

## **The Dangers of UN Security Council Resolution 2334 (2016)**

Jerusalem Center for Public Affairs, by Amb. Alan Baker, 26 December 2016

The December 23, 2016, resolution adopted by the UN Security Council regarding Israel's settlement policy has been received with mixed and even extreme reactions.

The Palestinian leadership, having initiated the resolution, is celebrating its adoption as an affirmation by the international community, including the United States, of its claims against Israel.

Israel sees this resolution as a major impediment to continued peace negotiations in light of the fact that it by-passes the negotiation process in an attempt to prejudge central issues that are on the negotiating table. As such, it seriously prejudices any possible return to the negotiating process.

Israel considers that the resolution provides political incentives to those in the international community hostile to Israel. It advances boycotts and sanctions and could even be used to support possible litigation against Israeli leaders.

### **Summary of Implications**

Following is a brief summary of the legal and quasi-legal implications of the resolution:

1. The resolution (as all previous resolutions regarding Israel) was adopted under the *sixth* chapter of the UN Charter (Pacific Settlement of Disputes) and as such is not mandatory. It contains a series of political determinations and recommendations to the international community. The resolution does not make law, and as such, the determinations as to the lack of legal validity of Israel's settlements are no more than declaratory.
2. Much of the terminology repeats UN terminology and language used in previous Security Council and General Assembly resolutions ("inadmissibility of acquisition of territory by force," "Palestinian territory occupied since 1967 including East Jerusalem," "secure and recognized borders," "violation (serious or flagrant) under international law," the references to the lack of legal validity of settlements, and their being an "obstacle" or "major obstacle" to achieving a two-state solution).

3. References in the tenth preambular paragraph to the fact that “the status quo is not sustainable” and “entrenching a one-state reality” are new and would appear to be inspired by, or even direct quotes from statements by President Obama, Secretary of State Kerry, and Vice President Biden.
4. Similarly, expressions not previously included in major Security Council resolutions regarding the peace process, such as “two-state solution based on the 1967 lines” (operative paragraph seven), as well as the references in the ninth paragraph to the “Arab Peace Initiative” and the “principle of land for peace” as additional bases for peace, clearly are intended to instill concepts that have never been agreed-upon elements in the negotiating process.
5. The call upon states in the fifth operative paragraph to distinguish between dealings between Israel-proper and the territories will also be used by BDS activists and states to buttress their boycott campaigns.
6. The reference in the third operative paragraph to the “4 June 1967 lines” as a basis for negotiations would appear to be a new element, echoing statements by Obama and Kerry, and running counter to the 1967 Security Council resolution 242, which is the basis for all of the Arab-Israeli peace process, which calls for negotiation of “secure and recognized boundaries.” The Israeli-Palestinian Oslo Accords make no specific reference to the 1967 lines. As such this reference would appear to be an attempt to prejudge or unduly influence the negotiating issue of borders.
7. Despite the declaratory and recommendatory determinations in the resolution attempting to prejudge the status of the territories, east Jerusalem, borders, and settlements, the resolution nevertheless would appear to contradict itself in that it goes on to reaffirm the call for negotiations on “all final status issues” (operative paragraph eight) and for “a comprehensive, just and lasting peace.”

## **Analysis**

1. While the resolution does not replace Security Council Resolution 242, which is the accepted and agreed basis for the Israel-Arab peace process, it nevertheless contains elements that attempt to modify Resolution 242 and to sway the negotiating process in a particular direction.
2. The resolution cannot, in and of itself, serve as grounds for legal proceedings in the International Criminal Court (ICC) or other international tribunals. But clearly, it will be used by the Palestinian leadership as a political tool to buttress existing complaints. This despite the fact that the issues of Palestinian status vis-à-vis the ICC and the court’s jurisdiction regarding the territories have yet to be reviewed juridically. The

fact that the ICC Prosecutor has recognized the accession of “the State of Palestine” to the ICC Statute and has accepted their complaints are political decisions.

3. The United States, through its decision not to veto the resolution, enabled acceptance of a Security Council resolution referring to “*occupied Palestinian territory including East Jerusalem.*” This indicates U.S. acceptance of the fact that the territories and east Jerusalem belong to the Palestinians. This despite the claim that the United States has consistently agreed with Israel that there has never been any legal determination, agreement, treaty, or other binding source determining that.
4. This represents a serious, and even irresponsible departure from U.S. policy which has consistently advocated negotiated settlement of the issues of permanent status, Jerusalem, and borders.
5. This position taken by the United States (as well as the other members of the Security Council) also undermines the basic obligation of the Oslo Accords, signed by the PLO and witnessed by the United States (as well as the EU, Russia, Egypt and others), that the permanent status of the territories, the issues of Jerusalem, and borders are to be negotiated.
6. While the United States and Israel have entertained basic disagreements on settlement policy, the United States has consistently rejected, as a matter of basic policy, any attempt by the international community to prejudge this or the other permanent status negotiating issues.
7. The outrage voiced by Israel with both the resolution itself and the Obama administration’s enabling it to pass stems from five basic components:
  - The text of the resolution, which is unprecedented in the extent of the condemnatory language used.
  - Israel’s frustration at the irresponsible behavior by the Obama administration.
  - The evident irreversibility of the resolution and the potential for future damage.
  - The imbalance between accusations of Israeli violations of the Oslo Accords and the Palestinians’ blatant violations of international law in their incitement and payment to terrorists.
  - The issue of settlements is not the core of the conflict. It remains the Palestinians’ refusal to recognize the Jewish State and its right to any part of the land west of the Jordan River.

### **About Amb. Alan Baker**

Amb. Alan Baker is Director of the Institute for Contemporary Affairs at the Jerusalem Center and the head of the Global Law Forum. He participated in the negotiation and drafting of the Oslo Accords with the Palestinians, as well as agreements

and peace treaties with Egypt, Jordan, and Lebanon. He served as legal adviser and deputy director-general of Israel's Ministry of Foreign Affairs and as Israel's ambassador to Canada.