A grayscale photograph of a United Nations flag flying on a tall pole in front of a modern building with a grid of windows. The flag is the central focus, with the UN emblem clearly visible. The building's windows are reflected in the glass.

Palestinian Membership in UN Agencies: Mandatory Defunding Under US Law

Prof. Eugene Kontorovich



Av 5778 – July 2018
Policy Paper no. 39

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Palestinian Membership in UN Agencies: Mandatory Defunding US Law

Executive Summary

U.S. law prohibits funding UN “affiliated organizations” that accept the Palestinian Authority (PA) as a member state. In the past two years, the PA has been accepted into four such organizations, two of them in the past months. Yet thus far, none of these organizations have had their funding stopped.

This is part of the PA's strategy of seeking a fait accompli of statehood through perceived recognition, rather than as the result of negotiations with Israel. Such international recognition only hardens Palestinian positions and encourages the Palestinians to make maximalist and unrealistic demands in the peace process, while politicizing the technical agencies involved.

This briefing paper shows how all the relevant bodies, that accepted the PA as a member state, qualify as UN “affiliated organizations” within the meaning of existing law. Indeed, these agencies are already treated as UN affiliates for purposes of other statutes. This briefing paper describes the U.S. statutory framework and the nature of the various organizations' linkages to the UN. It concludes by discussing the anticipated counterarguments focused on the good works performed by the organizations.

A. Introduction

In May 2018, the Palestinian Authority (PA) sought and received membership in several UN organizations, including the United Nations Conference on Trade and Development (UNCTAD) and the Organization for the Prevention of Chemical Weapons (OPCW). The move was taken in retaliation for U.S. recognition of Jerusalem as Israel's capital and as part of a long-range Palestinian strategy of seeking statehood recognition through international organizations, rather than through negotiations with Israel. In 2016, the PA also joined the United Nations Framework Convention on Climate Change (UNFCCC), and in 2017 it joined the UN Convention to Combat Desertification (UNCCD). The Obama administration did not implement the mandatory funding cut-off for UNFCCC, and the PA's membership in UNCCD has thus far escaped public notice.

All four UN organizations have accepted “Palestine” as a full member state, despite the PA's lacking the international legal

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prerequisites for statehood. The acceptance of non-state actors as member states turns these UN agencies into political tools for Palestinian unilateralism, rather than technical agencies dealing with specialized tasks. Moreover, as evidenced by the Palestinian membership in UNESCO, once it is a part of these agencies, the PA will hijack their agendas and divert them to anti-Israel policies and polemics.

B. Statutory Framework

The acceptance of Palestinian membership by these UN-affiliated agencies has clear consequences under U.S law, which prohibits any U.S. funding of these organizations. In enacting these statutes, Congress made clear its intention to deter PA membership in such organizations. This is because it politicizes the organizations and furthers the Palestinian strategy of seeking to do a complete end-run around peace negotiations—in at least all of the West Bank, Gaza, and eastern Jerusalem—without any diplomatic settlement with Israel.

These statutes were passed by overwhelming and completely bipartisan majorities in Congress. Congress was fully aware that mandatory defunding could cause the U.S. to cut support for organizations whose work has some value to America.¹ Yet defunding was nonetheless made non-waivable, as part of a clear legislative judgment that the benefits of funding such organizations are outweighed by the harm caused by the Palestinian “internationalization” strategy.

There are two relevant statutes:

- Section 414 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (Public Law 101-246), states: “No funds authorized to be appropriated by this Act or any other Act shall be available for the United Nations or any specialized agencies thereof which accords the Palestine Liberation Organization the same standing as member states.”
- Section 410 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236), states that the United States shall not make contributions to “any affiliated organization of the United Nations which grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood.”

These two statutes are directed at two different kinds of international organizations. The first statute deals with the UN itself, and “specialized agencies,” which refers to a specific set of 15 organizations with a relationship to the UN based on the UN Charter. The 1990 statute has been triggered once, when the PA was accepted into UNESCO in 2011, forcing a reluctant Obama administration to end U.S. funding, which constituted 22 percent of the organization’s budget. Ultimately, this led to the U.S. formally quitting UNESCO this year.

The current round of PA UN memberships implicates the 1994 law.

That measure is broader, applying the funding prohibition to agencies that are not part of the U.N., but are rather “affiliated” with it. This prohibition can only be understood as including the wide range of international organizations with close relationships to the U.N.

Within the UN organizational system, there is no specific set of agencies known technically as “affiliates.” Instead, there is, in addition to specific “specialized agencies” covered by the 1990 statute, a wide range of organizations of different natures and structures, which together comprise “the United Nations system.” While the set of such organizations has no formal legal definition, the consistent practice of the UN is to define it as including both specialized agencies and “other related organizations.”² **The only clear test of “affiliated organization” under the 1994 statute is those parts of the “UN system” that are not “subsidiary organizations” already covered by the 1990 law.**

While the term “affiliate organization of the United Nations” is not defined in the 1994 defunding law, the term is used widely in various other statutes, some of them of great importance. These statutes have been interpreted as applying to all the agencies in question. **Moreover, the implications of deeming an organization not “affiliated” with the UN go far beyond defunding for PA membership—it would mean they do not fall within the scope of this legislation at all.** Some of the other statutes that deal with UN “affiliates” include:

- **Reporting requirements.** 22 U.S.C.A. § 287b-1(a-b) (extensive reporting requirements for U.S. contributions to “the United Nations and its affiliated agencies and related bodies”). The first such report, issued last year, includes contributions to all four agencies discussed in this report, indicating that the Executive considers all four to be “affiliated with the UN.”³ Prior reports under similar reporting statutes all counted contributions to these organizations. All these organizations are described in the annual presidential reports as part of the “UN and its associated entities, including UN agencies, organizations, funds, or other bodies that fly the UN flag, use the UN logo, or are otherwise *affiliated with the UN*” (emphasis added).

While the term “affiliate organization of the United Nations” is not defined in the 1994 defunding law, the term is used widely in various other statutes, some of them of great importance.

- **Prohibiting funding to Burmese military government.** 50 U.S.C.A. § 1701(iii) (funding restriction on “entities providing cash or resources to the SPDC [State Peace and Development Council], including organizations affiliated with the United Nations”).
- **Restriction on intelligence sharing.** 50 U.S.C.A. § 3047 (“no United States intelligence information may be provided to the United Nations or any organization affiliated with the United Nations”). Deeming OPCW not to be UN-affiliated would allow the sharing of sensitive chemical weapons information with the agency without any reporting to Congress. This would open possibilities for abuse in a future “Iran deal” type arrangement with a rogue state.
- **Seeking external, professional review of UN programs.** 22 U.S.C.A. § 2221(e).

The 1994 statutory term “affiliated organization” means nothing if it refers only to UN subsidiary and specialized agencies, which are covered by the 1990 statute. Thus, it can only refer to what the UN describes as “the UN system ... made up of the UN itself and many *affiliated programmes*, funds, and specialized agencies, all with their own membership, leadership, and budget,” of which all these organizations are a part.⁴

C. Application of the statutory framework to UN agencies joined by the PA

All of the four organizations that have given the PA state-party membership qualify as UN-affiliated organizations, thus triggering the mandatory, non-waivable funding restrictions embodied in U.S. law. Based on past experience, it is likely that those seeking to allow these agencies to evade the consequences of their actions under U.S. law will make various arguments that they do not meet the statutory conditions, arguments rooted in the structural murkiness of the UN system. However, the status of all these organizations as UN affiliates can be easily demonstrated.

UNCTAD

UNCTAD’s status as a UN affiliate is beyond dispute. It was created by the UN General Assembly and is structurally part of the UN Secretariat, reporting to the General Assembly and Security Council. It describes itself as a “UN agency,” and its secretary-general is appointed by the UN secretary-general.

UNFCCC

The UNFCCC organization is certainly a UN affiliate. The applicability of the defunding law to UNFCCC has been outlined before, in my congressional testimony,⁵ and in a letter by 28 senators to President Obama urging him to implement the defunding requirement.⁶

While the UNFCCC is a treaty, it is also an organization—like the UN itself. The Framework Convention on Climate Change creates agencies, and in particular, a secretariat to supervise its implementation. The UNFCCC Secretariat is “institutionally linked” to the United Nations and its UN affiliations are extensive:

- It is “administered under UN rules and regulations.”
- It is listed in the United Nations’ directory of “United Nations System Organizations.”⁷
- The head of the agency is appointed by the UN secretary-general.
- Its staff sits in UN offices.⁸
- UNFCCC officials can give work assignments to UN bureaucrats.
- It is regarded as a UN entity within the portfolio of the UN Board of Auditors,⁹ whose mandate is entirely limited to organizations that are part of the UN.¹⁰
- UNFCCC’s handbook states that it is “under the umbrella of the United Nations.”

If this is not “affiliated,” nothing is.

Indeed, the U.S. has long treated UNFCCC as a UN organization. The United Nations Participation Act of 1945 (P.L. 79-264) requires the president to report annually to Congress on U.S. activities in the UN. The reports cover “the activities of the U.S. government in the United Nations and its agencies.” Several of these reports (for example, 2009 and 2015) included U.S. support for the UNFCCC Secretariat within the framework of U.S. involvement with UN agencies.

The Obama State Department argued that the UNFCCC Secretariat is not an international organization at all because the UNFCCC is a treaty.¹¹ But these are not mutually exclusive. The mere fact that a treaty creates both substantive obligations and an associated organization does not mean that the latter is not an organization.¹² Indeed, the Obama administration’s arguments fall flat because the issue at hand is defunding: the U.S. cannot write a check to a treaty, only to an organization, in this case the UNFCCC UN-affiliated Secretariat. And if 500 workers sitting in a UN office in Bonn does not amount to an “organization,” nothing does.

Indeed, the Obama administration's arguments fall flat because the issue at hand is defunding: the U.S. cannot write a check to a treaty, only to an organization.

The U.S. government agency responsible for dealing with compliance with the CWC describes the OPWC as having an “affiliated relationship with the United Nations.” Similarly, presidential reports to Congress about U.S. involvement in the UN have treated OPCW as a UN affiliate.

UNCCD

Like UNFCCC, the UNCCD is an environmental treaty that creates a UN-affiliated organization, the secretariat, to supervise its work. The PA joined UNCCD in December 2017,¹³ in protest against U.S. recognition of Jerusalem as Israel's capital. Israel lodged a formal protest.¹⁴ Organizationally, UNCCD is very similar to UNFCCC, with which it also closely cooperates.

- The executive secretary is appointed by the UN secretary-general.
- The organization is headquartered in the same UN office building in Bonn as the UNFCCC.
- The U.S. includes funding to the UNCCD Secretari at (approximately \$2 million a year) in its report to Congress on funding of UN affiliates.

OPCW

OPCW supervises the enforcement of the Chemical Weapons Convention. Its status as a UN “affiliate” under U.S. law will likely be more contested because the organization is seen as one of the more useful agencies. While its connection to the UN is somewhat more attenuated than that of the other two organizations, it still crosses the statutory bar, as construed by prior executive determinations and practice under other statutes regarding UN “affiliates.”

OPCW is clearly part of what the UN calls the “UN system” or “UN family”—which is the only bright-line test or definition for the statutory term “affiliate” organization.

- The U.S. government agency responsible for dealing with compliance with the CWC describes the OPWC as having an “affiliated relationship with the United Nations.”¹⁵ Similarly, presidential reports to Congress about U.S. involvement in the UN have treated OPCW as a UN affiliate.¹⁶
- The UN itself specifically identified the OPCW as a “related organization,” i.e., an affiliate. The UN describes the OPCW as part of the “UN system” and “UN family.”¹⁷
- OPCW defines itself¹⁸ as an “autonomous international organization with a working relationship with the United Nations.”¹⁹
- OPCW staff and inspectors travel on UN-issued diplomatic documents.

- OPCW is one of the “member agencies” of the United Nations Evaluation Group,²⁰ which is an “interagency professional network that brings together the evaluation units of the UN system, including UN departments, specialized agencies, funds and programmes, and *affiliated organizations*” (emphasis added). Since OPCW is definitely not a UN specialized agency, program or fund, it is an “affiliated organization” by the definition of the UN’s own Evaluation Group.²¹ Similarly, the OPCW hosted last year’s annual meeting of the internal audit services of UN system organizations.²²
- The executive secretary is appointed by the UN secretary-general.
- The organization is headquartered in the same UN office building in Bonn as the UNFCCC.
- The U.S. includes funding to the UNCCD Secretari at (approximately \$2 million a year) in its report to Congress on funding of UN affiliates.

If Congress does not cut funds pursuant to duly enacted measures, the PA will have succeeded not just in twisting the UN system to its purposes, but the U.S. Constitution as well. If the U.S. does not enforce non-waivable statutory measures triggered by PA action, it will lose its credibility as a potential broker of Middle East peace.

D. Substantive Considerations

Supporters of the PA’s “internationalization” campaign will argue that cutting funding to these organizations will be counterproductive because they do valuable work, or at least some valuable work. However, there is an overriding consideration at work here: adherence to the U.S. Constitution, which prohibits the appropriation of any funds without congressional authorization. If Congress does not cut funds pursuant to duly enacted measures, the PA will have succeeded not just in twisting the UN system to its purposes, but the U.S. Constitution as well.

Indeed, if the U.S. does not enforce non-waivable statutory measures triggered by PA action, it will lose its credibility as a potential broker of Middle East peace. Any Middle East peace plan will require U.S. assurances to Israel in the event the Palestinians take certain hostile measures. Implementing those assurances will always have a cost, a downside. If the U.S. will not abide by its own statutes when doing so might be uncomfortable, it can hardly be expected to do so with mere diplomatic assurances. Moreover, a failure to implement the funding restrictions will only encourage the PA to step up its “internationalization” campaign: the current round of activity was certainly encouraged by President Obama’s failure to implement the restrictions on UNFCCC in 2016.

In any case, the policy objections fall flat:

- If cutting funds to these UN organizations is problematic, the fault lies squarely with the Palestinians and the UN itself. The PA has pushed its membership campaign knowing full well the consequences for the organizations under U.S. law. Moreover, the UN agencies admitted the PA with full knowledge of the consequences. The UN itself has put the promotion of the PA's agenda above the original goals of these agencies. If mandatory U.S. funding cuts would be destructive to the mission of these organizations, they would not have accepted PA membership.
- If cutting funding impedes the functioning of these organizations, the solution consistent with U.S. law is not to continue funding, but rather defunding to pressure the PA to quit the organizations it has already joined.
- The sums the U.S. provides to these organizations are quite small, some millions of dollars. If valuable mission functions would be sacrificed as a result, there are many nations that can step in and fill the shortfall, particularly those that have encouraged the PA's campaign to join the UN. Third countries have volunteered to fill much larger gaps in the wake of U.S. funding cuts to UNRWA.
- **UNFCCC.** Since the PA joined the organization, the U.S. has announced its intention to quit the Paris Climate Accord, the primary treaty the UNFCCC Secretariat supervises.
- **UNCTAD.** In the case of UNCTAD, the organization long ago turned itself into a forum for Palestinian Israel-bashing. It has a special unit, the Assistance to the Palestinian People Project, with a "specific mandate to monitor and investigate the social and economic impact of policies of the Israeli occupation authorities in the Palestinian territory." In practice, this means producing one-sided reports blaming Israel for the PA's economic woes. The organization's politicization will only increase with the PA as a full member.
- **OPCW.** While the U.S. does have a strong interest in OPCW's inspection and destruction programs, the downsides of PA membership are also greater than for other organizations. The PA will, for example, likely use its new position in the OPCW to trigger international involvement in Israel's use of tear gas against violent rioters. This is something it can only do as a member. Moreover, if the U.S. does not implement its mandatory defunding in this context, it is likely the PA will be encouraged to seek membership in the even more important International Atomic Energy Agency, creating a serious diplomatic headache for the U.S. On the other hand, the U.S. can find other ways to support OPCW's work, such as greater in-kind contributions or general contributions to the UN Trust Fund.

UN “Affiliated Organizations” That Have Accepted the Palestinian Authority as a Member State

Agency PA Accession Date	U.S. Contribution/ Total Budget	Nature of UN Affiliation	UN & US descriptions of organization’s UN affiliation
<p>UNFCCC March 15, 2016</p>	<p>\$6,925,000/ \$115,000,000</p>	<ul style="list-style-type: none"> Head of agency appointed by UN secretary-general Administered “under UN rules and regulations” Based in UN office building in Bonn UNFCCC can give work assignments to UN bureaucrats UNFCCC’s handbook states that it is “under the umbrella of the United Nations” 	<ul style="list-style-type: none"> Included in presidential reports to Congress of U.S. involvement with UN “affiliated organizations” Listed in UN directory of “United Nations Systems Organizations” Describes itself as “institutionally linked” to UN and “under the umbrella” of the UN Regarded as a UN entity within the portfolio of the UN Board of Auditors, whose mandate is limited to organizations that are part of the UN
<p>UNCCD March 29, 2017</p>	<p>\$2,000,000/ \$18,887,477</p>	<ul style="list-style-type: none"> Head of agency appointed by UN secretary-general Headquartered in the same building in Bonn as the UNFCCC 	<ul style="list-style-type: none"> Included in presidential reports to Congress of US involvement with UN “affiliated organizations” Described in various UN documents as a “UN agency” Inspected by UN agency with authority over UN system “organizations” and audited by UN Board of Auditors
<p>UNCTAD June 2018</p>	<p>\$1,494,990/ \$108,000,000</p>	<ul style="list-style-type: none"> Created by the UN General Assembly Part of the UN Secretariat Reports to the General Assembly and Security Council Head of agency appointed by UN secretary-general 	<ul style="list-style-type: none"> Included in presidential reports to Congress of U.S. involvement with UN “affiliated organizations” Describes itself as a “UN agency”
<p>OPCW June 21, 2018</p>	<p>\$18,240,000/ \$78,405,734</p>	<ul style="list-style-type: none"> Defines itself as “autonomous international organization with a working relationship with the United Nations” OPCW staff and inspectors travel on UN-issued diplomatic documents 	<ul style="list-style-type: none"> Included in presidential reports to Congress of U.S. involvement with UN “affiliated organizations” U.S. describes it as having an “affiliated relationship with the United Nations” UN describes it as “related organization,” i.e., an affiliate, and as part of the “UN system and UN family”

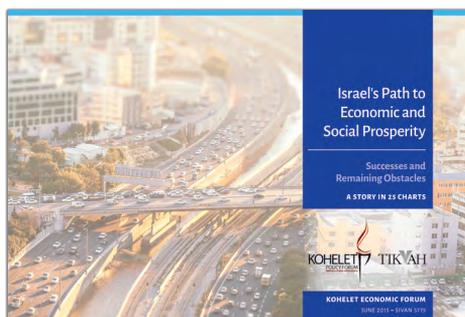


Endnotes

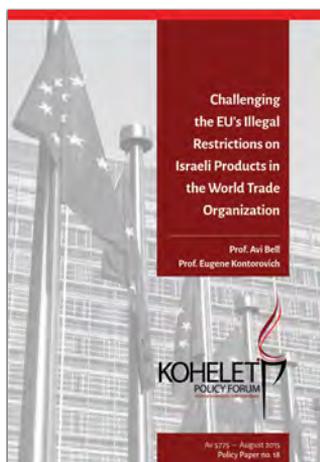
- 1 See, e.g., 135 Cong. Rec. H1912-03, H1915-16 (Mr. Lantos) (noting that while some affected agencies are important, it is more important that “affiliated organizations will know in advance that their actions will have consequences, and if they play the PLO game of allowing [sic] to become politicized puppets in an attempt to undermine the work of those useful organizations, the United States will withhold their financial contributions to those organizations”).
- 2 Legal Opinions of the Secretariat of the United Nations, “Definition of ‘United Nations Affiliated Bodies’ in relation to the Statute of the Joint Inspection Unit—United Nations Subsidiary Organs and Bodies—Question whether Such Bodies Must Abide By the Provisions of the Statute” (April 5, 2000), *United Nations Juridical Yearbook 2000*, <http://legal.un.org/unjuridicalyearbook/pdfs/english/volumes/2000.pdf>, 354-56.
- 3 White House, *Report to Congress of United States Contributions to International Organizations for Fiscal Year 2014*, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IAD/MASTER%20Sec%20312%20OMB%20Report_final.pdf.
- 4 United Nations, “Funds, Programmes, Specialized Agencies and Others,” <http://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/> (emphasis added).
- 5 Eugene Kontorovich, *Two Recent Examples of Executive Undermining of Congress's Spending and Foreign Commerce Powers*, testimony before the U.S. House Judiciary Committee, Task Force on Executive Overreach (May 12, 2016), <https://judiciary.house.gov/wp-content/uploads/2016/05/05122016-Kontorovich.pdf>.
- 6 United States Senate, letter to Secretary of State John Kerry signed by 28 senators, April 18, 2016, https://www.epw.senate.gov/public/_cache/files/oefac59c-4617-44d8-aa2d-a5d3e4e6623e/barrasso-unfccc-4-18-16.pdf.
- 7 United Nations System, Chief Executives’ Board for Coordination, “Directory of United Nations System Organizations,” <http://www.unsceb.org/directory#oe>.
- 8 United Nations Climate Change, “Contact Us,” <https://unfccc.int/about-us/contact-and-directions/find-contact-by-issue>.
- 9 United Nations, “United Nations Board of Auditors,” <http://www.un.org/en/auditors/board/faq.shtml>.
- 10 UN General Assembly Resolution 74(t)(a), Appointment of External Auditors (December 7, 1946), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/033/25/IMG/NR003325.pdf?OpenElement>.
- 11 Timothy Cama, “Palestine is Latest GOP Offensive in Climate Change Wars,” *The Hill*, April 23, 2016, <http://thehill.com/policy/energy-environment/277336-palestine-is-latest-gop-offensive-in-climate-change-wars>.

- 12 U.S. law treats various entities created by treaties as “international organizations” under the International Organizations Immunity Act, 22 USC 228. Similarly, the fact that an agency’s name does not include words like “organization,” “agency,” or “commission” does not preclude its being treated as an international organization under U.S. law (for example, the Global Fund to Fight AIDS, Tuberculosis and Malaria is deemed an “international organization”).
- 13 United Nations Treaty Collection, Chapter XXVII: Environment, United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, October 14, 1994, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-10&chapter=27&clang=en.
- 14 United Nations, C.N.188.2018.TREATIES-XXVII.10 (Depositary Notification), United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, October 14, 1994, Israel Communication, April 4, 2018, <https://treaties.un.org/doc/Publication/CN/2018/CN.188.2018-Eng.pdf>.
- 15 Department of Commerce, Bureau of Industry and Security, *Chemical Weapons Convention Bulletin 3*, updated May 2006, https://www.cwc.gov/assets/pdf/outreach_industry_publications_cwco03.pdf. The cognate Australian government agency also describes OPCW as a UN affiliate. See Australian Safeguards and Non-Proliferation Office, *Annual Report 2016-17*, section 2, “Australia and the Chemical Weapons Convention—20 Years On,” <http://dfat.gov.au/about-us/publications/corporate/annual-reports/asno-annual-report-2016-17/html/section-2/australia-and-the-chemical-weapons-convention-20-years-on.html>.
- 16 See also U.S. Homeland Security Department, Administrative Appeals Office, *In re Application to Preserve Residence for Naturalization Purposes under Section 316(b) of the Immigration and Nationality Act*, 8 U.S.C. S 1427(b), 2008 WL 4051777, at *3 (determining that under U.S. law the OPCW is treated as an “affiliate” of the UN).
- 17 United Nations, “Funds, Programmes, Specialized Agencies and Others,” <http://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/>.
- 18 Organisation for the Prohibition of Chemical Weapons, “About OPCW,” <https://www.opcw.org/about-opcw/>.
- 19 Organisation for the Prohibition of Chemical Weapons, “OPCW Agreements,” <https://www.opcw.org/about-opcw/opcw-agreements/>.
- 20 United Nations Evaluation Group, “Member Agencies,” <http://www.uneval.org/about/memberagencies>.
- 21 United Nations Evaluation Group, *UNEG Principles of Working Together*, Art. 2 & Annex 2, <http://www.unevaluation.org/document/download/2419>.
- 22 United Nations, Report of the Joint Inspection Unit for 2017 and Programme of Work for 2018, https://www.unjiu.org/sites/www.unjiu.org/files/a_72_34_jiu_annual_report_en.pdf, Par. 9.

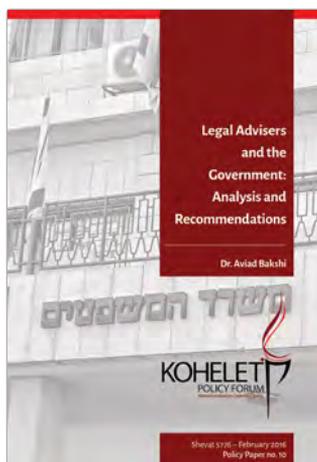
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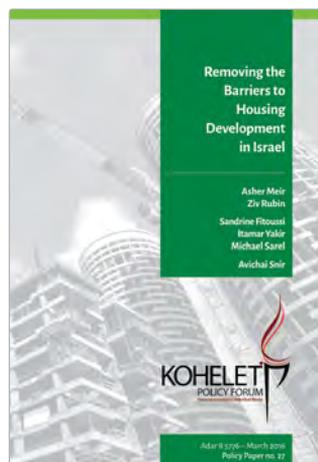
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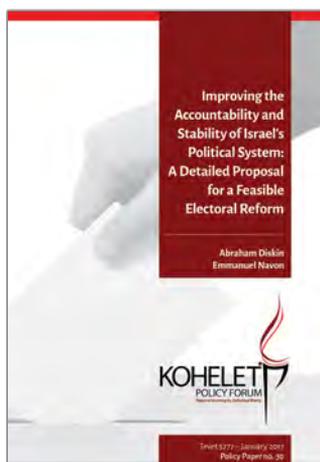
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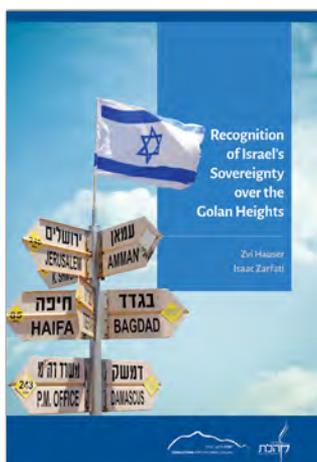
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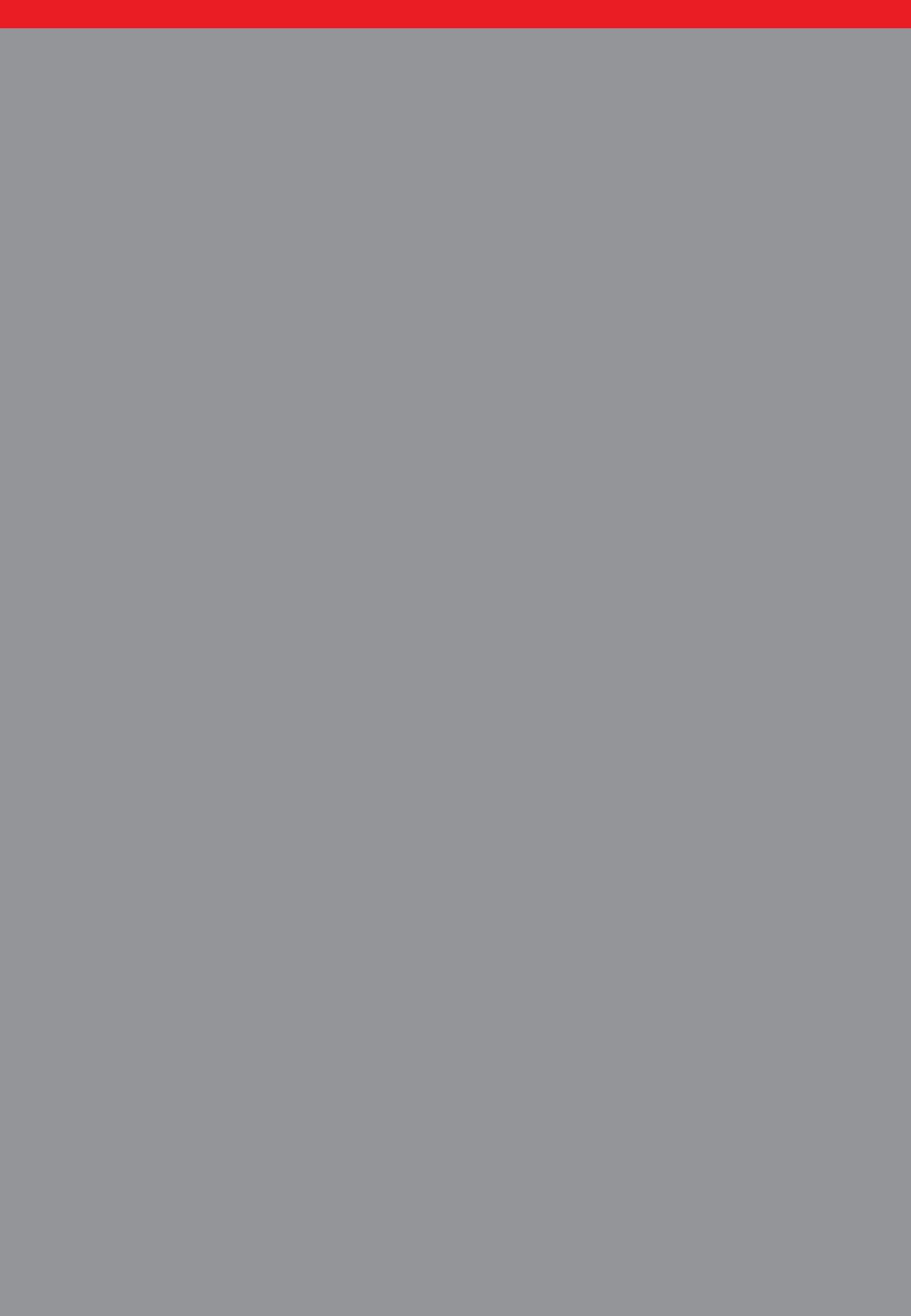
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