

Israel's Interface with the Palestinian Constitutional Structure

Analysis-Base Product

Executive Summary

1. A prevailing mindset is that the Palestinian constitutional structure, including the Palestinian founding documents, is an internal Palestinian matter.
2. The Re'ut Institute contends that the interfaces of the Palestinian constitutional structure with Israel obligate it to formulate suitable policies.
3. The Re'ut Institute has identified five interfaces of the Palestinian constitutional structure with Israel:
 - **Representation** – Which entity represents the Palestinian people and regarding which issues?
 - **Right to Self-Determination** – Will this right be fully realized upon the establishment of a Palestinian state?
 - **Refugeism and Diaspora** – What will be the relationship between Palestinian refugees in the diaspora and the Palestinian state?
 - **Israeli-Arabs** – In Permanent Status a triangular relationship of ambiguous nature will exist among the Palestinian state, Israel and its Arab citizens.
 - **Outstanding Issues** – How will the Palestinian constitutional structure influence the issues left for Permanent Status negotiations?
4. The Re'ut Institute claims that this issue might have far reaching effect on the stability of the Israeli-Palestinian relationship. Therefore, Israel should develop a suitable policy in order to influence the content of the Palestinian founding documents or their interpretation.
5. This paper contains three chapters:
 - **First Chapter** – Analysis of the Palestinian constitutional structure from an Israeli perspective;
 - 1) A presentation of the tension between the ethos of the Palestinian struggle and the principle of historic compromise and its effect upon Palestinian constitutional structure;
 - 2) An analysis of the interfaces between the Palestinian constitutional structure and Israel.
 - **Second Chapter** – Analysis of Palestinian Interfaces with Israel as dictated by the Third Draft Constitution for a Palestinian State;
 - **Third Chapter** – An identification of arenas in which Israel should design policies regarding the interfaces discussed above.

6. The immediate goal in relation to the Palestinian constitutional structure is to formulate a consistent set of policies. A pressing concern is the expected Fourth Draft Constitution for a Palestinian State.

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Scope

1. This paper is an "[Analysis-Base Product](#)"¹ of the Re'ut Institute. It deals with the interfaces of the "[Palestinian Constitutional Structure](#)" with Israel, focusing on the "[Palestinian Constitution – Draft No. 3](#)" (hereinafter "the Third Draft"). The aim of this paper is to provide:
 - A. Analysis of the Palestinian Constitutional Structure and the "[Palestinian Founding Documents](#)" in light of the tension between the "[Ethos of the Palestinian Struggle](#)" and the "[Principle of Historic Compromise](#)";
 - B. Presentation of the interfaces of the Palestinian Constitutional Structure with Israel;
 - C. Analysis of the aforementioned interfaces in the context of the Third Draft;
 - D. Identification of "[Arenas](#)" where Israel needs to design policy regarding the aforementioned interfaces.

¹ The Concept of "Analysis-Base" refers to systematic and extensive mapping of issues and their interconnectedness.

First Chapter: Israel's Interfaces of the Palestinian Constitutional Structure

Need

2. From the perspective of the Israeli-Palestinian political process, the Palestinian Constitutional Structure includes the institutions, founding documents and legislative and executive branches of the “PLO” and “Palestinian Authority” (PA), as well as drafts of the founding documents of the Palestinian state (see “State-in-the-Making” or “Nascent State”).²
3. Our working assumption is that Palestinian Founding Documents express the formal ideological platforms of both the PLO and the PA and reflect the aims and national ambitions of the Palestinian people.

4. The prevailing view is that the Palestinian Constitutional Structure is an internal Palestinian matter.
5. However, the Palestinian Constitutional Structure interfaces with Israel in ways that are politically significant. These interfaces will influence future bilateral relations, as well as prospects for “Permanent Status Agreement” and the chances of establishing a stable “Permanent Status” based upon the principle of a “Two-State Solution”.
6. Furthermore, the Palestinian Constitutional Structure interfaces with its neighbors, particularly Jordan, in ways that will impact their future bilateral relations.
7. Thus:
 - A. The contents of the Palestinian Constitutional Structure must be examined;
 - B. Clear policies for issues which interface with Israel must be designed;
 - C. The immediate goal is to consolidate a clear policy regarding the creation of a Fourth Draft Constitution for a Palestinian state, which is to be written in the near future.

Between Ethos of Struggle and Principle of Historic Compromise

8. There are two opposing Palestinian narratives regarding the realization of Palestinian nationalist aspirations. The Re'ut Institute frames them as the “Ethos of the Palestinian Struggle” (hereinafter “Ethos of Struggle”) and the “Principle of Historic Compromise”.

Ethos of the Struggle

9. Central principles of the Ethos of the Struggle are:
 - A. Aspiration for a “One-State Solution” encompassing all of “Mandatory Palestine” (and even the territory east of the Jordan River of “Trans-

² The judicial branch is outside of the scope of this paper as it has little relevance to the issue presented in this document.

- Jordan”), while negating the “Jewish Right to Self-Determination” (See “Anti-Zionism”).
- B. The “Palestinian Right to Self-Determination” will be fulfilled only with the liberation of **all** of Mandatory Palestine and with the realization of the “Right of Return” of “Palestinian Refugees” to their original homes. The state will then become the sole representative of the entire Palestinian people;
 - C. The “Issue of Palestinian Refugeeism” will be resolved only when Palestinian refugees are allowed to return to their original homes. The **Right of Return is inalienable and personal**; neither the Palestinian state nor the PLO have the right to concede the Right of Return on behalf of individual refugees;
 - D. “Israeli-Arabs” are Palestinians in every sense;
 - E. Establishing a Palestinian state within the “6/4/67 Borders” and the principle of a Two-State Solution are only a **phase** of the Palestinian national struggle; in other words it is unacceptable to agree to an “End of Conflict” or “Finality of Claims” with Israel.
10. Though related, the concept of the “Ethos of the Palestinian Struggle” is distinct from the “Doctrine of Armed Struggle”.³
- A. The similarity: A shared end – the establishment of a Palestinian state on Mandatory Palestine in its entirety (see “Phased Plan”);
 - B. The difference is in the means. The Doctrine of Armed Struggle ideologically limits Palestinian struggle against Israel exclusively to military means. Ethos of Struggle accepts that liberating Palestine may require a combination of fighting Israel and engaging it politically.

Principles of Historic Compromise

11. Under the Principle of Historic Compromise the Palestinians will accept a Two-State Solution within the area of Mandatory Palestine:
 - A. Recognition – either implicit or explicit – of the existence of Israel and the Jewish Right to Self-Determination in the State of Israel;
 - B. The Palestinian Right to Self-Determination will be realized in the State of Palestine, whose borders will be based upon the 6/4/67 lines and will

³ The principles of the Doctrine of Armed Struggle appear in the “Palestinian National Charter” (7/68). The “Phased Plan” (12th Conference of the Palestinian National Council, Cairo 6/74) determined:

- (1) Through “armed struggle”, an “independent combatant national authority” would be established over any territory that is “liberated” from Israeli rule. (Article 2);
- (2) The Struggle against Israel would continue until the establishment of the State of Palestine on all the areas of Mandatory Palestine by using any part of liberated Palestinian land as a base of operations (Article 4);
- (3) Liberate all Palestinian land with the assistance of other Arab countries (Article 8).

- include the “West Bank”, “Gaza Strip” and “East Jerusalem” (Al-Quds), which will be its capital;
- C. The 6/4/67 borders are the basis for the division of the area between the Jordan River and the Mediterranean Sea between the State of Israel and the State of Palestine according to a 78:22 ratio respectively. From a Palestinian perspective, agreement on this ratio signifies a territorial compromise of;
 - 1) 78% of the area of Mandatory Palestine in comparison to the Palestinian territorial claims in 1948 for 100% of the land;
 - 2) 26% of the area of Mandatory Palestine in comparison to “UN General Assembly Resolution 181” (“Partition Plan”) (11/47), which allocated 48% of the area to the Palestinian side as opposed to 52% towards the Jewish side.
 - D. From the Principle of Historic Compromise it is clear that the Palestinians cannot accept further territorial compromise *within* the West Bank, Gaza or East Jerusalem. Therefore any recognition in Israeli sovereignty within these areas must be compensated territorially on a **1:1 ratio**.
 - E. The PLO represents the Palestinian refugees and is authorized to negotiate on their behalf regarding the implementation of the Right of Return according to UN Resolution 194.
 - F. The issue of Palestinian Refugeeism will be **resolved in agreement with Israel**. Hence, it is *inferred* that the majority of Palestinian Refugees will not return to the State of Israel. The Palestinian State will represent its citizens and residents upon the resolution of the refugee issue;
 - G. Israeli-Arabs are citizens of Israel;
 - H. **A Palestinian State *alongside* the State of Israel is a goal of the Palestinian national struggle;**
 - I. “End of Conflict” and “Finality of Claims” are possible through signing a Permanent Status Agreement, which resolves all “Outstanding Issues”.

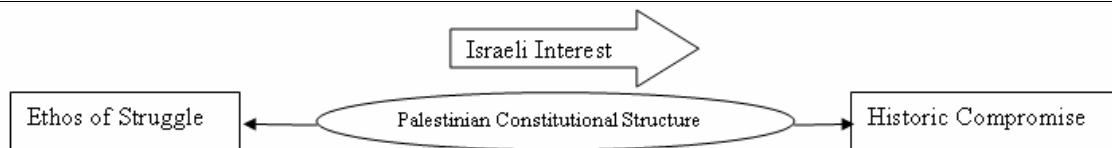
Ambiguity Between Ethos of Struggle and Principle of Historic Compromise

12. The Palestinian Founding Documents and Palestinian Constitutional Structure represent **ambiguity between the Ethos of Struggle and the Principles of Historic Compromise**. For example:
 - A. The “Algiers Declaration” (11/88) accepts the principle of a “Two-State Solution” based on UN General Assembly Resolution 181 (the Partition Plan) and mentioning “UN Security Council Resolution 242”; However, the Declaration still insisted on the full “Right of Return”;
 - B. Theoretically, the Oslo Agreements reflected clear acceptance of the Principle of Historic Compromise. However, the “Basic Law” of the PA,

which was supposed to be written in the spirit of the “[Interim Agreement](#)” (9/95) contains ideas which derive from the Ethos of Struggle;⁴

- C. The Third Draft Constitution for the Palestinian State (05/03) (See “[Palestinian Constitution – Draft No. 3](#)”) contains ideas deriving from the Ethos of Struggle (see below).

13. Accordingly, the Palestinian Constitutional Structure embodies ambiguity between the Ethos of the Struggle and the Principles of Historic Compromise.
14. The fundamental assumption of the Re’ut Institute is that Israel has a clear political interest in influencing the Palestinian Constitutional Structures – its framework, content, interpretation or implementation – so as to reflect the mindset of the historic compromise as opposed to the ethos of struggle.



Interfaces of the Palestinian Constitutional Structure with Israel

15. The Re’ut Institute has identified five interfaces of the Palestinian Constitutional Structure with Israel: “[Issue of Palestinian Representation](#)”, “[Issue of Palestinian Right to Self-Determination](#)”, “[Palestinian Refugeeism](#)” and “[Palestinian Diaspora](#)”, “[Israeli-Arabs](#)” and “[Outstanding Issues](#)”.⁵

⁴ Those elements in the “[Basic Law](#)” that contradict the spirit of the “[Interim Agreement](#)” and the principles of historic compromise are:

- “[The Palestinian Right to Self-Determination](#)” – The introduction to the Basic Law can be understood as implying that an independent Palestinian state does not necessarily exhaust the Palestinian right to self determination: “No one can abolish the peoples’ right to seek the right of return and self-determination, **including** the establishment of the independent Palestinian State with Jerusalem as its capital”.

Although the Interim Agreement does not explicitly refer to the establishment of a Palestinian State, the “[Oslo Process](#)” presumed such an outcome.

- “[Palestinian Diaspora](#)” – While the Interim Agreement principally refers to the residents of the Gaza Strip and the West Bank, the Basic Law states that the **Palestinian People** are the source of all its power (Article 2);

“[Israeli-Arabs](#)” – One of the Interim Agreements' presumptions was that Israeli-Arabs were not subject to negotiations, as they are Israeli citizens. The Basic Law does not refer directly to Israeli-Arabs. However, the introduction the Basic Law alludes to the Palestinian armed struggle and to the bond between the Palestinian People and the “land of its forefathers and grandfathers”.

⁵ See Appendix 1: “The Interfaces of the Palestinian Founding Documents with Israel”.

Issue of Palestinian Representation

16. **What is the Interface?** – This interface refers to the powers and responsibilities of representation by the representative bodies of the "Palestinian People":
- A. Who do the Palestinian political entities represent? i.e. who have the PLO and the PA represented during the "Interim Period"? Who will the PLO and the "Palestinian State with Provisional Borders" (PSPB) represent after the latter is established? Who will the PLO and the Palestinian state represent in Permanent Status and after a Permanent Status Agreement?
 - B. Who will represent the PA or the Palestinian state? Will it be the executive branch of the state ("Council of Ministers"), the executive branch of the PLO ("Executive Committee") or a combination of both?
17. **What is the significance for Israel?** – It is important for Israel to know who the Palestinian entities represent and what authority they have to deal with the issues on the agenda. For example:
- A. Does the Palestinian state, with either permanent or provisional borders, represent the entire Palestinian people or its citizens only? Is it authorized to discuss the Issue of Palestinian Refugeeism?

B. The Third Draft leaves open, albeit implicitly, the potential for a future connection between a Palestinian state and Israeli-Arabs. (See the "Permanent Status of the Issue of Palestinian Representation")

18. **Issue of Palestinian Representation According to the Ethos of Struggle –**
- A. The PLO is the "Sole Legitimate Representative of the Palestinian People";
 - B. Only complete "**Right of Return**" **into the State of Israel** exhausts the Palestinian Right to Self-Determination. Otherwise, the Palestinian struggle will continue;
 - C. Therefore, the Palestinian Authority or the Palestinian state alongside Israel will exist as a mechanism to continue the PLO-led Palestinian national struggle;
 - D. Once the Palestinian state on Mandatory Palestine in its entirety is established, the refugee problem will be resolved and the claims of the Palestinian Diaspora will be settled. Accordingly, the Palestinian nationalist struggle will cease, the PLO will be dismantled and the Palestinian people will be represented by the Palestinian state.
19. **Issue of Palestinian Representation According to the Historic Compromise**
- A. The PLO will remain the sole legitimate representative of the Palestinian People until the establishment of a Palestinian state in the West Bank, Gaza and East Jerusalem;
 - B. Until the establishment of a Palestinian state and an agreed-upon resolution to the refugee problem, the PLO will continue to head a Palestinian national struggle;

- C. The creation of a PSPB *without* reaching an agreement on refugees will leave the Issue of Palestinian Representation and the Issue of Palestinian Right to Self-Determination unresolved. On the one hand, the Palestinian state is expected to represent its residents and citizens. On the other hand, it is not clear who will represent the Palestinian refugees in the Diaspora and within the Palestinian state;
- D. The creation of a PSPB and an agreement concerning the refugees will satisfy the Palestinian Right to Self-Determination and end the Palestinian national struggle. The Palestinian state will be the sole representative of its residents and citizens and will not represent Israeli-Arabs.

Palestinian Right to Self-Determination

20. **What is the Interface?** – This interface relates to the method in which the Right to Self-Determination is realized:

- A. Does the establishment of a Palestinian state fully realize the Palestinian Right to Self-Determination and resolve all Outstanding Issues (See: "Finality of Claims")?

Or

- B. Even after the establishment of a Palestinian state, will groups of “Palestinians” still continue to claim that their Right to Self-Determination has yet to be realized?

21. **What is the significance for Israel?** –

- A. Finality of Claims – The realization of the Right to Self-Determination is one of the principal claims of the Palestinian national movement and has gained widespread international support. In this context, the issues are what criteria need to be satisfied before the Palestinian Right to Self-Determination is fulfilled and removed from the political agenda.
- B. Israeli-Arabs – Officially, the State of Israel claims to be the only representative of its Arab citizens. However, some Palestinians claim that Israeli-Arabs' right to Self-Determination is compromised by the Jewishness of the State of Israel.

22. **Right to Self-Determination According to the Ethos of Struggle**

- A. The Palestinian Right to Self-Determination is based on the following dimensions:
 - 1) Political dimension – national independence;
 - 2) Territorial dimension – connection / ownership / sovereignty over all of the territory of Mandatory Palestine;
 - 3) Right of the Palestinian refugees to return to their homes.

Accordingly,

- B. The Palestinian Right to Self-Determination will be realized through:

- 1) The establishment of a Palestinian state in the whole of Mandatory Palestine; *and*
 - 2) The realization of the Right of Return of Palestinian refugees to their original homes;
- C. The establishment of a Palestinian state in the West Bank, Gaza and East Jerusalem does not fulfill the Right to Self-Determination of a significant portion of the Palestinian people, including the Palestinian refugees in the Diaspora and within the Palestinian state and Palestinians who reside in Israel (Israeli-Arabs).
23. **Right to Self-Determination According to the Historic Compromise**
- A. Realization of the Palestinian Right to Self-Determination depends primarily on the sovereignty of the Palestinian state;
- Therefore,
- B. The establishment of a Palestinian state with **Permanent** Borders based on 6/4/67 lines alongside Israel *combined with* an agreement on the refugee issue will fully realize the Palestinian Right to Self-Determination;
 - C. The establishment of a PSPB *without* an agreement on the refugee issue may represent a partial fulfillment of the Palestinian Right to Self-Determination leaving the Refugee Issue unresolved.

Issue of Palestinian Refugeeism and the Diaspora

24. **What is the Interface?** – Palestinian Diaspora includes Palestinians residing primarily in the “Host Countries” (Jordan, Syria and Lebanon). The relationship of the Palestinian Constitutional Structure to the Palestinian Diaspora and to the Issue of Palestinian Refugeeism will influence the ability of Israel to reach a solution to the refugee issue.
25. **What is the significance for Israel?** – The vague relationship between the future Palestinian state and the Palestinian Diaspora raises the following questions:
- A. What will be the powers and responsibilities of the Palestinian state regarding the refugees?
 - B. Will there be a distinction between the Palestinian refugees living within the Palestinian state and those in Host Countries?
 - C. Will there be Palestinian refugees in a Palestinian state? Conceptually, there seem to be two possibilities:⁶

⁶ In Hebrew, the word "Palestine" may be spelled as פלשתינה (eluding to the land of the Philistines) or פלסטין (as in "Palestine"):

- The former – פלשתינה – accentuates the geographic scope of Mandatory Palestine eluding to the land of the *Philistines* – פלשת - or the territory of the British Mandate formerly referred to as *Phalastina-Eretz-Yisrael* (פלשתינה-ארץ-ישראל);
- The latter – פלסטין – accentuates the national identity of the Palestinian people.

- 1) ***National*** refugeeism – Derives first and foremost from the unfulfilled **national aspirations** – the establishment of a Palestinian state. Therefore, a Palestinian state will realize the Right to Self-Determination of the refugees. Current refugees who will live within the Palestinian state will be characterized as "**Displaced**", living in their homeland but not in their original homes.
- 2) ***Territorial*** refugeeism – Derives first and foremost from the unfulfilled right to **live in a specific territory**. Therefore, even after the establishment of a Palestinian state **there will be "Palestinian refugees" living in the State of Palestine** because they will not be allowed to return to their original homes. These refugees may continue to insist on the Right to Return to their homes in Israel.

26. **Issue of Refugeeism and the Diaspora According to the Ethos of Struggle –**

- A. **Refugeeism is territorial**, and thus derives from the original dispersal of the Palestinian population from their homes. Therefore, refugees may continue to demand the Right of Return to their original homes and property located within the State of Israel;
- B. The PLO will continue to represent these refugees in the Diaspora, as well as within the Palestinian state, until the refugees are resettled in their original homes;
- C. According to this logic there may be **Palestinian refugees in the State of Palestine**.

27. **Refugeeism and Diaspora According to Historic Compromise –**

- A. The Issue of Refugeeism stems from the original dispersal of the Palestinian population from their homes. However, **resolving the issue of Palestinian Refugeeism is dependant primarily on the realization of the Palestinian Right to Self-Determination in the State of Palestine**;
- B. Therefore, implicitly, return of refugees to the State of Palestine is a sufficient resolution to their plight as refugees;
- C. According to this logic, there should not be a Palestinian refugees in the State of Palestine.

Prof. Shimon Shamir of Tel-Aviv University explains how the use of the English word "Palestine" deepens the ambiguity on the Palestinian side. The same word, "Palestine", can mean both:

- the Principle of Historic Compromise in the form of a state in the West Bank, Gaza and East Jerusalem within the principle of a Two-State Solution; *or*
- the Ethos of the Palestinian Struggle in the form of a political entity that spans Mandatory Palestine in its entirety.

See Shamir Shimon, "Spelling Mistakes – Falastin or Palestine", **The Seventh Eye**, March 2005. (in Hebrew)

Israeli-Arabs

28. **What is the Interface?** – In Permanent Status a triangular relationship is likely to exist among the Palestinian State, Israel and its Arab citizens.
29. **What is the significance for Israel?** – This complex triangular relationships will significantly impact the future of the State of Israel:
- A. Among Israeli-Arabs, some constituencies identify themselves as "Palestinians". Some desire a "One-State Solution" or a "State-of-all-its-Citizens", which negates the Jewishness of the State of Israel;
 - B. Parts of the Israeli-Arab population may prefer to live under the sovereignty of the State of Palestine rather than the State of Israel;
 - C. "Irredentism" – It is possible that the State of Palestine or non-governmental bodies in it will claim to represent Israeli-Arabs. In other words, they will claim extra-territorial powers, which will infringe upon Israel's sovereignty;
 - D. "Convergence Phenomenon" – Groups and individuals, propelled by "Anti-Zionism", "Anti-Semitism" or criticism of the State of Israel, may converge and unite their efforts, focusing on the status of Israeli-Arabs in the context of the Jewishness of the State of Israel;
 - E. Terror and Violence – Fundamentalist Islamic states and extremist organizations, such as *Al-Qaeda* or *Hizbullah*, may encourage Arab citizens of Israel to carry out terror operations;
 - F. The issue of Israeli-Arabs may transform from an issue that is primarily internal into a matter of foreign affairs (See "Permanent Status of the Political-Legal Status of Israeli-Arabs").
30. **Issue of Israeli-Arabs According to the Ethos of Struggle** –
- A. Arab citizens of Israel are Palestinians in every way, and will be represented by Palestinian entities (the PLO) until "liberation";
 - B. The Palestinian national struggle must maintain a connection, legal and political, with Israeli-Arabs.
31. **Issue of Israeli-Arabs According to the Principle of Historic Compromise** –
- A. Although Israeli-Arabs are "Palestinians", they are also citizens of Israel and their status is not subject to negotiation between Israel and the Palestinian side;
 - B. Therefore, Israeli-Arabs are not represented by a Palestinian party and their status is an internal matter of the State of Israel.

Outstanding Issues

32. **What is the Interface?** – In the "Declaration of Principles" (9/93) Israel and the PLO agreed to postpone a number of issues until Permanent Status negotiations:
- A. "Historical Issues" – Issues which emanate from the 1948 conflict such as refugees and permanent borders;

- B. Relations between Israel and the State of Palestine in Permanent Status, such as arrangements regarding security, economics, water or relations with third parties.
33. **What is the significance for Israel?**
- A. In the Palestinian Founding Documents a few articles do establish positions on Permanent Status issues;
- B. These positions, constitutionally enshrined, limit the flexibility of Palestinian negotiators and democratically elected leaderships, making it more difficult to arrive at a Permanent Status Agreement. For example, according to the Third Draft, amendments to the constitution are to be approved by two thirds of the "Representative Council" (legislative branch of the Palestinian State).⁷
34. **Outstanding Issues According to the Ethos of Struggle –**
- A. There is no room for compromise with Israel;
- B. The aspirations of the Palestinian national struggle are anchored in the Palestinian Founding Documents such as the "Palestinian National Charter" – a Palestinian state on all of Mandatory Palestine, no recognition of Israel or of the Jewish Right to Self-Determination, a full Right of Return and so on.⁸
35. **Outstanding Issues According to the Principle of Historic Compromise –**
- A. On one hand, all Outstanding Issues are to be resolved through negotiations between Israel and the Palestinians;
- B. On the other hand, anchoring the Principle of Historic Compromise at a constitutional level ties the hands of future Palestinian negotiators in making any further compromises inconsistent with the Principle of Historic Compromise.

⁷ See Nathan Brown, **The Third Draft Constitution for a Palestinian State: Translation and Commentary**, Palestinian Center for Policy and Survey Research, October 2003, Article 186, pp.72-74.

⁸ See e.g. "The Palestinian National Charter" (7/68) that negates the "Jewish Right to Self-Determination" and calls for the destruction of the State of Israel through armed struggle. See Articles: 12-17, 20-21 and 28-29.

Second Chapter: The Interfaces of the Third Draft with Israel

36. The Palestinian Founding Documents constitute the formal ideological platform of the PLO and the PA, expressing national aspirations and objectives.
37. The Third Draft Constitution for a Palestinian State (5/03) is the most recent Palestinian Founding Document laying the formal legal groundwork for the establishment of a Palestinian state.
38. Discussions about a fourth draft, expected to be presented after the coming election for the "Palestinian Legislative Council" (PLC) of the PA (7/05), are already taking place.
39. The Third Draft is likely to serve as a basis for these discussions.

40. The prevailing view is that the constitution of the Palestinian state is strictly an internal Palestinian matter. Therefore, it seems that neither Israel nor any other party has concerned itself with its content or the process of its creation.
41. In fact, the Palestinian Constitutional Structure has five interfaces with Israel that have meaningful implications on Israel's (and Jordan's) identity and wellbeing, as well as on the prospects for a stable Two-State Solution.
42. Therefore, the Re'ut Institute claims that the general rule of non-intervention should be qualified in the Israeli-Palestinian case, i.e.:
 - A. The content of the draft constitution must be examined.
 - B. A clear policy regarding the process of preparing an additional draft constitution must be shaped. In other words, should the Palestinian constitutional process be encouraged or delayed?
 - C. A clear policy regarding the Third Draft's interfaces with Israel should be designed.

Background

43. The Third Draft was commissioned by the "Central Committee" of the PLO. Previous drafts were also created by the PA. The draft will enter into force with the establishment of a Palestinian state.
44. The Third Draft was written in the context of the "Roadmap" (4/03),⁹ which calls on the Palestinians to implement comprehensive political reforms in preparation for a PSPB ("The Second Phase of the Roadmap"). These reforms include the drafting of a new Palestinian constitution.

⁹ In the "Bush Vision for the Middle East" (6/02), President Bush presented his plan for a renewal of the political process and called for the creation of a new Palestinian constitution.

The Quartet's Roadmap (4/03), which was based on the Bush speech, calls for a quick drafting of a new constitution in the build-up to the PSPB. The most recent draft was written by a special commission appointed by the PLO and headed by the PA's then-Minister of International Cooperation and Planning and PLO official Nabil Shaath.

45. Therefore, the Third Draft was founded upon the working assumption that the borders of the state would be provisional and that several Outstanding Issues between Israelis and Palestinians would remain unresolved:
- A. Palestinian Representation – Following the establishment of a Palestinian state and before the signing of a Permanent Status Agreement, the Palestinian People may have two legitimate representatives: a Palestinian state and the PLO;
 - B. Self-Determination – The establishment of a PSPB does not necessarily signify the realization of the Palestinian Right to Self-Determination for those Palestinians living in the Diaspora;
 - C. Refugees and Jerusalem – Even after the establishment of a PSPB, several Outstanding Issues, such as Jerusalem or Refugeeism, may remain unresolved;
 - D. Relations between the two states – A PSPB may be established through "Unilateral Recognition" and not through an agreement within the Second Phase of the Roadmap. Therefore, central issues in the relations between Israel and the PSPB, such as economic or security arrangements, may not be addressed.
 - E. Therefore, the PSPB would be established before reaching Finality of Claims or End of Conflict.
46. The ratification of the constitution – The draft constitution is to be ratified in three stages:
- A. By the "Palestinian National Council" (PNC) or the Central Committee of the PLO;¹⁰
 - B. By the legislative branch of the Palestinian state (the "Representative Council"), with approval of two thirds of its members;
 - C. The Representative Council of the Palestinian state may subject the draft to a referendum. It is unclear whether those voting would be the residents of the state or the entire Palestinian People (See "Map of the Palestinian People").¹¹
47. **Amending the constitution** – The constitution may be amended only after it has entered into force and by a **two-thirds majority** of the Representative Council.¹²
48. **The Third Draft contains 190 articles** about including various constitutional issues, such as separation of powers or civil rights.

¹⁰ The presumption was that this stage will take place before the establishment of a Palestinian state.

¹¹ See: Brown, Article 186, pp.72-74. **Changes in the Draft of the Constitution** – (1) The procedure for ratifying the constitution sets no mechanism for amending the draft's content, but only a process for deciding whether the content is acceptable in the first place; (2) There is no reference to what happens if the Constitution is rejected during this phase; (3) No one is granted explicit authorization to review the Draft **before** it is submitted for a vote.

¹² **Ibid.**

49. The Re'ut Institute has identified **ten of these articles, clustered into five issues, each constituting an interface with Israel:** "[The Issue of Palestinian Representation](#)"; "[The Issue of the Palestinian Right to Self-Determination](#)"; the Issue of "[Palestinian Refugees](#)" or the "[Palestinian Diaspora](#)", "[Israeli-Arabs](#)", and the "[Outstanding Issues](#)".

The Five Clusters of Issues in Relation to the Third Draft

50. The Third Draft assumes the establishment of a PSPB before a Permanent Status agreement is reached.
51. The Third Draft is ambiguous in its discussion of the five subjects listed above.
52. This ambiguity indicates indecision between the Ethos of the Palestinian Struggle and the Principle of Historic Compromise.

53. It is an assumption of the Re'ut Institute that it is in the interests of a stable Two-State Solution that the constitution – its contents, interpretation and application – better reflects the Principle of Historic Compromise.



Issue of the Palestinian Right to Self-Determination

54. The term "Right to Self-Determination" **does not appear** in the Third Draft.
55. According to the Ethos of Struggle, the Palestinian Right to Self-Determination is realized only through the liberation of Mandatory Palestine in its entirety. On the other hand, according to the Principle of Historic Compromise, the establishment of a Palestinian state in the West Bank and Gaza Strip would satisfy that right.
56. Therefore, the Third Draft indicates indecision regarding the question of whether a Palestinian state on part of Mandatory Palestine realizes the Palestinian Right to Self-Determination for the entire Palestinian People or for the residents of the Palestinian state only. (See "[All Its Residents/Citizens Approach](#)" and "[Containment Approach](#)" to the Palestinian Right to Self-Determination).

Issues of Palestinian Representation, Refugees and Palestinian Diaspora

57. Upon the implementation of the "Second Phase of the Roadmap" and the establishment of a PSPB two entities may have valid claim to represent the Palestinian side:
- A. **The Palestinian state** in Gaza and the West Bank, distinguished from the PLO, will have the characteristics of a state, including UN membership and the capacity to conduct foreign relations. This state may be the representative of all its residents in the West Bank and Gaza Strip, including those who are refugees.

- B. **PLO** – The PLO will remain the "sole legitimate representative of the Palestinian people" – representing the entire Palestinian People, including the residents of the Palestinian state.
58. **The first draft of the Constitution from 2001**, which was written before the Roadmap, reflects better the idea that the **future Palestinian state will succeed the roles of both the PLO and the PA and will represent the entire Palestinian People** ("Succession Approach to the Issue of Palestinian Representation").¹³
59. The Third Draft is more ambiguous and does not clarify who will represent the Palestinians on which issues.¹⁴
- A. It has no references to the position of the PLO in relation to the Palestinian state, despite its continuing parallel existence (seemingly at least until the signing of a Permanent Status Agreement and the resolution of the refugee issue);
- B. The draft uses **different concepts to describe the population that the Palestinian state will represent**, such as "every citizen", "every Palestinian", "anyone who bears Palestinian nationality" or whoever is a member of the Palestinian People;¹⁵
- C. Article 13 of the Third Draft stipulates that every Palestinian refugee from the 1948 War has the Right to Return **to the Palestinian state**. The Palestinian **state** will strive to implement the Right of Return of the refugees to their homes and to realize their right to compensation **through negotiations** on the basis of UN General Assembly Resolution 194.
- This formulation indicates a "softening" of the First Draft (2001), which affirmed that the refugees have the Right to Return to their original homes and that this right is personal and inalienable. Hence, neither the Palestinian state nor the PLO has the power to concede the Right of Return in the name of the refugees.¹⁶
- D. As discussed, the Third Draft implicitly grants right to citizenship and the right to vote and run for office to Israeli-Arabs and Palestinian residents of Host Countries. (See below for further discussion on Israeli-Arabs).

¹³ Nathan J. Brown, **Palestinian Politics After the Oslo Accords**, University of California Press, 2003, pp. 90-91.

¹⁴ For example, the constitution is based on the goodwill of the "Palestinian People" and on this basis the PLO has the authority to ratify it before the establishment of the state. Immediately after the establishment of the state and general elections, the first legislature is slated to ratify the constitution by a two-thirds majority or to decide whether to present it in a referendum. (See Article 185 of the Third Draft).

¹⁵ "Every citizen", see Article 53 for "*Muatan*"; For "Every Palestinian" or "All who are part of the Palestinian People", see Article 21 for "*Falestini*" or "*man yakhmal al-jinsia al-Falestiniya*"; For "All who are part of the Palestinian people", see Article 66 for "*Al-Sha'ab al-Falestini*".

¹⁶ Nathan J. Brown, **Palestinian Politics After the Oslo Accords**, University of California Press, 2003, pp. 11-12.

- E. Article 109 of the Constitution announces the formation of a "Representative Council" empowered to represent the "Palestinian Diaspora" (See "[Map of the Palestinian People](#)") both within Palestine and outside of it. Its members will be chosen according to Palestinian law or appointed according to the laws of the members' country of residence. This clause theoretically signifies that Israeli-Arabs and Palestinians who are citizens of Jordan would be represented by the Council or the Palestinian state. The Third Draft does not designate specific powers to either the PLO or the Palestinian state to represent the Diaspora.
60. According to the Ethos of Struggle, the PLO is the sole legitimate representative of the Palestinian People until the liberation of Mandatory Palestine in its entirety and the realization of the refugees' Right of Return to their original homes.
61. In contrast, according to the Principle of Historic Compromise, the Palestinian state is the representative of its residents and successor to the PLO.
62. The Third Draft reflects inability to decide between the two approaches. The undefined nature of the borders and lack of resolution of Outstanding Issues means that the PLO will have valid claim for representation even after the establishment of a Palestinian state. The Third Draft does not clearly distinguish between the authorities of the two bodies.

Israeli-Arabs

63. The Third Draft **does not explicitly mention Israeli-Arabs**, though there are several significant references.
- A. Conceptually, Israeli-Arabs are included within the constitutional definition of the "Palestinian people" and therefore have the right to Palestinian citizenship on the basis of the principle that **every Palestinian is entitled to Palestinian citizenship**.¹⁷
- B. The Third Draft outlines the "Electoral System for the Palestinian State" and uses several different concepts to describe those eligible to vote and run for office. Implicitly, **Israeli-Arabs would be allowed to participate in the election process in the Palestinian State**.
- The right to vote – Article 21 grants the right to vote to "**every Palestinian ("*Falestini*")**" and Article 53 sets out that right for every citizen ("*Muatan*"). Israeli-Arabs are "Palestinian";
 - The right to run for office – Article 21 of the Constitution grants the right to be elected to everyone who "bears Palestinian nationality" ("*..man yakhmal al-jinsia al-Falestiniya..*");
 - Nevertheless, Article 53 limits the right to run for office to a "citizen" ("*Muatan*"). Hence, according to Articles 12 and 53 of the Third

¹⁷ Article 12 states that Palestinian citizenship will be granted to all who had such citizenship before May 15, 1948, and to their descendents, and to all Palestinians who were forced to flee from their homes prior to that date, and to their descendents.

Draft, Israeli-Arabs may theoretically be elected in the elected bodies of the Palestinian state;

- Article 66 of the constitution stipulates that the legislature will represent "the Palestinian People" ("*al-sha'ab al-falastini*"). However, those elected to the legislature cannot retain the citizenship of any other country.¹⁸
64. According to the Ethos of Struggle, Israeli-Arabs are Palestinians in every sense until their "liberation".
 65. According to the Principle of Historic Compromise, Israeli-Arabs are citizens of the State of Israel and are represented by it.
 66. The Third Draft is ambiguous about the status of Israeli-Arabs. Although the Palestinian state does not demand rights to their representation, their rights to vote and to run for office are guaranteed by the constitution.

Outstanding Issues

67. The Third Draft's stance on Outstanding Issues reflects the tension between the Ethos of the Struggle – according to which there is no room to compromise with Israel – and the Principle of Historic Compromise – according to which Outstanding Issues will be resolved through negotiations with Israel.
68. The anchoring of uncompromising positions in the constitution will impede the process of arriving at a resolution with Israel. According to the Third Draft, amendments are possible only with a two-thirds majority of the members of the "Representative Council" (the legislature of the Palestinian state).
69. In addition to the Issue of Refugeeism (see above), there are references to only some of the historical issues in dispute:
 - A. **Borders** – Article 1 defines the borders of the Palestinian State as areas not in Israeli hands on the eve of 6/4/67 – in other words, all of the territory of the West Bank, Gaza and East Jerusalem. The Palestinian territory is a "Single Territorial Unit" and is not divisible, although with no reference to "Safe Passage".

The clause is written in the spirit of the principle of a Two-State Solution, although it is not clear whether a Palestinian state in these borders would realize the Palestinian Right to Self-Determination.
 - B. **Jerusalem** – Article 4 of the Third Draft establishes that Jerusalem will be the capital of the Palestinian state without specifying its municipal borders.

¹⁸ Articles 113 and 131 determine that a candidate to the Presidency or Premiership must carry "Palestinian citizenship exclusively".

Table

70. The table below presents a comparison between the Ethos of Struggle and the Principle of Historic Compromise in relation to the five Interfaces:

	Representation	Right to Self-Determination	Diaspora	Israeli-Arabs	Outstanding Issues
Ethos of Struggle	PLO - sole legitimate representative of the Palestinian People	Palestinian state on all of Mandatory Palestine and full realization of the Right of Return	Right of Return and full repatriation of property	Palestinians in every sense.	No room for compromise
Principle of Historic Compromise	Palestinian state will inherit the powers of representation from the PLO, representing its residents and the Palestinian Diaspora, though not Israeli-Arabs	Realized with the establishment of a Palestinian state within the 6/4/67 borders	Diaspora-Palestinians may return to Palestine. Return to Israel only with agreement by Israel	Israeli-Arabs are citizens of Israel and are not represented by a Palestinian side.	The principle of the Two-State Solution – 6/4/67 borders, Al-Quds as capital, arrangements for coexistence, etc.
References in the Third Draft	Ambiguity It is not clear who represents the Palestinian People (the PLO or the state), and it is not clear whom the state represents; its residents only or the Diaspora as well.	Ambiguity This concept is not mentioned in the constitution.	Historic Compromise: Right of Return to the Palestinian state. The state will strive to implement the Right of Return through negotiation on the basis of UN General Assembly Resolution 194	Ambiguity No direct reference, however the constitution grants them the right to citizenship, to vote and run for office.	Establishing the principles of Historic Compromise on the Constitutional level i.e. Al-Quds as capital and 6/4/67 borders.

Third Chapter: “Arenas”

Introduction

71. An “Arena” is a space - diplomatic, political, legal, economic, civil or military - where the State of Israel or third parties need to establish organizing principles in order to safeguard their interests.

Arenas Relating to the Interfaces of the Palestinian Constitutional Structure

72. **Policies regarding the constitution of the Palestinian state** - It is necessary to identify an organizing principle to guide policies regarding the coming into being of a constitution for the Palestinian state. Theoretically, the possibilities are:
- A. **Encouraging or discouraging the processes of formulation** of a constitution *prior to* – as opposed to following - the establishment of a Palestinian state;
 - B. Directly influencing **the content** of the Palestinian constitution;
 - C. Influencing the **interpretation** of the Palestinian constitution on the basis of international law or through diplomatic proceedings (declarations or coordination among third parties);
 - D. Anchoring the principles of the Two-State Solution **in future agreements** – and avoiding attempts to impact the content or interpretation of the Palestinian constitution – by negotiating the:
 - 1) Content of the articles dealing with agreements between Israel and the Palestinians, such as those concerned with the Right to Self-Determination, Palestinian Representation, dual citizenship, status of Palestinian refugees in the Palestinian state and so on;¹⁹

¹⁹ For example, the Permanent Status of the Palestinian Right to Self-Determination was to have been decided during the years 1999-2001.

The Israeli position was that the establishment of the Palestinian state would realize the Right to Self-Determination of the entire Palestinian people. In other words, the Palestinian Right to Self-Determination would be fulfilled only through the establishment of the Palestinian state (see "Containment Approach to the Palestinian Right to Self-Determination").

See Sher Gilead, **Just Beyond Reach: Negotiations for Peace 1999-2001**, Tel Aviv; Mashkal, 2001, Section 2.9 pp. 421 (in Hebrew).

Israel therefore contended that the Palestinian government would be the sole representative of all its residents and citizens, refugees and non-refugees alike.

As such, the PLO would have had no standing to represent this population, and the Palestinian state would not represent any population outside its borders. Specifically, the Palestinian state would have had no power of representation of Israeli-Arabs. (Sher, Section 2.18, pp. 422).

Therefore, with the establishment of the Palestinian state, the PLO would have been required to change its name and founding documents, including its declared aims (Sher, 2.20, pp 423).

Nevertheless, the Geneva Initiative (10/03) presents a different approach:

- 2) Agenda of the Political Process (agreement or negotiations) – Israel must decide if it wants to address the aforementioned issues directly within the framework of the political process. Until now, the parties have not done so.
73. **Israel's policies vis-à-vis its Arab citizens** – This arena encompasses every aspect of Israeli policies towards Israeli-Arabs and their subsequent impact on the triangular relationship among the State of Palestine, Israel and its Arab citizens.
- The central question is how much influence, responsibility and authority Israel is prepared to allow Palestinian entities to exercise over its Arab citizens. This issue touches on subjects such as the economy (trade rights), law (citizenship rights or dual citizenship), politics (the rights of Israeli-Arabs to vote and run for office in the Palestinian state), society (family unification) and diplomacy (political representation).
74. **Issue of Palestinian Representation** – This arena examines which entity has the authority to represent the Palestinian People on particular issues.
75. **Issue of the Palestinian Right to Self-Determination** – This arena is concerned with whether the establishment of a Palestinian state realizes the Palestinian Right to Self-Determination.
76. **Second Phase of the Roadmap: PSPB** – This arena encompasses all of the processes, arrangements, understandings and agreements which relate to the establishment of the Palestinian State with Provisional Borders within the framework of the 2nd Phase of the Roadmap.
- Seen in this context, it is Israel's responsibility to evaluate the significance of the "Provisional nature" of the borders in relation to the five comprehensive Interfaces. Thus, for example, is the Palestinian Right to Self-Determination realized only in a Palestinian state with permanent borders, and not in a PSPB? Who will be the interlocutor for the political process after the establishment of a Palestinian state in the Second Phase of the Roadmap, the PLO or the PSPB?
77. **Diplomacy in the international arena** – This arena relates to the political and diplomatic moves of the State of Israel that help to influence the expected Fourth Draft of the Palestinian Constitution. This arena encompasses four different approaches, each of which is capable of being an individual arena in its own right:
- A. **Bilateral level** – Steps that Israel takes vis-à-vis the Palestinians after which the Palestinian side reciprocates;

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- Drawing a connection between the relationship of the Palestinian state to the Palestinian Right to Self-Determination on the one hand, and of the relationship of Israel to the Jewish Right to Self-Determination on the other: (See Preamble and Article 2.4 of the Geneva Initiative).
 - The Geneva Initiative does not attempt to define the "Palestinian people", the territory on which the Palestinian Right to Self-Determination will be fulfilled, and whether that right will be satisfied fully with the establishment of a Palestinian state.

- B. **International level** – Public and/or discreet moves coordinated with third parties vis-à-vis the content or interpretation of the Palestinian Founding Documents;
 - C. **International law** – Use of international law to foresee and prevent possible Palestinian undermining of Israeli sovereignty (as embodied in the Palestinian Founding Documents);
 - D. **Public relations** – Making the case for Israeli interest in Palestinian internal affairs by emphasizing the negative consequences posed by positions in the Palestinian Founding Documents on issues that Interface with Israel.
78. Constitutional Foundations of Israel – This arena refers to the extent of Israel's relationship with Diaspora Jewry. This discussion may affect Israel's ability to meddle in the parallel Palestinian debate about the relationship between the Palestinian state and Palestinian Diaspora. Two clusters of issues compose this arena:
- A. A definition of the relationship between Israel and the entire Jewish people such as: the issue of Jewish representation, realization of the Jewish Right to Self-Determination, Law of Return, the establishment of a representative body for the entire Jewish people, the right to vote and run for office, dual citizenship and so on;
 - B. Constitutional arrangements to determine Permanent Status issues, including the "Basic Law: Jerusalem, Capital of Israel".

End.

Appendix A:

	Founding Document	Issue of Representation	Right to Self-Determination	Diaspora	Israeli-Arabs	Outstanding Issues
PLO	Palestinian National Charter	The PLO is the "sole legitimate representative of the Palestinians."	Will be realized with the establishment of a State in Mandatory Palestine in its entirety.	Full right of return	Palestinians in every sense.	According to the Palestinian traditional narrative, the State of Israel has no right to exist.
	Algiers Declaration	The PLO is the "sole legitimate representative of the Palestinians"	Two-State Solution according to the "Partition Plan"/ of UN Resolution 181	Full right of return	No direct reference. The State of Palestine is the state of Palestinians, regardless of their current residence.	No specified borders. Negotiations on borders stems from the Partition Plan.
PA	Interim Agreement	Underlying assumption: Palestinian state represents its residents during Permanent Status (assuming that they are not refugees) and therefore the state inherits this right from the PLO.	Underlying assumption: Will be realized with the establishment of a state more or less within the 6/4/67 borders.	As one of the Outstanding Issues, a resolution of the issue will be reached through a comprehensive political process and an agreement between the two parties.	Israeli-Arabs are an internal Israeli issue.	This issues will be resolved through comprehensive negotiations with Israel on resolving the issues.

	Basic Law	The Palestinian state will be established under the leadership of the PLO.	Ambiguous: The establishment of a state is necessary but possibly not sufficient to realize this right.	Even though the PA is slated to represent the residents of the West Bank and Gaza Strip only, it is still stipulated that the Palestinian people is the source of the PA's Authority.	No reference. It may imply a political connection between them and the PA.	Jerusalem is the capital of Palestine.
Palestinian State	Third Draft of the Constitution	Ambiguous: It is not clear who represents the Palestinian people, and it is not clear whom the state represents: its residents or the Diaspora as well.	Ambiguous: The term is not mentioned in the Constitution.	A Right of Return to the Palestinian state and directing application of the Right of Return toward negotiation based on UN Resolution 194.	Ambiguous: Not mentioned directly, though the Constitution indirectly allows them to have the right of citizenship, to vote and to run for office in Palestine.	Establishing facts on the ground. Jerusalem is the capital; the borders of the state: all of the territory of the West Bank and Gaza Strip.