 25, 2006 and their subsequent authority in the Gaza Strip. The Hamas Charter contains statements such as "[o]ur struggle against the Jews is very great and serious," and calls for raising "the banner of Allah over every inch of Palestine."[244] Of more concern is the line stating that "[t]he Prophet Allah ... has said: '[t]he Day of Judgment will not come about until Muslims fight the Jews, when the Jew will hide behind stones and trees. The stones and trees will say, O Muslims, O Abdulla, there is a Jew behind me, come and kill him.'"[245] Before Hamas' electoral victory, security officials described their possible ascendancy as a "no-win situation"[246] and asserted that Hamas would never agree to recognize the State of Israel or put terror aside.[247] Today, more than one year after the elections, Hamas' stance has not changed. In this current political reality Israel's inherent right of self-defense becomes even more essential.

It is not surprising, facing this reality, that General Amos Gilad implied that in order to exercise its right of self-defense Israel needs more than sovereignty over any future safe passage. She also requires control over the crossing points that provide access to such passage. Only with such control can Israel effectively defend herself and her citizens, by determining who can use the safe passage, what they can carry with them, and ensuring that such standards are reliably implemented.

243. Oslo II Agreement, Article XII (emphasis added), *available at*: http://www.acpr.org.il/resources/oslo2.html (last visited Feb. 12, 2007).
244. Khaled Abu Toameh, *Bombing the Ballot,* JERUSALEM POST, Jan. 6, 2006, at 16 (citing to Hamas' 1988 Charter).
245. *Id.*
246. Margot Dudkevitch, *Security Officials: Hamas Victory WWould Destroy PA,* JERUSALEM POST, Jan. 11, 2006, at 2.
247. *Id.*

International law appears to support Gilad's assertion. Some might argue that this control will interfere in the affairs of another state -- the future Palestinian state. Since there is a duty on states not to intervene in the affairs of other states, surely Israel cannot then enjoy control over the crossing points? While at first glance this might seem to be implied from the duty not to intervene in the affairs of other states, a proper understanding of this duty suggests that in fact this is not its intended meaning.

4. The Duty of a State Not to Intervene in the Affairs of Another State

International law generally forbids intervention by one state in the affairs of another. The intervention that is so prohibited is understood as something less than aggression but more than mere interference, and much stronger than mediation or diplomatic suggestion. To fall within the prohibited realm of intervention, the intervention generally speaking must be against the will of the particular state affected, and almost always, as clarified by the International Court of Justice in the case of *Nicaragua v. United States of America*, serving by design or implication to impair the political independence of that state.[248]

Clearly, while the future Palestinian state may oppose Israel's control of the crossing points, such control would not impair by design or implication Palestine's political independence. On this basis, such control, and what could be seen as intervention in the affairs of another state, does not fall within the realm of the prohibition expressed by this international duty. This conclusion is supported by the further holding of the International Court of Justice. The Court went on to say that for an intervention by one state in the affairs of another to fall within the prohibited realm it must both impinge on matters as to which each state is permitted to make decisions by itself freely (for example, choice of its own political system or formulation of its own foreign policy), and if it involves interference in regard to this freedom, it must do so by methods of coercion, especially the use of force (for example, provision of support to underground movements attempting to overturn the elected government). Anything that falls short of this is strictly speaking not intervention.[249]

It does not appear that Israel's control of the crossing points would be deemed intervention. The control of the crossing points is not a matter for the Palestinian state to decide by itself freely. The matter needs to be decided by both the Palestinians and the Israelis, taking into consideration Israel's legitimate security concerns. Further, such control would not be implemented by force.

Even if Israel's control of the crossing points was construed as a form of prohibited intervention, it would appear that such control would fall into the principal exceptions to the duty. Under these exceptions a state has a legitimate

248. STARKE, *supra* note 216, at 93-94.
249. *Id.* at 94.

right of intervention. The relevant exceptions are those enshrined "to protect the rights and interests, and the personal safety of its citizens abroad" and "self-defense."[250] Not only could Israel intervene on the basis of self-defense, but also, surely the right to protect citizens abroad would extend to the right to protect citizens within the relevant country -- which is the exact purpose that such control would serve. Thus, even if construed as a form of prohibited intervention, Israel could control the crossing points on the basis of these exceptions to the duty.

Therefore, on the basis of Israel's right to self-defense, and the exceptions to the duty not to intervene in the affairs of another state, Israel is arguably entitled to control the crossing points allowing access to the safe passage. This is in addition to her retention of sovereignty over the passage. These are essential features of any safe passage regime.

III. ISRAEL'S SECURITY CONSIDERATIONS

A. Israel's Need for Defensible Borders

In an address by US President George W. Bush to the American Jewish Committee in May of 2001, Bush stated that "[f]or a Texan, a first visit to Israel is an eye-opener. At the narrowest point it's only eight miles from the Mediterranean to the old armistice line. That's less than from the top to the bottom of Dallas-Ft. Worth Airport. The whole of pre-1967 Israel is only about six times the size of the King Ranch near Corpus Christi."[251] Indeed the distances between Israeli population centers and the pre-1967 armistice lines are negligible. Twenty-one miles separate the West Bank and Haifa, nine miles separate the West Bank and Netanya, eleven miles separate the West Bank and Tel Aviv, ten miles separate the West Bank and Beersheba, and seven miles lie between the Gaza Strip and Ashkelon.[252]

These trifling distances could easily be exploited by a hostile state such as Iran, Saudi Arabia, or Syria to launch an attack against the Jewish State. Traditionally, it is this threat of conventional warfare that lies at the heart of Israel's claim for defensible borders. Borders, with which, were Israel to come under attack, the Israeli Defense Forces could fulfill it's defensive mission using a conventional army or some combination of ground forces, and achieve a high probability of success.[253] Within the pre-1967 lines, Israel loses the ability to defend herself.[254]

250. *Id.* at 95.
251. *See* Mitchell G. Bard, ed. *Myths and Facts: A Guide to the Arab-Israeli Conflict* (2001).
252. *Id.*
253. Maj.-Gen. (res.) Yaakov Amidror, *Israel's Requirements for Defensible Borders, in* DEFENSIBLE BORDERS FOR A LASTING PEACE 17, 19 (2005).
254. DR YUVAL STEINITZ ET AL, DEFENSIBLE BORDERS FOR A LASTING PEACE 2 (2005)

According to universal military principles of defense, an adequate defensive plan will allow a state sufficient strategic depth to enable defensive forces to be deployed, and to ensure an acceptable distance between the front and the strategic centre of the state. Within the pre-1967 lines, at its narrowest, Israel was nine miles wide. Given such an insignificant width, neither of the two principles of defense would be satisfied. Strategic infrastructure in the centre of the country would be exposed, and there would be insufficient depth within which the Israeli Defense Forces could regroup and respond.[255]

The US Joint Chiefs of Staff recognized this after the Six Day War in 1967 when they concluded that, "[f]rom a strictly military point of view, Israel would require the retention of some captured Arab territory in order to provide militarily defensible borders."[256] Moreover, the claim to defensible borders was recognized as a right by the phrasing of U.N. Security Council Resolution 242, the definitive statement of the senior body at the United Nations on settling the conflict.[257] The Resolution calls for the "[w]ithdrawal of Israeli armed forces from *territories occupied* in the recent conflict (the 1967 War) (emphasis added). It is vital to note that the resolution does not call for withdrawal from 'the territories occupied' but only from "territories occupied." The English version of the Resolution, which is the prevailing version,[258] intentionally leaves out the definite article "the" so as to leave indefinite the amount of territory from which Israel is expected to withdraw. Therefore this tacitly confers a right to defensible borders on Israel.[259]

Ideally, for Israel to have defensible borders, three elements should be satisfied. The first requires Israeli control over the external border between the West Bank and Jordan, and the Gaza Strip and Egypt respectively. The second is the broadening of the corridor connecting Tel Aviv and Jerusalem, as well as establishing a perimeter to protect Jerusalem. Third, and finally, is shifting Israel's boundary with the Palestinian entity eastward "so that militarily vital territory does not end up under Palestinian control."[260] Aspects of these elements may be viewed by some as utopian, such as control over external borders. Indeed, as discussed *supra* in the Introduction to this article, Israel has recently relinquished control over

255. *Id.*
256. *Id.*
257. *See* Dr. Meir Rosenne, *Understanding UN Security Council Resolution 242 of November 22, 1967, on the Middle East, in* DEFENSIBLE BORDERS FOR A LASTING PEACE 41, 41 (2005).
258. *Id.* at 41, 46. Two draft resolutions were presented to the Security Council, one in French and the other, presented by the British, in English. The French text made use of the definite article "the" and called for the withdrawal of Israeli forces from "the occupied territories." Thus, the French version of the resolution seems to require that Israel withdraw from all territory that had been occupied in Israel's defensive war. The English version on the other hand intentionally leaves out the definite article, thus tacitly requiring that Israel withdraw from only some of the occupied territories. In the case of clashing texts due to language differences, preference is given to the text that was originally submitted to the U.N. Security Council. In this case, that text is the English text. Thus, the English text prevails on this matter. *Id.*
259. *Id.*
260. STEINITZ ET AL, *supra* note 253, at 4.

the border between the Gaza Strip and Egypt. Therefore, although not all three elements will ultimately be satisfied, what is essential for Israeli security is the retention of control over certain militarily vital territory, such as the West Bank mountain ridge.

Since its capture by the IDF in 1967, the West Bank has contributed greatly to Israel's security. Lying immediately adjacent to the Israeli coastal plain, the West Bank north-south mountain ridge commands a view of vital Israeli infrastructure, such as the Ben Gurion international airport and major highways connecting Jerusalem, Tel Aviv and Haifa. Thus, any hostile military force in charge of the ridge could threaten daily life and even mobilization of Israeli's in the centre of Israel.[261] Israeli control of the mountain ridge affords her some level of security.

Moreover, the West Bank mountain ridge serves as a barrier protecting Israel's coastal plain from attacks from the East. It comprises a 4,200 foot ridge that is relatively steep, and would be an obstacle to a ground attack. At the very least, the amount of time it would take a hostile force to reach the top of the ridge would be sufficient for Israel to mobilize her reserve troops. Thus, even if not preventing an attack by a conventional army, the ridge would afford Israel the time necessary to prepare for an effective Defense.[262]

Further, Israel's control of the West Bank mountain ridge enables her to prevent the smuggling of advanced weapons to Palestinian terrorist groups. In addition, air defense systems positioned along the ridge can intercept enemy aircraft from forward positions, before they reach Israeli population centers.[263] Therefore it is apparent that at the very least what is required for Israeli security is control of the West Bank mountain ridge. Without such control, Israel makes herself vulnerable to attack by hostile forces. Indeed, American Lt. General Kelly admitted that, "[i]t is impossible to defend Jerusalem unless you hold the high ground.... An aircraft that takes off from an airport in Amman is going to be over Jerusalem in two-and-a-half minutes, so it is utterly impossible...to defend the whole country unless I hold that land."[264]

B. Has Advanced, Long-Range Military Technology Made Defensible Borders Obsolete?

The need for defensible borders has been disputed in recent years. In the era of long range missiles capable of crossing vast amounts of territory in minutes, one

261. Yaakov Amidror, *Israel's Requirements for Defensible Borders,* in STEINITZ ET AL, *supra* note 252, at 37.
262. *Id.*
263. *Id.* at 39.
264. Lieutenant General (Ret) Thomas Kelly, Director of Operations from the Joint Chiefs of Staff during the Gulf War of 1991, *quoted in* Mitchell G. Bard, *Myths & Facts Online: Boundaries,* Jewish Virtual Library, *available at* http://www.jewishvirtuallibrary.org/jsource/myths/mf10.html#f *citing* Jonathan Schachter, *Territory Vital to Security, U.S. General Says,* The Jerusalem Post, Nov. 7, 1991.

would think that the concept of defensible borders was no longer of such importance. In fact, the contrary is true. History has shown that while aerial attacks may damage, countries are only conquered by troops occupying land. For example, in Iraq's 1991 invasion of Kuwait, despite six weeks of Allied bombing, Kuwait was only liberated when the Allied troops marched into the country.[265] Thus, while some argue that modern technology makes defensible borders no longer as significant as they used to be, the opposite is, in fact, true. That is, the existence of modern technology only accentuates the need for defensible borders.

As demonstrated by the recent Hezbollah attacks, the advent of missiles has increased the value of territory and space. In the age of missiles, the positioning and dispersal of infrastructure, weapons systems, and command and control mechanisms become critical. Missile defense can limit the impact of an attack, but cannot prevent it completely, and in the face of a nuclear attack it is the possibility of response that acts as a deterrent to potential aggressors. This, in turn, is determined by the territory and depth available to a country. The more territory that a state has between itself and its attacker, the better possibility of an effective response and the more of a deterrent it is. This case particularly applies in Israel, where the majority of Israeli forces are reserve troops who mobilize only within 48 hours of attack. Defensible borders will enable a numerically weaker Israeli Defense Forces to withstand an initial assault, until such time as the army is fully mobilized.[266]

C. Have Political Developments in the Middle East Made Defensible Borders Unnecessary?

In recent years there have been several positive political developments in the Middle East. Among these are the conclusion of peace treaties between Israel and Jordan, and Israel and Egypt respectively, the efforts to democratize Iraq, and the departure of the Syrian army from Lebanon. Some argue that these developments militate against the need for defensible borders. However this is not the case, as politics in the region are very fluid, and no guarantees can be made that the improved political situation will be permanent.[267] Defensible borders remain essential.

Moreover, although there may have been some developments, recent calls from the President of Iran for Israel to be wiped off the map[268] reiterate the need for Israeli caution in making territorial concessions. The continued necessity for Israel

265. *Id.*
266. Amidror, *supra* note 252, at 28-29.
267. STEINITZ ET AL, *supra* note 252253, at 2.
268. On October 26, 2005, Iranian President Mahmud Ahmadinejad, speaking at a forum called 'The World Without Zionism,' stated that "Israel should be wiped off the map." Iranian President Calls for Israel's Destruction, Voice of America News, (Oct. 26, 2005), *available at* http://www.globalsecurity.org/wmd/library/news/iran/2005/iran-051026-voa01.htm

to maintain defensible borders is especially so with the imminent possibility of Iran's possessing nuclear warheads. Further, while Israel may be at peace with Egypt and Jordan, she is not at peace with other Arab countries within the region. Threats still exist from countries such as Iran, Syria, and Saudi Arabia, which could purchase advanced military technology with billions of dollars in oil revenues and subsequently fire missiles into Israeli territory. Despite modern political developments in the Middle East, demonstrates Israel's continuing need for defensible borders.

U.S. President George W. Bush recognized this need and, in his April 14, 2004 letter to Prime Minister Ariel Sharon, committed US support. Bush wrote that "[t]he United States reiterates its steadfast commitment to Israel's security, including secure and defensible borders, and to preserve and strengthen Israel's capability to deter and defend itself, by itself, against any threat or possible combination of threats."[269] Bush reiterated this commitment in a statement on April 11, 2005, made to Prime Minister Ariel Sharon, in Crawford, Texas. Bush stated that "[t]he United States is committed to Israel's security and well being as a Jewish state, including secure and defensible borders."[270]

D. The Threat of Terrorism

Disproportionate emphasis has been placed on defensible borders in the context of an external threat from, for example, Iran, to the exclusion of a more imminent threat: terrorism. Too little, if any, consideration has been given to Katyusha rockets or Qassam rockets or other such weapons being fired from within the Gaza Strip and West Bank. Terrorists carrying these readily available and easily transportable weapons could also infiltrate from the West Bank into Israel. The concept of defensible borders is, perhaps, even more essential in this context. Indeed, to see the real importance of the Gaza Strip and the West Bank for Israeli security, one need only look at the many attacks that were carried out by the Palestinians living in these areas prior to 1967. Any territorial link between the West Bank and Gaza Strip only augments this threat by allowing for terrorist infiltration into Israel.

One can in fact distinguish, as Dan Haloutz, IDF Chief of Staff, between full-scale war and low-scale conflict. Low-scale conflict does not mean that there are no casualties. However, as compared to full-scale war, which is usually shorter, sharper and generally ends with a much clearer result, low-scale conflict is

269. Press Release, The White House, Letter From President Bush to Prime Minister Sharon (Apr. 14, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040414-3.html.
270. Press Release, The White House, President and Prime Minister Sharon Discuss Economy, Middle East (Apr. 11, 2005), *available* at http://www.whitehouse.gov/news/releases/2005/04/20050411-2.html.

continuous and somewhat muddied.[271] It is this continuous, low-scale conflict, which takes the form of thousands of acts of terrorism, with which the authors of this article are presently concerned.

In considering safe passage in the context of terrorist infiltration into Israel, most people are concerned by the possibility of a terrorist using the safe passage, leaving the established route (a highway, for example), and entering Israel in order to carry out an attack. Few realize that there is a more subtle and more complex threat. In an attempt to prevent terrorist infiltration into Israel, Israel has erected a security fence along the entire Gaza Strip and part of the West Bank. It would be incorrect, however, to see this fence as a defensible border. While around the Gaza Strip the fence has succeeded in blocking infiltration attempts into Israel, this success is due in large part not to the fence but to the IDF that monitors the fence and has intercepted most terrorists before they crossed through the fence.[272] Further, and possibly most importantly, the fence along the West Bank is only in the process of being constructed, and is incomplete in many places.[273] Thus, safe passage from the Gaza Strip into the West Bank effectively constitutes safe passage directly into Israel. A terrorist can therefore use the safe passage, enter the West Bank, and from there easily infiltrate Israel.[274]

The completion of the security fence around the West Bank may minimize this particular threat, and make it more difficult for terrorists to infiltrate Israel from the West Bank. However the security fence will not be a panacea to the terrorist threat from the West Bank and Gaza Strip that is augmented by the creation of a safe passage.

In addition, smuggling of arms from Egypt into the Gaza Strip is a notorious and ongoing practice. Israeli intelligence believes that at least 10 Strella SA-7 shoulder-launched anti-aircraft missiles have been smuggled into Gaza in recent years.[275] Indeed, the IDF website states that during the year 2003 a total of 44 tunnels between Egypt and Gaza, presumably used for the passage of these weapons, were discovered, while in 2004 the number had decreased somewhat to 36.[276] It is left for us to wonder how many of these tunnels were *not* discovered and operate daily until today. And lest it be assumed that the tunnels are the only method devised to bring weapons into Gaza, it should be recalled that the PA under

271. Jerusalem Issue Brief, Jerusalem Centre for Public Affairs, Dan Haloutz, 21st Century Threats Facing Israel, Vol. 3, No 16, February 3, 2004, *available at* http://www.jcpa.org/brief/brief3-16.htm (last visited Apr. 26, 2007).

272. STEINITZ ET AL, *supra* note 253, at 14.

273. Dan Izenberg & Yaakov Katz, *'Karni crossing is an acid test of Abu Manen's Capabilities,'* JERUSALEM POST, Jan. 5, 2007, at 3.

274. *Id.*

275. Ben-David, Alon, "PIJ attempted helo shootdown, say Israelis." Jane's Defence Weekly, at 25 (Feb. 15, 2006.).

Israel Defense Forces: The Official Website, General Info and Statistics, *available at* www.idf.il/dover/site/mainpage.asp?sl=EN&id=22&docid=37572.EN.

276. Israel Defense Forces Official Web Site, *available at* www.idf.il/dover/site/mainpage.asp?sl=EN&id=22&docid=37572.EN (last visited April 26, 2007).

the late Yasser Arafat was itself responsible for the infamous Karine A, a cargo ship loaded with tons of Iranian missiles that Israel intercepted en route to Gaza.[277] The list of armaments on the ship is disquieting.

As a result of the discovery of the Karine A, the PA, Hamas, Islamic Jihad and other organizations may not at present possess all of the arms which were on board the ship, but this does not mean that their efforts to acquire such weaponry have abated. Indeed, the practice of arms smuggling has only increased with Palestinian control of the Rafiah border crossing, as discussed *supra* in the Introduction to this article. Yuval Diskin, head of Israel's domestic security service, the Shin Bet, said that large quantities of weapons have been smuggled since Israel's withdrawal from Gaza. These included an undetermined number of Soviet-era Grad artillery rockets with a range of 30 km, a small quantity of Strela surface-to-air missiles, 305 anti-tank missiles and significant quantities of military-grade explosives.[278] Safe passage between the Gaza Strip and the West Bank could open the door to the free flow of rockets, arms and artillery from the Gaza Strip to the West Bank -- an as yet unprecedented situation. A heavily armed West Bank poses not only a terrorist threat, but in fact an existential threat to Israel, with or without the security barrier.

There are numerous instances of terrorism committed by the firing of, for example, rockets and mortar shelling, as discussed *supra* in the Introduction to this article. These incidents have had little impact on Israel, given the fact that most rockets to date have been launched from the Gaza Strip and could until recently only reach the Israeli Negev town of Sderot with a population of approximately 40,000. With the Israeli withdrawal from Gaza, rocket attacks have increased in frequency. Especially with the weapons being smuggled from Egypt, the Israelis are concerned by the prospect of rockets with greater range and more powerful warheads being fired from Gaza into the major Israeli port of Ashdod and the industrial zone of Ashkelon.[279] The danger of rockets striking Ashkelon is magnified by the location of the Rutenberg power station, which supplies half of Israel, as well as the large fuel and chemical depots, a desalination plant, and the oil pipeline running to the Red Sea port of Eilat.[280] On February 14, 2006, eight Qassam rockets were fired at the Western Negev, with one exploding close to a strategic installation in the Ashkelon industrial zone. The threat this capability

277. *See* The Jewish Virtual Library, *available at* http://www.jewishvirtuallibrary.org./jsource/Peace/paship.html (last visited April 26, 2007). The Karine A was a four-thousand ton freighter destined for the Gaza Strip. It was discovered in January 2002, carrying over 50 tons of weapons, including long range Katyusha rockets, LAW anti-tank missiles, Sagger anti-tank missiles, long range mortar bombs, mines, snipers rifles, and more than two tons of high explosives.

278. Ed Blanche, *Militant-fired MBll, Missiles Bracket Israel,* JANE'S MISSILES AND ROCKETS, Feb. 1, 2006.

279. *Id.*

280. Ed Blanche, *Israelis See Qassams Becoming a Problem,* JANE'S MISSILES AND ROCKETS, Apr. 1, 2006.

poses could wreak havoc: National Infrastructure Ministry officials told the *Jerusalem Post* that if fired accurately, Qassam rocks had the ability to shut down the Ashkelon power plant, which provides electricity to half the country, causing "severe damage to infrastructure and human lives."[281] Moreover, being closer to the Israeli border has enabled terrorists from Gaza to reach, as mentioned *supra*, the major coastal city of Ashkelon. This is especially so with reports by Shin Bet director Diskin that Fatah smuggled seven to ten missiles with a range of nine to eighteen miles (fifteen to thirty kilometers) into the Gaza Strip prior to disengagement. These missiles can reach approximately three times farther than the Qassam rockets that terrorists are currently using, and could put the major Israeli port city of Ashdod within firing range.[282] Additionally, Brigadier General Yossi Kooperwasser, Head of Military Intelligence Research, warned that, "It is very possible that in the coming months the Palestinian organizations will succeed in extending the Qassam range."[283] However, these facts pale in significance when compared with the imminent possibility of safe passage and the smuggling of rockets and such weapons into the West Bank via the safe passage.

To appreciate the threat that will likely be posed, it is important to have a basic knowledge of the kinds of weaponry that the Palestinians currently possess as well as those weapons that Palestinians could possess in the future. Weapons available include:

281. Yaakov Yk Katz, KK*assams at Ashkelon PDPose 'Disaster'Tthreat,* JERUSALEM POST. Feb. 17, 2006.
282. Hilary Leila Krieger, *Fatah Cells Have Long-Range Missiles, says Diskin,* JERUSALEM POST, Jan, 4. 2006, at 3.
283. Icenberg & Yaakov, *supra* note 274, at 25.

Weapon	Source	Range	Width	Weight	Weight of Explosives	Warhead Types
Qassam 3[284]	Palestinian Territories	10km	17cm	90kg	10-20kg	
Katyusha Rockets	Russia	Approximately 3 miles	132mm	42kg	22kg	
Sakr Eye: Low-Altitude Surface-to-Air Missile[285]	Russia	4400m	72cm	15kg		1kg plus HE smooth fragmentation with contact and graze fuzing
Strela 2: Low-Altitude Surface-to-Air Missile[286]	Russia	800-3,400m	.072m	9.15kg		1.17kg HE smooth fragmentation with contact fuzing
Mortars			81mm	42-44 kg	6, 8 kg	
Anti-Tank Grenades						
Anti-Tank Rockets		0.16 miles	60mm	5kg	7kg	
Anti-Aircraft Missiles						
RPG's	Soviet Union	0.3 km	85mm	7.9kg	2.1kg	
Grad Missiles (BM 21)	Russia	30km		18.4 kg		Smoke, incendiary, chemical, illumination, anti-tank mines, and anti-personal mines

284. *Gaza's Rocket Threat to Israel,* BBC NEWS, Nov. 15, 2006, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/3702088.stm (last visited May 2, 2007).
285. JANE'S LAND-BASED AIR DEFENSE 10 (James C. O'Halloran & Christopher Foss eds. Jane's Informations Group, Ltd. 17th ed. 2004). All of the statistics sited in this chart come from this book.
286. *Id.* at 21-28.

A West Bank armed with such weaponry means that most of the major Israeli population centers are potential targets. Qassams could be used to attack Kfar Sabba and Jerusalem. Katyushas could be used to attack Afula, Netanya, Tel Aviv, Kiryat Gat and Beersheva.[287] Further, serious threats would be posed to Israel's Strategic interests. The Ben-Gurion International Airport, through which nearly all international travelers pass, could, for example, be struck by a Qassam, as might route 443, a highway linking Jerusalem with Tel Aviv.[288] Indeed, Israel revealed on Monday, January 2, 2006 in an indictment filed in a Beersheba district court, that a recent terrorist attempt by Fatah's Al Aksa Martyr's Brigades against the Dimona nuclear reactor had been foiled.[289] Such an attack could be catastrophic, with nuclear fallout that would affect the entire region.

E. Do Hopes for Peace Eliminate the Threat of Terrorism?

Some might argue that the possibility of peace eliminates these threats to Israeli population centers and strategic interests. However, this does not appear to be the case based on the historic responses of the Palestinian people to peace initiatives. Indeed, on December 26, 2005, three Palestinian groups, one of which belongs to the mainstream Fatah faction of PA President Abu Mazen,[290] threatened to continue their attacks on Israel. They claimed to have long-range missiles, capable of reaching more Israeli towns and cities than in the past, and one of the groups says that it has developed a rocket with a range of 9.3 miles. Further, the groups claim that they possess Russian-manufactured Grad missiles smuggled into the Gaza Strip from Egypt. These missiles have a range of approximately 15 miles. The missiles, also known as BM-21, have a 122-mm caliber.[291] They were intended for military use, and not for attacks on vulnerable civilian population centers.

When asked whether Grad missiles had indeed been smuggled into the Gaza Strip from Egypt, an unnamed Palestinian official said he did not rule out the possibility that such weapons had been smuggled from Egypt in recent weeks.[292] This failure on the part of the PA to meet the commitments they made in the negotiations on the Rafiah crossing, discussed *supra* in the Introduction to this article, bodes poorly for the future Palestinian State's commitments to peace.

287. Toameh, *supra* note 31.
288. Maj.-Gen. (res.) Yaakov Amidror, *Israel's Requirements for Defensible Borders,in* DEFENSIBLE BORDERS FOR A LASTING PEACE, *supra* note 260, at 33.
289. Dan Izenberg, *Terrorists Targeted Dimona Reactor,* JERUSALEM POST, Jan. 3, 2006, at 4.
290. Fatah was established in approximately 1958 by members of the Palestinian dispora, including Yasser Arafat. After the war of 1967, Fatah became the dominant force in Palestinian politics. The leaders of Fatah lived in exile in Tunisia from 1982 until their return to the West Bank and Gaza in 1993. Currently Fatah is led by Mahmoud Abbas, and was the ruling party in the Palestinian territories until Hamas won the 2006 elections. The Encyclopedia Britannica, *available at* http://www.britannica.com/eb/article-9033809/Fatah (last visited May 11, 2007).
291. Toameh, *supra* note 7, at 2.
292. *Id.*

Further, the importation of such weapons into Gaza from Egypt increases the probability that they will be smuggled via the proposed safe passage from the Gaza Strip to the West Bank. The improved weaponry would enable Palestinians in the West Bank to reach additional Israeli population centers.

Thus, not only will the threat of smuggling be increased by the creation of safe passage, but the threat posed by the firing of rockets from the West Bank will be augmented. It does not appear that these threats will subside in the near future. In fact, the threats posed are multiplied by improved technology and increased rocket range. This confirms the need for defensible borders, and raises serious security concerns over any future 'safe passage' that is agreed to by the parties.

These security concerns seem to militate against the creation of any safe passage between Gaza and the West Bank. However, would such a non-contiguous Palestinian state be viable, as is so often demanded by international leaders? To answer this question, one needs to consider the meaning of viability, and examples of past and present non-contiguous states.

IV. 'VIABLE' STATEHOOD FOR THE PALESTINIANS

A. The Use of the Term 'Viable' in the Context of the Israeli-Palestinian Conflict

When referring to a future State of Palestine, many politicians and international organizations demand that the state be 'viable.' For example, President Bush called for "[a] viable Palestinian State" in a speech he delivered in February 2005.[293] Similarly, Condoleezza Rice asserted that, "Israel must also take no actions that prejudice a final settlement and must help ensure that a new Palestinian state is truly viable."[294]

These official American sentiments were echoed at the U.N., with Kofi Annan calling for "international support for an independent, democratic, viable, and contiguous Palestinian state."[295] Similarly, the Quartet agreed on "the need to ensure that a new Palestinian State is truly viable."[296]

These calls for a viable Palestinian state are often linked to the assumption that it must be contiguous to be truly viable. The premise here is that a non-contiguous state cannot be viable because to be viable one must necessarily have movement of

293. President George W. Bush, Remarks in Brussels, Beligum (February 21, 2005).
294. Condoleezza Rice, U.S. Secretary of State, Remarks at the London Meeting Supporting the Palestinian Authority, (March 1, 2005), *available at* http://www.state.gov/secretary/rm/2005/42822.htm. (last visited Apr. 26, 2007).).
295. Kofi Annan, U. N. Secretary-General, Remarks at the London Meeting Supporting the Palestinian Authority (March 1, 2005), *available at* http://usinfo.state.gov/mena/Archive/2005/Mar/01-828599.html. (last visited Apr. 26, 2007).
296. U.S. Dept. of State, Joint Statement by the Quartet at the London Meeting Supporting the Palestinian Authority ((March 1, 2005)), *available at* http://usinfo.state.gov/usinfo/Archive/2005/May/09-877134.html. (last visited Apr. 26, 2007).

people and goods between parts of the state's territory. The basis of this argument is questionable. First, there are already goods convoys transporting goods from Gaza to the West Bank.[297] This, interestingly, functions in the absence of safe passage.

Second, a Palestinian state could be viable without safe passage if the Palestinian people exercise their right to free transit. This right is accorded to the Palestinians by virtue of their being a member of the Arab League of States, and a signatory of the Arab Transit of 1977. In terms of this agreement, 'Palestine' has the right of free transit over the territories of other Arab signatory states. The exercise of this right could have an enormous impact on the future Palestinian state and its economy. Both Egypt and Jordan are signatories. Thus, they are obliged to exempt Palestinian goods in transit from custom duties, taxes and other such charges.[298] This, again, in the absence and without the necessity of safe passage.

Despite these facts, calls still abound for safe passage, which consider safe passage essential for a viable Palestinian state. To ascertain whether this understanding of viability is correct, one must consider the meaning of viability.

B. The Meaning of the Term 'Viable'

As defined in the *Oxford English Dictionary* viability has two meanings. Depending on which meaning is adopted, the meaning of viability in the context of the Israeli-Palestinian conflict, and the demands for the creation of a Palestinian state will differ. The word viable also has two meanings that correspond to the two distinct meanings of viability.

The first possible meaning of viability is the "quality or state of being viable, capacity for living, the ability to live under certain conditions. Also... now *esp.* feasibility, and the ability to continue or be continued."[299] According to *The Oxford English Dictionary* viable can mean "capable of living, able to maintain a separate existence."[300] If this is what is meant by the term viable, then it would seem that the Palestinian state could indeed be non-contiguous and yet remain a viable state. The fact that the state is non-contiguous does not render it unfeasible.

However, the words viability and viable can carry different meanings. According to *The Oxford English Dictionary,* viability can also mean "the condition of being traversable."[301] Viable too can mean "traversable."[302] Whether traversable means legally or physically traversable is a question in and of itself. Presumably, in the context of a Palestinian state, the term would be used to mean physically traversable, especially in light of the demands for territorial contiguity,

297. This is discussed *infra* in Part II of this article.
298. This is discussed *infra* in Part II of this article.
299. THE OXFORD ENGLISH DICTIONARY 588 (2d 1989).
300. *Id.*
301. *Id.*
302. *Id.*

territorial connectivity and territorial continuity. Given this meaning of the words, it appears as if the calls for a 'viable Palestinian state' might amount to nothing more than calls for a territorial link between the West Bank and Gaza Strip.

However, the understanding of these terms as considered in the previous paragraph is not supported by *Black's Law Dictionary.* In the authors' opinion this legal lexicon is to be preferred over the general purpose *Oxford English Dictionary. Black's Law Dictionary* defines the word viable as meaning "capable of independent existence or standing," or as "capable of living, especially outside the womb."[303] These definitions suggest that all that is required for a state to be viable is that it is capable of independent existence or survival. Some examples are illustrative:

303. BLACK'S LAW DICTIONARY 1597 (8th ed. 2004).

	Square Miles	Population	Gross Domestic Product *(GDP)	Importation of Goods Per Year	Exportation of goods Per Year	Inflation Rate	Unemployment Rate
Andorra[304]	181sm	71,822	$2.77 billion U.S. dollars	$1.879 billion U.S. dollars	$148.7 million U.S. dollars	3.5%	0%
Bahrain[305]	257 sm	708,573	$17.7 billion U.S. dollars	$9.03 billion U.S. dollars	$12.62 billion U.S. dollars	2.7%	1.5%
KUWAIT[306]	6880 sm	2,505,559	$52.17 billion U.S. dollars	$19.2 billion U.S. dollars	$56.06 billion U.S. dollars	3 %	2.2 %
Liechtenstein[307]	62 sm	34,247	$1.786 billion U.S. dollars	$917.3 million U.S. dollars	$2.47 billion U.S. dollars	1%	1.3 %
Luxembourg[308]	998 sm	480,222	$32.6 U.S. dollars	$24.22 billion U.S. dollars	$19.55 billion U.S. dollars	2.6%	4.1%
Monaco[309]	0.76 sm	32,671	$976.3 billion U.S. dollars	$916.1 million U.S. dollars	$716.3 million U.S. dollars	1.9 %	0%
Qatar[310]	4414 sm	907,229	$26.05 billion U.S. dollars	$12.36 billion U.S. dollars	$33.25 billion U.S. dollars	7.2%	3.2%

304. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 2005: ANDORRA, *available at* http://www.cia.gov/cia/publications/factbook/geos/an.html (last visited Feb. 11, 2007).
305. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 2005: BAHRAIN, *available at* http://www.cia.gov/cia/publications/factbook/geos/ba.html (last visited Feb. 11, 2007).
306. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 2005: KUWAIT, *available at* http://www.cia.gov/cia/publications/factbook/geos/ku.html (last visited Feb. 11, 2007).
307. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 2005: LIECHTENSTEIN, *available at* http://www.cia.gov/cia/publications/factbook/geos/ls.html (last visited Feb. 11, 2007).
308. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 2005: LUXEMBOURG, *available at* http://www.cia.gov/cia/publications/factbook/geos/lu.html (last visited Feb. 11, 2007).
309. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 2005: MONACO, *available at* http://www.cia.gov/cia/publications/factbook/geos/mn.html (last visited Feb. 11, 2007).
310. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 2005: QATAR, *available at* http://www.cia.gov/cia/publications/factbook/geos/qa.html (last visited Feb. 11, 2007).

There is no implication that the success of these small states is based on their territorial contiguity. Indeed, examples of both past and present non-contiguous states suggest that contiguity is not a prerequisite for a state's viability, and that a state will be capable of existing even if it is non-contiguous. It is to these examples that we now turn.

C. Non-Contiguous States

There are many examples, past and present, of non-contiguous states -- states consisting of two or more parts between which lies foreign sovereign territory -- that have nevertheless proven themselves to be viable. There are, however, some examples of non-contiguous states that do raise concerns. For example, East Pakistan (referred to as East Bengal prior to 1955) and West Pakistan, and the Danzig Corridor proved to be problematic.

Pakistan was created when the United Kingdom left India, and the subcontinent was divided according to religious affiliation. Pakistan's *raison d'etre* was to serve as a separate Muslim nation, and it was composed of territories in East and West India with a Muslim majority. The state gained independence on August 14, 1947, and from 1947 to 1971 the state consisted of two units: West Pakistan and East Pakistan, separated from one another by over 1000 miles of Indian territory. The Western Zone was called West Pakistan and the Eastern Zone was called East Bengal.[311]

In the general elections held in December, 1970, an East Pakistani party, the Awami League, came to power[312]. However, the West Pakistan-dominated leadership would not allow the elected party to enter office. Prior to the 1970 election, the government of Pakistan had always been dominated by West Pakistan, and the West Pakistanis were not prepared to relinquish their control[313]. Therefore, the Awami League advocated autonomy for East Pakistan. This demand was the immediate cause of the Bangladesh Liberation War that erupted in 1971, and led to the murder of approximately three million East Pakistanis by West Pakistani troops trying to quash the rebellion[314]. Eventually in 1971, after the intervention of India, West Pakistan surrendered and Bangladesh (formerly East Pakistan) declared her independence.[315]

Supporters of a safe passage between Gaza and the West Bank might claim that the Bangladesh Liberation War and the secession of East Pakistan was the result of non-contiguity between East Pakistan and West Pakistan. Historical fact

311. Discover Banglidesh, a*vailable at:* http://www.discoverybangladesh.com/history.html (last visited Feb. 11, 2007).
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*

indicates that this was not the case. There were five main causes of secession -- none of which was the non-contiguity of East Pakistan and West Pakistan.

In the general elections held in December, 1970, an East Pakistani party, the Awami League, came to power[316]. However, the West Pakistan-dominated leadership would not allow the elected party to enter office. Prior to the 1970 election, the government of Pakistan had always been dominated by West Pakistan, and the West Pakistanis were not prepared to relinquish their control[317]. Therefore, the Awami League advocated autonomy for East Pakistan. This demand was the immediate cause of the Bangladesh Liberation War that erupted in 1971, and led to the murder of approximately three million East Pakistanis by West Pakistani troops trying to quash the rebellion[318]. Eventually in 1971, after the intervention of India, West Pakistan surrendered and Bangladesh (formerly East Pakistan) declared her independence.[319]

A second cause of the 'Liberation War' was the existence of political differences between East Pakistan and West Pakistan. Even though East Pakistan was more populous, political power fell into the hands of West Pakistanis.[320] Since a straightforward system of voting would have concentrated power in the hands of East Pakistanis, West Pakistanis formulated a scheme of 'one unit,' where all of West Pakistan was considered one voting unit.[321] This was done solely to balance East Pakistan's votes. [322] Thus, East Pakistan was in a manner of speaking subjugated by the West, despite its being more populous.

Thirdly, there were differences in religious observance between East Pakistan and West Pakistan. The differing extent to which Islam was followed divided the territories ideologically. West Pakistan's population was 97 percent Muslim, and less liberal than East Pakistan, which had a non-Muslim population of fifteen percent.[323]

The fourth cause of war was the language debate. In 1948, Dhaka and Urdu were declared the official languages of all of Pakistan. This proved controversial because Urdu was only spoken in the West by the Miyahir and in the East by the Bihans. The majority group in West Pakistan spoke Purjabi and Sindhi, while Bangia was spoken by the majority group in East Pakistan. The language controversy eventually resulted in a revolt by both students and civilians in East Pakistan, many of whom lost their lives.[324]

316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. Debasish Roy Chowdhury, *Indians Are Bastards Anyways,* ASIA TIMES, June 23, 2005, *available at*, http://www.atimes.com/atimes/South_Asia/GF23Df04.html.
324. *Id.*

The fifth and final cause of the war was the impact of a major hurricane that affected East Pakistan. The apathy of the West Pakistani leadership and their failure to aid East Pakistan only aggravated an already tense situation.[325]

These factors led to the development of secessionist movements in East Pakistan, and the eventual landslide victory of the Awami League. The refusal by West Pakistan to accept the election results led to the Liberation War, which in turn led to the secession of East Pakistan and the creation of Bangladesh.

Clearly, while Pakistan had been non-contiguous, its non-contiguity had not caused its dissolution. In fact, it played no role in its dissolution. Hence calls for a sovereign territorial link between the West Bank and Gaza Strip cannot find support in the Pakistani experience.

A further example that could perhaps be cited by those in favor of the creation of a safe passage is that of the Danzig Corridor. However, this example also fails to support the creation of safe passage. Indeed, it demonstrates the threat that such passage could pose.

The Polish Corridor was a strip of territory transferred from Germany to Poland by the Treaty of Versailles in 1919.[326] The transfer of this territory was said to be justified on historical, ethnographic, economic, and political grounds. Historically, the territory had been Polish from the tenth century till the fourteenth century, and from approximately 1453/66 till 1772, when it was transferred to Prussia. Ethnographically the majority of the population was Polish, or Kashubian (a people who consider themselves Polish). Only a minority of the population was German. Economically and politically the Poles were able to convince Britain and France that if the new Polish state did not have an outlet to the Baltic Sea, it would be economically and politically dependent on Germany. Wanting a strong Polish state, Britain and France accepted this argument.[327]

The corridor ranged from 20-70 miles wide. It separated East Prussia from the rest of Germany. Although free German transit was permitted across the corridor, there was great resentment in Germany, with all post-World War I German governments refusing to recognize the borders agreed to at Versailles.[328] The important seaport of Danzig was made the 'Free City of Danzig' and placed under the control of the League of Nations.[329]

In 1933, the Nazi Party, led by Adolf Hitler, came to power in Germany. Initially, Hitler adopted a policy of rapprochement with Poland, even concluding the Polish-German Non-Aggression Pact of 1934. Following the annexations of Austria and Czechoslovakia, Hitler turned his attention to Poland. In early 1939, the German government intensified demands for the annexation of Danzig, as well

325. *Id.*
326. The Encyclopedia Britannica, *available at* http://www.britannica.com/eb/article-9060624/Polish-Corridor, (last visited Feb. 11, 2007).
327. *Id.*
328. *Id.*
329. *Id.*

as for construction of an extra-territorial road (under German sovereignty) through the Corridor, connecting East Prussia with the rest of Germany. Poland, with the support of Britain and France, rejected these demands. This was to no avail, as in September, 1939, Germany invaded Poland, and after Poland was under German control, Danzig and the Polish Corridor were re-annexed to Germany.[330]

Some might see the case of the Danzig Corridor as a reason for safe passage between Gaza and the West Bank. They could argue that had there been safe passage Germany would not have invaded Poland or re-annexed the Corridor. In the authors' opinion this is clearly not the case. Germany had in fact enjoyed free transit across the corridor. The state was therefore contiguous, even though the territory used for transit was not sovereign German territory. There was no need for attacks based on yearning for contiguity. Germany attacked not because she was non-contiguous but because she had adopted an aggressive and expansionist policy.

Therefore, this example does not support the call for safe passage between Gaza and the West Bank. In fact, it militates against such passage. The Palestinians, like the Germans, have adopted an expansionist policy, in the form of their 'phased approach.' This calls for the overrunning and destruction of the Jewish State in phases, one of which is the creation of a Palestinian state along the 1949 armistice lines, from where attacks on Israel will be made ever easier and more effective. This phased approach is clearly stated in the Hamas charter, quoted *supra* in Part II (F) (3) of this article. With Hamas' victory in the recent Palestinian elections, discussed *supra* in Part II (F) (3), the possibility of the staged approach being implemented becomes ever more ominous.

Clearly, the Pakistan and Danzig examples, which proponents of safe passage would cite as justification for its creation, do not, when carefully considered, offer justification for connecting Gaza and the West Bank. Nor do these cases suggest that a non-contiguous state is not viable. What accentuates this point is the number of non-contiguous states that are not problematic and which do appear to be viable, far exceed these examples of past non-contiguous states that were not viable or long-lasting.

Another example, geographically closer to the topic of this article, was a proposed solution for the conflict over Palestine advanced by the British Mandatory authorities in 1937. This was known as the Peel Commission Report, discussed *supra* in Part (II) (D) (6) of this article. It had no compunction against non-contiguous states, and had it been implemented, it would have resulted in a non-contiguous Jewish state.

No lesser authority than the United Nations General Assembly has demonstrated its acceptance of non-contiguous states. On November 29, 1947, the U.N. General Assembly voted to establish both a Jewish state and an Arab state. Each state was to comprise three segments. Diplomats at the U.N. that represented

330. *Id.*

the Jewish leadership struggled "to make everyone see that the proposed state, in spite of its tortuous boundaries, would have some economic viability."[331] The Jewish leadership accepted the General Assembly's Partition Plan despite the virtually non-contiguous territories offered them. The Arab leadership rejected it.[332]

Further demonstration that non-contiguous states can function, even in the hotly-contested Middle East, was furnished by the Mount Scopus enclave in North-Eastern Jerusalem. From the July 1949 Armistice Agreement until the Six-Day War of 1967, Israel maintained an enclave on Mount Scopus. Israel retained sovereignty over the enclave even though it was completely non-contiguous with the Israeli-ruled part of Jerusalem during that time. Mount Scopus, housing the Hebrew University's then main campus, and the original Hadassah hospital, was, at the time of the 1948 War of Israeli Independence, the highest strategic point in Jerusalem. Therefore, the Jordanians had an interest in the Mount from a military point of view. The Israelis were keen to retain control over the strategically situated campus and hospital.

On July 7, 1948, Jordan and Israel agreed to the withdrawal of all troops from the Mount and their replacement with U.N. forces. On April 3, 1949, the parties concluded an Armistice Agreement.[333] The Agreement's Article VIII calls for the "resumption of the normal functioning of the cultural and humanitarian institutions on Mount Scopus and free access thereto."[334] However, under the Armistice Agreement, Mount Scopus could only be accessed once every two weeks with a convoy from Israel that traveled with a U.N. escort. The convoy carried a change of guards, civilian caretakers and provisions for two weeks. A typical journey was described by Professor Norman Benturich, a member of the University faculty allowed up to the campus to care for the library of almost half a million books. Professor Benturich says, "Having had your identification checked by a U.N. officer, you enter an antique bus, which is completely blinded. Two Arab soldiers with rifles enter the crowded bus. We are warned not to speak while they are with us. At the British War Cemetery on Mount Scopus where the demilitarized area of the Israel enclave begins, they alight, the shutters are opened and the passengers breathe freely. During the few [h]ours the convoy waits on Scopus, you are free to wander until it is time to return." Thus, it appears that even in the hostile Middle East, non-contiguous states, such as Israel for the first two decades of its existence, can be viable.

Some states remain discontiguous today. Examples of current non-contiguous states that are nonetheless viable include:

331. ABBA EBAN, ABBA EBAN: AN AUTOBIOGRAPHY 95 (Random House 1977).
332. MARTIN GILBERT, THE ARAB-ISRAELI CONFLICT: ITS HISTORY IN MAPS 36 (5th ed. 1992).
333. General Armistice Agreement between Israel and Jordan.
334. 42 U.N.T.S. 303-320 (1949)

- Angola is separated from its oil- rich, 225 km-long Cabinda Province by the Democratic Republic of the Congo.[335]

- Russia maintains the oblast of Kaliningrad, which is a non-contiguous enclave surrounded by Lithuania, Poland, and the Baltic Sea.[336]

- Azerbaijan includes the exclave of Naxcivan Autonomous Republic, which is separated from Azerbaijan-proper by Armenia (an unresolved dispute exists between Azerbaijan and Armenia over the Nagorno-Karabakh region).[337]

- Brunei consists of two territories, physically separated by Malaysia.[338]

- East Timor is separated from its Oecussi (Ambeno) region on the northwest portion of the island of Timor by Indonesia.[339]

- Oman controls the strategic port of Musandam Peninsula, although it is separated by territory belonging to the United Arab Emirates.[340]

- Argentina is separated from its southern region of Ushuaia by Chilean territory.[341]

- The United States is separated from Alaska by approximately 2,000 miles of Canadian territory.[342]

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335. CIA World Factbook 2006, *available at* http://www.cia.gov/cia/publications/factbook/geos/ao.html (last visited Feb. 12, 2007).
336. CIA World Factbook 2006, *available at* http://www.cia.gov/cia/publications/factbook/geos/rs.html (last visited Feb. 12, 2007).
337. CIA World Factbook 2006, *available at* http://www.cia.gov/cia/publications/factbook/geos/aj.html (last visited Feb. 12, 2007)..
338. CIA World Factbook 2006, *available at* http://www.cia.gov/cia/publications/factbook/geos/bx.html (last visited Feb. 12, 2007)..
339. CIA World Factbook 2006, *available at* http://www.cia.gov/cia/publications/factbook/geos/tt.html (last visited Feb. 12, 2007).
340. CIA World Factbook 2006, *available at* http://www.cia.gov/cia/publications/factbook/geos/mu.html.
341. CIA World Factbook. 2006, *available at* http://www.cia.gov/cia/publications/factbook/geos/ar.html.

The fact that there were and are non-contiguous states, which are viable, appears to militate against the call for a territorially contiguous Palestinian state as a prerequisite for its viability. The state, it would seem, could function and maintain a separate existence without such contiguity.

CONCLUSION

Conventional wisdom insists that a territorial link between Gaza and the West Bank -- whether sovereign or not -- is essential for the existence of a viable Palestinian State. Thus, safe passage is called for to link Gaza and the West Bank. Indeed, the need for a territorial link of some sort is often imbedded in the call for a viable Palestinian state, the premise being that a non-contiguous state cannot be viable.

Notwithstanding conventional wisdom, the need for such a link is questionable. One generally thinks that at the very least the Palestinians need to be able to transport goods between the Gaza Strip and West Bank for their state to be viable. However, this is not the case. First, there are convoys, discussed in Part II (C) of this article, which are already in use, and which effect the movement of goods from Gaza to the West Bank, and from there to Jordan. Interestingly, this has been in use for ten years, despite the absence of any safe passage regime. Second, being a member of the Arab League of States and a signatory to the Arab Transit Agreement of 1977, 'Palestine' has the right of free transit across the territories of all Arab countries that are parties to the agreement. Both Egypt and Jordan are signatories to the Agreement. They are therefore under an obligation to exempt Palestinian goods in transit from customs duties, taxes and other such charges.[343] This would surely be preferable to a safe passage with its many security checks, customs and duties; however, it has not been fully capitalized upon. There is no reason for this not to be capitalized upon in as much as the Arab states profess their commitment to an economically successful Palestinian state. Thus, the need for safe passage is questionable.

Not only is the need for Palestinian safe passage questionable, but also the legal basis of the demand is dubious. International law does not require territorial contiguity. Contiguity is not a requirement for statehood; not under the traditional criteria for statehood, nor in terms of modern criteria that have arisen as a result of developments in the field of international law.

Not only is such a link -- be it sovereign or not -- *not required* of a state by international law, but it is also not granted to states as a right under international law. Both past and present international practice confirm that states made up of

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342. *Id.*
343. United Nations Conference on Trade and Development, Transit Trade and Maritime Trade Facilitation for the Rehabilitation of the Palestinian Economy (2004), *available at* http://www.unctad.org/en/docs//gdsapp20031_en.pdf (last visited Feb. 12, 2007).

geographically distinct areas have no inherent right to a special link connecting those areas, and in particular, a sovereign link.

This applies to the Israeli-Palestinian conflict as well. While the largely defunct interim Oslo Agreements mentioned the creation of safe passage, none of these eight agreements conferred a right to safe passage. Perhaps more importantly, U.N. Resolution 242, the foundation of any solution to the conflict, does not call for safe passage or confer a right to safe passage.

Thus, under international law, territorial contiguity is not a prerequisite for statehood. Therefore, should the Palestinians have non-contiguous territory, this would be no bar to statehood. In fact, a bar to statehood for 'Palestine' might arise, but not because its territory would be non-contiguous. Despite their numerous allies and admirers, 'Palestine' may not satisfy the criteria for statehood because its elected leaders utterly fail to exercise effective government, or exercise even nominal control over the Palestinian territories. Should the Palestinians restore law and order in Gaza and the West Bank, the authors see no reason why they could not create a viable, non-contiguous state.

Therefore, those who assert that Israel is obliged by international law to create such a passage are wholly mistaken or misled. There is no such obligation on Israel. Out of humanitarian concern Israel could choose to create such passage, but it is in no way obliged to do so. Undeniably Israel's security concerns militate against her doing so. As demonstrated *supra* in Part III, Israel is situated in an acutely threatening region with both states and terrorist organizations calling for and planning genocidal attacks aimed at obliterating or driving out its Jewish population.

Should Israel choose to create a safe passage, she need not transfer sovereignty over such passage to the Palestinians. Indeed, the concept of international servitudes urges her to retain sovereignty over the passage itself. The legal concept of international servitudes also entitles her to terminate the use of such passage should there be a violation of the treaty that creates such a passage, or should the Palestinians tacitly or expressly renounce such a treaty. This is important: were the Palestinians to comply with the terms of the treaty until the first day of its implementation and then breach the treaty by, for example, smuggling Iranian missiles or Hezbollah terrorists the length of the safe passage, then Israel would no longer remain bound by any such commitments.

Moreover, and as importantly, international law justifies Israel's retaining control over the crossing points, in light of its right to self-defense and its duty to protect her citizens.

Most importantly, contrary to the inflammatory assertion by Yasser Arafat, should Israel choose not to create any form of safe passage, she would not be relegating the Palestinians to a non-viable "Bantustan" of a state. To reiterate, there is no shortage of examples of non-contiguous, yet fully viable states.

In fact, as commented upon by distinguished journalist Bret Stephens, "a country's viability or 'sustainability,' is chiefly a function of the quality of

governance, not the extent of terrain."[344] Given this, the best determinant of a nation's viability is not its size, but according to Stephens, its democratic nature, economic structure, educational institutions and its commitment to the rule of law.[345] The Palestinians, it would appear, as the recipient of more foreign aid per-capita than any other people,[346] could succeed in these areas. They could also fail even with "territorial contiguity," "continuity," "connectivity" and what some world leaders deem as necessary for a "viable state."

As commented upon by Professor Alan Dershowitz, opponents of the two-state solution to the Israeli-Palestinian conflict often base their rejection on the fact that the proposed Palestinian state may not be completely contiguous. They reject the notion that the Palestinian state could be economically or politically viable if there is indeed to be no land link between the Gaza Strip and the West Bank. Dershowitz however sees no reason for this deeply ingrained belief. He argues that while the Gaza Strip may be non-contiguous from the West Bank, the state will still be viable. The Gaza Strip will not be isolated from the rest of the Arab world. It will be contiguous with Egypt, and because it is a seaport on the Mediterranean, it will have access to the rest of the world. Similarly, the West Bank will be contiguous with Jordan and through Jordan will have access to the Aqaba seaport,[347] the Indian Ocean, and the Far East.

Further, 'Palestine' is endowed with rich natural gas reserves, recently discovered off the coast of Gaza.[348] Contrary to what most people would imagine Gaza to be -- a dustbowl with no economy -- Gaza could yet be a new Qatar, economically thriving off its bountiful gas reserves.

There is therefore no reason to believe that a Palestinian state, lacking a territorial link between the West Bank and Gaza, will not be viable, where "viable" is understood as capable of independent existence. This fact is highlighted not only by the successful, non-contiguous states that exist today, but also by what Bret Stephens identifies as essential for a state's viability.

Sovereign safe passage for the Palestinians would render Israel non-contiguous, divided into disconnected northern and southern regions. If territorial contiguity is indeed an essential feature of viability, why then has the 'threat' to Israel's contiguity attracted no public concern? Where does the risk lie, given the clear intent (and capability) of various terrorist groups to launch virtually daily attacks on Israeli civilians, and given their clearly stated objectives to destroy Israeli morale, and to entice her to respond with disproportionate force and thereby

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344. DERSHOWITZ, *supra* note 144 , at 41.
345. *Id.*
346. According to the German newspaper *Die Welt*, "Palestine" is the world's largest per capita recipient of foreign aid. Joshua Muravchik, *The Road Map to Nowhere: Do we really need another Doomed Mideast Peace Process*, JEWISH WORLD REVIEW, Apr. 30, 2003, *available at* http://www.jewishworldreview.com/0403/muravchik.php3 (last visited Jan. 10, 2007).
347. DERSHOWITZ, *supra* note 144, at 36.
348. *See supra* Part II (D)(4).

to alienate Western governments? If any state's viability is at risk, Israel's predicament, as augmented by Palestinian safe passage, deserves careful consideration. Yet, to the best knowledge of the authors, none of the proponents of Palestinian safe passage have even mentioned this.

Finally, it is essential to note that whatever non-contiguity may remain between the parts of a future Palestinian state, such non-contiguity was not caused by Israel. Indeed, calls for territorial contiguity and safe passage are beyond the maximalist Palestinian demand that a Palestinian state be established along the pre-1967 armistice lines. This is the case as prior to 1967, the West Bank and the Gaza Strip were in fact non-contiguous. Indeed, the West Bank fell under Jordanian annexation, while the Gaza Strip fell under Egyptian control. Thus, when demanding contiguity between the two, the Palestinians are in fact demanding even more than a return to the pre-1967 armistice lines.[349]

Although some insist upon a territorial link between the West Bank and the Gaza Strip, which would be in derogation of Israeli sovereignty, Israel is not required to accede to this unprecedented demand. As demonstrated *supra* in Part III of this article, Israel has legitimate security concerns arising out of the various proposals for implementing safe passage. If the Palestinians were to constructively address these concerns, such as by dismantling the terror infrastructure as required by the Road Map, Israel's anxiety could be assuaged. Israel would then be more forthcoming in bilaterally negotiating the ways and means for safe passage of Palestinian persons and goods.

If the Palestinians desire a legitimate form of safe passage, then instead of turning to the world audience and attempting to isolate Israel, they would be better served by simply negotiating with Israel in good faith. It is on such a basis that any renewed peace process should begin. Every effort should be made to avoid the unrealistic Palestinian dream of a territorially contiguous state that reserves the option of terrorism.

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349. DERSHOWITZ, *supra* note 144, at 39.