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The Palestinian Unilateralist
Course and the Responsibility
of the International Community

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The Palestinian Unilateralist Course and the Responsibility of the International Community

For the last four decades, the international community has sought to promote a negotiated settlement of the Arab-Israeli conflict, in general, and its Israeli-Palestinian component in particular. Yet, there are now multiple reports that the Palestine Liberation Organization (PLO), which has Observer status at the U.N., is planning on taking steps in September to gain recognition for a Palestinian state as a full fledged member. Palestinian spokesmen have said that this will involve gaining recognition for the new state's borders through a U.N. resolution, instead to delineating them through negotiations with Israel.

The PLO is a signatory to the 1993 Oslo Agreements, which created the Palestinian Authority (PA), the governing body which has partial jurisdiction over some of the areas of the West Bank and the Gaza Strip. In the Gaza Strip itself there is another governing body, the Hamas government, which while expressing nominal recognition of the PA president, Mahmoud Abbas, nonetheless constitutes a separate administration. As will be demonstrated, a Palestinian **unilateral** initiative to establish a Palestinian state outside of these agreements will undermine the entire Arab-Israeli peace process, which was based on a negotiated outcome. Such a step could lead to escalating violence, a further intensification of the Israeli-Palestinian conflict, and if it was supported by the European Union, which undertook signed commitments that run counter to Palestinian unilateral moves, could also undercut its diplomatic standing as an honest broker in any peace process in the future.

The Palestinian leadership has been considering a unilateral declaration of independence for many years. The current phase began in 2008, in the aftermath of Kosovo's declaration of independence, under the previous Israeli government of Prime Minister Ehud Olmert. For example, Yasser Abed Rabbo, a senior advisor to Palestinian leader Mahmoud Abbas, told Agence France Presse immediately following the Kosovo declaration, "Our people have the right to proclaim independence even before Kosovo. And we ask for the backing of the United States and the European Union for our independence."

Moreover, on January 22, 2009, the Office of the Prosecutor of the International Criminal Court received an official communication from the PA Minister of Justice, Ali Kashan, expressing his readiness to recognize the jurisdiction of the ICC over "the territory of Palestine." Kashan invoked Article 12 (3) of the Rome Statute that allows states, which are not signatories, to seek ICC jurisdiction on an *ad hoc* basis. The PA wanted the ICC Prosecutor to determine that the PA already qualified legally as a state and therefore its letter to the Prosecutor should be accepted. It was the first unilateral step in recent years that the Palestinians took to obtain international recognition of Palestinian statehood.

At this point, there are a number of ways which the PLO can choose to advance towards statehood as they look to their options in September 2011. What is common to these various efforts are that they are unilateral initiatives, which involve completely breaking away from the path of Israeli-Palestinian negotiations that were launched in 1993, and seeking to resolve key elements of the Israeli-Palestinian conflict--like borders--without reference to the other side. Normally new states in the international community, first issue a declaration of independence on from the territory that they claim, and then seek U.N. membership. This was precisely the order followed by Kosovo, East Timor, and South Sudan which only after their independence, received international recognition and U.N. membership.

There is a second alternative as well. The Palestinian leadership appears to want to take its claim to statehood to the U.N. directly, without clarifying whether it will first declare a state. On May 16, 2011, Mahmoud Abbas wrote an op-ed in the *New York Times* disclosing that he would seek U.N. membership this September. The Arab League has indicated that it is prepared to request U.N. membership for a Palestinian state in late July.

Finally, there is a third course of action the Palestinian leadership might adopt which involves turning to the UN General Assembly, where it can easily obtain majority support with the backing of Third World countries, in order to promote the adoption of a non-binding resolution supporting Palestinian statehood. This would be only a declarative act, but it could have important implications.

I. How Unilateral Steps Towards Palestinian Statehood Undermine Past Agreements and the Arab-Israeli Peace Process

The Oslo Agreements that were negotiated in the 1990's between Israeli Prime Minister Yitzhak Rabin and PLO Chairman Yasser Arafat clearly established the principle that all outstanding differences between Israel and the Palestinians will only be resolved through negotiations and not by any other means, including unilateral actions. For example, in the exchange of letters on mutual recognition between the parties dated September 9, 1993, Arafat specifically undertook the following commitment:

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

The commitments that appeared in the exchange of letters set the stage for the first of the Oslo Agreements, known as the Declaration of Principles, that Israel and the PLO signed on the White House Lawn on September 13, 1993. Moreover, the subsequent implementation agreements under the Oslo rubric, reiterated this initial commitment. Thus when Israel and the PLO signed the Interim Agreement on September 28, 1995 (also known as Oslo II), Israel and the PLO agreed to the following critical clause:

“Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.” (Interim Agreement, Article 31)

The signing of the Interim Agreement, which took place at the White House as well, was an internationally significant event. There were a number of international parties that actually signed the Interim Agreement as witnesses, including the US, Russia, the European Union, Norway, Egypt, and Jordan.

Looking again at the substance of Article 31, what step could change “the status” of the West Bank? The negotiators had in mind two scenarios. Since 1967, the West Bank and the Gaza Strip had been territories under dispute where both Israel and the Arab states had voiced territorial claims. The West Bank had been under Israeli military control, since the Israel Defense Forces captured it in the 1967 Six Day War, after it had come under attack by Jordanian military forces. There were two ways the parties could change the status of the West Bank, or part of it. First, If Israel annexed the West Bank or part of it to Israel that would clearly be a change of status. Alternatively, if the Palestinian leadership unilaterally declared a Palestinian state in all or part of this territory, that would also constitute a change of status. The Interim Agreement explicitly precluded either of these steps.

True, Israeli settlement construction has been a politically contentious issue, over the years, but was never viewed as an activity that could change the status of the West Bank or the Gaza Strip. Indeed, when Israel uprooted all its settlements in the Gaza Strip in 2005, it proved that they were not an obstacle for an Israeli withdrawal from any territory from which it chose to withdraw. Moreover, the various Oslo Agreements made the settlements an issue for permanent status negotiations in the future and therefor did not treat them as a unilateral act that could alter the legal status of the territories.

The principle enshrined in the Oslo Agreements, that the Israeli-Palestinian conflict must be resolved through negotiations, has its roots in UN Security Council Resolutions 242, from 1967, and 338, from 1973. These two resolutions provided the terms of reference of all Arab-Israeli peace agreements. In Resolution 242 the Security Council called upon the Secretary-General to designate a special representative whose role would be “**to promote agreement and assist efforts to achieve a peaceful and accepted settlement.**” Resolution 338 called for “**negotiations between the parties**” to commence with the aim of “**establishing a just and durable peace in the Middle East.**” The UN Security Council plainly lent its weight to the achievement of peace through negotiations and not unilateral actions.

There are other important international declarations that called on the parties to the Israeli-Palestinian conflict to resolve their differences through negotiations. In April 2002, following their ministerial meeting in Madrid, the US, Russia, the EU, and the UN Secretariat established a diplomatic quartet to work together to help advance an Israeli-Palestinian peace agreement. In July 2002, the Quartet **“reaffirmed that there must be a negotiated permanent settlement based on UN Security Council Resolutions 242 and 338.”** The statement added that **“Israelis and Palestinians must address the core issues that divide them, through sustained negotiations.”**

The following year the Quartet issued at the end of April 2003 “The Performance Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict.” The Roadmap described a two-state solution arising only after **“a clear, unambiguous acceptance by both parties of the goal of a negotiated settlement.”** In February 2011, the Quartet met and reaffirmed that **“unilateral actions by either party cannot pre-judge the outcome of negotiations and will not be recognized by the international community.”**

II. Palestinian Unilateralist Options

As already noted, there are three unilateralist options that the Palestinians could adopt as they seek statehood in September. First, Mahmoud Abbas could simply declare a state from his office in Ramallah. Most states are established through a declaration of independence. In the present discussion over what the Palestinians will do in September, often it is incorrectly said that Abbas is going to the U.N. to obtain a Palestinian state. The fact is that the U.N. does not create states; it can admit a new state as a member of the U.N.

This mistaken description of Palestinian plans is found most frequently in Israel, where many have forgotten their own history. True, in November 1947 the U.N. General Assembly recommended the partition of British Mandatory Palestine into two states, in accordance with Resolution 181: a Jewish state and an Arab state. The resolution was resisted with armed force by the Arab states and the Palestinian Arabs themselves. In any case, Resolution

181 did not create the State of Israel, which only was established six months later when David Ben Gurion, Israel's first prime minister, declared Israel's independence in May 1948.

Mahmoud Abbas has made clear that he does not plan to follow this course of action and declare a state. On April 24, he gave an interview to *Newsweek* in which he spoke about going to the U.N. in September. Whatever resolution might be adopted in the U.N., the question posed was how he would act when returning to Ramallah. Would he then declare a state? *Newsweek* wrote: "For the statehood resolution to have more than just symbolic impact, Abbas would have to come back from New York and assert sovereignty over the territory the U.N. just handed him. But that would entail confrontational measures—for instance, ending the security cooperation with Israel. Abbas told me that's a path he will not take." His policy could change, but it appears he prefers to be passive in this matter and let the international community deliver him support for statehood from the outside.

Why is Abbas not declaring a state, like Kosovo, East Timor, or South Sudan? There are a number of reasons that can be speculated. Clearly, with a unilateral declaration, Abbas would be acting in direct defiance of the Obama administration which has been advising him not to go down the unilateral path. Given the adoption of recent legislation in the U.S. House of Representatives, Resolution 268, calls on President Obama to suspend U.S. aid to the Palestinian Authority for unilateral acts, like declaring statehood, Abbas has sound financial reasons for exercising some caution in this regard.

The Palestinians may also want to avoid committing themselves to certain borders. True, at the U.N. they might seek that any resolution mention the June 4, 1967 line, and by doing so, lock in an international consensus against continuing Israeli control beyond that line in the West Bank. But the PLO, by itself, will not want to declare that it accepts the 1967 line as the border of a Palestinian state, so that it can preserve further claims on Israeli territory in the future.

For example, in May 1999, when the PLO argued that the Oslo Agreements were about to expire, Nabil Sha'ath, who was the Palestinian Minister of International Cooperation, proposed reviving Palestinian claims to the 1947 lines from Resolution 181. There is a big difference between a situation in which the UN suggests a future border and one in which the Palestinians themselves declare their acceptance a certain line as their final border, and by doing so concede future claims they might wish some day to assert.

A second Palestinian unilateralist option will be to seek U.N. membership right away, with or without a prior declaration of independence. Writing an article on May 16 in the Op-ed page of the *New York Times*, Abbas disclosed that this is the likely Palestinian course of action: **“this September, at the United Nations General Assembly, we will request international recognition of the State of Palestine on the 1967 border and that our state be admitted as a full member of the United Nations.”** According to press reports in early July 2011, the Arab League has said that it would seek U.N. membership for a Palestinian state in the West Bank and the Gaza Strip this coming September.

What procedure must the Palestinians follow to be recognized as a member-state of the U.N.? According to Article 4 of the U.N. Charter, membership in the United Nations is “effected by a decision of the General Assembly upon the recommendation of the Security Council.” In other words, the Security Council must first decide to recommend the candidacy of the new state and then that recommendation goes to the General Assembly for approval.

The recommendation of the Security Council cannot be taken for granted. In the case of Kosovo, while some sixty countries have recognized it since it declared its independence, it has been unable to get over the hurdle of a Russian veto in the Security Council. In his AIPAC speech on May 22, President Barack Obama stated that he would not accept the Palestinians trying to win statehood by going to the UN: “No vote at the United Nations will ever create an independent Palestinian state”. Thus, as of now, it appears that the US will veto a Palestinian bid for UN membership in the Security Council.

There is a further problem with U.N. membership for a new Palestinian state. Mahmoud Abbas has agreed in principle reach a reconciliation understanding with Hamas. The U.N. Charter specifies that “Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” Could the U.N. admit a new state that included Hamas given the genocidal character of its 1998 Charter, which it has not recinded or fundamentally modified?

There is also a third Palestinian unilateralist option: to turn to the U.N. General Assembly. There is one way the General Assembly has the power to upgrade the international status of the Palestinians at the U.N.. Currently, as noted earlier, the PLO is a Observer Mission at the U.N. Like the Arab

League of the Organization of the Islamic Conference, it is a non-state Observer. It is possible that the General Assembly will vote to make the PLO into a state Observer, like the Holy See (the Vatican). This would be a largely symbolic change affecting issues, like the order of seating in the U.N. But should the resolution also contain details about other issues that are at the heart of the Israeli-Palestinian dispute, like borders or the status of Jerusalem, the the resolution could have a broader impact.

U.N. General Assembly resolutions are known to be legally non-binding and largely declarative in nature. Yet even a General Assembly resolution could have considerable impact, depending on how it is reported in the mass media. Should the resolution specify that the borders of the Palestinian state should be the 1967 lines, then this could have significance for the future diplomatic struggle over borders. For example, in early 2011, Riad Malki, the Palestinian foreign minister, expanded on the idea of UN recognition: “Such recognition would create political and legal pressure on Israel to withdraw its forces from the land of another state that is recognized within the 1967 borders by the international organization.”

Formally, the 1967 lines were only armistice lines from 1949 delineating where the parties determined that their armies halted in during Israel’s War of Independence. The 1949 Armistice Agreement itself stated that these were only military lines and were not a final international border:

“...no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations. (Article II)”

For that reason, strictly speaking, it is a mistake to say that there was a “1967 border”---it is more correct to call the boundary at that time “the 1967 line.”

Since 1967, the future border between Israel and the West Bank has been a matter of dispute, over which the parties need to negotiate. But if a General Assembly resolution pre-determines the location of those borders by enshrining the 1967 line, it will make any negotiations superfluous, especially if it effects the perceptions of policy-makers and political commentary in major media outlets.

The 1967 line is impossible for Israel to accept today. It places the entire Old City of Jerusalem, including the Western Wall and the Temple Mount, outside of Israel's jurisdiction. Additionally, it would put the Church of the Holy Sepulchre, the Mount of Olives, and the City of David on the Palestinian side. Elsewhere, according to the Israeli view, the 1967 line would deny Israel control of strategic territories that dominate Ben Gurion International Airport and critical areas in the Jordan Valley. The two main highways that connect Jerusalem to Tel Aviv run through West Bank territory and would be cut off, if Israel had to withdraw to the 1967 lines.

Originally, U.N. Security Council Resolution 242 did not call for a withdrawal from all the territories Israel captured in the 1967 Six Day War. Resolution 242 was drafted by Lord Caradon, the British ambassador to the UN at the time; the British foreign secretary in 1967, George Brown, later stressed: "The proposal said 'Israel will withdraw from territories that were occupied,' and not from 'the' territories, which means that Israel will not withdraw from all the territories." As a result, Israel expected that it would retain areas that it judged as vital in any final peace settlement.

A U.N. resolution might add the provision that the parties could agree to land-swaps, as President Obama suggested, but according to the past record of negotiations this would only produce a minuscule modification of the 1967 line, since Abbas himself only agreed to concede 1.9 per cent of the West Bank, when the land swap idea was last proposed. Given the stakes involved it is not surprising that Prime Minister Yitzhak Rabin, during whose premiership the Oslo Agreements were negotiated and signed, still insisted in his final parliamentary address in October 1995, that Israel will never return to the 1967 line.

The political influence of a U.N. General Assembly resolution that invoked the 1967 line would be affected by the nature of the majority that adopted it. Historically, the PLO Observer Mission has been able to advance resolutions in the U.N. General Assembly, with the help of friendly Arab states, that can easily win the overwhelming majority of member states by relying on the support of the Third World members of the Non-Aligned Movement. Because resolutions based on countries like Cuba, Zimbabwe, and Yemen are likely to be dismissed in the West, PLO representatives have additionally sought to win a "qualitative majority," consisting of the European Union, Canada, Australia, and Japan. A vote in the U.N. General Assembly for a Palestinian state that did not include a EU consensus and other Western countries might be a Pyrrhic victory for the PLO.

III. International Considerations

a. Premature Recognition and the Risk of Escalating Violence

In the U.N. system, new states have been admitted when they resolved bilaterally their differences with those states with which they have fundamental disputes. Thus Bangladesh could only become a UN member after it resolved its conflict with Pakistan, of which it was once a part. Indonesia's differences with East Timor were resolved before it declared its independence and became a U.N. member. South Sudan has some remaining disagreements with the northern Sudanese government in Khartoum, but they sufficiently resolved their differences so that Sudan recognized the results of the plebiscite in the south which called for the region's secession and independence. Khartoum even opened an embassy in Juba, South Sudan's capital, several months before its independence and recognition by members of the international community.

Europe should be cognizant of the dangers of premature recognition of states in unresolved conflicts, because of its own experiences. The late Richard Holbrooke, the architect of the Dayton Accords over Bosnia, has explained that the Yugoslav Wars (1991-1995) were ignited when Germany broke with the rest of Europe and recognized Croatia, prior to solving the problems created by the dissolution of Yugoslavia. A chain reaction followed and ethnic cleansing policies by the parties ensued. When it was clear that other parts of Yugoslavia would soon declare their independence next, local forces in Bosnia began to move to create areas of exclusive ethnic control.

Based on this experience, what would happen in the West Bank, if a Palestinian state were to be prematurely recognized? If there was recognition of the 1967 lines, then various Palestinian forces might be predisposed to claim territories still under Israeli control or where Palestinian control is ambiguous at best. There is still a large area of the West Bank, known as Area C, where Israel exercises full security control and its military facilities are also located (according to the 1995 Interim Agreement, in Area A, the Palestinians has full control, while there is a security regime of mixed control in Area B).

A Palestinian effort to take over parts of Area C in the aftermath of unilateral declaration of statehood or even in response to a UN resolution would be

strongly resisted by Israel. Should there be exchanges of fire between Palestinian and Israeli forces, the rocket attacks from the Gaza Strip may easily follow. Regardless of the outcome, the premature support for Palestinian statehood, while many territorial issues are unresolved with Israel, could easily lead to an escalatory spiral, enraging the populations of Arab states as well as Muslim communities in Europe.

The Palestinian population in the West Bank might not be predisposed to violent protests as it was in 2000 when Yasser Arafat launched the Second Intifada, after the failure of the Camp David negotiations under President Clinton. For one thing, the West Bank has made enormous economic progress in recent years. But that would not prevent outside powers from exploiting the political environment in the aftermath of a UN resolution by igniting a wave of new violence. For example, Israel disclosed that mass protests of Palestinians in Syria on the Golan Heights on May 15 and June 5, were organized by Iran's Revolutionary Guard Corps. Though Iran will not have its own forces on the ground in the West Bank to organize mass waves of protestors in the same way as in Syria, nonetheless it might well employ Palestinian organizations with close ties to Tehran for the very same purpose.

There are other considerations for major states looking at the question of premature recognition of a Palestinian state. Some states have been concerned with the implications of breakaway movements with territorial claims with respect to existing states seeking international support for their independence. For example, Spain was reluctant to recognize Kosovo, because it feared the precedent that it set for Basque separatists. Undoubtedly such concerns influenced states like Argentina (which claims the Falklands), Cyprus (which has to deal with Northern Cyprus) and India (which faces a militant insurgency in Kashmir). According to *Der Spiegel*, German Chancellor Angela Merkel is urging Abbas to refrain from a unilateralist course at the UN. Abbas cannot take an EU consensus supporting his September U.N. bid for granted.

b. Intensifying the Israeli-Palestinian Conflict

There is a broad misperception in the international community that by addressing what is understood in the West as the main political grievance of the Palestinian Arabs by supporting the immediate independence of independent Palestinian state, this action will go a long way to resolving the Israeli-Palestinian conflict as a whole and contribute to stability. This is

an incorrect understanding of the political dynamics that are about to take place. Mahmoud Abbas in fact explained in his May 16, Op-ed in the *New York Times* that he sees the unilateral strategy at the U.N. not leading to an end of the conflict, but rather as a new phase in its perpetuation:

“Palestine’s admission to the United Nations would pave the way for the internationalization of the conflict as a legal matter, not only a political one. It would also pave the way for us to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice”.

Indeed, as noted earlier, the Palestinian Authority began this new phase in January 2009, under the previous Olmert government, when the PA minister of justice turned to the Office of the Prosecutor of the International Criminal Court in the Hague.

Significantly, the PLO’s unilateral strategy at the U.N. allows it to achieve some of its interim goals on territory, without having to agree to a formal “end of the conflict” as all Israeli governments have insisted. Palestinian spokesmen may argue to their Western counterparts that the unilateral step at the U.N. does not negate future negotiations between Israel and an independent Palestinian state. Some might try to argue that at least Israel and the Palestinians will be able to negotiate on an equal footing. However, if the Palestinians took the issue of borders to the U.N., despite it being a subject for negotiations according to past agreements, then what’s to stop the PLO from going back to the U.N. every time it reaches an impasse with Israel over the other difficult issues on the permanent status negotiations agenda, like Jerusalem, refugees, or security arrangements.

The likely result of this process of the multilateralization of Israeli-Palestinian negotiations will be to completely undermine and even unravel the agreed basis for bilateral negotiations that the international community has carefully erected over the last forty-four years since U.N. Security Council Resolution 242 was adopted in November 1967.

c. The Standing of the European Union as an Honest Broker

As noted above, the EU is a signatory to the Oslo II Interim Agreement from 1995, which prohibited the parties from unilaterally changing the status of the West Bank and Gaza Strip prior to the completion of the permanent status negotiations. If the Palestinians decide to violate this commitment

they will undoubtedly ask the EU countries for support either by recognizing their newly declared state bilaterally, or by voting for the membership of the Palestinian state to the UN at the Security Council, or by backing a resolution in the General Assembly calling on state to recognize a Palestinian state.

If any UN resolution pre-judges the borders of the Palestinian state as the 1967 lines, then European countries will also be asked to lend their support to this unilateral assertion of the Palestinian state's borders as well. The Oslo Agreements plainly reserved the issue of future Israeli-Palestinian borders as an issue for negotiations between the parties themselves. European support for any of these initiatives would run contrary to the EU commitments to the agreements it signed in 1995.

Moreover, since the EU is part of the Middle East Quartet, it is committed as well to the 2003 Roadmap for Peace and subsequent Quartet Policy statements. Backing Palestinian unilateralism in any of the ways described above would run counter to the policies which the EU itself promulgated in the context of the Quartet. If EU member states support Palestinian unilateralism, in any form, and by doing so assist the PLO in steps that constitute a material breach of a core commitment in signed agreements, then how will the Israeli side view European involvement in the Middle East peace process in the future? Why would Israelis ever trust again European commitments? Under such conditions, the value of international guarantees would entirely lose their relevance for the Israeli public.

There is a broader issue as well. If the PLO declared a Palestinian state in violation of its legal obligations under the Oslo II Interim Agreement, it would have undertaken an illegal act because it acted in contravention of a signed treaty. As Professor Malcolm Shaw of the UK has argued in an October 18, 2010 submission to the Office of the Prosecutor of the International Criminal Court on this very issue, there is a general principle of law that "an illegal act cannot produce legal rights." Recognizing a state that was created through a treaty violation would be extremely problematic. There is also an American tradition in this same matter. According to the Second Restatement of the Foreign Relations Law of the United States (1981), a state is required not to recognize or treat as a state any entity which has "attained the qualifications of statehood in violation of international law."

IV. Policy Implications

Palestinian unilateralism entails a significant shift away from a negotiated settlement of the Arab-Israeli conflict and contradicts legal obligations that the PLO undertook when it first signed the Oslo Agreements in the 1990's. Presently there is a diplomatic effort underway to dissuade the Palestinian leadership from following this course of action. Whether that effort ultimately succeeds or not, unilateralism is a strategy that is not only relevant for September 2011, but can be pursued at any time. Even if Mahmoud Abbas halts the effort for now, it can be resumed in the future, with all the consequences that would flow from this action. For that reason, it is imperative that the international community oppose Palestinian unilateralism, regardless whether it is pursued in the U.N. Security Council or in the U.N. General Assembly. Only if the unilateralist temptation is blocked, will there be any chance for a negotiated solution to the Israeli-Palestinian conflict.

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