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Drafting a Joint Proposal for a U.N. Security Council Resolution on Israel-Palestine with Alan Dershowitz

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PRESENTATION

On Wednesday, September 14, I happened to sit for lunch in the faculty common room of Harvard Law School (HLS) next to Professor Alan Dershowitz, whom I had

* Presidential Professor of Law and Professor of Middle Eastern Law and Politics, University of Utah; EU Jean Monnet Professor of European Law, Saint Joseph's University, Lebanon; 2011 Custodian of the Two Holy Mosques Visiting Professor of Islamic Legal Studies, Harvard Law School. I am extremely appreciative of the many colleagues who discussed some or all of this work, at Harvard and beyond. I am especially grateful to the efficient research work of Daniel Purisch JD '11, as well as to Matthew Bobby JD '12, Lucianna Hayden JD '12, and the team at the HILJ who encouraged me to complete it so quickly. I am uniquely indebted to Professor Deena Hurwitz for her thorough, critical reading of this article. All shortcomings and mistakes are naturally my responsibility.

not met before.¹ Next to him was sitting Professor Robert Mnookin, with whom I had had previous discussions about the International Criminal Court (ICC), in particular whether the recognition of the State of Palestine by the United Nations General Assembly (UNGA) would allow the Palestinian Authority (PA) to secure the ICC's jurisdiction over potential crimes committed in the Palestinian territories.²

Both Israeli Prime Minister Netanyahu and the PA President Abbas were scheduled to speak before the General Assembly the following week.³ The conversation at lunch

¹ As a visiting professor at HLS in 2011, I have been the beneficiary of former Dean (and present Justice) Elena Kagan's decision to increase the number of visiting professors and lecturers. In an already large school, the presence of dozens of visitors a year raises logistical-social problems for them and for the permanent colleagues as well as wonderful opportunities constrained by time and place. See Kevin Washburn, *Elena Kagan and the Miracle at Harvard*, 61 J. LEGAL EDUC. 67, 70–71 (2011). The almost daily faculty lunch occasion, which is at the origins of the present article, is one of the most fruitful fora for social and intellectual encounters against the characteristically busy schedules in the law school. Elena Kagan was also apparently at the origins of this consistently special occasion for visitors to meet stellar colleagues.

² See generally LAUREN MACCARONE, THE AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT, THE PALESTINIAN AUTHORITY'S APPLICATION FOR UNITED NATIONS MEMBERSHIP AND ITS IMPLICATIONS FOR THE INTERNATIONAL CRIMINAL COURT (2011), available at http://www.amicc.org/docs/Palestine_and_the_ICC.pdf. Statehood is a prerequisite both for an entity to accept the jurisdiction of the Court on an *ad hoc* basis as a State Non-Party under Article 12(3) of the ICC's Rome Statute, as well as by becoming a State Party through accession to the Statute under Article 125(3) and then referring its situation to the Prosecutor under Article 14. Rome Statute of the International Criminal Court arts. 12(3), 14, 125(3), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). Following the 2008-09 Gaza war, the Palestine National Authority lodged an Article 12(3) declaration accepting ICC jurisdiction; the Office of the Prosecutor has yet to act, in part due to uncertainties regarding Palestine's statehood. See Office of the Prosecutor, *Palestine*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine/> (last visited Jan. 4, 2011). For Palestinian Authority President Abbas's argument that Palestine meets the criteria of statehood, see Mahmoud Abbas, *The Long Overdue Palestinian State*, N.Y. TIMES, May 16, 2011, at A27. The State of Israel signed the Rome Statute but subsequently communicated its intention not to become a party or to be otherwise legally bound by its signature. See United Nations Treaty Collection, *Rome Statute of the International Criminal Court*, UNITED NATIONS, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited Jan. 4, 2011).

³ President Abbas's speech, which started shortly after noon on Friday, September 23, developed a narrative of Palestinian history focusing on the sacrifices of Palestinians in an effort to have a state covering twenty-two percent of historic Palestine, the emptiness of negotiations with Israel over two decades while settlements are creating *faits accomplis* on the ground, and the rationale behind the request for statehood before the U.N. Security Council

drifted naturally from ICC jurisdiction to the Palestinian statehood bid, which was scheduled for discussion in my Public International Law (PIL) class the following week as a live case for testing the criteria of government and state recognition. The discussion was heating up politically and in the press, with the announcement that the United States would veto it at the U.N. Security Council (UNSC), leaving a realm of uncertainty over whether the PA would seek full U.N. membership through an application to the UNSC, or recognition as a State from the UNGA.⁴

As the discussion with Bob Mnookin started, I realized that my immediate neighbor was the famous (and in Arab and Palestinian circles, infamous) lawyer and professor who took on, and won, difficult and controversial First Amendment and criminal cases, and who is considered the most articulate defender of Israel in the United States.⁵ He told us he was seeing the Israeli Prime Minister for dinner on Friday, September 16, which made the conversation even more concrete. An immediate ice-breaking moment resulted from introducing myself as the lawyer of the Sabra and Shatila victims in their case against Ariel Sharon and others in Belgium.⁶ Alan

for a so-far stateless people. For an English translation, see *Text of Abbas Speech to the UN General Assembly*, JADALIYYA REPORTS, Sept. 23, 2011, <http://www.jadaliyya.com/pages/index/2727/text-of-abbas-speech-to-the-un-general-assembly>). The request was formally handed to the U.N. Secretary General two hours earlier. Prime Minister Netanyahu's speech was delivered at 1:30 p.m., with the narrative focusing on the lack of trust following the dismantlement of the Gaza settlements and the continued armed conflict despite the withdrawal from Gaza, the rejection that the West Bank settlements were a hurdle, and the offer to start immediate negotiations without any precondition. For the full text, see *Full Transcript of Netanyahu Speech at UN General Assembly*, HAARETZ, Sept. 24, 2011, <http://www.haaretz.com/news/diplomacy-defense/full-transcript-of-netanyahu-speech-at-un-general-assembly-1.386464>). A useful timeline of the day can be found at *Palestinian UN Bid for Statehood: As It Happened*, THE GUARDIAN, Sept. 23, 2011, <http://www.guardian.co.uk/world/blog/2011/sep/23/palestinian-statehood-un-general-assembly-live>.

⁴ Full United Nations membership requires both a "recommendation" of the UNSC and a "decision" of the UNGA, while the UNGA's general powers leave it free to adopt a non-binding resolution recognizing Palestinian statehood in the absence of a UNSC recommendation. See Charter of the United Nations arts. 4, 10, Oct. 24, 1945, 1 U.N.T.S. XVI. Eventually, the decision was made to pursue full United Nations membership, and a request was made to the UNSC. See Neil MacFarquhar & Steven Lee Meyers, *As Palestinians Seek U.N. Entry, A Push for Talks*, N.Y. TIMES, Sept. 24, 2011, at A1.

⁵ See, e.g., *Heated Debate Between Dershowitz Ben-Ami*, THE PHILADELPHIA JEWISH VOICE, Oct. 21, 2010, <http://blog.pjvoice.com/diary/132/heated-debate-between-dershowitz-benami>.

⁶ In re Sharon & Yaron, 42 I.L.M. 596 (2003) (Belgian Court of Cassation). On this case, which the plaintiffs won and which was retroactively dismissed by a change of the law in the summer of 2003, see e.g., THE CASE OF ARIEL SHARON AND THE FATE OF UNIVERSAL JURISDICTION (John Borneman ed., 2004) (including essays by John Borneman, Chibli Mallat, Luc Walley, Laurie King-Irani, Dan Rabinowitz, Sally Falk Moore, Paul W. Kahn, and Reed Brody); Deena Hurwitz, *Universal Jurisdiction and the Dilemmas of International Criminal Justice: The*

Dershowitz's reaction was nuanced, and he explained in a later conversation that he was on record saying that the 1982–83 Kahan Commission had not gone far enough because it did not contain a criminal prosecution component.⁷ In a further email exchange for the present article on December 6, he clarified his position as follows:

I do believe Sharon was culpable but I am strongly opposed to the concept of universal jurisdiction and its selective application. For example, the Phalangists who carried out the massacre weren't brought before the Belgian court. Nor was Arafat etc. To accurately reflect my complex view on the matter, it is important to note

- 1) I agree with efforts to hold Sharon and others accountable for their actions and inactions;
- 2) I disagree with the mechanism you sought to invoke and came out against it;
- 3) I generally believe that Israel has a good system for bringing its military actors to justice;
- 4) Based on what I know--which is incomplete-- I don't think the Kahan commission was tough enough

Sabra and Shatila Case in Belgium, in HUMAN RIGHTS ADVOCACY STORIES 267 (Hurwitz et al. eds., 2009); Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888 (2003).

⁷ See, e.g., ALAN DERSHOWITZ, THE CASE FOR ISRAEL 12 (rev. ed. 2004) [hereinafter DERSHOWITZ, THE CASE FOR ISRAEL] ("Nor do I try to defend egregious actions by Israelis or their allies, such as . . . the 1982 Phalangist massacre of Palestinians in the Sabra and Shatila refugee camps"); *Q&A with Alan Dershowitz*, JPOST.COM, Oct. 20, 2005, <http://info.jpost.com/C004/QandA/qa.dershowitz.html> ("I too criticize Sharon's indirect involvement in the Sabra and Shatila massacres, as did the Israeli commission, but those massacres were conducted by Lebanese Christians in revenge for massacres conducted against their leaders and their people."). The Kahan Commission had found that Ariel Sharon as Minister of Defense "bears personal responsibility," but suggested only that he "draw the appropriate personal conclusions" (i.e., resign). REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT (1983), *available at* <http://www.mfa.gov.il/MFA/Foreign%20Relations/Israels%20Foreign%20Relations%20since%201947/1982-1984/104%20Report%20of%20the%20Commission%20of%20Inquiry%20into%20the%20e> (Kahan Commission).

on Sharon, but reasonable people can disagree in evaluating the outcomes of specific cases.⁸

The ice having broken so suddenly, we resolved to think about a Resolution which both Israelis and Palestinians could put to the Security Council as their Joint Proposal. I told him at lunch that despite such positions he had a profoundly adverse reception in the Arab world, and that this was all the more unfortunate since I saw his book *The Case for Peace*⁹ as a clear advocacy of a two-state solution in accordance with UNSC Resolution 242¹⁰:

⁸ E-mail from Alan Dershowitz, Felix Frankfurter Professor of Law, Harvard Law School, to author (Dec. 6, 2011) (on file with author).

⁹ ALAN DERSHOWITZ, *THE CASE FOR PEACE: HOW THE ARAB-ISRAELI CONFLICT CAN BE RESOLVED* (2005) [hereinafter DERSHOWITZ, *THE CASE FOR PEACE*]. I referred to the book in our conversation as *The Case for Palestine* and was corrected by Alan Dershowitz.

¹⁰ S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967):

The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security, *Emphasizing further* that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. *Affirms* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

- (a) For guaranteeing freedom of navigation through international waterways in the area;
- (b) For achieving a just settlement of the refugee problem;
- (c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

That is why to be pro-peace and pro-the two-state solution is to be pro-Palestinian *and* pro-Israel. ... During a speech delivered at the University of Toronto in March 2005, I declared that I was both pro-Israel and pro-Palestine, since I favored the two-state solution, the end of the occupation, and the dismantling of Israeli settlements in areas that will become part of the Palestinian state. There were boos and heckles from anti-Israel extremists who believe that everyone must choose sides in a zero-sum game and that to be pro-Israel necessarily means that one is anti-Palestinian. That is simply not the case. I have always been pro-Palestinian. Since 1967, I have urged Israel to trade captured land for peace, as provided by Security Council Resolution 242, which I helped (in a very small way) to draft. I opposed the building of Israeli settlements since the early 1970s and have

[hereinafter S.C. Res. 242]. Ever since the Resolution was passed, its interpretation has been subject to profound disagreements, especially as to whether the lack of a definite article before “territories” in the English text of paragraph 1(a) is meant to imply that withdrawal from some, but not all, of the occupied territories would suffice, while the French text was more specific (“Retrait . . . des territoires” and not “de territoires”). See, e.g., Ruth Lapidot, *Security Council Resolution 242: An Analysis of its Main Provisions*, in JERUSALEM CENTER FOR PUBLIC AFFAIRS & KONRAD ADENAUER SIFTUNG, ISRAEL’S RIGHT TO SECURE BORDERS: FOUR DECADES SINCE UN SECURITY COUNCIL RESOLUTION 242 13, 17–20 (2009), available at <http://www.jcpa.org/text/resolution242-lapidot.pdf> (supporting the Israeli view, but identifying the both sides of the debate). See also, e.g., SYDNEY D. BAILEY, THE MAKING OF RESOLUTION 242 154, 184 (1985). A good faith interpretation of the resolution as a whole is one that I believe Alan Dershowitz provides in our Joint Proposal and in his writings, which is that the return of land occupied in the 1967 war to build the Palestinian state is contingent on the end of the state of war (“secure boundaries”). The main drafter of the Resolution, British diplomat Lord Caradon, did not see any particular ambiguity in the text:

It was from occupied territories that the Resolution called for withdrawal. The test was which territories were occupied. That was a test not possibly subject to any doubt. As a matter of plain fact East Jerusalem, the West Bank, Gaza, the Golan and Sinai were occupied in the 1967 conflict.

LORD CARADON ET AL., UN SECURITY COUNCIL RESOLUTION 242: A CASE STUDY IN DIPLOMATIC AMBIGUITY 9 (1981). For a contrary view, see e.g., Lapidot, *supra*, at 17–20. Alan Dershowitz recognizes that “territories” is not the same as “the” or “all the territories,” but understands it as a good faith return of the whole of the West Bank (and Gaza) with adjustments and land swaps “acre for acre.” See Joint Proposal, *infra*, ¶ 1; *infra* text accompanying note 79.

been critical of the Israeli occupation of Palestinian population centers.¹¹

I had read that book, as well as *The Case for Israel* before visiting Harvard.¹² I disagreed with much of the narrative and many of the arguments but noticed that the overwhelming perception of Alan Dershowitz by my “tribe” ignored conclusions that he firmly supported. The very first pages of *The Case for Peace* express Dershowitz’s identification with the position as articulated by most Palestinians.¹³ Palestinian preference for the two-state solution has been overwhelmingly clear in private discussions with leading friends of all cries and hues over the years – from the families of those who died in the Sabra and Shatila refugee camps to leading politicians in the Palestinian national movement in the diaspora and in the Occupied Territories, including bright Palestinian intellectuals and diplomats in the Arab world and in the West. All have defended the two-state solution since Yaser Arafat abandoned the former Palestinian National Council platform advocating one secular and democratic state which included the Jews of Palestine.¹⁴ In *The Case for Peace*, Dershowitz embraces the two-state solution on terms that are almost identical to the Palestinian leadership’s:

The good news is that the elements are all in place.
The outline for the solution is obvious to all
reasonable people:

1. Two states based on Israeli withdrawal from all of
the Gaza Strip¹⁵ and nearly all of the West Bank, with
territorial adjustments consistent with Security
Council Resolution 242 . . . and the existing realities
on the ground.

¹¹ DERSHOWITZ, *THE CASE FOR PEACE*, *supra* note 9, at 202.

¹² DERSHOWITZ, *THE CASE FOR ISRAEL*, *supra* note 7.

¹³ *See* DERSHOWITZ, *THE CASE FOR PEACE*, *supra* note 9, at 1–3.

¹⁴ *See, e.g.*, NOAM CHOMSKY, *FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL, AND THE PALESTINIANS* 42 (updated ed. 1999) (“Within the international consensus, . . . a ‘two-state’ settlement . . . has been taken to be a politically realistic solution that would maximize the chances for peace and security for the inhabitants of the former Palestine, for the region, and for the world, and that satisfies the valid claims of the two major parties as well as is possible under existing conditions.”). For a legal discussion of the two Palestinian *mithaq* (often translated as “charters” or “covenants”) of 1964 and 1968, see, for example, CHIBLI MALLAT, *THE MIDDLE EAST INTO THE 21ST CENTURY* 60–66 (1996) [hereinafter MALLAT, *THE MIDDLE EAST INTO THE 21ST CENTURY*].

¹⁵ This was written before the Israeli dismantling of the Jewish settlements in Gaza in summer 2005.

2. Some symbolic recognition of the rights of Palestinian “refugees”¹⁶ including a compensation package and some family reunification but no absolute “right of return” to Israel of the millions of descendants of those who claim refugee status – a questionable “right” whose exercise would produce the great wrong of quickly turning the Jewish state into yet another Muslim Arab state. All Palestinians should have the right to “return” to what will become the Palestinian state.
3. A division of greater Jerusalem, with the Arab part becoming the capital of the Palestinian state and the Jewish part the recognized capital of Israel.
4. A renunciation of all forms of violence, including terrorism, and an undertaking by the Palestinian state to dismantle terrorist groups and take all reasonable efforts to prevent acts of terrorism, just as Israel had undertaken to prevent and punish Jewish terrorism against Palestinians.
5. An end to singling out of Israel for demonization and delegitimation – and to the hatred directed against the Jewish state and its citizens and supporters – by international organizations, many academics, religious leaders, and media pundits; and the normalization and acceptance of Israel as a full and equal member of the international community.¹⁷

This text could easily have been recast into a Security Council resolution, and our Joint Proposal did include most of its tenets, to which I added a few which Alan Dershowitz would probably not have required. These may turn out to be the most interesting and controversial aspects of the proposal for many Palestinians, and are duly footnoted.¹⁸

In our very early conversation over lunch, which continued over the following weeks on various occasions, I emphasized the challenge as one where our agreement on any text for the Security Council would be meaningless if we did not genuinely believe we could convince our respective “tribes” and their leadership to espouse it. Now “tribe”

¹⁶ I am not sure why “refugees” is in quotation marks.

¹⁷ DERSHOWITZ, THE CASE FOR PEACE, *supra* note 9, at 2.

¹⁸ See *infra* text accompanying notes 88–90.

is an antiquated word, which is not appropriate for lawyers, and came up in conversation with colleagues during my earlier visit to Cambridge in the spring of 2011. Spring 2011 was dominated by the revolution in the Middle East, and I was far less interested by the Israel-Palestinian conflict, except for its negative interference with the nonviolent struggle against the Arab dictatorships and absolute monarchies afoot. I argued, and continue to argue, that the revolution was Middle Eastern, not merely Arab, because Turkey, Israel, and Iran are naturally part of it, and I continue to argue that the Arab Spring is a misnomer because this was a massive, unprecedented Middle East-wide, nonviolent revolution.¹⁹ I did not expect that demonstrations of the same nature would take place in Israel or the West Bank, owing to the special circumstances in both countries, or in my native Lebanon or Iraq, where heads of the executive did not resemble the “dinosaurs” and their offspring who prevailed elsewhere.²⁰ But it was obvious there would be significant repercussions for the Palestinian-Israeli conflict, and it was important to anticipate matters and help orient them, to the extent an individual can have any effective role in a wave of nonviolence and human rights protests with a scope stretching across the region and beyond, all the way to China.²¹

China may be far-fetched, but there is little doubt that the so-called Arab Spring has affected, and will affect, Israel-Palestine and vice-versa. This is incorporated in one of the recitals in the Joint Proposal.²² But I could not find a more adequate expression than “tribes” to present the case in the newspaper: “peoples” might seem the more natural choice, but it sounds presumptuous to talk about our “peoples,” as if we were their representatives. “Tribes” has a lighter tone.

Nor do I feel blindly attached to my tribe, whether its interests are defined as Arab, Lebanese, or indeed as Christian or Maronite, the more specific religious denomination into which I was born. Through my education and political beliefs, I have always considered human rights to be superior to any form of “tribal” right, be it sectarian, religious or national, gendered, or economically defined. This is the

¹⁹ See Chibli Mallat, *The Philosophy of the Middle East Revolution; Take One: Non-Violence*, 3 MIDDLE E. L. & GOVERNANCE 136, 138 (2011) [hereinafter Mallat, *The Philosophy of the Middle East Revolution*].

²⁰ About the rulers across the region before the 2011 Revolution: “It takes at least a generation to establish democracy and the rulers in the Middle East are all ruthless dinosaurs.” *FiveBooks Interviews: Chibli Mallat on Maverick Political Thought*, THEBROWSER.COM, Nov. 11, 2009, <http://thebrowser.com/interviews/chibli-mallat-on-maverick-political-thought>.

²¹ On the fearful response of China’s ruling class to the Middle East Revolution, see generally James Fallows, *Arab Spring, Chinese Winter*, THE ATLANTIC, Sept. 2011, <http://www.theatlantic.com/magazine/archive/2011/09/arab-spring-chinese-winter/8601/>; Randall Peerenboom, *China and the Revolutions in the Middle East and North Africa*, 3 MIDDLE E. L. & GOVERNANCE 160 (2011).

²² Joint Proposal, *infra*, third recital.

universal legacy of the Enlightenment, which introduced the notion that the individual has absolute rights that she may claim and is entitled to defend. Kant, in particular, builds a system from this absolute centrality of the individual in his pithy philosophical work, from the three *Critiques* to the little treatise on *What is Enlightenment?*²³

There is one key reservation in my espousal of Kant's philosophy. When individual rights come up against collective rights, I have problems with Kant and the Rawlsian legacy that best puts it in constitutional motion at the end of the twentieth century, for I *also* find some truth in collective rights, be they religious or national, competing with the individual's bedrock perimeter of freedom and equality. The difficult joint embrace of collective and individual rights has long been a concern of my constitutional understanding of the Middle East's sectarian exception to the territorial nation-state.²⁴ Balancing individual and "tribe"—national as in Palestinian and Israeli, religious-sectarian as in Muslim, Christian, and Jewish, linguistic-ethnic as in Arab-, Kurdish-, and Hebrew-speaking groups—informs my vision of Israel-Palestine as a hard and stubborn fact documented from the beginning of Near Eastern written civilization.²⁵ In this balance, my preference for a united state of Israel-Palestine for all its citizens trumps the separation into two states regardless of their respective sizes. But I am not impervious to the sectarian *calque* as one which commands some legitimacy in a seemingly uninterrupted recorded history of the Middle East over five millennia.²⁶

A one-state solution is not acceptable to Alan Dershowitz,²⁷ nor does it express the conviction of most Palestinians. A few die-hards, outliers, dreamers, idealists, call

²³ IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Paul Guyer & Allen W. Wood trans., Cambridge UP 1999) (1781); Immanuel Kant, *Critique of Practical Reason* (1788), in *PRACTICAL PHILOSOPHY* 133 (Mary J. Gregor trans., Cambridge UP 1999) [hereinafter Kant, *Critique of Practical Reason*]; IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* (Paul Guyer & Eric Matthews trans., Cambridge UP 2001) (1790); Immanuel Kant, *An Answer to the Question: What is Enlightenment?* (1784), in *PRACTICAL PHILOSOPHY* 11 (Mary J. Gregor trans., Cambridge UP 1999). The answer of Kant to the nature of Enlightenment is for each individual to stand up for his opinion: "*Sapere aude!* Have courage to make use of your *own* understanding! is thus the motto of enlightenment." Kant, *supra*, at 17.

²⁴ See CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* 171–79 (2007) [hereinafter MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW*].

²⁵ *Id.* at 142, 171. See also Chibli Mallat, *Islam and the Constitutional Order*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* (Michel Rosenfeld & András Sajó eds., forthcoming 2012).

²⁶ On *calques*, the legal-diplomatic written exemplars that get repeated with infinitesimal changes down the centuries, a concept I learnt from the late John Wansbrough, see MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW*, *supra* note 24, at 16–32.

²⁷ *Q&A with Alan Dershowitz*, THE JERUSALEM POST, Oct. 20, 2005, <http://info.jpost.com/C004/QandA/qa.dershowitz.html>.

them as you wish, invariably cling to that more humanist vision.²⁸ Despite the Joint Proposal presented here, and irrespective of my sincere wish to see it put in effect, I am very much one of the one-stater die-hards, following a position that I articulated in a 1996 book as “a different type of Arab-Israeli peace”:²⁹ one state with federal arrangements that are attentive to the collective rights of the two “tribes” in parallel with the unassailable perimeter of the individual’s rights. I go even further, for my argument for one undivided republic of Israel-Palestine is actually practical as well as moral.³⁰ But unlike the one-state’s most articulate proponent, the late Edward Said,³¹ I moderate my enthusiasm for that solution in several ways.

For starters, it is difficult to be more royalist than the king, or in this case more Palestinian than the Palestinians, especially for someone who is not a Palestinian. All the leading Palestinian colleagues I know well, except for Professor Said, support a two-state solution. I do not see it as proper to oppose that political platform shared across the board of Palestinians.³² I also support any initiative to lessen violence, whether it consists in refraining from physical violence against Jewish settlers, halting

²⁸ The literature on the one-state solution has grown significantly over the past two decades. See, e.g., ALI ABUNIMAH, *ONE COUNTRY: A BOLD PROPOSAL TO END THE ISRAELI-PALESTINIAN IMPASSE* (2006); VIRGINIA Q. TILLEY, *THE ONE-STATE SOLUTION: A BREAKTHROUGH FOR PEACE IN THE ISRAELI-PALESTINIAN DEADLOCK* (2005); Tony Judt, *Israel: The Alternative*, N.Y. REV. BOOKS, Sept. 25, 2003, <http://www.nybooks.com/articles/archives/2003/oct/23/israel-the-alternative/>; Edward Said, *The One-State Solution*, N.Y. TIMES MAGAZINE, Jan. 10, 1999, <http://www.nytimes.com/1999/01/10/magazine/the-one-state-solution.html>; A periodically updated bibliography of articles in English on the one-state solution is available at FOR ONE DEMOCRATIC SECULAR STATE IN ISRAEL/PALESTINE, <http://oss.internetactivist.org/> (last visited Dec. 24, 2011). I call the vision humanist because of its vision of humans as opposed to members of a community or citizens of a state.

²⁹ MALLAT, *THE MIDDLE EAST INTO THE 21ST CENTURY*, *supra* note 14, at 26–70.

³⁰ For an interesting shift on the “practicality” of the one-state solution in view of the cheese-like shape of Israel-Palestine in the wake of settlements and the wall, see Bernard Avishai, *Saving Israel From Itself: A Secular Future for the Jewish State*, HARPER’S MAGAZINE, Apr. 2005, at 33.

³¹ See, e.g., Edward Said, *The One-State Solution*, N.Y. TIMES, Jan. 10, 1999, <http://www.nytimes.com/1999/01/10/magazine/the-one-state-solution.html?pagewanted=all>.

³² Even Hamas expresses its acceptance for a “temporary” two-state solution garbed in an Islamicized jargon for armistice, *hudna*. See, e.g., Ramy Baroud, *Hamas’ Political Impasse*, MA’AN NEWS, July 4, 2009, <http://www.maannnews.net/eng/ViewDetails.aspx?ID=211670>; *PM Haniyeh: We Will Accept a Palestinian State on the ‘67 Borders and Call a Truce*, MA’AN NEWS, Sept. 22, 2006, <http://maannnews.net/eng/ViewDetails.aspx?ID=190009>. For an account of Hamas’s more radical origins by a historic leader of the movement, see ‘ABD ALLĀH ‘AZZĀM, *HAMĀS : AL-JUDHŪR AL-TĀRĪKHĪYAH WAL-MĪTHĀQ* [Hamas: The Historical Roots and Charter] (1990) (in Arabic).

the bulldozing of Palestinian homes and orchards, removing checkpoints on the West Bank, allowing Palestinian day workers to cross into Israel, stopping the repression of Palestinian demonstrators, or exchanging prisoners in vastly asymmetric ways. An agreement between Israelis and Palestinians on two states would immediately lessen violence and save lives, and I find the possibility of saving one single life always compelling against any political calculation anchored in a perception of time being in favor of some later holier solution. My rephrased Kantian question takes the following universalist form in this context: can one conceive an immediately enforceable law that marks the last death in the Israeli-Palestinian conflict?³³ The Joint Proposal is animated by this conviction.

There is also an important lesson I learned from the first conference I organized between Palestinian and Israeli jurists shortly after the first agreements had been signed,³⁴ as I was poring over the long texts of the Oslo Accords.³⁵ Any agreement or treaty is bound merely to mark the beginning of innumerable others because of the small territories involved, the profound imbrication of peoples on both sides of any statal divide, and the demands of the economy. While the Joint Proposal below is determinedly in the two-state solution camp, I intentionally preserve in the text glimpses of the “different type of Israeli-Palestinian peace” I first developed fifteen years ago.³⁶

My strategic disagreement with Alan Dershowitz is real. What I have at heart, as a principled position, is my longstanding advocacy of what stands in my present constitutional thought as a “federal Israel-Palestine.” This preference is at odds with the vision offered by Alan Dershowitz in *The Case for Peace*. In his second chapter entitled “Is the One-State Solution a Barrier to Peace?,” his answer is a resounding yes. He considers the bi-national state argument an “anti-Israel screed,”³⁷ a “crackpot idea,”³⁸ even an “anti-Semitic” device.³⁹ I continue to support the idea, correctly ascribed by Alan Dershowitz to Noam Chomsky in 1974⁴⁰ and to Antony Judt in

³³ This is my modest equivalent, in time, to Kant’s famous fundamental law of pure practical reason: “So act that the maxim of your will could always hold at the same time as a principle in a giving of universal law.” Kant, *Critique of Practical Reason*, *supra* note 23, at 28.

³⁴ The proceedings of this conference were published in *THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES* (Eugene Cotran & Chibli Mallat eds., 1996).

³⁵ Declaration of Principles on Interim Self-Government Arrangements, Isr.-Palestinian Liberation Organization, Sept. 13, 1993, 32 I.L.M. 1525.

³⁶ MALLAT, *THE MIDDLE EAST INTO THE 21ST CENTURY*, *supra* note 14, at 26–71.

³⁷ DERSHOWITZ, *THE CASE FOR PEACE*, *supra* note 9, at 29.

³⁸ *Id.* at 30.

³⁹ *Id.* at 30–31.

⁴⁰ Noam Chomsky, A Radical Perspective, Talk Before the Third Annual Convention of the Association of Arab-American University Graduates, Evanston, IL (Oct. 29–Nov. 1, 1970), *in*

2003.⁴¹ Ironically, I published in 2007 an extensive email exchange with Professor Chomsky, in the form of a debate over this very issue, with Chomsky firmly in the Dershowitz camp of the two-state solution, albeit with profoundly different reasons and explanations.⁴²

In the Joint Proposal below, my hope is that the breakthrough it would occasion by institutionalizing the region-wide nonviolent revolution in the Israeli-Palestinian context also creates the conditions for a persistent and intimate cooperation between the two governments. Such nonviolent cooperation, if properly understood and espoused by their leaders and societies, favors a day-to-day fluidity far closer to one state in the medium-to-long term. The regional success of nonviolent revolutions in the surrounding countries also facilitates the advent of such fluidity. The Middle East nonviolent revolution informs and is informed by Israel-Palestine. This century-old truism is not about to vanish.

At the center of the construction of the Joint Proposal lies an insistence on “good faith” adoption and the slow and difficult restoration of trust among leaders aiming towards a common goal. This can be established only through the highest conflict resolution mechanism possible, a joint leadership committee composed of the two chief executives in the two states, which we announce in the fifth paragraph of the Joint Proposal. The “Nonviolent Israeli-Palestinian Committee” is bound to face immense problems couched in a historic zero-sum solution: if taken by Israel, a drop of water from the aquifer of the West Bank is a loss to the Palestine state, and a square yard gained in Jerusalem for the Palestinian state is a square yard lost to the state of Israel. And vice-versa. The difficulty is compounded by a continuing imbalance that undermines reciprocity. Should the proposal be adopted, the most difficult immediate hurdles concern security, with the imbalance between thousands of Palestinian prisoners in Israel and no Israeli prisoners in Palestine, one of the most powerful armies in the world on one side, and a ragtag of soldiers on the other. No bargaining power or quid pro quo there. Settlements are no less problematic with the violence entailed by the use of bulldozers under cover of law to expand them, which Israel only is capable of exercising, together with the highway roads that serve them exclusively. There is also no reciprocity there either, for no Palestinian settlements are allowed in Israel, whether for Israeli Arabs, or for Gazans or West Bankers. Nor are there Palestinian bulldozers ever narrowing Jewish land. Mostly, the one-hundred year

NOAM CHOMSKY, PEACE IN THE MIDDLE EAST? REFLECTIONS ON JUSTICE AND NATIONHOOD 93 (1974).

⁴¹ Judt, *supra* note 28.

⁴² *Mallat and Chomsky – An exchange Over the Future of Palestine-Israel* (May-June 2006), in CHIBLI MALLAT, PRESIDENTIAL TALK 36 (2008). See also Chomsky-Dershowitz Debate, Cambridge, MA (Nov. 29, 2005), *video available at* <http://www.youtube.com/watch?v=9zkmLTBe8p8>, *transcript available at* http://www.democracynow.org/2005/12/23/noam_chomsky_v_alan_dershowitz_a.

civil war that I read in the history of Israel-Palestine is a fight defined first and foremost by property.⁴³ The differences and bargaining positions are significant: they are addressed in the Joint Proposal by an open acknowledgment, a call for continuous and mutual empathy, and the creation of the only mechanism that can solve them: a genuine nonviolent committee led by the leaders of the two countries, which will have to meet for a very, very long time.

Creative solutions to a problem which is inherently a zero-sum game are imperatively needed if the Nonviolent Committee is not to flounder days after its establishment. Most dear to my perspective is the concept of “freedom of movement” as understood and applied by the states and societies of the European Union since its emergence in the Treaty of Rome in 1957.⁴⁴ The rationale is as follows: by establishing the principle of freedom of movement for all Palestinians and all Israelis in Israel and in Palestine, the right of return can be exercised without existential risk to the Jewish community in Israel that the arrival of hundreds of thousands of Palestinian refugees would pose. Alan Dershowitz is correct when he considers an *absolute* right of return as a non-starter.⁴⁵ But by also *absolutely* negating the right of return, Israel falls foul of a basic principle of international law,⁴⁶ a specific resolution requesting the return of Palestinian refugees with the same strength of the UNGA resolution establishing

⁴³ The best book on the subject remains BARUCH KIMMERLING, *ZIONISM AND TERRITORY: THE SOCIOTERRITORIAL DIMENSIONS OF ZIONIST POLITICS* (1983).

⁴⁴ See *infra* text accompanying note 94.

⁴⁵ See Alan Dershowitz, *Palestinians and the ‘Right of Return’: Israel Doesn’t Have to Affirm Bogus Palestinian Refugee Claims to Resolve This Issue*, CHRISTIAN SCI. MONITOR, Apr. 16, 2007, <http://www.csmonitor.com/2007/0416/p09s01-coop.html>.

⁴⁶ See Arab Charter on Human Rights art. 22, Sept. 15, 1994, *reprinted in* 18 HUM. RTS. L.J. 151 (1997); International Covenant on Civil and Political Rights art. 12, Mar. 23, 1976, 999 U.N.T.S. 171 (“No one shall be arbitrarily deprived of the right to enter his own country.”); American Convention on Human Rights art. 22(5), Nov. 22, 1969, 1144 U.N.T.S. 123; International Convention on the Elimination of All Forms of Racial Discrimination (CERD) art. 5(d)(ii), Dec. 21, 1965, 660 U.N.T.S. 195 (“States Parties undertake . . . to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law, notably in the enjoyment of . . . [t]he right . . . to return to one’s country.”); Protocol No. 4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3(2), Sept. 16, 1963, E.T.S. 114; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 45, 134, Aug. 12, 1949, 75 U.N.T.S. 135 (presuming a right to return following the cessation of hostilities); African Charter on Human and Peoples’ Rights art. 12(2), June 27, 1981, 21 I.L.M. 58 (1982); Universal Declaration of Human Rights art. 13(2), G.A. Res. 217 (III) A, U.N. Doc A/RES/217A(III) (Dec. 10, 1948) (“Everyone has the right . . . to return to his country.”).

Israel,⁴⁷ and the reference in Resolution 242 to the need to solve the refugee problem.⁴⁸

The truth is that much has been agreed to already in the on and off negotiations between the two parties, with a package including compensation, an absolute right of return to the Palestinian state, and figures ranging between a few tens of thousands to a few hundreds of thousands under the cover of family reunification and other such criteria.⁴⁹ Still, these are solutions that the Palestinian leadership is incapable of “selling” to the refugees. In my conviction that I can persuade my “tribe” to adopt the proposal, I had freedom of movement in mind for the most destitute Palestinian whom I can imagine, and whom I know well from representing him for over two years in a titanic battle carried out in Belgium against the Prime Minister of Israel: the resident of Sabra and Shatila who has survived the massacre of his and her family. For

⁴⁷ G.A. Res. 194 (III), ¶ 11, U.N. Doc. RES/194(III) (Dec. 11, 1948) (“Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest possible date, and that compensation should be paid for the property of those choosing not to return and for the loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.”). See also G.A. Res. 3236 (XXIX), ¶ 2, U.N. Doc. A/RES/3236(XXIX) (Nov. 22, 1974) (“Reaffirms also the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return.”).

⁴⁸ S.C. Res. 242, *supra* note 10, art. 2(b).

⁴⁹ See, e.g., Ian Black & Seumas Milne, *Palestinians Agreed Only 10,000 Refugees Could Return to Israel*, GUARDIAN, Jan. 24, 2011 (referencing proposals in negotiations between 2007–09 that provided for the return of 5,000 to 150,000 refugees to Israel); *Essentials of the Camp David II Proposals by Israel*, MIDEASTWEB.NET, <http://www.mideastweb.org/campdavid2.htm> (noting Israeli proposal to accept 100,000 refugees on family reunification grounds) (archived version available at <http://web.archive.org/web/20110718185231/http://www.mideastweb.org/campdavid2.htm>); Miguel Moratinos, *EU Non-Paper* (Jan. 27, 2001), reprinted as *EU Description of the Outcome of Permanent Status Talks at Taba*, HAARETZ, Feb. 14, 2002, <http://www.haaretz.com/news/eu-description-of-the-outcome-of-permanent-status-talks-at-taba-1.52973> (EU Special Representative to the Middle East Process describing a three-track Israeli proposal presented during the Taba negotiations beginning with the return of 25,000 refugees). See also BILL CLINTON, MY LIFE 936–38 (2004); YORAM MEITAL, PEACE IN TATTERS: ISRAEL, PALESTINE, AND THE MIDDLE EAST 69–91 (2006); DENNIS ROSS, THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE 655, 804–05 (2004); Robert H. Mnookin et al., *Barriers to Progress at the Negotiation Table: Internal Conflicts Among Israelis and Among Palestinians*, 6 NEV. L.J. 299, 318–27. During my work on the Sabra and Shatila case with Belgian colleagues, Luc Walley discovered in the Israeli-Palestinian discussions a particularly moving reference to Israel’s agreement that the survivors of Sabra and Shatila would be given priority to return.

Muhammad Abu Rudeina and his sister Nawal, orphaned in the massacre,⁵⁰ I can argue that the freedom of movement will provide them far more than anything presently on the table: you may not take the family home key and return to your village to claim your house and land, but you will be able to visit Palestine. The more peace, the more fluidity for people, be they workers or visitors. And our “tribe” has something to reciprocate. The Palestinian government, the Arab governments, and the larger community can tell an increasingly reassured Israel that the more freedom of movement that is allowed to Palestinian refugees in short or long stays in Israel, the more freedom of movement for Jewish Israelis wanting to visit our countries on similar terms. The precedent in Europe is overwhelming. It can be extended and magnified across the Middle East and Europe.⁵¹ Nor have I heard dissonance amongst Israeli colleagues on this issue: so long as the Israeli government retains a final say in the intensity of movement across its border, progressively longer visits of Palestinian “refugees” can be accommodated in a way that changes the game in the way freedom of movement has made the concept of the EU real to its citizens, without jeopardizing the national integrity or security of its member-states.⁵²

The proposal below is a *compromise*. The line between compromising and being compromised is at the heart of daily life, as I learnt long ago in a description by Lebanese leader Kamal Jumblatt of 25 years of his political struggle.⁵³ The life of a political leader is made of daily compromises. This is also true for a lawyer, and for a human rights advocate. There is no evident bright line between compromising and being compromised, although I may have reached some solace in my search for a “flawless theory of nonviolence.”⁵⁴ Less ambitiously, the overwhelming espousal of

⁵⁰ Muhammad Abu Rudeina’s recollection of his last moments with his father, included in the complaint in the Sabra and Shatila case, is excerpted in Hurwitz, *supra* 6, at 268. The full complaint, including a number of survivors’ testimonies is available in English at *Complaint Lodged by Survivors Against Israeli Prime Minister Ariel Sharon, Director General of the Defense Ministry Amos Yaron and Other Israelis and Lebanese Responsible for the Sabra and Shatila Massacre (June 18, 2001)*, 12 PAL. Y.B. INT’L L. 219 (2005), and in the original French at Chibli Mallat et al., *La Plainte Contre Ariel Sharon avec Constitution de Partie Civile*, 81 (nouv. sér.) REVUE D’ETUDES PALESTINIENNES 12 (2001). Additional testimonies in Arabic are on file with author.

⁵¹ See MALLAT, THE MIDDLE EAST INTO THE 21ST CENTURY, *supra* note 14, at 207–15.

⁵² My use of quotation marks for “refugees,” unlike Professor Dershowitz’s above, see *supra* note 16 and accompanying text, comes from the fact that Palestinian refugees and their descendants will in the solution provided no longer be considered stateless, for they will hold full Palestinian citizenship.

⁵³ KAMĀL JUNBLĀT, RUB‘ QARN MIN AL-NIDĀL [A Quarter Century of Struggle] (1987) (1974) (in Arabic).

⁵⁴ See Chibli Mallat, Law and the Middle East 2011 Revolution: On Nonviolence, Paper to be presented before Yale Law School’s Middle East Legal Studies Seminar, Istanbul, Turkey (forthcoming Jan. 13–14, 2012) (on file with author) [hereinafter Mallat, Law and the Middle East 2011 Revolution]. I argue in this paper that nonviolence in absolute is possible, but only

nonviolence as illustrated in the Middle East revolution afoot has been internalized considerably by the Palestinians and to a lesser degree by the Israelis.⁵⁵ This bright line of nonviolence would certainly mark a historic breakthrough if it materializes in a UNSC Resolution proposal by the two parties. This is why the recitals at the beginning of our Joint Proposal insist on the novelty and importance of nonviolence in the Middle East revolution. The operative clauses are premised on nonviolence, and severe tests for the joint nonviolent committee will arise on day one of any agreement.

With a view to my attachment to nonviolence as it unfolds in the Middle East, I had little moral hesitation in partnering up with Alan Dershowitz, despite the knee-jerk reaction from a whole host of friends and family, who pursed their lips at hearing his name mentioned as a partner, and the hate blogs that would follow. I like the no-nonsense dimension in the man, and I am amused by a style that appears abrasive to those who disagree with him. Although I have sympathy for those who are on the receiving end of nuance-less attacks, breaking through open doors is not a practice I particularly enjoy. Partnering in a proposal with Professor Alan Dershowitz *is* meaningful. It was triggered by complete deadlock between the principals of Israel and Palestine at the United Nations in September 2011. The proposal might turn into a naive and insignificant academic exercise, but it is not insignificant to me. Alan Dershowitz also took chances on his long-standing reputation as the defender of Israel, come what may. I suspect that there was serious hesitation on his part in joining his signature to that of a lawyer who had put the former Prime Minister of Israel in the dock, and who poses in his writings serious questions on the democratic nature of the State of Israel.⁵⁶

during the revolution. Once a new political-constitutional regime is established, society is bound to revert to the daily use by the state of its monopoly over violence.

⁵⁵ For an interesting perspective on the undertow of Arab-Israeli equality in the “Israeli spring,” see Inès Weill-Rochant, *De Tel Aviv à Jérusalem: En Attendant la Révolution . . .*, ARABSTHINK.ORG (Aug. 20, 2011), <http://arabsthink.com/2011/08/20/de-tel-aviv-a-jerusalem-en-attendant-la-revolution/>. On the First Palestinian Intifada as the start of mass nonviolence in the Middle East, see ERICA CHENOWETH & MARIA J. STEPHAN, *WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT* 119–46 (2011); MARY ELIZABETH KING, *A QUIET REVOLUTION: THE FIRST PALESTINIAN INTIFADA AND NONVIOLENT RESISTANCE* (2007).

⁵⁶ So that there would be no misunderstanding or false impression, I immediately shared with Alan Dershowitz my preferred vision of a federal Israel-Palestine. See, e.g., CHIBLI MALLAT, *THE MIDDLE EAST INTO THE 21ST CENTURY*, *supra* note 14, at 26–70; Chibli Mallat, *A Federal Israel-Palestine: Ending 100 Years of Civil War in the Holy Land?*, DAILY STAR, Sept. 17, 2010, <http://www.dailystar.com.lb/Law/Sep/17/A-federal-Israel-Palestine-Ending-100-years-of-civil-war-in-the-Holy-Land.ashx>; Chibli Mallat, *A Federal Israel-Palestine: Nonviolence and Law to End the 100-Year Civil War*, DAILY STAR, Sept. 23, 2010,

More alluring in the proposal is that it is “academic” in more than one meaning of the term. The proposal did start indeed as an academic exercise. During lunch, as I was explaining that the Palestinian statehood bid was a great case study for my PIL class addressing the doctrine of state and government recognition, Alan Dershowitz expressed his interest in participating in the class. I welcomed it, but I wanted to ask the students whether we could stretch the discussion further in this way, to the detriment of a whole host of other issues in the syllabus. They were naturally excited by the prospect, and Alan Dershowitz addressed the class the following week.⁵⁷

At our initial lunch, the academic side of the exercise that became the Joint Proposal emerged from the following tell-tale discussion with Robert Mnookin. Bob asked me about the pros and cons of the Palestinian initiative in the United Nations against the certainty of the U.S. veto. I ascribed the statehood initiative by Mahmud Abbas as a way for Palestine to regain prominence internationally against the marginalization of the Palestinian issue by the Middle East revolution. I also expected the move to attract focus for a while and then to collapse again into indifference and U.S.-Israeli opposition. But I also explained that this was all speculative, and that I preferred a different intellectual approach: not so much assessing the pros and cons of a particular move, or attempting an impossible prediction, which is conditioned by so many factors that make it impossible to write virtual history.⁵⁸ No, the more useful approach formulates the problem in a different way: knowing what one knows about the Palestinian-Israeli conflict, could one conceive of a UNSC Resolution which would be acceptable to both parties? To my students the question was: knowing what you know, and the principles of international law on statehood, can you write such a draft?

Dershowitz was receptive to the argument and said he would be interested in following through. We both were of the opinion that any text would need to be “minimalist.” A long text is always more difficult to agree on. A few days later, I drafted a resolution, which I sent him. He replied that he would accept it with significant changes. That first version had less than 450 words.⁵⁹ The published version is not much longer, slightly over 630 words, and the changes are referenced

<http://www.dailystar.com.lb/Law/Sep/17/A-federal-Israel-Palestine-Ending-100-years-of-civil-war-in-the-Holy-Land.ashx>.

⁵⁷ In a short string of subsequent emails, we decided that his participation would not be formal. A few friends whom I told the unusual story attended the class on 27 September.

⁵⁸ On the impossibility of “virtual history” in the Niall Ferguson style, see my brief comments in Chibli Mallat, *Des Relations Privilégiées Entre l'Union Européenne et les Pays Voisins: Les Promesses de l'Art. 8 du Traité de Lisbonne (TUE)*, in *MÉLANGES SOLDATOS* n.1 and accompanying text (forthcoming 2012).

⁵⁹ See *infra* note 67. See also the handwritten comments to the first draft by Alan Dershowitz in the appendix.

below, some of which express the most telling divergences between Alan Dershowitz and me.

Contrary to the negative connotation of the expression, I take academic exercises seriously. The massive majority of academic work remains confined to limited circles, yet the apparent cacophony hides a reality of consensus-forming common discourse, best described by Robert Fossaert in *La Société*.⁶⁰ Sometimes, an academic will cause a revolution of sorts, the most illustrative example being the letter by then “Princeton academic” Albert Einstein to FDR on the need for the Manhattan Project before Nazi Germany could get the nuclear bomb.⁶¹ Wide is the spectrum between the inchoate formation of Fossaert-style *discours commun*, and the immediate and direct incidence of a draft text written by two academics on the longest surviving conflict in the world. Still, academic exercises may fall on the lower end of the spectrum in terms of impact, though law has a way of capturing the imagination because of its naturally

⁶⁰ ROBERT FOSSAERT, LES STRUCTURES IDÉOLOGIQUES, VI LA SOCIÉTÉ 200–01 (1983) (internal references omitted, emphasis in original):

Ce discours [social commun] est une culture commune et son évolution, dans une société donnée, atteste les progrès – ou les reculs – de l'acculturation générale. Encore faut-il bien concevoir que *le discours social commun n'est pas homogène. Ce n'est pas une sorte de minimum culturel commun à chacun des individus relevant d'un même réseau idéologique, mais c'est un discours communément répandu dans tous les groupes élémentaires que ce réseau interconnecte.* Le discours social commun est ce que Braudel étudie sous le nom de « civilisation matérielle », mais aussi ce à quoi Lefebvre appliqua sa « critique de la vie quotidienne ». C'est la pâte épaisse et chaque jour rebrassée des pratiques et représentations que tous les hommes, liés par un même réseau, « comprennent » et « appliquent », mais sans les comprendre de même, ni les appliquer à l'identique. En effet, le discours social commun est le terrain même où se joue ce que Bourdieu appelle « la distinction », jeu subtil où tout le système des tensions sociales – et, finalement, des luttes de classes – se manifeste par la différence des besoins, des goûts, des opinions, des valeurs, etc., sans rompre pour autant l'unité d'une communauté sociale qui s'identifie collectivement dans un discours social *suffisamment commun* pour que les comportements différentiels y prennent un sens. Un exemple ? Boire du vin est une pratique caractéristique de la civilisation française – c'est-à-dire du « discours » commun dans la France actuelle – et cette pratique commune donne un sens au choix – volontaire ou forcé – du « gros rouge » ou du « bordeaux léger » et à toutes les subtilités de la « bonne cave ».

On my appreciation of Fossaert as the Max Weber of the early 21st century, see Chibli Mallat, *Introduction à la pensée de Robert Fossaert*, in 82 TRAVAUX ET JOURS 97 (2009).

⁶¹ Letter from Albert Einstein to President Franklin Delano Roosevelt (Aug. 2, 1939), available at <http://www.dannen.com/ae-fdr.html>.

binding nature, and because of the conciseness that a legal text is capable to bottle time in, from the U.S. Constitution to UNSC Resolution 242. The U.S. Constitution was not an academic exercise, nor was Resolution 242. But both were written by lawyers, and their conciseness is an essential element of their enduring quality. “The text of the [U.S.] Constitution and its amendments comes to just over seventy-five hundred words.”⁶² The most famous UNSC Resolution in history, Resolution 242, has only 292 words.

Some of the PIL students responded effectively with excellent draft resolutions of their own, which we also discussed in class.⁶³ In the course of the exchange with Alan Dershowitz, I thought however that our efforts could be more ambitious—less “academic” —and that we had means to convey any joint proposal to decision-makers who would pay attention to our agreement, even if they did not immediately espouse it.

There were a number of options to pursue this route. We could have written an op-ed in a more accessible style. We could have elicited the support of some great names on both sides for a text published in an international newspaper. I thought that our contacts among the leadership of both sides warranted something more engaged, which could be turned into a rapid process ending in the Security Council. But even after we agreed on that route, there were different options ahead. We could have written a draft, agreed on it partially and totally, and put it to the respective leaders or their top aides. Alan Dershowitz thought that the expected morass where every word gets scrutinized, the text rewritten time and again in a broken telephone fashion, was not worth the trouble. I agreed, especially since this is done routinely by a multitude of negotiators in the Quartet and elsewhere, who have far more time and resources than law professors ten-thousand miles away. We therefore resolved not to share the full text with our decision-making contacts, but to inform them of the exercise’s general contours and the nearness of its completion and publication. Publication was the chosen route, better than a press conference, where we would appear for what we are not—representatives or negotiators—or a faculty colloquium, which would remain localized. We also chose publication in the Middle East rather than in the United States, however more impactful *a priori* a text in the leading U.S. papers might be. After all, convincing our Middle Eastern tribes was the main object of the exercise.

⁶² CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 1 (2004).

⁶³ The two draft resolutions, by Albert Cahn & Christine Newman, and Volodymyr Shkilevych, are available at www.Righttononviolence.org, under Initiatives/Israel-Palestine/Resources.

So the text was published in English in *The National*,⁶⁴ one of the three main English-speaking papers in the Arab Middle East I regularly contribute to, and in Arabic in the two main pan-Arab newspapers, *as-Sharq al-Awsat*⁶⁵ and *al-Hayat*.⁶⁶ I am particularly grateful to the editors-in-chief of the three papers, respectively Hassan Abdelfattah, Tariq Humayyed and Ghassane Charbel, who responded so positively to this unusual submission. Draft Security Council resolutions do not constitute ideal op-eds.

Habent sua fata libelli. The proposal may be another small and insignificant blip in the long history of the Israel-Palestine conflict. As an “academic exercise,” it can remain strictly confined to the traditional understanding of that expression. In shape at least, the following presentation of the Joint Proposal, and the comments in the footnotes, form an academic reflection that documents the variations in its emergence over two weeks of discussions and my perspective on the terms and changes agreed with Alan Dershowitz. I am eager to read his take on our efforts, which is bound to be profoundly different. I am also convinced that this is not a mere academic exercise.

TEXT AND COMMENTS⁶⁷

This draft Security Council Resolution originated in an unplanned lunch encounter in the Harvard Law School common room at the time of the discussion over Palestinian statehood during the annual U.N. General Assembly meeting. Considering how close some of the language of the two main parties looked after years of intense suffering and debates, we thought it should be possible to agree on a text that our respective “tribes” could accept. The text strictly reflects our personal convictions and hopes. It

⁶⁴ Chibli Mallat & Alan Dershowitz, *A Joint Proposal on the Foundations of the Two-State Solution*, NATIONAL, Oct. 27, 2011, <http://www.thenational.ae/thenationalconversation/comment/a-joint-proposal-on-the-foundations-of-a-two-state-solution>.

⁶⁵ Alan Dershowitz & Chibli Mallat, *A Draft Resolution on Israel and Palestine in the Security Council*, AL-SHARQ AL-AWSAT, Oct. 27, 2011, <http://aawsat.com/leader.asp?section=3&issueno=12021&article=647094> (in Arabic).

⁶⁶ *A Draft Resolution on Israel and Palestine in the Security Council*, DAR AL-HAYAT, Oct. 27, 2011, <http://international.daralhayat.com/internationalarticle/322829> (in Arabic).

⁶⁷ Since the idea was to write as “minimalist” a text as possible, my original draft included passages in bold which represented, in my view, the strict minimum required to make the Joint Proposal meaningful. So the original minimalist text (the parts kept in bold here) turned out to be 232 words – sixty words shorter than UNSC Resolution 242. S.C. Res. 242, *supra* note 10. The text not in bold was included to incorporate the nonviolent/human rights vision that I have insisted on throughout my career as the key to Palestinian success in their fight to realize their rights. See, e.g., Chibli Mallat, *A New Approach*, DAILY STAR, Nov. 27, 2007, <http://www.dailystar.com.lb/News/Middle-East/Nov/27/A-new-approach.ashx>.

is up to the directly concerned parties and peoples to decide if it may serve as a basis for negotiations or be useful in any other manner.⁶⁸

The UNSC,

Reiterating its vision of a region where two democratic states, Israel and Palestine, live side by side, as expressed in Security Council Resolutions 1397 (2002), 1515 (2003) and 1850 (2008),⁶⁹

Recalling all previous relevant Resolutions, including Resolutions 242 (1967) and 338 (1973), as the basis of a just and enduring peace in the principle of land for peace,⁷⁰

Inspired by the human rights revolutions afoot in the region and the persistent commitment of dozens of millions of its citizens to the principle of non-violence as the privileged means to effect democratic change in the region and beyond,⁷¹

⁶⁸ The last sentence of this *chapeau* was corrected by Alan Dershowitz from “decide if it may be useful.” I find his suggestion to be more engaging. It was important for us not to appear in any way as negotiators for either party, despite the side effort in “preparing” the Palestinian and Israeli leaders, as well as colleagues in the State Department and friends at Harvard. I am particularly grateful to Professor Sari Nusaibeh, Dr. Muhammad Shtayyeh, and to Dr. Jeffrey Feltman for their attention to the proposal. It would take too long to also thank Harvard Law colleagues who discussed it enthusiastically on various occasions. Professor Robert Mnookin, Professor Gerald Neuman, Dean Martha Minow, Professor William Alford, Professor Vicki Jackson, Professor Gabriela Blum, and Professor Noah Feldman were particularly supportive, as well as Professor Peter Schuck at Yale and Dean Hiram Chodosh at Utah. None of the colleagues mentioned is responsible for any view expressed in this article.

⁶⁹ All three resolutions confirm the agreement of the UNSC on “a vision of two states living side by side.” Insistence on the *democratic* regime here is meant to reinforce the adoption of nonviolence as the exclusive means to advance political goals by the respective governments, in fulfillment of the republican imperative first adumbrated by Jean Jacques Rousseau in his 1765 edition of Abbé de Saint-Pierre’s *Projet de Paix Perpétuelle* (1715), in *THE PLAN FOR PERPETUAL PEACE, ON THE GOVERNMENT OF POLAND, AND OTHER WRITINGS ON HISTORY AND POLITICS* 23 (Christopher Kelly & Judith Bush trans., 2005) (for Rousseau, the European “eternal” peace advocated by the Abbé would be impossible to achieve so long as absolute rulers were in power) and Immanuel Kant, who transformed Rousseau’s edition into the classic “democratic theory of war” in his *Toward Perpetual Peace* (1795), in *PRACTICAL PHILOSOPHY*, *supra* note 23.

⁷⁰ I argued in an early position paper that UNSC Resolution 242 (and the identical rephrasing of UNSC Resolution 338 in the wake of the 1973 war) represents a uniquely enduring *Gestalt* for peace in the Arab-Israeli conflict since its passage. See Chibli Mallat, *The Middle East: Perspectives on an International Conference* (SOAS, Ctr. of Near and Middle Eastern Studies, Middle East Situation Papers No. 4, 1987). See also MALLAT, *THE MIDDLE EAST INTO THE 21ST CENTURY*, *supra* note 14, at 44, 70.

Recognizing that Palestinians and Israelis are destined to live forever together on the same soil, in the same land,⁷²

1. *Recognizes*⁷³ the State of Israel as the Democratic State of the Jewish people⁷⁴ with due regard to the full equality of the Palestinians in the Israeli State,⁷⁵

⁷¹ Nonviolence as a central novelty in the 2011 Middle East revolution is argued in Mallat, *The Philosophy of the Middle East Revolution*, *supra* note 19. On this theoretical quest for an effective comprehensive theory of nonviolence on the international and domestic levels, see my elaboration in Mallat, *Law and the Middle East 2011 Revolution*, *supra* note 54.

⁷² The formula “Palestinians and Israelis are destined to live forever together on the same soil, in the same land” is a tribute to the vision and sacrifice of Yitzhak Rabin, who said these words on the occasion of the historic meeting with Bill Clinton and Yaser Arafat at the White House on September 13, 1993. *See, e.g.,* MALLAT, *THE MIDDLE EAST INTO THE 21ST CENTURY*, *supra* note 14, at 26.

⁷³ Full original version (i.e. without the bold “minimalist” passage, *see supra* note 67):

1. *Recognizes* the State of Israel as a Jewish and Democratic State with due regard to the full equality of the Palestinians in Israel, and the State of Palestine as a Democratic Arab State, with the full protection of non-Arabs remaining within the borders of the State of Palestine along the 1967 borders, with adjustments and land swaps to be agreed by the Israeli and Palestinian governments.

⁷⁴ Formula preferred by Alan Dershowitz to “Jewish and Democratic State” which I inserted originally to match the insistent request of Israeli Prime Minister Benjamin Netanyahu. *See* his annotations on the first draft in *infra* Appendix. I do not see a difference between the two formulas, “state of Israel as the democratic state of the Jewish people,” and “state of Israel as democratic and Jewish state,” but I understand Professor Dershowitz’s preference for this formulation as according with his strong belief that Israel is and must remain secular, and that it belongs to the Jewish people, in the same way the United States is secular and belongs to the American people, hence “of the Jewish people,” rather than “Jewish state.” But the nuance is not decisive to confer democracy on Israel on such terms, for in both cases a contradiction—in diplomatic terms a “tension”—between democratic and Jewish is bound to exist in a country that includes non-Jews as citizens. There are no non-Americans or non-French who are citizens of the United States and France in the way one finds non-Jews who are citizens in Israel. While we accept the tension explicitly in the Joint Proposal through the precisely-worded phrase “with due equality to all the non-Jewish citizens,” some scholars consider it an unresolvable contradiction. A strong expression of this position appears in a lecture by philosopher and lawyer Richard Dworkin, *Democracy and Religion: America and Israel*, Lincoln, NE (Oct. 28, 2008), *video available at* <http://www.youtube.com/watch?v=AU9kUIY-xUY>, who adopts the Kantian-Rawlsian position that Israel must be secular if it wants to be democratic. I am grateful to Nimer Sultany for this reference. In an innovative argument at a lecture at Harvard Law School on November 10, 2011, Palestinian leader and Member of Knesset Dr. Jamal Zahalka argued that “democracy” is the reason why a Jewish state has dealt historically with Palestinians in a harsh and discriminatory manner: precisely because the Jewish state claims it is democratic, the argument goes, it needs to perpetuate a Jewish majority as condition for the endurance of its expressed democratic character. The victims of that democratic vision are Palestinian by

necessity. Jamal Zahalka, *Debunking the Myth of Israeli Democracy*, Cambridge, MA (Nov. 10, 2011), *video available at* <http://www.youtube.com/watch?v=zPGnn4FfblQ>.

Short of declaring total incompatibility between Jewish and Democratic Judt- and Dworkin-like, there are several ways of considering this thorny problem, which triggers profound passions for all concerned. (a) One way avoids both terms by questioning the validity or usefulness in recognizing a state under international law beyond its mere short name: the state of Israel, same as the state of Palestine, does not need to be recognized as Jewish, or Arab, or democratic. All Israelis in Israel are absolutely equal citizens, and all Palestinians in Palestine are absolutely equal citizens. “Arab” and “Jewish” references should therefore be totally omitted. This view was related, for example, by my colleague Professor Henry Steiner in informal conversation (Nov. 18, 2011). (b) Another is to suggest that the Israeli Prime Minister calling Israel a “Jewish state” adds nothing to the Israeli Declaration of Independence or the U.N. General Assembly founding resolution in 1947 of the two states. There is even a special clause in the UNGA so-called Partition Plan that refers to Israel as a Jewish state:

When the independence of either the *Arab* or the *Jewish* State as envisaged in this plan has become effective and the declaration and undertaking, as envisaged in this plan, have been signed by either of them, sympathetic consideration should be given to its application for admission to membership in the United Nations in accordance with Article 4 of the Charter of the United Nations.

G.A. Res. 181 (II), Part I.F., U.N. Doc. A/RES/181(II) (Nov. 29, 1947) (emphasis added) [hereinafter U.N. Partition Plan]. In Israel’s Declaration of Independence, reference to the Jewish nature of the state is overwhelming: “birthplace of the Jewish people,” “establishment of a Jewish State,” “REPRESENTATIVES OF THE JEWISH COMMUNITY OF ERETZ-ISRAEL AND OF THE ZIONIST MOVEMENT,” and “Provisional Government of the Jewish State, to be called ‘Israel.’” THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (1948), *available at*

<http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel>. Following this argument, the Jewish character of the State has long been recognized in various forms. Thus, there is nothing new to the clause adopted here. (c) A third way is to say that Israel is *also* a Jewish state, which is the position I advocated with Palestinian colleagues in a response to Prime Minister Netanyahu’s speech that introduced his insistence on that recognition. See Chibli Mallat et al., *Netanyahu’s Proposal for ‘Lasting Peace’ - and a Human Rights Response*, DAILY STAR, Aug. 20, 2009, <http://www.dailystar.com.lb/Law/Aug/20/Netanyahus-proposal-for-lasting-peace---and-a-human-rights-response.ashx> (also published in Arabic at AN-NAHAR, Aug. 24, 2009).

⁷⁵ Professor Duncan Kennedy’s reaction to “the State of the Jewish people” was: “What about the Israeli Arabs?” The dual “democratic”-“full equality to non-Jews” qualification of the State is my response to that worry. The ultimate question is this: is it possible for any democracy not to be secular? As noted in *supra* text accompanying note 24, I have my doubts on the absoluteness of the Kant-Rawls-Dworkin take on American and European liberalism. For the views of Kennedy on the Israel-Palestine conflict, see e.g., *A One State Solution - Discussion with Prof Duncan Kennedy - Harvard University*, BROWSER, Mar. 1, 2010, <http://thebrowser.com/articles/one-state-solution-discussion-prof-duncan-kennedy-harvard-university>. In the same vein, consult the arguments of the editor of the leading Palestinian journal in English, Dr. Ahmad Samih Khalidi and the British barrister Guy

and the State of Palestine as an Arab Democratic State, with the full equality⁷⁶ of non-Arabs and non-Muslims⁷⁷ in the Palestinian State, **along secure borders defined by Resolution 242 and the demarcation lines as of June 1, 1967**,⁷⁸ with

Goodwin-Gill. Guy S. Goodwin-Gill, Opinion Re The Palestine Liberation Organization, the Future State of Palestine, and the Question of Popular Representation (August 10, 2011), reprinted in Guy S. Goodwin-Gill, *Guy S. Goodwin-Gill Legal Opinion on Palestinian Statehood Bid*, JADALIYYA REPORTS, Aug. 31, 2011, <http://www.jadaliyya.com/pages/index/2530/guy-s-goodwin-gill-legal-opinion-on-palestinian-s>; Ahmad Samih Khalidi, *Why Can't the Palestinians Recognize the Jewish State?*, 40 J. PALESTINE STUDIES 78, 78–81 (2011).

⁷⁶ Originally “protection”: I changed the word to equality in a later version because protection sounds both imprecise and patronizing. The reason why the qualifying clauses are not in bold is because they seem redundant. A democratic state is premised on the equality of all of its citizens, and this should not need to be spelled out. However, since both Prime Minister Netanyahu and Professor Dershowitz see the qualification of Jewish/Jews as essential, this express mention of equality seemed in order for non-Jews in a Jewish state of Israel, and, accordingly, for non-Arabs in an Arab State of Palestine. The qualifying clause (full equality for non-Jews, full equality for non-Arabs) underlines the tension, although this is hardly new. One can find it in the Balfour Declaration and in the Israeli Declaration of Independence, and the tension has persisted ever since. Several laws perpetuate the discrimination, most notably the Israeli law of return and various property and family reunification statutes. See generally BARUCH KIMMERLING, *THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY* 173–207 (2001); Nadim N. Rouhana & Nimer Sultany, *Redrawing the Boundaries of Citizenship: Israel's New Hegemony*, 33 J. PALESTINE ST. 5, 7–9 (2003); Amnon Rubenstein, *The Curious Case of Jewish Democracy*, 41 AZURE 33 (2010), available at <http://www.azure.org.il/download/magazine/Az41%20Rubinstein.pdf>.

⁷⁷ The addition of “and non-Muslims” was suggested by Alan Dershowitz. While possibly redundant, this is a useful mention in the sectarian constitutional *calque* of the Middle East, considering the tragic dwindling of the Christian communities in the Middle East, especially in Israel-Palestine. See, e.g., Chibli Mallat, *Reversing Christian Disappearance from the Middle East: Three Legal Proposals to Consider*, DAILY STAR, May 6, 2010, <http://www.dailystar.com.lb/Law/May/06/Reversing-Christian-disappearance-from-the-Middle-East-Three-legal-proposals-to-consider.ashx> [hereinafter Mallat, *Reversing Christian Disappearance from the Middle East*].

⁷⁸ Usually reference is made to June 4, the day before the full outbreak of the Seven-Day War. I prefer June 1 to avoid the emergence of hidden maps in some military headquarters that showed a movement of troop across the borders in the final few days before the full hostilities. For the importance of maps as concerns the June 5 line as opposed to the 1949 Armistice Line in the case of Syria, see Chibli Mallat, *Les Frontières Syro-Israéliennes en Droit International*, in 1 LES CONFÉRENCES DU CEDROMA 69 (2004) (also published in Arabic at AN-NAHAR, July 20, 2000, and in a shorter English version as Chibli Mallat, *Why 1949 Armistice Line Could Serve All Three Countries Well*, DAILY STAR, July 20, 2000, <http://www.dailystar.com.lb/News/Politics/Jul/20/Why-1949-armistice-line-could-serve-all-three-countries-well.ashx>). The map mentioned in that article for the 1967 border was downloaded from an official Israeli government website. It has since been removed from the site. Whether consciously or not, it is now very difficult to find a detailed map depicting the

adjustments and acre-for-acre⁷⁹ land swaps to be agreed in good faith⁸⁰ by the Israeli and Palestinian governments within a reasonable timeframe not exceeding five years,⁸¹

It is understood by all sides that the agreed upon borders will not be exactly the same as the June 1, 1967 demarcation lines and will be consistent with the recognition by Resolution 242 of the need to balance the requirement of secure and recognized

1967 borders on official Israeli websites. One example, produced by the U.S. Central Intelligence Agency, is available at http://www.lib.utexas.edu/maps/middle_east_and_asia/txu-oclc-244806184-wbank_08.jpg (last visited Jan. 5, 2011) (indicating the 1967 borders by a dashed green line).

⁷⁹ The specification of “acre-for-acre” was added by Alan Dershowitz. The published Arabic translation mentions “dunum for dunum” instead of acre for acre. Dunum is used both in Hebrew and Arabic for acre. I perceive this addition to be extremely useful in order to remove the ambiguity raised by the percentage points talk bandied about in the near-successes of previous negotiations: is it ninety-one percent or ninety-four percent or ninety-nine percent? See generally *supra* note 49. The two parties will no doubt continue to pour over maps *ad nauseam* to demarcate their borders, as they have for the past twenty years. So long as the swaps envisaged are done acre for acre, dunum for dunum, the behavior of a car salesman (my formula)/rug merchant (Dershowitz’s) and corresponding bargaining style (no offense intended to the respective trades) is significantly reduced. During the early negotiations after Oslo, British ambassador to Lebanon David McLennan told me that Israelis negotiate like a used car salesman who “sells the car and returns with the tires.” When I teasingly asked whether Netanyahu did not sell used cars in his young days in America, Alan Dershowitz corrected me: Mr. Netanyahu was once a furniture salesman. Thence the bait-and-switch mercantile metaphors, where a state is recognized but its sovereignty bantustanized. While the continuation of a zero-sum negotiation style is bound to happen, one hopes that good faith negotiations conducted without violence or the threat of violence from either party will result in the border and other zero-sum areas of discords becoming increasingly secondary to the inevitable dynamism of the multiplication of economic, labor, and scientific cooperation. Soon enough, the border could become as benign as the one that today separates Germany from France.

⁸⁰ This draws on the obligation under the Vienna Convention on the Law of Treaties arts. 26, 31, May 23, 1969, 1155 U.N.T.S. 331, to interpret agreements “in good faith.” An early draft of Article 26 adds that “good faith, inter alia, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.” See JEFFERY DUNOFF ET AL., *INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-SOLVING APPROACH* 56 (2d ed. 2006). This addition was eventually dropped as being already included within the concept of good faith. Nowhere is good faith more necessary than in the implementation of a UNSC Resolution agreed by the Palestinians and the Israelis over Jerusalem and the West Bank.

⁸¹ Five years is an arbitrary span of time, which will hopefully be as irrelevant as the exact number of dunums that will be exchanged in the spirit of the previous two footnotes and accompanying texts. “Secure boundaries” is the particular goal of both parties.

boundaries free from threats or acts of force with the general principle of the inadmissibility of the acquisition of territory by war⁸²;

2. Recognizing that the two state solution can never be realized without direct negotiations between the parties,⁸³ calls for an immediate resumption of the negotiations between the Israeli government and the Palestinian government represented by the Palestinian Authority based on the positive *acquis* of the negotiations between the two parties since the Oslo Accords,⁸⁴ and for developing this *acquis* on established principles of international law, including the rejection of the use of physical coercion to advance territorial claims,⁸⁵ the need for secure and

⁸² Most of this paragraph was written by Alan Dershowitz. As I understand it from our conversations, it is a way to preserve, for instance, the Western Wall in Israel and some settlements, in return for the construction of a road linking the West Bank to Gaza and land inside pre-1967 Israel. Alan Dershowitz related to me a conversation he had with Palestinian President Mahmud Abbas, in which Abbas suggested that one square meter of Jewish quarter inside old Jerusalem was worth ten thousand square meters in a barren Negev. The combined mention of borders that are not exactly the same as the ones in pre-1967 war, and of the acre-for-acre ratio, should limit the temptation of bad faith negotiations on both sides. I added the reference to “the inadmissibility of the acquisition of territory by war,” also mentioned in Resolution 242. S. C. Res. 242, *supra* note 10.

⁸³ The phrase before “Calls” did not appear in the published versions. I received it from Alan Dershowitz on October 25, 2011 after both the *National* and *al-Sharq al-Awsat* had agreed on publishing the full texts they had received from us on the following day. I have no problem with the phrase, but it would have been awkward to have two different versions in English and in Arabic. I promised him that a subsequent publication would include the phrase.

The chicken and egg logic dominating the language of the two parties was in evidence at the U.N. General Assembly annual meeting, with Prime Minister Netanyahu saying he was ready to sit with President Abbas for direct negotiations without preconditions, and Abbas saying that he would not sit with Netanyahu unless Netanyahu was ready to recognize a Palestinian state along the 1967 borders and stop building settlements. Our proposal is meant to break the circular argument. It inevitably leads to discussions between the two leaders and their constituencies before it is jointly presented to the United Nations, with the Joint Proposal as a working template for a text that both “tribes” can ultimately agree on. This is also why we decided to publish it without presenting it to them first in full.

⁸⁴ “*Acquis*” is borrowed from the *acquis communautaire* of the EU treaties and jurisprudence. It refers to the progress made in the building of an “ever closer Europe” mentioned in the various treaties, and represents the body of texts and practices that have accumulated in the march towards European integration over sixty years. See, e.g., Carlo Curti Gialdino, *Some Reflections on the Acquis Communautaire*, 32 COMMON MKT L. REV. 1089 (1995). I meant the inclusion of the concept of *acquis* to refer to the positive and generally forgotten agreements and near agreements in twenty years of negotiations between the two parties, and the wider contributions of the international community. Oslo I and II, Camp David, and Taba in the first case, and Resolution 242 in the second case, are examples of the Israeli-Palestinian *acquis*.

⁸⁵ Dershowitz preferred “territorial claims” to “territorial enlargement.” “Claims” is more precise and projects better in the future.

recognized boundaries, the cessation of all individual and collective incitement and delegitimization by the Palestinian and Israeli governments and civil societies, and their replacement by an active empathy recognizing the immense suffering of both peoples;

3. Notes the deep and difficult outstanding problems dear to both parties,⁸⁶ including justice for Palestinian and Jewish⁸⁷ refugees and the Jewish settlers⁸⁸ in the West Bank, the continued unity of Jerusalem,⁸⁹ as well as security

⁸⁶ It is an illusion to think that even within five years, the famous “four” problems – borders, security, Jerusalem, and refugees – will be fully settled. We decided therefore just to underline these problems in ways that open windows on joint cooperation by employing slightly more creative language than the hallowed mantras. See *supra* note 81.

⁸⁷ “And Jewish” added by Alan Dershowitz. I have long argued that the compensation *and* return of Jews who were citizens of various Arab and Muslim countries should be pursued *irrespective* of the issue of Palestinian refugees. Nothing has impoverished the Arab world as much as the loss of its Jewish citizens, and this should be remedied in any case by every concerned country, from Morocco to Iran.

⁸⁸ “Justice for the Jewish settlers” is a provocative formula, which appeared in my first draft. Like the “Israeli security in particular,” and the “Jewish character of Israel,” it was bound to elicit a strong reaction from my “tribe,” but also of many Jewish Israelis like Professor Yochai Benkler, who expressed his disagreement with it in conversation. In fact, a massive worldwide constituency, including many Israelis, opposes the settlers and consider that they deserve no justice. Still, I fail to see a qualitative *moral* difference in telling Jews who have settled a mile east of Jerusalem in 1968 that they are wrong, while finding nothing wrong in Jews having settled a mile west of Jerusalem in 1966. *Legally*, such settlement is universally condemned as a violation of international law, namely Article 49 paragraph 6 of the Fourth Geneva Convention, *supra* note 46. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136 (July 9); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136, 240 (July 9) (Declaration of Judge Buergenthal). Another argument is more practical: there must be something for everyone in this Resolution to facilitate its adoption. An acknowledgment that the Jewish settlers deserve recognition for their (arguably self-inflicted) conundrum might allay their virulent opposition to an agreement of two states along the 1967 border. In her comment on this article, Professor Hurwitz wrote: ‘I share the discomfort with this proposal – I don’t think the settlers deserve justice per se, especially if they moved to the territory to claim it in the *illegal* notion of the term. You may say that they deserve some kind of incentives to make them leave, but I agree with those who say that *justice* is not the right term.’ E-mail from Deena Hurwitz, Director, University of Virginia International Human Rights Law Clinic and Human Rights Program, to author (Dec. 31, 2011) (on file with author).

⁸⁹ I chose deliberately not to include the Palestinian demand of a divided Jerusalem agreed by Alan Dershowitz in CASE FOR PEACE, see *supra* note 9, at 2 ¶3, cited at *supra* text accompanying note 17 (accepting a division of greater Arab Jerusalem in Arab Palestinian and Jewish Israeli capitals respectively), in the hope that some ways to keep the city whole along the lines of the forgotten *Corpus Separatum* option would remain possible. See U.N. Partition

concerns for all, for Israel in particular,⁹⁰ and calls for their nonviolent resolution by negotiations between Palestinians and Israelis,⁹¹ with the facilitation by all concerned of the fullest solidification of the two democratic states living in peace side by side;

Plan, *supra* note 74, Part III. A wall in the midst of Jerusalem, real like in the rest of the West Bank, or virtual because of the erection of a state with secure and fixed boundaries à la East Germany, undermines the spirit of an open future, and is a nightmare for the citizens of Jerusalem and its neighbors. I had on a number of occasions argued with the leaders of the Vatican against the division into two capitals. See Mallat, *Reversing Christian Disappearance from the Middle East*, *supra* note 77; Chibli Mallat, *Whither Christian Jerusalem? The City is Holy to Three Religions, Not Just Two*, DAILY STAR, Aug. 4, 2000, <http://www.dailystar.com.lb/Opinion/Commentary/Aug/04/Whither-Christian-Jerusalem-The-city-is-holy-to-three-religions-not-just-two.ashx>. I stand by the superior concept of the *Corpus Separatum*, which should be revived as *Corpus Specialis*, with mechanisms developed significantly by the United Nations in the period 1948–1950. See I DOCUMENTS ON THE ARAB- ISRAELI CONFLICT 1038–88 (M. Cherif Bassiouni ed., 2005). On the tragic modern history of Jerusalem, see BERNARD WASSERSTEIN, *DIVIDED JERUSALEM: STRUGGLE FOR THE HOLY CITY* (2001). Of all the Western countries, France appears to be the only one that continues to defend the *Corpus Separatum* solution.

⁹⁰ This mention of “Israeli security in particular,” while the reality of the daily insecurity of Palestinians is far more palpable, has elicited a strong reaction from esteemed colleagues, especially Edward Mortimer. Maybe it was wrong to include it as it brings up an unnecessary flash point that appears unbalanced since Palestinian security casualties have been by any comparative standard far more numerous, but I was genuine in pushing for language that would be convincing to the other “tribe” without endangering basic principles. The principle of nonviolence is one that should be sufficient to allay the concern: if Palestinians commit to nonviolence, a position which I support even in the current intolerable life they find themselves subjected to by Israel’s policies, then what is the harm of allowing additional reassurance that facilitates the adoption of the resolution? My answer to Edward Mortimer goes further: I hope that there will be no Palestinian army in the new Palestine. Costa Rica has been the most stable and rich country in the whole of the Americas since it decided not to have an army in the 1950’s. My greatest regret in the long fight for democracy in Iraq is that the instability that followed the invasion of 2003 has resulted in over a half-million strong army. If avoiding the establishment of an army for the Palestinian state is preferable, then the “Israeli security in particular” clause included here could be read positively.

⁹¹ There are two attitudes towards the resolution of the four central issues at play in the negotiations. See *supra* note 86 (borders, security, Jerusalem, and refugees). One way is to elaborate a “final” agreement from the outset that includes a solution to each. See, e.g., PALESTINIAN PEACE COALITION, *THE GENEVA ACCORD: A MODEL ISRAELI-PALESTINIAN PEACE AGREEMENT* (2003), available at <http://www.geneva-accord.org/mainmenu/english>. I prefer short framework texts like the one adopted here for reasons elaborated above. See *supra* note 67.

4. Requests the parties in their coming negotiations to honour the principle of non-subordination⁹² and non-discrimination⁹³ established in the best practices of states domestically and internationally and the right to freedom of movement in Israel and Palestine stipulated in the Oslo Accords for all Palestinians and Israelis,⁹⁴ with due regard to justice and fairness in allaying

⁹² The non-subordination concept derives from Professor Owen Fiss' seminal article on the unfair treatment of minorities by majorities. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). The American context of the clause comes from the *Brown v. Board of Education* tradition and the civil rights movement for the African-American community. In the article, Fiss considers non-subordination as a justiciable legal duty of the majority to minority groups. He argues that the constitutional equal protection prohibits a historically-defined collective group constituting a majority of immutable quality from subordinating a minority group that has historically been subject to the majority's unfair treatment. Transposing this sophisticated understanding of equal protection as non-subordination to the Palestinian-Israeli conflict represents for me the most viable approach to the interplay of groups in the region. It needs to be fleshed out by the good-faith practice of the two parties in the Nonviolence Committee in paragraph 5 of the Joint Proposal, perhaps through including some type of mixed court to resolve subordination claims in a Fissian spirit.

⁹³ While non-subordination is for groups, non-discrimination is more aptly related to individuals. See, e.g., CERD, *supra* note 46, arts. 1(1), 5. I am grateful to Professor Carlos Vázquez for his clarification on the subtleties of the CERD text.

⁹⁴ As argued in the presentation, the freedom of movement for persons is a central piece of the solution to the thorniest problem, that of Palestinian refugees. As a professor of European law concerned with the democratic deficit of Europe, I have long held the view that the most tangible right that has made Europe is that of the freedom of movement for its citizens, which developed in stages to become "complete" in the most recent amendments to the EU foundational documents. See Treaty on the Functioning of the European Union art. 21(1), Dec. 13, 2007 (amended), 2008 O.J. (C 115) 1. Other rights are weakened by problems of representation, most notably the right to elect Members of the European Parliament in direct, universal suffrage, 1976 O.J. (L 278), when the real decision makers are the unelected Commission and Council. But the right of workers, then extended to other categories of persons, to consider Europe as their natural common and free living space well before European Citizenship was legally introduced in 1993, has constituted the most tangible, daily-lived, bottom-up, democratic right. See MALLAT, *THE MIDDLE EAST INTO THE 21ST CENTURY*, *supra* note 14, at 173–216. The most eloquent description of the work of the ECJ in this regard can be found in the late Gordon Slynn's chapter 'Affecting the People', in his *INTRODUCING A EUROPEAN LEGAL ORDER* (1992) 85–135. For a fuller documentation of cases and their interaction with the new European citizenship, see generally e.g., PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES AND MATERIALS* 743–846 (4th ed. 2008). The distance between European films in the Italian realist style of the 1970's, like *PANE E CIOCCOLATA* (Cinema International Corporation 1974), and *L'AUBERGE ESPAGNOLE* (Fox Searchlight Pictures 2002) shows the mental shift in a single generation. *PANE E CIOCCOLATA* ends on the massive return of embittered Italian workers from Northern countries to vote in their national elections. *L'AUBERGE ESPAGNOLE* underlines the dynamism of European students moving around European university towns as if at home.

the legitimate security fears of the Jewish community within and outside Israel, and the prolonged stateless suffering of Palestinian refugees⁹⁵;

5. *Establishes* a Nonviolent Israeli-Palestinian Committee, led by the Israeli Prime Minister and the President of the Palestinian State tasked to accelerate the peaceful solidification of the two states, and meanwhile to ensure that facts on the ground and the use of violence do not imperil the security and viability of the two states, in particular the security of Israel as a Jewish democratic state, and the viability of a democratic State of Palestine that appeals to all Palestinians,⁹⁶ **and to establish prompt and effective mechanisms to resolve the disputes non-violently among them**⁹⁷;

6. *Remains* seized of the matter.

⁹⁵ These two phrases, which are asymmetrical, underline the need for active empathy announced in paragraph 3. Not only should the respective parties desist from group demonization, incitement, and dehumanization, but for peace to endure and become entrenched, the empathy must involve the two most profound concerns of the massive majority of Jewish Israelis, and Palestinians: the sense of insecurity of Jews after the Holocaust, and the suffering of Palestinian homeless refugees since the Nakba. The original text included explicit reference to the Holocaust and the Nakba (“**with due regard to justice and fairness in allaying the legitimate security fears of the Jewish community** within and outside Israel in the wake of the Holocaust, **and the prolonged stateless site of Palestinian refugees** in the wake of the Nakba”), but Alan Dershowitz preferred them omitted out of concern that they would be put in a comparative perspective.

⁹⁶ There is here also asymmetry between ‘security’ and ‘viability,’ with a concession from me to the demographic argument. Following Seyla Benhabib, *What is Israel’s End-Game?*, RESETDOC, Apr. 15, 2009, <http://www.resetdoc.org/story/1184>, I find the demographic argument to be premised on an inherently discriminatory conception, which plays out in Dr. Jamal Zahalka’s reading of the risk for the alliance of democracy and Jewishness to be contingent on a perpetual Jewish majority in a country that says all its citizens, Jews and non-Jews, are equal. *See supra* note 74.

⁹⁷ As underlined in the presentation of this Proposal, the Committee will face innumerable problems on the very first day of the passage of the Resolution. To avoid its rapid collapse, intense and flexible conflict-resolution mechanisms need to be put in place. I originally suggested adding a provision advocating the involvement of the international community on an as-needed basis, but Dershowitz preferred not to mention it. He is right to think that Palestinians and Israelis need not be babysat through their everyday conflicts. The passionate interest in the longest standing conflict in modern history ensures a continued attention worldwide to the day after.

APPENDIX

1. *And now - now/1948*
Recognizes the State of Israel as a Jewish Democratic State *of the Jewish people* with due regard to the full equality of the Palestinians in the Israeli State, **and the State of Palestine as a Arab Democratic State**, with the full protection of non-Arabs in the Palestinian State, **along secure borders defined by the demarcation lines as of 1 June 1967**, with adjustments and land swaps to be agreed in good faith by the Israeli and Palestinian governments within a reasonable timeframe not exceeding five years. *Resolution 242*
2. *Ref for Ref (of dispute for dispute)*
Calls for an immediate resumption of the above on the positive *acquis* of the negotiations between the two parties since the Oslo Accords, and for developing this *acquis* on established principles of international law, including the rejection of the use of physical coercion to advance territorial enlargement.
3. **Notes the deep and difficult outstanding problems dear to both parties, including justice for Palestinian refugees and the Jewish settlers in the West Bank, the continued unity of Jerusalem, and security concerns for all, in for Israel in particular, and calls for their nonviolent resolution by negotiations between Palestinians and Israelis, with the facilitation by all concerned of the fullest solidification of the two democratic states living in peace side by side,**
4. **Requests the parties in their coming negotiations to honor the principle of non-subordination and non-discrimination established in the best practices of states domestically and internationally and the right to freedom of movement in Israel and Palestine stipulated in the Oslo Accords for all Palestinians and Israelis, with due regard to justice and fairness in allaying the legitimate security fears of the Jewish community within and outside Israel in the wake of the Holocaust, and the prolonged stateless site of Palestinian refugees in the wake of the Nakba,**
5. *do not let it stay (in the air)*
Establishes a Nonviolent Israeli-Palestinian Committee, led by the Israeli Prime Minister and the President of the Palestinian State tasked to accelerate the peaceful solidification of the two states, and meanwhile to ensure that facts on the ground and the use of violence do not to imperil the security and viability of the two states, in particular the security of Israel as a Jewish democratic state, and the viability of a democratic State of Palestine that appeals to all Palestinians, and to establish prompt and effective mechanisms to resolve the disputes nonviolently amongst them with assistance of the international community as needed.
6. *6) end of independent, delegations, demonstration*
Remains seized of the matter

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